APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 21, 2022]

No. 20-16068
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC., DBA Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PARENTHOOD CALIFORNIA CENTRAL COAST, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST,	)
Plaintiffs-Appellees,	)
	)

v.

TROY NEWMAN,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis; ALBIN RHOMBERG; SANDRA SUSAN MERRITT, AKA Susan Tennenbaum; GERARDO ADRIAN LOPEZ,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16070
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC., DBA Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PARENTHOOD CALIFORNIA CENTRAL

COAST, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST,
Plaintiffs-Appellees,

v.

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

and

TROY NEWMAN; ALBIN RHOMBERG; SANDRA SUSAN MERRITT, AKA Susan Tennenbaum,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16773
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC.,

DBA Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PARENTHOOD CALIFORNIA CENTRAL COAST, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST,
Plaintiffs-Appellees,

v.

ALBIN RHOMBERG,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis; TROY NEWMAN; SANDRA SUSAN MERRITT, AKA Susan Tennenbaum; GERARDO ADRIAN LOPEZ,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16820
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC., DBA Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PARENTHOOD CALIFORNIA CENTRAL COAST, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST,
Plaintiffs-Appellees,

v.

SANDRA SUSAN MERRITT, AKA Susan Tennenbaum,
Defendant-Appellant,

and)
)
CENTER FOR MEDICAL PROGRESS;)
BIOMAX PROCUREMENT SERVICES,)
LLC; DAVID DALEIDEN, AKA Robert)
Daoud Sarkis; TROY NEWMAN; ALBIN)
RHOMBERG; GERARDO ADRIAN LOPEZ,)
Defendants,)
_____)
NATIONAL ABORTION FEDERATION,)
Intervenor.)
_____)

OPINION

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

Argued and Submitted April 21, 2022
San Francisco, California

Before: Mary H. Murguia, Chief Judge, Ronald M. Gould, Circuit Judge, and Nancy D. Freudenthal,[*] District Judge.

Opinion by Judge Gould

[*] The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

SUMMARY[**]

Federal Wiretap Act / Damages / First Amendment

The panel affirmed in part and reversed in part the district court's judgment, after a jury trial, in favor of Planned Parenthood Federation of America, Inc., and other plaintiffs on claims of trespass, fraud, conspiracy, breach of contracts, unlawful and fraudulent business practices, violating civil RICO, and violating various federal and state wiretapping laws.

Defendants used fake driver's licenses and a false tissue procurement company as cover to infiltrate conferences that Planned Parenthood hosted or attended. Using the same strategy, defendants also arranged and attended lunch meetings with Planned Parenthood and visited Planned Parenthood health clinics. During these conferences, meetings, and visits, defendants secretly recorded Planned Parenthood staff without their consent. After secretly recording for roughly a year-and-a-half, defendants released on the internet edited videos of the secretly recorded conversations. After a jury trial, the district court entered judgment in favor of Planned Parenthood and awarded it statutory, compensatory, and punitive damages as well as limited injunctive relief.

Affirming in part, the panel held that the compensatory damages were not precluded by the First Amendment. The panel held that under *Cohen v.*

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Cowles Media Co., 501 U.S. 663 (1991), and *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), facially constitutional statutes apply to everyone, including journalists. None of the laws defendants violated was aimed specifically at journalists or those holding a particular viewpoint, and the two categories of compensatory damages permitted by the district court, infiltration damages and security damages, were awarded by the jury to reimburse Planned Parenthood for losses caused by defendants' violations of generally applicable laws.

The panel reversed the jury's verdict on the claim under the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d), and vacated the related statutory damages for violating this statute, which provides that a person may record a conversation in which he or she is a party unless the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." At trial, Planned Parenthood argued that the criminal or tortious purpose behind defendants' recordings was to further their civil RICO enterprise with the ultimate goal of harming or destroying Planned Parenthood. The panel held that defendants' violation of civil RICO was not a sufficient criminal or tortious purpose to impose liability under § 2511(2)(d) because the criminal or tortious purpose must be independent of and separate from the purpose of the recording.

The panel addressed defendants' other grounds of appeal in a separate memorandum disposition, filed simultaneously with this opinion.

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GOULD, Circuit Judge:

Defendants-Appellants ("Appellants") used fake driver's licenses and a false tissue procurement company as cover to infiltrate conferences that Plaintiffs-Appellees ("Planned Parenthood") hosted or attended. Using the same strategy, Appellants also arranged and attended lunch meetings with Planned Parenthood staff and visited Planned Parenthood health clinics. During these conferences, meetings, and visits, Appellants secretly recorded Planned Parenthood staff without their consent. After secretly recording for roughly a year-and-a-half, Appellants released on the internet edited videos of the secretly recorded conversations. Planned Parenthood sued Appellants for monetary damages and injunctive relief. After pre-trial motions and a six-week trial, Appellants were found guilty of trespass, fraud, conspiracy, breach

of contracts, unlawful and fraudulent business practices, violating civil RICO, and violating various federal and state wiretapping laws. Planned Parenthood was awarded statutory, compensatory, and punitive damages as well as limited injunctive relief.

Appellants argue that the compensatory damages awarded against them are precluded by the First Amendment and that Planned Parenthood did not show that Appellants violated the Federal Wiretap Act.[1] We have jurisdiction under 28 U.S.C. § 1291. We affirm the awards of compensatory and punitive damages, but we reverse the jury's verdict on the Federal Wiretap Act claim and vacate the related statutory damages for violating the Federal Wiretap Act.

I. BACKGROUND

In 2013, David Daleiden, a long-time pro-life activist, started the Human Capital Project ("HCP"). Daleiden is well-known in pro-choice circles, and his name was on "no access" lists of individuals barred from entering Planned Parenthood conferences and affiliated health centers.[2] Daleiden partnered with two other long-time pro-life activists, Troy Newman and Albin Rhomberg, to start HCP. Newman operated

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[1] In a separate memorandum disposition, filed simultaneously with this opinion, we address Appellants' other grounds of appeal.

[2] In this Opinion, we use the term "pro-life" to describe Appellants because Appellants refer to themselves using this term. Likewise, we use the term "pro-choice" to describe Appellees because Appellees use that term.

Operation Rescue, which maintains a website that publicizes the names, photographs, and personal information of abortion providers. Rhomberg has worked on pro-life projects for more than four decades, including projects that publicize the names of abortion providers in several countries.

In February and March of 2013, Daleiden circulated a proposal to Newman and Rhomberg outlining an undercover operation to infiltrate organizations, especially Planned Parenthood and its affiliates, involved in producing or procuring fetal tissue and to expose alleged wrongdoing through the release of "gotcha" undercover videos. In March 2013, Daleiden, Newman, and Rhomberg formed the Center for Medical Progress ("CMP") to oversee their operation; Daleiden was the CEO, Newman the Secretary, and Rhomberg the CFO. To carry out their operation, Daleiden created a fake tissue procurement company, BioMax.[3] Daleiden filed BioMax's articles of incorporation with the State of California in October 2013, signing the fictitious name "Susan Tennenbaum." BioMax had a website, business cards, and promotional materials, but was not in fact involved in any business activity. Daleiden used the false name "Robert Sarkis" while posing as BioMax's Procurement Manager and Vice President of Operations.

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[3] Tissue procurement companies obtain human tissue samples, including fetal tissue from abortion providers, and provide them to medical researchers. Fetal tissue donation to medical researchers is legal under federal law. Federal law permits "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. § 289g-2(e)(3).

Daleiden then recruited additional associates to participate in the scheme. Susan Merritt, another long-time pro-life activist who had previously participated in an undercover operation targeting abortion providers, posed as BioMax's CEO "Susan Tennenbaum." Brianna Baxter, using the alias "Brianna Allen," posed as BioMax's part-time procurement technician. Adrian Lopez used his own name and posed as a BioMax procurement technician.

To further the subterfuge, Daleiden created or procured fake driver's licenses for himself, Merrit, and Baxter. Daleiden modified his expired California driver's license, typing "Robert Daoud Sarkis" over his true name. Using the internet, he paid for a service to produce fake driver's licenses for "Susan Tennenbaum" (Merritt) and "Brianna Allen" (Baxter). Daleiden also had bank cards issued for the aliases Sarkis and Tennenbaum.

To establish their credentials, BioMax "employees" attended several entry-level conferences. In June 2013, "Robert Sarkis" attended the International Society of Stem Cell Research Annual Meeting in Boston. In September of that same year, "Susan Tennenbaum" and "Brianna Allen" attended the Association of Reproductive Health Professionals conference in Colorado as representatives of BioMax. Contacts from this meeting vouched for BioMax's *bona fides*, permitting BioMax to register as an exhibitor at the National Abortion Federation ("NAF") 2014 Annual Meeting. Planned Parenthood Federation of America ("PPFA") is a member of NAF, as are many of PPFA's affiliates, providers, and staff.

Daleiden, using Merritt's alias "Susan Tennenbaum," signed Exhibitor Agreements for the 2014 NAF conference on behalf of BioMax. Daleiden, Merritt, and Baxter all attended NAF's 2014 Annual Meeting in San Francisco on behalf of BioMax, presenting their fake California driver's licenses at check-in and posing as Sarkis, Tennenbaum, and Allen. All signed confidentiality agreements, that among other things, prohibited them from recording. However, they covertly recorded during the entire conference.

For over a year, Appellants Daleiden, Merritt, and Baxter (using their false names) and Lopez (using his real name), on behalf of BioMax, attended the 2015 NAF Annual Meeting and three Planned Parenthood conferences held in Florida and Washington, D.C. At these conferences, Appellants often signed additional exhibitor or confidentiality agreements and secretly recorded persons with whom they spoke.

Daleiden also repeatedly sought a meeting with Dr. Deborah Nucatola, to whom he had introduced himself at the 2014 NAF Annual Meeting; Dr. Nucatola was then the Senior Director of Medical Services at PPFA and an abortion provider in California. She eventually agreed to meet, and Daleiden and Merritt secretly recorded Dr. Nucatola throughout a two-hour lunch. Daleiden and Merritt repeated this same strategy with Dr. Mary Gatter, the Medical Director of Planned Parenthood Pasadena and San Gabriel Valley, Inc.: during a lunch meeting solicited by Daleiden, Daleiden and Merritt recorded Dr. Gatter without her knowledge.

Daleiden and Merritt also used their conference contacts to secure visits to Planned Parenthood clinics in Texas and Colorado. At both, they posed as Sarkis and Tennenbaum and wore hidden cameras that recorded the entire time.

On July 14, 2015, CMP started releasing videos that included footage from the conferences, lunches, and clinic visits Appellants had secretly recorded. Appellants portray themselves as journalists reporting important and newsworthy information, whereas Planned Parenthood argues that Appellants purposefully conducted a smear campaign using illegal methods.

In response to the release of the videos, the recorded individuals testified that they received a variety of threats. Planned Parenthood provided temporary bodyguards to several of the recorded individuals and even relocated one of the recorded individuals and her family. Planned Parenthood also hired security consultants to investigate Appellants' infiltration and enhance the security of its conferences.

Planned Parenthood timely brought a civil action against Appellants in January 2016 seeking compensatory, statutory, and punitive damages for claims including violation of civil RICO, federal wiretapping law, state wiretapping laws, civil conspiracy, breach of contracts, trespass, and fraud. Planned Parenthood also sought injunctive relief prohibiting Appellants from carrying out similar future infiltrations.

After a six-week trial, the jury found for Planned Parenthood on all counts. The jury awarded Planned Parenthood compensatory and punitive damages, and the district court later awarded nominal and statutory damages, resulting in a total damages award of $2,425,084.

The compensatory damages were divided into two categories: infiltration damages and security damages. The infiltration damages, totaling $366,873, related to Planned Parenthood's costs to prevent a future similar intrusion. They included costs for assessing Planned Parenthood's current security measures and exploring potential upgrades, reviewing and upgrading Planned Parenthood's vetting of visitors and attendees at conferences, monitoring social media for potential threats, hiring additional security guards for Planned Parenthood's conferences, and improving the badging and identification systems at the conferences. The security damages, totaling $101,048, related to Planned Parenthood's costs for protecting their doctors and staff from further targeting by Appellants and from foreseeable violence and harassment by third parties. The security damages included costs for physical security and online threat monitoring for the individuals recorded in the videos that Appellants released.

The district court also awarded Planned Parenthood limited injunctive relief against all Appellants except Lopez. On August 19, 2020, the district court denied Appellants' motion for judgment as a matter of law, a new trial, and to amend the judgment. Appellants timely appealed.

II. STANDARD OF REVIEW

We review constitutional challenges *de novo*. *Crime Just. & Am., Inc. v. Honea*, 876 F.3d 966, 971 (9th Cir. 2017). "We review de novo a judgment as a matter of law." *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017). Judgment as a matter of law is appropriate when the evidence permits only one reasonable conclusion. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205–06 (9th Cir. 2008).

III. THE FIRST AMENDMENT

"[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).[4] In *Cohen*, a campaign worker, Mr. Dan Cohen, provided two newspapers with information damaging to his candidate's opponent. *Id.* at 665. Cohen revealed the information on the condition that his identity as the source be kept secret. *Id.* However, the newspapers subsequently published articles revealing Cohen as the source of the damaging information, and Cohen was fired from the campaign. *Id.* at 666. Cohen sued the newspapers seeking compensatory damages under a state promissory estoppel cause of action. *Id.* at 671. He argued that the newspapers' publication of his name was a breach of promise, which caused him to lose his job and lowered

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[4] We express no view on whether Appellants' actions here were legitimate journalism or a smear campaign because even accepting Appellants' framing, the First Amendment does not prevent the award of the challenged damages.

his earning capacity. *Id.* In reasoning that the First Amendment did not bar the damages, the Supreme Court explained that "[i]t is . . . beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws'" and "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937)).

We recently reiterated this holding, stating that "the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018). In *Wasden*, we examined an Idaho statute criminalizing entry into or obtaining records of an agricultural production facility by force, threat, misrepresentation, or trespass; obtaining employment with an agricultural facility by force, threat, or misrepresentation with intent to cause harm; or entering and recording inside a non-public agricultural production facility without consent. *Id.* at 1190–91. In response to facial First Amendment challenges, we held that the provisions criminalizing entry and recording violated the First Amendment because the entry provision was overbroad and the recording provision was a content-based restriction that was unable to survive strict scrutiny. *Id.* at 1194–98, 1203–05. Conversely, the provision criminalizing obtaining records did not facially violate the First Amendment because it protected the facility owners' property rights from legally cognizable harm. *See id.* at 1199–1201. The employment provision,

meanwhile, complied with the First Amendment because the Supreme Court had previously held that such speech was unprotected by the First Amendment, and the provision was not aimed at suppressing a specific viewpoint. *Id.* at 1201–02 (citing *United States v. Alvarez*, 567 U.S. 709, 723 (2012)). *Wasden*, therefore, repeated that facially constitutional statutes apply to everyone, including journalists.[5]

Wasden was not novel within the Ninth Circuit. More than fifty years ago, we held that journalists could not use subterfuge to gain entry into a private home and secretly record an individual suspected of committing a crime. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 247, 249 (9th Cir. 1971). We noted that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. 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." *Id.* at 249.

Adhering to *Cohen*, *Wasden*, and *Dietemann*, we repeat today that journalists must obey laws of general applicability. Invoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society. None of the laws Appellants violated was aimed specifically at journalists or those holding a particular viewpoint. The two categories of compensatory damages permitted by the district court, infiltration damages and security damages, were

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[5] Appellants raise no facial First Amendment challenges.

awarded by the jury to reimburse Planned Parenthood for losses caused by Appellants' violations of generally applicable laws. As required by the Supreme Court in *Cohen*, and our court in *Wasden* and *Dietemann*, Appellants have been held to the letter of the law, just like all other members of our society. Appellants have no special license to break laws of general applicability in pursuit of a headline.

Appellants are incorrect in arguing that the infiltration and security damages awarded by the jury are impermissible publication damages. In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court held that a public figure could not recover damages for emotional distress or reputational loss caused by the publication of an ad parody about him absent a showing of falsity and actual malice. 485 U.S. 46, 56 (1988). However, the facts before us are distinguishable from *Hustler Magazine*. The jury awarded damages for economic harms suffered by Planned Parenthood, not the reputational or emotional damages sought in *Hustler Magazine*. *See id.* at 50; *see also Cohen*, 501 U.S. 663 (1991) (distinguishing between economic damages and "damages for injury to [one's] reputation or his state of mind"); *Veilleux v. NBC*, 206 F.3d 92, 127–29 (1st Cir. 2000) (same).

Further, Planned Parenthood would have been able to recover the infiltration and security damages even if Appellants had never published videos of their surreptitious recordings. Regardless of publication, it is probable that Planned Parenthood would have protected its staff who had been secretly recorded and safeguarded its conferences and clinics from future

infiltrations by Appellants and third parties. Appellants' argument that, absent a showing of actual malice, all damages related to truthful publications are necessarily barred by the First Amendment cannot be squared with *Cohen*. In *Cohen*, the Supreme Court upheld an economic damage award reliant on publication—damages related to loss of earning capacity—even though the publication was truthful and made without malice. *See Cohen*, 501 U.S. at 671.

Our decision does not impose a new burden on journalists or undercover investigations using lawful means. From the beginning of their scheme, Appellants engaged in illegal conduct—including forging signatures, creating and procuring fake driver's licenses, and breaching contracts—that the jury found so objectionable as to award Planned Parenthood punitive damages. Journalism and investigative reporting have long served a critical role in our society. *See Wasden*, 878 F.3d at 1189. But journalism and investigative reporting do not require illegal conduct. In affirming Planned Parenthood's compensatory damages from Appellants' First Amendment challenge, we simply reaffirm the established principle that the pursuit of journalism does not give a license to break laws of general applicability.

IV. THE FEDERAL WIRETAP ACT

At trial, Planned Parenthood alleged that Appellants recorded Planned Parenthood's staff forty-two separate times at conferences, lunches, and health clinics without their consent in violation of the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d). Planned Parenthood argued that the criminal or tortious

purpose behind these recordings was to further Appellants' civil RICO enterprise with the ultimate goal of harming or destroying Planned Parenthood. Planned Parenthood also contended that Appellants' civil RICO scheme served the same purpose: harming and destroying Planned Parenthood.[6]

The jury agreed with Planned Parenthood and determined that Appellants had illegally recorded Planned Parenthood staff in all forty-two of the pled instances. The jury awarded Planned Parenthood damages based on these recordings, and, pursuant to the jury's findings, the district court awarded statutory damages to various Planned Parenthood entities for these same violations.[7]

On appeal, Appellants contend that they could not have violated the Federal Wiretap Act because their

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[6] "To state a civil RICO claim under 18 U.S.C. § 1964(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to the plaintiff's business or property." *Abcarian v. Levine*, 972 F.3d 1019, 1028 (9th Cir. 2020) (internal quotations and citation omitted). Planned Parenthood alleged that Daleiden's production and transfer of the three fake driver's licenses, in violation of 18 U.S.C. § 1028(a)(1) and (a)(2), served as the civil RICO predicate acts.

[7] The jury awarded Planned Parenthood approximately $100,000 in compensatory damages related to the Federal Wiretap Act claim, and the district court awarded statutory damages of $90,000. Additionally, the jury awarded Planned Parenthood $870,000 in punitive damages for claims of fraud, trespass, breach of Maryland wiretapping law, and breach of federal wiretapping law. The jury did not specify which claims the punitive damages related to.

violation of civil RICO is not a sufficient criminal or tortious purpose to impose liability under § 2511(2)(d). We agree.

The Federal Wiretap Act generally prohibits any person from intentionally recording an oral communication. 18 U.S.C. § 2511(1)(a). One exception to this broad prohibition is that a person may record a conversation in which he or she is a party unless the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." § 2511(2)(d).

A recording has a criminal or tortious purpose under § 2511(1) when "done for the purpose of facilitating some further impropriety, such as blackmail." *Sussman v. Am. Broad. Companies, Inc.*, 186 F.3d 1200, 1202 (9th Cir. 1999). This criminal or tortious purpose must be separate and independent from the act of the recording. *Id.* ("[T]he focus is not upon whether the interception itself violated another law; it is upon whether the *purpose* for the interception—its intended use—was criminal or tortious.") (citation omitted). Put another way, the independent purpose must be "essential to the actual execution of an illegal wiretap . . . [and] directly facilitate the criminal conduct." *United States v. McTiernan*, 695 F.3d 882, 890 (9th Cir. 2012); *see also Caro v. Weintraub*, 618 F.3d 94, 99–100 (2d Cir. 2010). The recording party must also have the independent criminal or tortious purpose at the time the recording was made. *See Sussman*, 186 F.3d at 1203; *see also Caro*, 618 F.3d at 99 ("There is a temporal thread that

runs through the fabric of the statute and the case law. At the time of the recording the offender must intend to use the recording to commit a criminal or tortious act.").

With this understanding, it is clear that Appellants' violations of civil RICO could not have served as the criminal or tortious purpose required by § 2511(2)(d). Planned Parenthood alleged that the criminal or tortious purpose of Appellants' civil RICO violation was to destroy Planned Parenthood. Planned Parenthood similarly argued that the purpose of the secret recordings was to further Appellant's civil RICO scheme, which sought to destroy Planned Parenthood. However, § 2511(2)(d) requires that the criminal or tortious purpose be independent of and separate from the purpose of the recording. Planned Parenthood runs afoul of this requirement by reusing the same criminal purpose—furthering the civil RICO scheme to destroy Planned Parenthood—as both the purpose of the civil RICO claim and the independent criminal or tortious purpose of § 2511(2)(d).[8] And, Planned Parenthood's argument is circular: according to Planned Parenthood, the civil RICO conspiracy is furthered by the recordings, and the recordings themselves further the ongoing civil RICO conspiracy. Such reasoning is not permitted by § 2511(2)(d). *See Sussman*, 186 F.3d at 1202.

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[8] Planned Parenthood briefly suggests that Appellants use of the secret recordings for fundraising can serve as an alternative independent purpose under § 2511(2)(d). However, fundraising is not a criminal or tortious purpose.

V. CONCLUSION

For the above reasons, we affirm the award of infiltration and security damages and the award of punitive damages. We reverse the jury's verdict on the Federal Wiretap Act claim and vacate the related statutory damages awards.[9]

AFFIRMED IN PART, REVERSED AND VACATED IN PART.

[9] Other than the statutory damages, all of Planned Parenthood's damages related to the Federal Wiretap Act are duplicative of damages affirmed in the simultaneously-filed memorandum disposition. This opinion vacates the statutory damage awards related to the Federal Wiretap Act.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 21, 2022]

No. 20-16068
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

TROY NEWMAN,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16070
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants-Appellants,

and

TROY NEWMAN; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16773
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

ALBIN RHOMBERG,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16820
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

SANDRA SUSAN MERRITT, AKA Susan Tennenbaum,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

MEMORANDUM[*]

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

Argued and Submitted April 21, 2022
San Francisco, California

Before: MURGUIA, Chief Judge, GOULD, Circuit Judge, and FREUDENTHAL,[**] District Judge.

Defendant-Appellants ("Appellants") appeal (1) rulings and findings on the breach of contract claims; (2) the grant of summary judgment on several trespass claims; (3) several rulings regarding the RICO claim; (4) the approval of adverse inferences; (5) rulings on numerous jury instructions; (6) rulings on several discovery and evidentiary issues; (7) rulings regarding the recorded individuals' reasonable expectations of privacy; (8) the award of compensatory damages; (9) the grant of injunctive relief; (10) the sufficiency of the evidence supporting the judgment against Adrian Lopez, Troy Newman, and Albin Rhomberg; and

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

[**] The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

(11) the failure of the district court to recuse himself or be disqualified.[1] As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[2]

We review the grant and denial of summary judgment *de novo*. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). We view the evidence in the light most favorable to the non-moving party and may affirm on any ground supported by the record. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

"A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (citation omitted).

"We review de novo a judgment as a matter of law." *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017). Judgment as a matter of law is appropriate when the evidence permits only one reasonable conclusion.

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[1] In a separate opinion, filed simultaneously with this memorandum disposition, we discuss the facts of this case and Appellants' First Amendment and Federal Wiretap Act grounds of appeal.

[2] Any purported basis of appeal not explicitly addressed in this memorandum disposition or the simultaneously filed opinion is waived either because it was not properly raised or because reaching the issue is unnecessary to the panel's decision. *See, e.g.*, *Badgley v. United States*, 957 F.3d 969, 978–79 (9th Cir. 2020); *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012).

Torres v. City of Los Angeles, 548 F.3d 1197, 1205–06 (9th Cir. 2008) (citation omitted).

1. The district court did not err in determining that the public policy exception did not excuse Appellants' contractual breach. The videos did not contain evidence of wrongdoing. Further, Appellants do not show that "the interest in . . . enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178(1) (1981). There is a strong public interest in the enforcement of contracts entered willingly. Given Appellants' elaborate and long-term deception, Plaintiffs-Appellees ("Planned Parenthood") were reasonably justified in expecting that the contracts and their terms would be honored. Appellants' reliance on the public policy exception is also undercut by their misconduct, *see infra*, and their publication of significant amounts of video that is not related to any alleged crime or wrongdoing, *see Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011).

The district court did not err in determining that Planned Parenthood Federation of America ("PPFA") is a third-party beneficiary of the National Abortion Federation ("NAF") Agreements. PPFA benefitted from the NAF Agreements because the agreements protected confidential information disclosed at NAF conferences attended by PPFA members. *See Goonewardene v. ADP, LLC*, 434 P.3d 124, 126–27 (Cal. 2019). PPFA is also a NAF member, and the NAF Agreements state that NAF conference information is provided to help NAF members; PPFA thus benefited from receiving

confidential information at the NAF conferences, and giving benefits to PPFA and others was a motivating purpose of the NAF Agreements. *See id.*

Substantial evidence supported the jury's verdict that Appellants violated the Planned Parenthood Gulf Coast ("PPGC") non-disclosure agreement ("NDA"). There is sufficient evidence to show that Appellants should have reasonably understood that the conversations at the PPGC clinic were confidential, including: the recorded conversations that took place in areas with access limited to staff using secure keycards; Daleiden and Merritt entered these secured locations only after signing an NDA, presenting (fake) identification, going through a metal detector, and seeing PPGC staff use a keycard to enter; and Planned Parenthood's staff testified that they generally understood such conversations to be confidential.

The NAF NDAs were supported by consideration. The NAF exhibitor agreements and NDAs are best read as a single contract because they were "executed as parts of substantially one transaction" covering the entrance to and conduct during the NAF conferences. *See Meier v. Paul X. Smith Corp.*, 205 Cal. App. 2d 207, 217 (Cal. Ct. App. 1962). NAF gave consideration for the NDAs. The exhibitor agreements allowed NAF to reject an exhibitor for any reason in its sole discretion, and NAF's decision to admit Appellants, constituted consideration.[3]

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[3] The jury found that Daleiden, BioMax, and CMP breached the obligations clause of the exhibitor agreements. We will not now review the district court's denial of Appellants' motion for

2. The district court did not err in granting Planned Parenthood's motion for summary judgment as to claims that various Appellants trespassed in several clinics and conferences. Appellants exceeded the scope of their consent to enter the Planned Parenthood conferences and facilities and NAF conferences by surreptitiously recording Planned Parenthood staff in violation of contractual promises Appellants made to Planned Parenthood—including promises to maintain confidentiality and to comply with fraud and privacy laws. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *see also supra* Part 1.

3. There was no error in the district court's rulings on the RICO claim. Planned Parenthood's RICO claim satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. § 1028(c)(3)(A). *See, e.g., United States v. Gutierrez*, 963 F.3d 320, 339 n.7 (4th Cir. 2020); *United States v. Klopf*, 423 F.3d 1228, 1239 (11th Cir. 2005). The production and transfer of the fake driver's licenses affected interstate commerce because Appellants used the fake licenses to gain

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summary judgment on this issue. *Williams v. Gaye*, 895 F.3d 1106, 1122 (9th Cir. 2018). Likewise, we need not reach the issue whether the district court erred in granting Planned Parenthood summary judgment regarding the breach of the educational and products clauses of the exhibitor agreements.

Appellants waived their argument that the Exhibitor Agreements became moot by failing to adequately brief the issue. *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010). Even if we were to reach the merits of Appellants' argument, we would affirm the district court because the exhibitor agreements did not state that eviction was the sole remedy for a breach and Planned Parenthood could seek other lawful remedies.

admission to out-of-state conferences and facilities, and then presented those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce. *See United States v. Turchin*, 21 F.4th 1192, 1202–03 (9th Cir. 2022). And further, Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was "intimately related to interstate commerce." *See United States v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007).

The district court did not err in denying Appellants' renewed motion for judgment as a matter of law regarding the required *pattern* of predicate acts necessary to violate RICO. A pattern may be established by proof that defendants' conduct possessed "open-ended continuity," *i.e.*, that their conduct "by its nature project[ed] into the future with a *threat* of repetition." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (emphasis added). "As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied." *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.5 (9th Cir. 1987). The evidence showed that various Appellants had previously advocated for or used undercover sting operations targeting Planned Parenthood, and CMP and BioMax were still extant and intended to carry out future projects. The district court did not err in determining that "there was sufficient evidence on which a reasonable jury could rely to establish open-ended continuity."

The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law on RICO proximate cause. There was a direct relationship

between Appellants' production and transfer of the fake driver's licenses and the alleged harm. *See Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 12 (2010); *see also Harmoni Intl. Spice, Inc. v. Hume*, 914 F.3d 648, 651–52 (9th Cir. 2019). The district court permitted only infiltration damages and security damages, limiting any difficulty in determining what damages were attributable to Appellants' RICO violation; there is no risk of Planned Parenthood recovering duplicative damages; holding Appellants liable discourages illegal behavior; and there are no more directly injured victims. *See Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*, 943 F.3d 1243, 1249–52 (9th Cir. 2019); *Harmoni*, 914 F.3d at 652.

4. We "review for abuse of discretion a district court's decision to draw an adverse inference from a party's invocation in a civil case of the Fifth Amendment privilege against self-incrimination." *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 909 (9th Cir. 2008). Courts may draw adverse inferences in civil cases from a party's invocation of the Fifth Amendment right not to testify. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000).

Here, the district court did not abuse its discretion in approving the adverse inferences according to the standard set forth in *Glanzer*. *Id.* at 1265. There was no less burdensome way for Planned Parenthood to present evidence about the topics covered by the adverse inferences: no alternative testimony or documents were available to show the state of mind or

beliefs of those who had refused to testify, Appellants themselves objected to the admission of evidence that supported some adverse inferences, and the stipulations to which Appellants agreed were misleading and incomplete. *See Glanzer*, 232 F.3d at 1265. There was also a substantial need for the adverse inferences: in particular, many of the adverse inferences regarding Newman related to his knowledge, intent, and motive, crucial components of Planned Parenthood's causes of action. *See id.* Further, evidence in the record supports all of the adverse inferences that Appellants allege lacked a factual foundation.

The adverse inferences were also reasonable, and neither their number nor use was unduly prejudicial. The adverse inferences accompanied a complex, six-week trial with dozens of witnesses and numerous exhibits. The district court gave the jury proper limiting instructions, telling the jury that they were permitted, but not required, to draw the adverse inferences, and instructed the jury that they "may not consider" the adverse inferences as to Planned Parenthood's California claims. The district court also did not abuse its discretion in admitting Newman Adverse Inference 1. The district court balanced the interests of the parties in admitting this adverse inference because Newman himself objected to the admission of the book upon which this adverse inference was based.

The district court did not err in permitting adverse inferences based on two non-parties invocations of the

privilege against self-incrimination.[4] The non-party adverse inferences were relevant to Planned Parenthood's claims, the adverse inferences could not have been obtained from other sources, the district court evaluated proper criteria when permitting the admission of these adverse inferences, and the district court gave a limiting instruction to the jury. There was no abuse of discretion.

Finally, even assuming *arguendo* that the district court erred in drawing some or all of the adverse inferences, any error was harmless. *See Richards*, 541 F.3d at 915. The jury saw significant evidence and could evaluate the demeanor of those witnesses who did testify, and none of the adverse inferences were so prejudicial as to taint the verdict.

5. We review the district court's formulation of civil jury instructions, including its denial of a proposed jury instruction, for abuse of discretion. *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014) (en banc); *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002). We review whether an instruction stated the law correctly *de novo*. *Peralta*, 744 F.3d at 1082. "We do not reverse the

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[4] Appellants argue that adverse inferences against non-parties should not be permitted, but do not explain why. Other circuits have upheld such inferences. *See, e.g.*, *LiButti v. United States*, 107 F.3d 110, 122–124 (2d Cir. 1997); *F.D.I.C. v. Fid. & Deposit Co.*, 45 F.3d 969, 977–78 (5th Cir. 1995); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275–81 (3d Cir. 1986); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 521 (8th Cir. 1984). Appellants have not pointed to any circuits which do not permit adverse inferences about nonparties, much less provided any reason this court should not permit them.

judgment if the alleged error in the jury instructions is harmless." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1087 (9th Cir. 2005) (citation omitted). When a party fails to preserve an objection to a jury instruction, we review for plain error. *Skidmore as Tr. for Randy Craig Wolfe Tr. V. Led Zeppelin*, 952 F.3d 1051, 1072 (9th Cir. 2020) (en banc). "Jury instructions must be supported by the evidence, fairly and adequately cover the issues presented, correctly state the law, and not be misleading." *Peralta*, 744 F.3d at 1082.

The district court did not abuse its discretion in instructing the jury and, assuming *arguendo* that the district court erred, any error was harmless. First, the district court did not err in failing to give the First Amendment instructions that Appellants requested. The proposed instruction that the jury should assume the truth of the videos' content was unnecessary because Planned Parenthood stipulated that the participants spoke the words recorded in the videos. The instruction regarding publication damages was unnecessary because the jury was only permitted to award narrow categories of damages. Furthermore, when evaluated as a whole, any potential omission was harmless because the jury was instructed to consider only two narrow categories of damages "directly caused" by Appellants.

Second, the district court did not err in instructing the jury regarding Appellants' breach of the NAF Agreements. Appellants did not object to this instruction, and we review for plain error. *Skidmore*, 952 F.3d at 1072. The district court determined only

after providing its instruction that Appellants breached the NAF Agreements by disclosing confidential information. However, Appellants have not shown that this error "affected substantial rights," *id.* at 1073, because Appellants admitted in their answer that Daleiden disclosed information learned at NAF meetings to third parties without NAF's consent.

Third, the district court did not abuse its discretion when instructing the jury regarding California Penal Code § 632. The instruction required that the jury find that an Appellant "intentionally recorded" and that the recorded individual "had a reasonable expectation" of privacy. The instruction closely followed the 2022 California Civil Pattern Jury Instructions, and any potential difference between the instructions and the language in *People v. Superior Ct. of Los Angeles Cnty.*, 449 P.2d 230, 237 (Cal. 1969) is irrelevant and harmless.

Fourth, the district court did not err in instructing the jury on punitive damages. Because Appellants did not object to the district court's omission of the punitive damages instruction Appellants originally requested, we review for plain error. *Skidmore*, 952 F.3d at 1072. The district court did not plainly err in omitting Appellants' requested instruction prohibiting third-party damages because the instructions on punitive damages as a whole did not permit such an award.

Fifth, there was no error in the recording instructions. Neither 18 U.S.C. § 2510(2) nor Florida Statute § 934.02(2) require a separate expectation of privacy above the objective reasonableness of the recorded individual's subjective belief. *See Price v.*

Turner, 260 F.3d 1144, 1148–49 (9th Cir. 2001); *Huff v. Spaw*, 794 F.3d 543, 549 & n.4 (6th Cir. 2015); *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985). All the recorded individuals exhibited reasonable expectations of privacy; they conversed in private areas that were protected by keycard access or limited to badge-carrying conference attendees, and the conversations took place behind closed doors or in areas where no one could reasonably be expected to surreptitiously eavesdrop. *See infra* Part 7. The instruction regarding corporate standing under the recording statutes also accurately conveyed the law. *See Smoot v. United Transp. Union*, 246 F.3d 633, 639–40 (6th Cir. 2001). And many of the recordings contained information concerning Planned Parenthood's business matters, so any potential error in the corporate standing instruction was harmless. *Altera Corp.*, 424 F.3d at 1087.[5]

6. We review a district court's rulings on discovery for abuse of discretion. *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016). "A district court is vested with broad discretion to permit or deny discovery, and a decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (citation omitted). "We

[5] Appellants' cursory argument that Planned Parenthood Northern California ("PPNorCal") lacked standing to bring its recording claim fails because there was sufficient evidence in the record to show that Dr. Drummond-Hay was recorded discussing PPNorCal's internal matters.

review evidentiary rulings for abuse of discretion and reverse if the exercise of discretion is both erroneous and prejudicial." *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013). Prejudice occurs when the district court's error "more probably than not" tainted the verdict. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008).

First, the district court did not err in prohibiting discovery into, and evidence at trial showing, Appellants' purported credibility and good intent and positive results from Appellants' actions. These issues were irrelevant to the claims at issue; journalists have no special license to break laws of general applicability, s*ee, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018); and there was no evidence in the record that Planned Parenthood broke any laws or that any charges have been filed against Planned Parenthood by the Department of Justice.

Second, the district court did not abuse its discretion in refusing to admit Appellants' California Penal Code § 633.5 affirmative defense evidence.[6] Any evidence that Appellants gained after they had already started their surreptitious recordings had no bearing on why they initially decided to record. Appellants only engaged Dr. Smith after they began releasing the videos, so this evidence could not have influenced their intent to make any of the recordings. The district court

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[6] *De novo* review is only available when a defendant was completely prevented from presenting a defense, which was not the case here. *See Branch Banking*, 871 F.3d at 759–60; *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010). Even if we reviewed *de novo*, we would reach the same conclusion.

admitted evidence related to the Dr. Nucatola meeting. Moreover, even if the excluded evidence had been admitted, it was unlikely to have changed the jury's verdict. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001).

Third, even assuming *arguendo* that *de novo* review applies, the district court did not err in admitting evidence showing historical violence against abortion providers. This evidence was probative of important issues, including why the conferences had high security, why Planned Parenthood incurred certain expenses to restore security, and why individuals at the conferences had reasonable expectations of privacy. The danger of unfair prejudice did not substantially outweigh the probative value of this evidence.[7] *See* Fed. R. Evid. 403.

7. The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law regarding the recorded individuals' reasonable expectations of privacy at various conferences and meetings. "[W]hether a communication is confidential is a question of fact normally left to the fact finder."

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[7] Appellants waived their objection to the admission of the NAF report on historical anti-abortion violence by failing to sufficiently raise this issue in their opening briefing. *See Badgley*, 957 F.3d at 978–79. Even if not waived, Appellants failed to show that the district court abused its discretion in admitting the report as a business record because they did not point to any inaccuracies in the report or otherwise demonstrate that the report was unreliable. *See N.L.R.B. v. First Termite Control Co.*, 646 F.2d 424, 427 (9th Cir. 1981).

Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1126 (9th Cir. 2017).[8]

Substantial evidence supports the jury's determination that the recorded individuals had objectively and subjectively reasonable expectations of privacy. Dr. Nucatola met Appellants at a private conference, and she understood attendees to have been carefully vetted; Appellants carried out an elaborate ruse to portray themselves as representatives of a fake tissue procurement company; Dr. Nuctatola's conversation with Appellants occurred in a booth in the back of a restaurant when the restaurant was busy; Dr. Nucatola testified that she could not hear conversations at other tables and believed that their conversation was private; and the jury saw multiple videos of the restaurant meeting and could judge for themselves whether Dr. Nucatola had a reasonable expectation of privacy. Similarly, Dr. Gatter was introduced to Appellants by a trusted colleague; Appellants carried out an elaborate ruse to portray themselves as representatives of a fake tissue procurement company; Appellants met Dr. Gatter and Laura Felczer in an empty restaurant; and the jury saw video of the meeting and could judge for themselves whether Dr. Gatter and Felczer had a reasonable expectation of privacy.

Substantial evidence also supports the jury's finding that the individuals recorded at the conferences had

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[8] Our review is not *de novo* because the issues here are primarily factual. *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020).

objectively and subjectively reasonable expectations of privacy. The conference organizers took extensive measures to protect the security of the conferences including reserving private hotel spaces; restricting access to the conferences; hiring security to monitor entrances; requiring attendees to pre-register; requiring attendees to show photo ID at check-in; requiring attendees to sign confidentiality agreements; and requiring attendees to wear badges at the conferences. The conversations generally occurred in crowded areas with lots of background noise. Many who attended the conferences testified that they believed the conferences and their conversations were private.

8. The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law on the infiltration and security damages on grounds that the damages were proximately caused by Appellants' underlying torts. A defendant proximately causes damages when there is a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury" such that the alleged injury "was a foreseeable and natural consequence" of the defendant's scheme. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657–58 (2008).

The infiltration damages covered expenses such as assessing security systems, vetting practices review, hiring security guards for meetings, and installing conference badging systems. The jury could have concluded that Planned Parenthood incurred these costs to prevent further infiltrations by the Appellants and their co-conspirators as a direct result of Appellants' wrongful trespass, recording, and breach of

contract actions. The security damages provided physical security and online threat monitoring for individuals recorded in the videos Defendants released. Given the history of violence against abortion providers, it was a foreseeable and natural consequence of Appellants' actions that the recorded individuals would be subject to threats and reasonably fear for their safety. *See Bridge*, 553 U.S. at 657–58.

9. We review an award of punitive damages for abuse of discretion, and "a challenge to the sufficiency of the evidence to support a punitive damage award must be rejected if the award is supported by substantial evidence." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906–07 (9th Cir. 2002). In general, a general jury verdict will be upheld only if there is substantial evidence to support each theory of liability submitted to the jury. *Webb v. Sloan*, 330 F.3d 1158, 1166 (9th Cir. 2003). However, a reviewing court has the discretion to construe a general verdict as attributable to any theory if it is supported by substantial evidence and was submitted to the jury free of error. *Traver v. Meshriy*, 627 F.2d 934, 938–39 (9th Cir. 1980); *see Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996).

There was no error in the award of punitive damages. Though we reverse the jury's verdict on the Federal Wiretap Act claim, there was substantial evidence to support the other theories of liability. There was substantial evidence that Appellants committed fraud, trespassed, and violated state wiretapping laws, and that they engaged in that conduct through "fraud" or "intentional misconduct." There was indeed

overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, Merritt, Rhomberg, Newman, CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation.[9] That evidence included: (1) that Daleiden and Merritt intentionally recorded individuals without their consent at conferences and meetings; (2) that Daleiden and Merritt intentionally misrepresented their identities, the intent of their participation, and their work affiliations to attend conferences, lunches, and meetings; (3) that Newman was aware of and agreed to the fraudulent tactics; (4) that Rhomberg knew the project would involve secret recordings and advised on what should be recorded; and (5) that Daleiden, Rhomberg, and Newman formed CMP and BioMax to infiltrate conferences attended by Planned Parenthood staff and obtain "gotcha" videos made with hidden recording equipment. *See* 18 U.S.C. § 2520(b)(2); Fla. Stat. § 768.72; *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 650 (Md. 1992). Given the overwhelming and largely undisputed evidence of intentional fraud by the Defendant-Appellant agents of CMP and BioMax, there was no error on the punitive damages award.

10. "We review the district court's decision to grant a permanent injunction for abuse of discretion."

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[9] Appellants waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs. *See Isabel v. Reagan*, 987 F.3d 1220, 1226 n.7 (9th Cir. 2021); *Badgley*, 957 F.3d at 978–79. Even if the argument were not waived, Appellants' challenge would be meritless and would not shield them from liability.

Arizona Dream Act Coal. v. Brewer, 855 F.3d 957, 965 (9th Cir. 2017). "Although questions of standing are reviewed de novo, we will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010).

The district court did not clearly err in determining that Planned Parenthood had standing to seek injunctive relief. Following a six-week jury trial, the district court determined, among other things, that: Appellants used fake driver's licenses and secretly recorded individuals associated with Planned Parenthood; Daleiden, Merritt, Baxter, and Lopez secretly recorded everyone with whom they spoke to at various conferences, lunches, and clinics; Daleiden, Newman, and Rhomberg sought to end legal abortion in America; Merritt and Daleiden had previously engaged in undercover work targeting Planned Parenthood; all individual Appellants were involved with CMP, which is still operational and has the aim of ending legal abortion; and each individual Appellant has the ability to continue to conduct similar work. None of these factual findings were clearly erroneous, *see Preminger v. Peake*, 552 F.3d 757, 762 n.3 (9th Cir. 2008), and the district court did not err in determining that Planned Parenthood had standing to seek injunctive relief because it was likely to be injured again in a similar way, *see Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

The district court did not abuse its discretion in determining that the injunction was in the public interest. The district court found that Appellants' actions substantially disrupted Planned Parenthood's legal provision of healthcare to patients. *See Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) ("The public interest mostly concerns the injunction's impact on nonparties rather than parties.") (internal quotations omitted). There was no evidence in the record that Planned Parenthood broke the law or that any charges had been filed against Planned Parenthood by the Department of Justice.

Nor did the district court abuse its discretion in determining that many of Planned Parenthood's injuries could not be addressed by damages. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Damages alone could not prevent Appellants from committing further illegal actions targeting Planned Parenthood such as trespass, unconsented recordings, and breach of contracts.

Finally, the district court did not abuse its discretion in issuing a permanent injunction against all Appellants except Lopez. The district court observed Merritt during the six-week trial and heard significant evidence about her long-time pro-life activism, including her role in Appellants' scheme and a previous undercover activity targeting Planned Parenthood.[10]

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[10] The only Appellant who sufficiently raised a challenge to the injunction regarding him or herself is Merritt; all other Appellants waived such a challenge. *See Badgley*, 957 F.3d at 978–79.

11. Substantial evidence supports the judgment against Lopez. Lopez knew Daleiden's true identity but referred to Daleiden by his fake name, Sarkis, when attending Planned Parenthood's conferences; Lopez posed as a BioMax technician, which he was not; and Lopez secretly recorded at the conferences he attended without the consent of those he recorded.[11]

Substantial evidence also supports the judgment against Rhomberg. Rhomberg was the CFO of CMP and participated in numerous CMP board meetings for several years; Rhomberg assisted in CMP's fundraising; Rhomberg received a "project proposal" from Daleiden outlining a plan to buy "Undercover Equipment" to expose fetal trafficking using "'gotcha' undercover videos" from annual abortion-provider conferences that Appellants later attended and where they secretly recorded attendees; the jury heard Rhomberg admit at his deposition, in contradiction to his trial testimony, that Daleiden told him he intended to go undercover to infiltrate abortion-provider conferences; and the jury saw a video in which Daleiden called Rhomberg from one of Planned Parenthood's clinics using the fake name "Sarkis."

Substantial evidence supports the judgment against Newman. Newman was the Secretary of CMP; after publication of the videos, Newman wrote that "I just

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[11] Appellants cursorily argue that Lopez is subject to the agent immunity rule. This argument is unpersuasive because Lopez himself had a duty to not defraud Planned Parenthood. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 512 (Cal. 1994); *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1381 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Apr. 7, 2000).

wanted to underscore that it was my project for the past three years" and "originated from our office alone,"; in a book he wrote, Newman described an elaborate hoax scenario to send a team with a hidden video camera into clinics providing abortions; Daleiden testified that Newman appreciated the undercover methodology of the project; Rhomberg testified that Newman participated in CMP board meetings every few months for several years; the adverse inferences approved by the district court stated that Newman had an "integral role in CMP and the Human Capital Project since its origin in 2013," "understood that one of CMP's goals was to end abortion, and to defund and shut down Planned Parenthood," knew that other Appellants used fake names to infiltrate Planned Parenthood's conferences, and knew BioMax was a front organization that surreptitiously recorded Planned Parenthood's staff without their consent; and the day after the first video was released, Newman wrote that "this has exceeded our expectations. We are off to a great start."

We are not convinced by Newman's argument that it was "fundamentally unfair" for the district court to include him on the trespass and recording claims even though the complaint did not allege that he committed these offenses. This argument was waived due to insufficient briefing, *see Badgley*, 957 F.3d at 978–79, and Newman did not allege any prejudice from this omission. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000).

Planned Parenthood did not need to prove that Newman could only be liable in his personal capacity if

an ordinarily prudent person knowing what he knew at the time would not have acted similarly. The district court correctly noted that tacit consent and knowledge of unlawful purpose are enough to prove a director's personal liability, and corporate officers can be personally liable "for violating their own duties towards persons injured by the corporation's tort." *See PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1380 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Apr. 7, 2000). Even if the district court had applied Newman's preferred test, Newman cannot show prejudice: there is substantial evidence that Newman authorized or knew about the tortious conduct and an "ordinarily prudent person, knowing what [Newman] knew at that time, would not have acted similarly under the circumstances." *See Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 508–09 (Cal. 1986).

Newman's argument that a person who is not a party to a contract cannot be guilty of conspiracy to break that contract is unavailing. Newman relies on *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973), which is limited to "the tort of breach of duty of good faith and fair dealing" and is inapplicable here. *See Younan v. Equifax Inc.*, 169 Cal. Rptr. 478, 485 (Cal. Ct. App. 1980).

12. "Rulings on motions for recusal are reviewed under the abuse-of-discretion standard." *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012). The standard is "[w]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."

Id. (quoting *United States v. Hernandez,* 109 F.3d 1450, 1453 (9th Cir. 1997) (per curiam)).

Judge Orrick did not abuse his discretion in refusing to disqualify himself, and Judge Donato did not abuse his discretion in determining that Judge Orrick need not recuse himself. A reasonable person would not ascribe the views of a judge's spouse to the judge him or herself simply because the spouse's profile picture included the judge. *See Perry v. Schwarzenegger*, 630 F.3d 909, 911–12 (9th Cir. 2011). Nor would a reasonable person have questioned the impartiality of Judge Orrick given his former role at the Good Samaritan Family Resource Center.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-00236-WHO

[Filed April 29, 2020]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,[1]
Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,[2]

[1] Plaintiffs, as identified in the Final Preliminary Jury Instructions (Dkt. No. 850) are Planned Parenthood Federation of America (PPFA); Planned Parenthood: Shasta-Diablo, Inc. dba Planned Parenthood Northern California (PPNorCal); Planned Parenthood Mar Monte, Inc. (PPMM); Planned Parenthood of the Pacific Southwest (PPPSW); Planned Parenthood Los Angeles (PPLA); Planned Parenthood/Orange and San Bernardino Counties (PPOSBC); Planned Parenthood California Central Coast (PPCCC); Planned Parenthood Pasadena and San Gabriel Valley, Inc. (PPPSGV); Planned Parenthood of the Rocky Mountains (PPRM); and Planned Parenthood Gulf Coast (PPGC) and Planned Parenthood Center for Choice (PPCFC).

[2] Defendants, as identified in the Final Preliminary Jury Instructions (Dkt. No. 850) are the Center for Medical Progress (CMP), BioMax Procurement Services (BioMax), David Daleiden, Sandra Susan Merritt, Adrian Lopez, Albin Rhomberg, and Troy Newman.

Defendants.)
_____)

ORDER RESOLVING UNFAIR COMPETITION CLAIM AND ENTERING JUDGMENT

Re: Dkt. Nos. 1048, 1059

INTRODUCTION

This Order addresses plaintiffs' Unfair Competition Law ("UCL") claim arising under California Business & Professions Code section 17200 *et seq*. and their request for a permanent injunction, and enters Judgment. It follows a trial that commenced on October 2, 2019 and ended with the jury's verdict, which was overwhelmingly in plaintiffs' favor, on November 15, 2019. I now find in plaintiffs' favor on the UCL claim; an abundance of evidence supports it. I enter a permanent injunction against the defendants, although more limited than sought by plaintiffs. And I enter Judgment in accordance with the verdict and the orders that preceded it.[3]

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[3] Certain claims were adjudicated against defendants on summary judgment. Those claims were (1) partial summary judgment to plaintiffs on the interstate commerce nexus for the false identification predicate acts under RICO; (2) partial summary judgment to plaintiffs on Daleiden and BioMax's breach of the PPFA Exhibitor Agreements; and (3) partial summary judgment in favor of PPFA against BioMax, Daleiden, and Lopez for trespass at the PPFA conferences in Florida and Washington, D.C. and in favor of PPGC/PPCFC and PPRM on trespasses in Colorado and Texas (reserving for trial CMP's liability and actual damages). Dkt. No. 753 at 134-135. In addition, in an Order dated November 11, 2019, I granted portions of plaintiffs' Rule 50 motion, finding that: (1) plaintiffs' employees and contractors are

BACKGROUND

The jury found the following defendants liable on the following claims:

Trespass. Defendants Daleiden, Lopez, BioMax, and CMP's trespasses during two PPFA conferences in Florida and one in Washington, D.C. caused actual damages to PPFA. Rhomberg and Newman conspired with those trespassing defendants. Verdict at 1. Defendants Daleiden, Merritt, BioMax, and CMP's trespass at the PPGGC/PPCFC Health Center caused actual damages to PPGC/PPCFC. Defendants Rhomberg and Newman conspired with defendants to trespass at that Health Center. Verdict at 3.[4]

Breach of PPFA Exhibitor Agreements. Defendants Daleiden, BioMax, and CMP breached PPFA's Exhibitor Agreements at three PPFA Conferences, causing PPFA actual damages. Verdict 4-6.

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third-party beneficiaries of the NAF Exhibitor and Confidentiality Agreements; (2) defendants Merritt, Daleiden, BioMax, and CMP breached the NAF 2014 Confidentiality Agreement and defendants Daleiden, Lopez, BioMax, and CMP breached the NAF 2015 Confidentiality Agreement prohibiting "Videotaping or Other Recording"; and (3) defendants Daleiden, BioMax, and CMP breached the NAF Exhibitor Agreements in 2014 and 2015 concerning the requirement to provide "truthful, accurate, complete, and not misleading" information. Dkt. No. 994 at 1.

[4] I had determined that PPRM was nominally damaged by defendants' trespass at PPRM's clinic in Colorado. The jury determined that PPFA was not damaged by defendants' trespass PPRM's clinic, but that Rhomberg and Newman conspired with Daleiden, Lopez, Merritt, and CMP in that trespass. Verdict at 2.

Breach of NAF Agreements. PPFA was actually damaged by defendants Daleiden, Merritt, Lopez, BioMax, and CMP's breach of the 2014 and 2015 NAF Agreements. Verdict at 7.

Breach of PPGC Agreement. Daleiden, BioMax, and CMP breached the PPGC Nondisclosure Agreement, causing actual damages to PPGC. Verdict at 8.

Fraudulent Misrepresentations. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman committed or conspired to commit fraudulent misrepresentations against PPFA, PPGC, PPOSB, and PPPSGV, causing actual damages to PPFA, PPGC, PPOSBC, and PPPSGV. Verdict at 9-11.

False Promise Fraud. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman committed or conspired to commit false promise fraud in connection with the PPFA's Exhibitor Agreements, causing actual damages to PPFA. Verdict at 12-13. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Neman committed or conspired to commit false promise fraud in connection with PPGC's Nondisclosure Agreement, causing actual damage to PPGC. Verdict at 14-15.

RICO. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman committed or conspired to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1962(c) and 1962(d)), causing actual damages to PPFA, PPGC, PPOSBC, PPPSGV. Verdict at 16-17.

Recording Law, California (Penal Code section 632). Defendants Daleiden and Merritt violated Penal Code

632 by recording staff of PPNorCal, PPFA, and PPPSGV, causing actual damage to PPFA and PPPSGV. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman conspired to violate Penal Code section 632. Verdict 19-20.

Recording Law, Florida. Defendants Lopez and/or Daleiden violated Florida law by recording staff of PPFA, PPPSGV, PPCCC, PPRM, PPOSBC, PPCG, and PPPSW, causing actual damages to PPFA, PPOSBC, and PPPSGV. Verdict 21-25. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman conspired to violate Florida law. Verdict at 26.

Recording Law, Maryland. Defendants Daleiden, Merritt, or Lopez violated Maryland law by recording PPFA, PPGC, and PPCFC staff causing actual damages to PPFA and PPGC. Verdict at 27-29. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman conspired to violate the Maryland recording law. Verdict at 30.

Recording Law, Federal. Defendants Daleiden, Lopez, or Merritt violated the Federal recording law by recording PPFA, PPGC, PPCFC, PPRM, PPPSGV, PPCCC, PPOSBC, PPPSW, and PPNorCal, causing actual damages to PPFA, PPGC PPOSBC, and PPPSGV. Verdict at 31-40. Defendants Daleiden, Merritt, Lopez, BioMax, CMP, Rhomberg, and Newman conspired to violate the Federal recording law. Verdict at 41.

Punitive Damages. Defendants Daleiden, Merritt, BioMax, CMP, Newman, and Rhomberg were liable for punitive damages for one or more of fraud, trespass,

Florida recording, Maryland recording, or Federal recording law claims. Verdict at 42-43.

The UCL claim was not tried to the jury. As a purely equitable claim, it was left for adjudication by me, if necessary, following the trial. *See, e.g., Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 179 (2000). Relatedly, the issue of what – if any – injunctive relief plaintiffs were entitled to remained outstanding.

After the verdict was rendered, I discussed with the parties how to resolve the remaining issues. While I agreed "with defendants that 'the facts underlying the jury verdict and the UCL claim are nearly identical and the legal issues significantly overlap,'" and I was "inclined to resolve these issues through briefing, supported by citations to the trial transcript and other evidence in the record," I asked each side to "file a proffer identifying with specificity what testimony or other evidence that was not submitted on summary judgment or adduced at trial they intend to introduce in support of or in defense to the UCL claim and request for injunctive relief." Dkt. No. 1036 (quoting Dkt. No. 1033). After reviewing those proffers, and given the jury's verdict, I determined that I could resolve the UCL claim solely on the "illegality" and "fraudulent" UCL prongs and that I could address the appropriateness of any injunctive relief based on the trial record and undisputed evidence. Dkt. No. 1044. I ordered plaintiffs to file proposed facts and conclusions of law identifying "the precise injunctive relief they seek," the factual and legal bases for that relief under the UCL, and (if sought) the factual and legal bases for

injunctive relief under their other claims. *See* Dkt. Nos. 1044 (Minutes), 1046 (Transcript).

Having reviewed the proffers and the parties' briefing on the UCL claim and equitable relief, I now resolve the remaining issues. With respect to the equitable and injunctive relief based on the UCL or other claims, given the evidence at trial – in particular regarding the backgrounds of defendants, their prior acts and knowledge of tactics used to gather information on abortion providers based on misrepresentations and surreptitious recordings, the roles and goals of each defendant in the Human Capital Project ("HCP"), the testimony of the defendants on the stand regarding their role and intent with respect to the HCP and Planned Parenthood specifically[5] – there is no need for further proceedings before I rule. Defendants were able to and did present evidence regarding these issues in their defense of plaintiffs' claims for liability under RICO (on whether the alleged criminal conspiracy under RICO was "open ended"), for conspiracy liability, for punitive damages, and more generally in support of their narrative that defendants were engaged only in legal journalistic efforts to uncover evidence of criminal activity.

With respect to balance of hardships and public interest (discussed more below), I likewise considered the evidence at trial, as well as defendants' proffer of evidence regarding the social utility of defendants'

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[5] Newman did not testify at trial, but given the jury's verdict on the claims asserted against him, the jury likely took adverse inferences against him on the non-California claims.

conduct. Dkt. No. 1041. Most of that evidence had already been submitted to me by defendants – in proffer form (by counsel) or in declaration form – at summary judgment, in connection with motions *in limine*, or during trial (to allow resolution of disputes over the relevance or admissibility of witness discovery or testimony at trial). I have considered and weighed defendants' beliefs about what that proffered evidence would show, and what the testimony and documents submitted to me showed, in reaching my determination that the public interest and balance of hardships weigh in favor of injunctive relief.

I. FINDINGS OF FACT

It is not necessary for me to find facts with respect to the merits of defendants' liability under the UCL claim: the illegal and fraudulent prongs of the UCL are satisfied given the jury's verdict that defendants engaged in numerous illegal and fraudulent acts in California and emanating from California, against California-based plaintiffs and others, committed in violation of California law, Federal law, and the laws of other jurisdictions. I discuss defendants' legal arguments about the inapplicability of the UCL in the next section and find that they lack merit.

Establishing a violation of the UCL does not determine what sort of equitable relief is appropriate for that violation or for the other claims on which plaintiffs prevailed at trial. I directed plaintiffs to prepare findings of fact and conclusions of law addressing the need for equitable relief and the appropriate scope of that relief under the UCL and any other claims on which plaintiffs intended to rely in

support of their requested injunctive relief. I will address the scope of injunctive relief later in this Order, but find the following facts that generally support the need for injunctive relief.

1. In late 2012, David Daleiden traveled to Wichita, Kansas, the headquarters of Troy Newman's anti-abortion organization Operation Rescue, to discuss a plan to target Planned Parenthood through a series of undercover videos. Trial Tr. 2050:20-25; 2052:3-2053:4; 2054:1-15; TRX 24, TRX 123.

2. In March 2013, Daleiden formed the Center for Medical Progress ("CMP"), with Newman joining as a board member shortly after CMP's creation. Trial Tr. 2055:12-23; TRX 132; TRX 338. Daleiden was CMP's CEO. Newman was Secretary of CMP. Rhomberg was CMP's "Chief Financial Officer." TRX 338; TRX 37.

3. CMP's plan was to create a video campaign (later known as the Human Capital Project or HCP) against Planned Parenthood with the objective of creating "maximum negative impact – legal, political, professional, public – on [Planned Parenthood]" and to "create public outrage towards" Planned Parenthood through a series of undercover gotcha videos. TRX 24, 67, 68, 106; Trial Tr. 3460:22-3461:3.

4. Daleiden, acting as CMP's CEO, set up a front company called BioMax Procurement Services, LLC ("BioMax"). TRX 364; Trial Tr. 2104:11-14; 2461:25-2462:4; 2463:4-8 ("BioMax was organized as a vehicle . . . to use to do large parts of undercover works").

5. Daleiden filed Articles of Organization for BioMax with the California Secretary of State listing "Susan Tennenbaum," as its manager, and signing her name. There is no such person. TRX 364; Trial Tr. 2093:12-18; 2097:6-2098:8.

6. Daleiden took significant steps to make BioMax appear legitimate. For example, he created a website for BioMax . Trial Tr. 2105:1-16 (Daleiden testimony regarding steps he took to make BioMax seem legitimate); TRX 123 (early roadmap noting the need to "park domain and temporary website of fake company").

7. Daleiden hired co-conspirators Merritt and Lopez, and non-parties Brianna Baxter and Annamarie Bettisworth Davin, to pose as BioMax officers and employees and use those false identities to infiltrate conferences and health centers to secretly film Planned Parenthood staff and others. Trial Tr. 2086:20-2087:16; 2088:1-18; 2113:9-2114:8; 2161:12-23. These individuals were independent contractors of CMP. Trial Tr. 2086:20-2087:16; 2088:1-18; 2161:12-23; 2454:25-2455:1; TRX 352 (independent contractor agreement for Susan Merritt).

8. Daleiden created fake names and backgrounds for the purported BioMax employees, which he trained the CMP contractors to use. TRX 426 ("field worker employees, which he trained the CMP contractors to use. TRX 426 ("field worker vocabulary"); TRX 549; Trial Tr. 437:12-439:3, 438:7-439:2 (Merritt given instructions and background by Daleiden); 2161:24-2166:22 (Daleiden testimony about training contractors) 2168:13-2169:17 (Daleiden testimony

about his "training of undercover actors"); 2170:7-19 (Daleiden provided email with "background information for the -- for the undercover investigator to know about their – about their characters.").

9. Daleiden also created business cards and promotional materials for BioMax. The promotional materials described BioMax as "a biological specimen procurement organization headquartered in Norwalk, California." Trial Tr. 2114:17-19, 2116:8-22. Daleiden and the CMP contractors distributed the BioMax business cards and displayed promotional materials at conferences. TRX 366, 654 (business cards); TRX 31 (BioMax brochure); Trial Tr. 2112:4-2113:13; 2114:17-2116:22; *see also* Trial Tr. 1220:17-21, 1222:4-10; TRX 8017, 578, 1809.

10. In addition, Daleiden created and/or solicited the production of fake California drivers' licenses with the fake BioMax names for himself, Merritt and Baxter. For his own ID, he used an expired drivers' license and typed "Robert Daoud Sarkis" over his true name. Through Craigslist, Daleiden located a service in Southern California, which he paid to produce phony drivers' licenses with the names "Susan Tennenbaum" and "Brianna Allen." TRX 140; Trial Tr. 2122:18-2133:2; 2154:5-2155:20; 3465:3-5.

11. Daleiden had bank cards issued for BioMax under fictitious names or without the consent of the named cardholder. TRX 140; TRX 584; Trial Tr. 2155:21-2156:23, 2157:15-25, 2158:3-2159:5; Court Ex. 5 at 30:21-31:7 (Cronin Dep.).

12. Newman advised Daleiden and took credit for directing the Project. Trial Tr. 3461:11-15; TRX 28 (press release).

13. Rhomberg and Newman participated in CMP board meetings with Daleiden every few months to discuss and receive updates on the progress of the project. Trial Tr. 704:2-19. Daleiden sent them emails laying out a roadmap of the Human Capital Project's goals and activities. TRX 67 (email to Rhomberg with roadmap); TRX 123 (email to Newman with road map notes).

14. Rhomberg and Newman knew that Daleiden and CMP had created a front company to infiltrate conferences and health centers of abortion providers. Trial Tr. 719:14-720:5 (discussion of email from Daleiden that told Rhomberg the "infiltration was successful and BioMax is now a known and trusted entity"); Trial Tr. 3462:6-9 ("Troy Newman understood that BioMax was created as a front organization to provide a cover story to allow Daleiden, Merritt and Lopez to tape plaintiffs' doctors and staff."); *see also* TRX 24.

15. Rhomberg gave Daleiden tips regarding taping strategy, and the ultimate distribution of the videos. TRX 64A, 65, 79, 380. He also assisted Daleiden in fundraising and was considered one of Daleiden's most trusted advisors. Trial Tr. 711:3-7, TRX 65.

16. Daleiden updated Rhomberg on a meeting with Planned Parenthood's staff and reported that Dr. Nucatola had believed the lies that Daleiden and Merritt told her. TRX 380.

17. Rhomberg was aware that Daleiden was using a fake name because Daleiden called Rhomberg while in character from PPGC's facility in Texas, identifying himself as "Robert Sarkis." TRX 6103; Trial Tr. 722:21-5; 847:18-848:22.

18. Daleiden and CMP used the same methods and strategies that Newman had discussed in a book he published advocating sting operations against abortion providers. TRX 30; Trial Tr. 3461:17-21. Newman "understood that the same methods and strategies were being used by Daleiden, Merritt, and Lopez in recording Plaintiffs' doctors and staff" at PPFA and NAF conferences, Planned Parenthood affiliate facilities, and restaurants. Trial Tr. 3462:3-5; *see also* TRX 24.

19. In 2013, Daleiden began to register BioMax as an exhibitor at reproductive health conferences. He registered "Brianna Allen" and "Susan Tennenbaum," who were purportedly representing BioMax, as attendees at the Association of Reproductive Healthcare Providers ("ARHP") in Denver in 2013. Trial Tr. 2430:11-24.

20. Merritt attended the ARHP conference using the fake name "Susan Tennenbaum" and falsely claimed to be BioMax's CEO and founder (as she would continue to do at two NAF conferences and private meetings with individual doctors and staff of various Planned Parenthood affiliates). Trial Tr. 413:23-414:5.

21. At ARHP, Merritt met two employees of the National Abortion Federation ("NAF"). As instructed by Daleiden, she told the NAF representatives that she

was the CEO of BioMax, a start-up tissue procurement company. Trial Tr. 418:8-18; 427:6-428:6, 441:23-25; 2435:23-2436:13.

22. Daleiden then emailed the NAF contacts Merritt made at ARHP – Jennifer Hart and Sandy Fulkerson-Schaeffer -- to obtain information about registration for NAF's 2014 conference in San Francisco, California. Trial Tr. 2472:9-2473: 10; TRX 414. In reliance on the fact that they had met Merritt at a reproductive health conference and her lies about BioMax, NAF staff invited BioMax to exhibit at the 2014 NAF conference. Court Ex. 1 at 84:09-84:18; 84:19-85:07 (Davis Dep.)

23. Daleiden registered BioMax as an exhibitor for NAF's 2014 annual conference. He signed the name "Susan Tennenbaum" on the registration form. In addition, he used the payment card he had obtained in the name of Phil Cronin and forged Cronin's signature in connection with paying for registration. TRX 370; Trial Tr. 2206:2-2211:6.

24. Daleiden, Merritt and Baxter checked-in at NAF's registration desk using their fake California drivers' licenses.

25. To protect the safety of all conference attendees, NAF requires all attendees to sign confidentiality agreements that specifically prohibit attendees from making video recordings. Trial Tr. 895:12-896:15; 898:19-899:7. Daleiden, Merritt and Baxter all signed a confidentiality agreement promising not to make any video recordings even though they intended to secretly record the entire time

they were at the conference. TRX 416, 1012; Trial Tr. 445:22-446:19; Trial Tr. 2212:21-2213:5.

26. Daleiden, Merritt and Baxter wore hidden video cameras and recorded everyone they spoke to at the NAF 2014 conference. Trial Tr. 450:5-8.

27. Daleiden introduced himself to Dr. Deborah Nucatola at the NAF 2014 conference. Trial Tr. 1489:6-9; 1491:14-24. He represented to her that he worked for BioMax and that BioMax was a tissue procurement organization that was interested in developing relationships with Planned Parenthood affiliates. 1491:14-1492:8.

28. In September 2014, Daleiden, posing as "Briana Allen," emailed Vikky Graziani, the administrator for PPFA's Medical Services Department, asking to register BioMax as an exhibitor for PPFA's 2014 North American Forum on Family Planning ("Forum") in Miami, Florida. He used Dr. Nucatola as a reference. TRX 4051; Trial Tr. 2525:8-23.

29. Ms. Graziani discussed BioMax with Dr. Nucatola, who explained that BioMax had exhibited at the 2014 NAF conference, that Dr. Nucatola had met BioMax representatives there, and based on her discussions with them, she believed BioMax would be a "good fit for [PPFA's] conferences." Based on the false information that Dr. Nucatola passed along to Ms. Graziani, and the fact that BioMax had attended the 2014 NAF conference, PPFA permitted BioMax to attend its conferences as an exhibitor. Trial Tr. 2784:7-2785:20.

30. As a condition of participation in the Planned Parenthood conferences, exhibitors must agree to a set of written terms and conditions. Exhibitors must confirm that their exhibits are "educational and informative," provide information about services useful to the provision of reproductive health care, and are "beneficial to the interests of . . . clients and patients." TRX 1910. Daleiden (acting as "Brianna Allen") acknowledged, and therefore agreed to, PPFA's terms and conditions for exhibitors at PPFA conferences. TRX 1907; Trial Tr. 2526:20-2527:1.

31. Daleiden subsequently registered BioMax as an exhibitor at two more PPFA conferences, Medical Director Conference ("MeDC") in Orlando, Florida and the PPFA 2015 National Conference in Washington D.C. In so doing, he falsely represented that BioMax was a real tissue procurement company. TRX 1915; TRX 1920.

32. PPFA requires all conferences attendees including exhibitors to present photo identification. Trial Tr. 3107:5-11. Daleiden used his fake drivers' license at the registration desk at each PPFA conference. Trial Tr. 2226:14-16; 2718:24-2719:13; TRX 6119.

33. At each of the reproductive health conferences he attended, Daleiden identified himself as a representative of BioMax. He distributed BioMax business cards with the fake name "Robert Sarkis." Trial Tr. 2197:18-2199:6; 2200:6-14.

34. Daleiden and Lopez wore hidden cameras at all PPFA conferences and secretly recorded everyone they spoke to at the conferences. Trial Tr. 591:5-22.

35. Daleiden registered BioMax for the NAF 2015 conference and, along with Merritt, Davin, and Lopez, infiltrated the 2015 NAF conference in April 2015 in Baltimore, Maryland. TRX 217 (NAF 2015 Registration); Trial Tr. 2232:5-2233:10 (Daleiden testimony that he signed Susan Tennenbaum name on the registration).

36. Lopez signed the NAF confidentiality agreement prohibiting videotaping prior to attending the 2015 NAF annual conference even though he intended to secretly record the entire time he was at the conference. Trial Tr. 614:5-11; TRX 248.

37. In 2015, Daleiden told NAF staff that he had signed the confidentiality agreement, which was untrue. TRX 6064 (NAF 2015 check-in video). NAF staff believed Daleiden's lie and therefore admitted him to the conference. Trial Tr. 970:21-971:6.

38. After the 2014 NAF conference, Daleiden (posing as "Robert Sarkis") invited Dr. Nucatola to lunch with him and Merritt (posing as "Susan Tennenbaum"), who were still both claiming to be BioMax representatives. TRX 722, 8021. Based on these false representations, Dr. Nucatola met with Daleiden and Merritt at a restaurant in Los Angeles. Trial Tr. 1499:18-1500:1. Daleiden and Merritt both wore hidden cameras and recorded the entire lunch meeting with Dr. Nucatola without her knowledge or consent. Trial Tr. 462:15-463:4; TRX 6104.

39. Daleiden met Dr. Mary Gatter when "Sarkis" infiltrated the Forum in Miami in October 2014. TRX 683; TRX 8017; TRX 6021; Trial Tr. 2249:9-11. Posing as "Robert Sarkis," he set up a lunch meeting with Dr. Gatter purportedly to discuss the possibility of starting a fetal tissue donation program at PPPSGV. "Sarkis" sent Dr. Gatter misinformation about BioMax to entice her to meet with him. TRX 8017. TRX 683.

40. "Sarkis" and "Tennenbaum" met with Dr. Gatter and her colleague, Laurel Felczer, in February 2015 in Pasadena, California. Trial Tr. 1228:23-1229:10; Trial Tr. 473:8-15; Trial Tr. 2254:7-12. Daleiden and Merritt told Dr. Gatter that they were BioMax representatives. Trial Tr. 473:16-19; 474:23-24; 476:1-477:20; TRX 6082. Daleiden and Merritt both wore hidden cameras and did not inform either Dr. Gatter or Ms. Felczer that they were being recorded. Trial Tr. 473:21-474:25.

41. Daleiden met Dr. Savita Ginde at the Forum in Miami. Trial Tr. 2957:21-24; TRX 578; TRX 5960A. Posing as "Robert Sarkis," he sent her an email seeking a meeting and enclosing a copy of the BioMax brochure and a "welcome letter from our founder CEO, Susan Tennenbaum." TRX 578; Trial Tr. 2260:19-61:12. Dr. Ginde agreed to meet with "Sarkis" and "Tennenbaum" and admitted them into the PPRM Stapleton campus for that purpose. Trial Tr. 2960:24-2962:1.

42. Daleiden and Merritt both wore hidden cameras and filmed the entire meeting with Dr. Ginde. Trial Tr. 2261:21-2262:14; 481:6-16. Dr. Ginde and her

staff were unaware they were being filmed and did not consent to the filming. Trial Tr. 481:17-20.

43. Daleiden (posing as "Robert Sarkis") met PPGC staff at the PPFA National Conference in March 2015. Trial Tr. 2262:19-25. "Sarkis" then sent a follow-up email afterward to Tram Nguyen and Melissa Farrell, the head of research at PPGC. Trial Tr. 2262:19-2263:7; TRX 1809. Farrell agreed to meet with "Sarkis" and "Tennenbaum." TRX 653.

44. Ms. Farrell requested that BioMax execute a non-disclosure agreement prior to any meeting. TRX 653. Daleiden signed the NDA on behalf of BioMax using the name "Susan Tennenbaum," and agreed in the NDA that BioMax would not disclose confidential information. Trial Tr. 2265:9-14. In fact, he intended to disclose any information he thought would be harmful to Planned Parenthood that he recorded at the meeting. Daleiden did not disclose this intent to Ms. Farrell or anyone else at PPGC.

45. Daleiden and Merritt presented their fake IDs to enter the PPGC facility. Trial Tr. 482:13-19; TRX 6102; Trial Tr. 2271:9-24. They both surreptitiously recorded the entire meeting, including a tour of the employee-only pathology lab. Trial Tr. 483:10-24; 2268:17-2269:25.

46. "Sarkis" and "Tennenbaum" would not have been admitted to the NAF conferences, the PPFA conferences, or the facilities at PPRM and PPGC, and would not have been able to set up lunch meetings with Planned Parenthood staff, had they disclosed their true identities and purpose. Trial Tr. 862:14-864:19 (NAF);

2782:7-2783:1 (PPFA); 2960:24-2962:1 (PPRM); 1601:16-1602:8 (PPGC).

47. As a result of Defendants' conduct, Planned Parenthood incurred hundreds of thousands of dollars in costs. PPFA had to spend hundreds of thousands of dollars to prevent additional infiltrations and revise its conference security protocols. TRX 8072 at 3; Trial Tr. 3131:2-3137. PPFA, PPGC, PPOSBC and PPPSGV incurred costs for providing security to, and/or relocating, individuals targeted by Defendants. TRX 8072 at 13.

48. Daleiden's goal and life's work is to end legal abortion in America. He has been an anti-abortion activist since high school. He believes that legal abortion "is a license for medical professionals to kill children in the womb." Trial Tr. 2300:14-15.

49. Prior to forming the Center for Medical Progress in 2013, Daleiden already had a years-long track record of creating undercover videos about Planned Parenthood in his role as the Director of Research for Live Action, an anti-abortion group. Trial Tr. 2040:1-2042:2.

50. Daleiden is proud of the conduct he engaged in that was at issue in this case (actions that the jury found to be fraudulent and criminal), which he believes exposed Plaintiffs' criminal activity. Trial Tr. 2653:15-17.

51. Newman and his organization, Operation Rescue, operate the website abortiondocs.org, which publicizes the names, photographs and business

addresses of abortion providers, including Dr. Nucatola and Dr. Gatter. Trial Tr. 3460:13:17; TRX 22.

52. Newman has described abortion providers as "murderers" in a published book in which he called for their execution by the government to "expunge blood guilt from the land and people." Trial Tr. 3460:2-11.

53. Newman participated in the conspiracy described above because his goal is to finish off Planned Parenthood and end abortion. He considers Planned Parenthood to be a "death machine." Trial Tr. 3463:6-12; TRX 47, 106. Newman claimed responsibility for the work of the HCP. TRX 28.

54. Rhomberg's goal and life's work is to end legal abortion in America. Trial Tr. 684:11-685:22.

55. Prior to her work for CMP, Merritt worked on a project for Live Action, posing as someone she wasn't in order to obtain information from Planned Parenthood clinics. Trial Tr. 488-490.

56. Each defendant has the ability to continue the activities found to be illegal by the jury. CMP & BioMax are both still active. *See* Trial Tr. 2462:10-18; TRX 8060; 8069.

57. CMP is still operational and intends to do multiple projects of which the Human Capital Project was the first. Trial Tr. 2297:2-15.

58. CMP continues to have the same aims that were stated in its project proposals. Trial Tr. at 2299:24 - 2300:5 ("in terms of wanting to -- wanting to draw public attention and bring public pressure to bear for

the sort of policy changes that would address criminal fetal trafficking and, hopefully, prompt the appropriate responses from the appropriate public authorities for activity like that, that's definitely still something that Center for Medical Progress wants to do.").

59. Daleiden has continued to post videos of footage recorded at PPFA events, including as late as 2019. Trial Tr. at 2294:20-2295:15.

60. In the summer of 2019, Daleiden, on behalf of CMP, created a campaign on the fundraising page GoFundMe to raise money to pay a court mandated fine related to the release of certain videos. The campaign noted that "CMP has more videos to release soon" and asserts that the money CMP was fined could have instead been used "to produce more video exposes of Planned Parenthood's sale of baby body parts." ECF 662-1, Ex. 20.

Newman argues that the findings of fact about his activities are improper because they rely heavily on the adverse inferences on which I instructed the jury that they could rely in light of Newman's invocation of the Fifth Amendment and refusal to answer. I also explained to the jury that the inferences could *not* be considered when determining Newman's liability under the California claims. With respect to the non-California claims, the jury found Newman liable on conspiracy grounds for all of the claims presented to them. Based on their express and implicit findings, the jury drew adverse inferences against Newman on which I may rely along with evidence admitted at trial when determining the appropriate scope of injunctive relief under the other claims against Newman.

With respect to the UCL, plaintiffs argue that while they cited Newman's inferences in support of their proposed Findings of Fact, each of those proposed facts was corroborated by exhibits and other witness testimony. I agree. The facts attributed to Newman in the Findings of Fact are, for purposes of the UCL, corroborated by trial exhibits, including the correspondence sent between Newman and Daleiden and the correspondence in which Newman took credit for the HCP.[6]

II. MERITS OF THE UCL CLAIM

A. Legal Standard

The UCL authorizes the court to "make such orders or judgments ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203. Because a UCL claim is equitable in nature,

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[6] In their Reply, plaintiffs cite evidence and make arguments not presented in their Proposed Findings of Fact and opening brief. Defendants object to that evidence and the arguments and ask me to strike them or permit defendants to address the new evidence and arguments. Dkt. No. 1058. That request is DENIED. I have fully reviewed all of the evidence cited by all of the parties in support or in opposition to judgment on the UCL claim and the equitable relief requested by plaintiffs. At this stage, I can weigh the evidence – not only that cited to me by the parties but also any evidence adduced at trial – as well as the merits of each side's arguments without the gloss provided by the parties.

the court, rather than a jury, must decide whether there was a UCL violation and what equitable remedies, if any, are appropriate is "subject to the broad discretion of the trial court." *Zhang v. Super. Ct.*, 57 Cal. 4th 364, 371 (2013).

In the Ninth Circuit, "it would be a violation of the Seventh Amendment right to jury trial for the court to disregard a jury's finding of fact." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (citing *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991)). "[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are 'based on the same facts,' in deciding the equitable claims 'the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.'" *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (quoting *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990)).

For purposes of this motion, I need only consider the illegal and fraudulent prongs of the UCL, given the jury's verdict finding defendants engaged in numerous illegal and fraudulent acts in California and emanating from California, against California-based plaintiffs and others, committed in violation of California law, Federal law, and the laws of other jurisdictions.

B. Business Conduct

As a threshold issue, defendants argue that the UCL does not apply to their conduct because they did not engage in any "business" or "commercial" acts that could constitute prohibited unfair business practices.

Defendants raised the identical argument on summary judgment, contending that the UCL claim failed because "there were no 'business practices' that any defendant engaged in with respect to each plaintiff," and that "defendants cannot be liable for 'unfair business acts' because there is 'no market' – presumably a for-profit market – for fetal tissue, and that any acts taken by or on behalf of BioMax or CMP could not, as a matter of law, constitute unfair business acts." Dkt. No. 753 at 112.

I rejected that argument on summary judgment, finding that based on undisputed evidence "that Rhomberg and Newman – as well as CMP, BioMax, and Daleiden – engaged in practices that on their face can be considered 'business practices' under the UCL." *Id*. I noted that:

> [T]here is evidence, some of it disputed, showing that defendants' intent and purpose was to set up BioMax as a fictitious company operating in a real industry in competition with other companies (including Stem Express and other targets of the HCP). There is evidence that defendants made misrepresentations to the California Secretary of State as part of setting up the "front" company BioMax as well as websites, business cards, and business brochures that plaintiffs disputedly relied on to provide defendants access to their conferences and businesses. These acts by defendants on their face are business acts. There is also evidence, some disputed, that the purpose of both CMP and the HCP (including the creation

> of the fake BioMax company) was to run plaintiffs' businesses out of business. These allegations are sufficient to bring a claim under the UCL.

Id. at 112-113. The evidence at trial *confirmed* that defendants' intent and purpose was to set up BioMax as a competitor tissue procurement company (registering with California's Secretary of State, creating a website and marketing materials, and opening "company" credit cards) to position itself as a competitor with other tissue procurement companies in order to gain access to and gather information that they would use to seek the defunding and destruction of Planned Parenthood (the umbrella organization and its affiliates) as a business. *See* Findings of Fact *supra*.

Defendants rely on two cases holding that associations were not "businesses" under Section 17200. In *That v. Alders Maint. Assn*., 206 Cal. App. 4th 1419 (Cal. App. 4th Dist. 2012), the court rejected the idea that a homeowner's association could be considered a business under the UCL, where plaintiff was attempting to challenge election-related activities conducted by the HOA. *Id*. at 1427 ("applying the UCL to an election dispute would simply make no sense"). In *Bermudez v. Serv. Employees Intl. Union, Loc. 521*, 18-CV-04312-VC, 2019 WL 1615414, at *1 (N.D. Cal. Apr. 16, 2019), the plaintiff could not pursue a UCL claim for return of fees against a union because the union "did not participate as a business in the commercial market, nor was its policy of collecting fair-share fees a commercial activity." *Id*. *1 n. 1.

Those cases are inapposite because Daleiden and BioMax (and the other defendants "representing" BioMax) took numerous steps to set up a business. Those acts, including registering BioMax with the Secretary of State as a business and opening bank cards in BioMax's name, are indisputably "business activity." BioMax and Daleiden, Merritt, and Lopez (as well as at least two other non-defendant co-conspirators) then represented themselves to plaintiffs and numerous other individuals and entities as both an operational business and employees of that business to solicit meetings and information in competition *with other businesses*. Indeed, at trial Daleiden testified that BioMax was, through conversations with other entities, "exploring the possibility of -- well, sort of what it would take to work with, like, ethical tissue samples and do ethical tissue procurement." Trial Tr. 2175:12-17.

The UCL applies to defendants' conduct.

C. Fraudulent Conduct Under the UCL

It is unclear whether plaintiffs seek to rest the merits of their UCL claim on *both* the illegal and fraudulent prongs of the UCL. In their proposed Judgment and Permanent Injunction, plaintiffs do not address what the Judgment should look like with respect to their UCL claim. *See* Dkt. No. 1050 at 5 (incorporating language suggested by plaintiffs in December 2019 in response to contemplated partial Rule 54(b) judgment). But in their Memorandum in Support of Equitable Relief, they repeatedly refer to "defendants' illegal and fraudulent" conduct as supporting their requests for injunctive relief under the

UCL. *See, e.g.*, Dkt. No. 1049 at 2, 3. Therefore, I assume that they intend to seek judgment concerning the UCL under both prongs.

The standard for proving fraudulent conduct under the UCL is not as stringent as the showing required for common law fraud and the persons protected from the fraudulent conduct are different. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL. . . This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.") (quoting *Day v. AT & T Corp.*, 63 Cal.App.4th 325, 332 (1998)).

There is some ambiguity in California law whether fraudulent conduct between competitors is actionable under the UCL.[7] That is not an issue here. Defendants positioned BioMax as a company offering tissue procurement services to plaintiffs (not as a competitor to plaintiffs, but as a competitor to actual tissue procurement companies) and to all others who saw the

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[7] *See, e.g.*, *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001) (discussing competitor case).

BioMax table (or were approached by defendants) at the conferences they infiltrated or saw BioMax's websites or advertising materials. *See* Findings of Fact. The deceptions that the jury found defendants engaged in, and the evidence at trial, are sufficient to sustain the UCL claim under the fraudulent prong. *See, e.g., Copart, Inc. v. Sparta Consulting, Inc.*, 339 F. Supp. 3d 959, 989 (E.D. Cal. 2018) ("Copart was not a competitor of Sparta, much less a direct competitor. Instead, Copart was Sparta's consumer, and the jury found Copart was deceived by Sparta.").

D. Illegal and Fraudulent Conduct Under the UCL

The merits of plaintiffs' UCL claim under the illegal and fraudulent prongs is established based on facts expressly or implicitly found by the jury. *See L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993). Based on the jury's explicit and implicit findings, and considering the totality of the evidence adduced at trial, I find that each defendant engaged in illegal and fraudulent conduct in violation of the UCL. The verdict – finding defendants liable for numerous claims under Federal, California, Florida, Washington, D.C., and Maryland laws – supports a finding that each of the defendants engaged in illegal and fraudulent acts under the UCL.

III. SCOPE OF INJUNCTIVE RELIEF

Having found the facts above and that the defendants are liable under the UCL, the issues become whether injunctive relief is appropriate and

what the scope of the injunction should be. Plaintiffs ask me to impose the following injunction:

> 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 other persons, firms, or corporations acting in concert or participation with them are permanently enjoined from doing any of the following, with respect to PPFA and all Planned Parenthood affiliates (collectively referred to as "Planned Parenthood"):
>
> (1) Entering or attempting to enter a Planned Parenthood conference, office, or health center, 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:
>
> (a) any meeting or conversation with Planned Parenthood staff that Defendants know or should know is private; or
>
> (b) at a Planned Parenthood conference, office or health center.
>
> B. In addition, Defendants shall serve a copy of this injunction on any person who, in active concert with Defendants, either has or intends to enter Planned Parenthood's property or record Planned Parenthood's

personnel, and provide Plaintiffs with proof of service thereof.

Dkt. No. 1050 at 10-11.[8]

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, 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 – a "showing of a[] real or immediate threat that the plaintiff will be wronged again" to justify injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

1. Irreparable Injuries and Inadequate Legal Remedies

Defendants contend that plaintiffs cannot satisfy the first two prongs of the *eBay* test because they

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[8] Plaintiffs do not seek injunctive relief against defendant Lopez as he "had no history of anti-abortion activity prior to his involvement in Defendants' illegal conspiracy." Dkt. No. 1049 at 1 n. 1.

cannot show that they will suffer "irreparable injuries" absent an injunction or that legal remedies for future intrusions by defendants would be inadequate. Defendants' argument relies almost entirely on the amount of damages plaintiffs sought and were awarded by the jury to compensate them for their security improvements following defendants' intrusions. Defendants contend that these damages are sufficient.

Plaintiffs respond that there was ample testimony at trial from their staff members demonstrating how irreparable their injuries were and how insufficient the limited amount of damages for security were, considering stress and anxiety defendants' intrusions caused their staff and the significant disruption defendants' intrusions caused to their staff's normal roles and job duties (because they were diverted to investigating and tracking defendants' actions). They further assert that their damages were circumscribed and limited through court rulings. They contend that despite the award of compensatory and punitive damages, the narrow category of security damages allowed represented a small fraction of the damages that they initially sought and did not encompass all of the "security grants" PPFA gave to affiliates. They argue that in the Ninth Circuit, these types of difficulties in "establishing economic harm" due to "lack of proof of damages, and possible immeasurability or unascertainability of harm, [do] not mean" a plaintiff was not harmed, and that those difficulties weigh in favor of injunctive relief. *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1105 (9th Cir. 1994); *see also Rent-A-Ctr., Inc. v. Canyon TV and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)

(recognizing "that intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm").

I agree that the extensive testimony at trial demonstrated irreparable injuries to plaintiffs flowing from defendants' conduct and that, for a number of reasons, a significant portion of plaintiffs' injuries could not adequately be addressed by damages or were difficult to measure if not impossible to accurately value as part of a request for damages. Those injuries include plaintiffs' staff reactions to the intrusions – even in situations where the staff did not believe that they personally had been recorded by defendants – and the disruptions to the normal work of plaintiffs in order to internally investigate and respond to defendants' intrusions. *See, e.g.*, Trial Tr. 1144:18-1145:3, 1519:1-10, 3173:10-19.[9] These injuries were not, and could not in the future, be adequately compensated by damages, given difficulties in their valuation and ascertainability. Plaintiffs sought (and were largely awarded) the narrow category of security damages that

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[9] I do not rely on the damages that were cut from this case due to my rulings that damages resulting solely from third-parties' actions were barred as a form of "reputational damages" precluded by the First Amendment absent a defamation claim. While plaintiffs rely on one case finding that injunctive relief was supported by "damages" that were not cognizable under applicable laws, *Dairy Maid Dairy, Inc. v. U.S.*, 837 F. Supp. 1370, 1381 (E.D. Va. 1993) (recognizing that legal remedies can be considered inadequate, supporting injunctive relief, where damages capped by law), I do not need to rely on this category of damages in order to find that plaintiffs have shown adequate irreparable injuries and inadequate legal remedies.

they could readily identify and prove up. But that does not minimize the fact that additional injuries (identified above) were suffered by plaintiffs, supporting their request for injunctive relief.

2. Balance of Hardships

Considering the effect of injunctive relief on each party, defendants argue that this factor weighs against injunctive relief because it will impede their journalistic efforts protected by the First Amendment and hamper their ongoing efforts generally to oppose abortion and expose alleged criminal and other bad conduct by Planned Parenthood and its affiliates. Defendants note that the equities typically weigh heavily against injunctions that prohibit speech or conduct and argue that the injunction sought by plaintiffs would prevent defendants from engaging in legal conduct, like surreptitiously recording plaintiffs' staff in public places in states where the consent of all parties being recorded is not required or where they are recording evidence of actual criminal conduct.[10] Finally,

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[10] Defendants' cases are procedurally and factually inapposite; none of them address situations where a court considered injunctive relief following a judgment that defendants' conduct was illegal and therefore not protected by the First Amendment. Defendants' cases generally address situations where an injunction was appropriate to restrain government or union defendants from violating plaintiffs' First Amendment rights. *See Sammartano v. First Jud. Dist. Ct., in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (reversing district court's refusal to enjoin policy prohibiting wearing of club insignia at a government facility); *San Diego Minutemen v. California Bus. Transp. and Hous. Agency's Dept. of Transp.*, 570 F. Supp. 2d 1229, 1256 (S.D. Cal. 2008 (requiring government to reinstate plaintiff's permit);

defendants contend that because their actions forced plaintiffs to improve their conference and clinic security measures, plaintiffs are less likely to face future intrusions by defendants or like-minded individuals.

Defendants' arguments go too far. Simply claiming the mantel of a journalist does not give someone a license to trespass, illegally record, or otherwise commit violations of generally applicable laws.[11] The "evidence" defendants actually gathered and then published as a result of the conduct the jury found was illegal did not itself show any illegal conduct by Planned Parenthood or plaintiff affiliates.[12] Further,

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Swanson v. U. of Hawaii Prof. Assembly, 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003) (enjoining union from collecting fees contrary to plaintiff's First Amendment rights).

[11] "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *see also Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("the media have no general immunity from tort or contract liability"); *Council on Am.-Islamic Rel. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 330 (D.D.C. 2011) ("[T]he protections afforded by the First Amendment, far reaching as they may be, do not place the unlawful acquisition of information beyond the reach of judicial review.").

[12] The "evidence" gathered by defendants from their acts found to be illegal by the jury – primarily the recordings taken by defendants – was submitted to both Judge Ryu and myself in support of defendants' requests to compel discovery and on summary judgment. None of it showed that Planned Parenthood or its affiliates were engaged in the illegal sale of fetal tissue for

that defendants' conduct caused plaintiffs to increase their security measures for access to their conference and offices does not mean that plaintiffs no longer face a threat of intrusion from defendants or those acting in concert with defendants. The defendants' history and longstanding opposition to the activities, if not the very existence, of plaintiffs completely undermines their argument. Plaintiffs' interim security measures might discourage future intrusions by defendants directly, but with technological advances in surreptitious recording and the very real possibility of acting in concert with others (who are not yet known to plaintiffs), plaintiffs' security improvements do not diminish their hardship argument.

That said, the language of the injunction should be narrowed. Plaintiffs admit that their proposed language would prohibit "slightly more" conduct than the jury found defendants guilty of, such as by using misrepresentations to gain access to "public" area of plaintiffs' offices. Reply at 8. They argue that over-expansiveness is necessary and does not tip the balance of hardships against an injunction because defendants "engaged in a long-running, fraudulent scheme" and in these circumstances equity requires the injunction to be "'clear, simple and effective,' even if it sweeps in some otherwise lawful conduct." Reply at 8. They ask for an over-expansive injunction because they want "clear boundaries" to avoid future disputes about whether the injunction was violated, for example, if

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profit or illegal changes in abortion procedures to facilitate the harvesting of fetal tissue.

defendants accessed "public" parts of plaintiffs' conferences or offices by misrepresentation.

The cases on which plaintiffs rely are far narrower or based on a far different record than this one. For example, in *Galella v. Onassis*, 353 F. Supp. 196, 237 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2d Cir. 1973), the court declined to use ambiguous and disputable terms (like "prohibitions upon [] leaping, blocking, taunting, grunting, hiding and the like" and ""harassing, endangering") in crafting an injunction against a photographer who had repeatedly violated the privacy rights of his targets; instead, it used fixed "proscribed distances" to set the limits of an injunction. *Id.* at 237. Similarly, in *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997), the Court upheld an injunction placing restrictions on where and how anti-abortion counsellors could approach people entering an abortion clinic by setting an absolute boundary ("buffer zone"). The record justifying that absolute boundary was based on evidence that many of the counsellors had been "arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff" as well as the fact that the "counselors remain free to espouse their message outside the 15–foot buffer zone." *Id.* at 384-85.[13]

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[13] In an attempt to justify an injunction that sweeps in potentially more conduct than the jury or I determined was illegal, plaintiffs also rely on *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). There, the majority noted that an injunction that "incidentally affect[ed] expression" was not an impermissible prior

These "absolute boundary" injunctions are inapposite. Here the issue is whether an effective and clear injunction can be crafted that proscribes only the sort of illegal conduct that defendants were found guilty of *or* whether I should sweep into the injunction conduct that may be legal in some states and in some areas (*e.g.,* accessing public spaces in a hotel where plaintiffs may be holding a conference or meeting, or recording in states where all-party consent is not required).

I conclude that the injunctive relief to which plaintiffs are entitled extends only to that conduct for which the defendants have been found guilty. Plaintiffs are not wrong to fear that defendants will take advantage of any ambiguity in the terms of an injunction to disrupt their work and mission.[14] However, a narrower injunction is feasible and necessary to avoid tipping the hardships away from plaintiffs and towards defendants.[15] The injunction

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restraint primarily because it was based on a record of "prior unlawful conduct" that the injunction sought to directly remedy (violation of buffer-zones), but the majority also struck down provision of the injunction including prohibitions on displaying images and the buffer zone on private property because those provisions "sweep more broadly than necessary to accomplish the permissible goals of the injunction." *Id*. at 763 n.2 & 776.

[14] While many things were in dispute in this case, it is beyond dispute that plaintiffs and defendants have been and will continue to be opposed to each other's "life work" and "mission."

[15] In justifying an injunction which covers legal conduct, plaintiffs rely on *Facebook, Inc. v. Power Ventures, Inc*., 252 F. Supp. 3d 765, 784 (N.D. Cal. 2017), *aff'd*, 749 Fed. Appx. 557 (9th Cir. 2019)

does not interfere in any way with legal efforts of the defendants to oppose abortion and convince the public and governmental actors to defund Planned Parenthood.

3. Public Interest

The public interest weighs in favor of granting injunctive relief to plaintiffs.[16] Defendants argue that their investigation uncovered illegal conduct and resulted in at least one plea deal by a tissue procurement organization, spurred Congressional hearings, and caused the Department of Justice to open an investigation, serving the public interest and weighing in favor of allowing defendants to continue

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(unpublished) which noted that "even if" the injunction at issue there covered legal conduct courts have "equitable power to enjoin otherwise lawful activity." That case relied solely on *U.S. v. Holtzman*, 762 F.2d 720 (9th Cir. 1985), which explained in depth that "although federal courts have the equitable power to enjoin otherwise lawful activity if they have jurisdiction [] and if the injunction is necessary and appropriate in the public interest to correct or dissipate the evil effects of past unlawful conduct, this power is not often necessary or appropriate, and is therefore infrequently exercised. Courts commonly have exercised this extraordinary power only in antitrust cases. . . . Even in the antitrust area, however, a necessary and appropriate injunction against otherwise lawful conduct must be carefully limited in time and scope to avoid an unreasonably punitive or nonremedial effect" and struck down an injunction that was not "limited in time." *Id.* at 726. This is not an antitrust case and plaintiffs' requested injunction is not limited in time or scope.

[16] The "public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Jud. Dist. Ct., in and for County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002).

their investigatory efforts.[17] However, there was no evidence submitted at summary judgment or in pre-trial motions to show that any Planned Parenthood affiliate violated any law in connection with the transfer of tissue to the company that entered the plea deal.[18] In addition, the Congressional hearings did not demonstrate that plaintiffs violated any federal law regarding the sale for profit of fetal tissue or alteration of abortion procedures (despite Congress having received the "evidence" uncovered by defendants through the HCP). Finally, no charges have resulted from the Department of Justice investigation.[19]

The evidence in the record is that Planned Parenthood provides extensive non-abortion related medical services and screenings to hundreds of thousands of patients each year who might not

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[17] Defendants argue that I should hold further proceedings so I can "try" the public interest issue, considering the evidence defendants proffered in Dkt. No. 1041. Oppo. at 1. But the majority of this evidence – in proffer form (by counsel) or in declaration form – was presented by defendants to me at summary judgment, in connection with motions *in limine*, or during trial (to allow resolution of disputes over the relevance or admissibility of witness discovery or testimony at trial). I have considered and weighed defendants' beliefs as to what that proffered evidence would show, and for the evidence submitted to me what it showed, in reaching my determination that the public interest weighs in favor of injunctive relief.

[18] Instead, the plea was based on the company's admission that it sold tissue at a profit to researchers.

[19] No announcement has been made (or is expected to be made) if this investigation is continuing.

otherwise receive medical services. Trial Tr. 1589:2-19; 317:19-318:5; TRX 871.[20] The evidence, including from witnesses who testified at trial, shows a substantial disruption to those services and the siphoning off of staff time and expenses to address defendants' intrusions into plaintiffs' conferences and clinics. The public interest is served by a narrow injunction targeted to the illegal conduct that I and the jury found that the defendants committed.

4. Real and Immediate Threat of Future Injury

Finally, defendants contend that plaintiffs cannot identify a true "real and immediate threat." They reason that defendants are now well known to plaintiffs (meaning there is no chance any defendant could gain access to plaintiffs' conferences or offices in the future), plaintiffs can point to no acts of deception or intrusion by these defendants since 2015, and any damages plaintiffs suffered are not irreparable as shown by the damages they sought and received for their improved security implemented following the release of defendants' videos.

Plaintiffs respond that the jury's implicit finding of an open-ended criminal enterprise itself is sufficient to satisfy this factor. They also contend that while the predicate acts supporting this claim were related to the false IDs, the ongoing nature of the criminal enterprise

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[20] Contrary to defendants' assertion in their Objections (Dkt. No. 1058 at 3-4), this evidence – which I may consider even if plaintiffs had not identified it in their Reply – does not discuss the "quality" of services but the nature and number of services.

– whose overarching goal was to drive plaintiffs out of business – is ongoing according to defendants' own statements.

Given the totality of the evidence at trial regarding the background of defendants as well as the past and continuing goals and aims of defendants with respect to Planned Parenthood, I conclude that plaintiffs have standing to seek injunctive relief. The evidence demonstrates a strong likelihood of future violations by defendants themselves or by defendants working in active concert with others. *See* Findings of Fact 49, 50, 55, 56, 57, 58, 59, 60. There is ample evidence that defendants relied on their past experience, using misrepresentations and surreptitious recordings, to target abortion providers and then used those and similar but more "advanced" tactics to carry out the HCP. While those pre-HCP acts and the actual acts used to carry out the HCP do not by themselves establish a real and immediate threat of future injury, they are strong evidence showing a continued reliance on those tactics and real threat of defendants utilizing them in the future. *See, e.g., Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where, as here, defendant's past and present misconduct indicates a strong likelihood of future violations."). Similarly, defendants' continued belief that their "journalistic" tactics were legal – despite pre-trial rulings by the Court and the jury's conclusions – is strong evidence that defendants intend to repeat them in the future. *See, e.g.*, Oppo. at 26:12-13. Finally, there was ample evidence that defendants' aims or goals

were and remain to target if not "destroy" Planned Parenthood and its affiliates.[21]

Considering all of the relevant factors and the totality of the evidence, the evidence supports permanent injunctive relief in favor of plaintiffs, albeit narrower than what plaintiffs request.

B. Under the UCL

1. Balance of Equities

Specific to the UCL, the California Supreme Court has "emphasized that the equitable remedies of the UCL are subject to the broad discretion of the trial court" and that the "UCL does not require 'restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court 'may make such orders or judgments ... as may be necessary to prevent the use or employment ... of any practice which constitutes unfair competition ... or as may be necessary to restore ... money or property.'" *Zhang v. Super. Ct.*, 57 Cal. 4th 364, 371 (2013) (quoting *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 179-180 (2000)). That is a "a grant of broad equitable power," but one which

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[21] The parties dispute the significance of CMP's interrogatory response that "Defendants have no definitive plans at this time to attend or enter any of Plaintiffs' or the National Abortion Federation's future conferences, meetings, or facilities." Dkt. No. 607-7 at 15:26–28. But whereas CMP could have said identified defendants had no plans or no future intent, the response was, instead, equivocal as to "definitive plans." CMP's equivocal response weighs in favor, if only slightly, as evidence of a real and imminent future harm.

should not be exercised "without consideration of the equities on both sides of a dispute." *Cortez*, 23 Cal. 4th at 180.

In considering what injunctive relief is appropriate under the UCL, I have considered all of the equitable considerations put forth by defendants, both in their initial proffer (Dkt. No. 1041) and in their opposition to plaintiffs' request for injunctive relief. Dkt. No. 1056. To repeat, those equities include, among others, that defendants' "investigative work" led to the prosecution and plea agreement of a tissue procurement operation in Orange County (although there was no evidence at summary judgment or pre-trial that any Planned Parenthood affiliate violated a law in transferring tissue to that company; the company's plea concerned *that* company's transfer of tissue to researchers). I have also considered that defendants' "investigative work" led to Congressional hearings and a Department of Justice investigation (although there is no evidence that any Federal government entity has concluded that any Planned Parenthood affiliate illegally profited from the sale of fetal tissue or altered procedures in violation of federal laws).

I have considered the equities put forward by plaintiffs, including the impacts that defendants' illegal and fraudulent conduct had on their staff, including the staff who were surreptitiously recorded and the staff who testified at trial. I considered the impact that the defendants' illegal and fraudulent conduct had on plaintiffs' ability to provide a secure environment for their affiliates and staff who attend PPFA's

conferences, as well as staff and patients in their clinics.

I conclude that the equities tip sharply in plaintiffs' favor and justify the imposition of injunctive relief as an equitable remedy under the UCL.

2. Scope

The UCL was not intended to regulate conduct "unconnected" to California, although it may be invoked by "out-of-state parties when they are harmed by wrongful conduct occurring in California." *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 222–25 (Cal. App. 4th Dist. 1999). Similarly, "out-of-state conduct causing injury within the state [can] be enjoined," but not "out-of-state conduct causing out-of-state injury." *Id.* at 224 n.12.

Defendants argue that the UCL, by itself, cannot support the broad injunction plaintiffs seek, which expressly covers conduct outside of California by all of the defendants (except Lopez) and protects PPFA and all-non-California affiliates. Plaintiffs respond that there is evidence of out-of-state conduct injuring California plaintiffs. For example, the jury awarded PPPSGV security costs (incurred in part as a result of defendants taping Dr. Gatter in Florida) and the jury awarded PPOSBC security costs (incurred as a result of defendants taping Dr. Russo in Florida). Pls. Mem. ISO Injunctive Relief [Dkt. No. 1049] at 5. However, plaintiffs do not identify what specific injunctive relief would be appropriate solely under the UCL in terms of which defendants it would cover or which plaintiffs it would benefit. Instead, plaintiffs dodge the question by

arguing that the non-California plaintiffs are entitled to an injunction "that applies to all Planned Parenthood affiliates on their trespass and unlawful recording claims." *Id*.[22]

Given the limits of the UCL, I conclude that all named plaintiffs (except PPLA and PPMM who did not recover on any claim), are covered by the narrowed injunctive relief specified below based on the UCL against ***conduct occurring in California or conduct occurring outside of California that causes injury within California***.

C. Under the Laws of Trespass

As noted, plaintiffs assert that they are entitled to injunctive relief in light of the summary judgment and verdicts in their favor on trespass, which arose under the laws of Florida and Washington, D.C., with respect to the PPFA Conferences, and under the laws of Colorado and Texas, with respect to the clinic intrusion claims asserted by PPRM and PPGC/PPCFC. Defendants dispute the availability of injunctive relief under those jurisdictions' laws, pointing out that the cases relied on by plaintiffs arose in the context of continuing or expressly threatened continued trespasses. As noted above, plaintiffs have standing to

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[22] With respect to those sources, plaintiffs rely only on my and the jury's findings with respect to the trespass claims (brought under the laws of Florida and the District of Columbia with respect to the PPFA conference and under the laws of Colorado and Texas with respect to the clinic intrusions), and two of the recording law claims (brought under the federal and Florida recording statutes). These bases for relief are addressed below.

seek injunctive relief because of the realistic likelihood that defendants will continue their conduct to attempt to infiltrate PPFA's conferences and plaintiffs' offices, either directly or through individuals acting in concert with them.[23]

Defendants argue that injunctive relief cannot be based upon the trespass claims because they involved inherently factual situations arising under materially different state trespass laws. For example, trespass was found with respect to the PPFA conferences only after I reviewed PPFA's contracts with the hotels in Florida and Washington, D.C. and found that they conveyed sufficient "possessory interest" to PPFA to establish trespass. And, with respect to the Colorado and Texas clinic infiltrations, I had to consider each of those states' laws with respect to consent and whether fraud vitiated consent. Defendants also contend that trespass cannot be sustained where only public spaces (like hotel lobbies or reception areas) are accessed, yet plaintiffs' injunctive relief reaches into those public spaces. Given the fact-specific and state-specific issues,

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[23] *See Whelpley v. Grosvold*, 249 F. 812, 816 (9th Cir. 1918) (upholding an injunction based on evidence of "repeated and threatened to be repeated" trespasses "the effect of which would be to destroy the value of the appellee's leasehold interest, and for which damages were necessarily difficult of ascertainment and could be obtained, if at all, only by a multiplicity of suits. In such a case a suit in equity for an injunction is the permissible and the only adequate remedy."); *see also Empire Star Mines Co. v. Butler*, 62 Cal. App. 2d 466, 529 (Cal. App. 1st Dist. 1944) (authorizing injunctive relief in quiet title suit "against repeated or continuous trespasses. The property owner will not be relegated to successive suits for damages" based on evidence that defendants' practices had been ongoing for "a considerable period").

defendants argue that injunctive relief cannot be based on the trespass claims, let alone nationwide relief based on the laws of states not at issue in this case.

Plaintiffs, in Reply, argue that it can be assumed that all future PPFA conference will use similar hotel contracts, giving PPFA consistent and sufficient "possessory interest." They fault defendants for failing to identify any materially significant differences in each state's trespass laws regarding the issues of consent and when fraud vitiates consent that may lead to different conclusions. But it is plaintiffs who seek a nationwide injunction, not defendants. It is *plaintiffs'* burden to show how a finding of trespass – arising in different circumstances and considered under different states' laws – supports their requested injunction.

Based on the record, the trespass claims support the following injunctive relief: *PPFA* is entitled to relief to prevent defendants from trespassing in *restricted areas* at future PPFA conferences, given the testimony about PPFA's security concerns at conferences, the testimony about their conference security protocols, and the testimony regarding the restricted-access provisions PPFA negotiates in all of their conference contracts.[24] As to offices and clinics, PPFA, PPRM, and PPCG/PPCFC are also entitled to relief preventing

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[24] As defendants point out, the only conferences at issue – and the only hotel contracts reviewed – were for PPFA conferences. The injunctive relief does not extend to "conferences" held by affiliates because there is absolutely no evidence in the record about what sorts of conferences they hold, where those conferences are held, and what sorts of restrictions are present in contracts for any conference held by affiliates.

defendants from trespassing in r*estricted areas* of their offices and clinics.[25]

D. Under the Federal and Florida Recording Statutes

Plaintiffs argue that they are entitled to injunctive relief, on a nationwide basis, under their federal wiretap claim and point out that defendants were found liable for 42 separate recordings under that law. Verdict at 31-39. Plaintiffs contend that injunctive relief is appropriate when there is a threat of continued violation, relying almost exclusively on *default judgment* cases brought against persons who pirated "satellite broadcasts of copyrighted television programming" without paying the subscription or broadcast fees. *See, e.g.*, *DISH Network L.L.C. v. Rios*, 2:14-CV-2549-WBS-KJN, 2015 WL 632242, at *2 (E.D. Cal. Feb. 13, 2015); *Dish Network L.L.C. v. Reed*, 2:14-CV-2548 KJM DAD, 2015 WL 4478243, at *1 (E.D. Cal. July 22, 2015), *report and recommendation adopted*, 2:14-CV-2548 KJM DAD, 2015 WL 13655446 (E.D. Cal. Sept. 16, 2015); *see also MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (relying on specific statutory provision of the Copyright Act authorizing injunctive relief). They are wrong to contend that these sorts of violations are "broadly similar" to the allegations and circumstances in this case. *But see* Reply at 14.

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[25] While the trespass claims support limited injunctive relief for these three plaintiffs, the other plaintiffs covered by the injunctive relief entered below are California plaintiffs who are entitled to the relief against intrusions into their offices or clinics under the UCL claim.

Defendants argue that the facts and circumstances of the allegations (and jury verdict) matter because a violation of the federal statute can be sustained only where that recording is made "for the purpose of committing criminal or tortious acts," an inherently factual situation that makes it inappropriate as a basis for the broad injunctive relief plaintiffs seek. Plaintiffs respond that given their security measures and defendants' "past history," any recordings that defendants attempt of plaintiffs in the future are "likely" to be done with numerous tortious purposes intended "such as violating RICO, defamation, false light, invasion of privacy, and tortious interference with contractual relations." Reply at 14 (citing an article on LiveAction.org noting, only, that pro-life journalists "routinely use fake IDs in their work").

Plaintiffs rely on two clinic buffer-zone cases that largely upheld injunctions that arguably impeded on anti-abortion protestors' speech rights, but they miss the significant distinctions between those cases and this one. In both of those cases, the bases for the injunctions were clearly defined and repeatedly demonstrated (repeated violations of prior buffer zones and illegal harassment at identified clinic locations). In addition, the scope of the injunctive relief was limited to the particular clinics and prevented only the specific conduct that created the impermissible disruption of services and harassment (fixed buffer zones, amplified noise prohibitions). *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994); *Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 361 (1997).

These cases do not support plaintiffs' overly expansive request here.[26]

With respect to injunctive relief under Florida law, plaintiffs note the Florida statute, Section 934.10, provides that "injunctive relief" may be appropriate, but cite only one case in support. In *O'Brien v. O'Brien*, 899 So. 2d 1133, 1134 (Fla. 5th Dist. App. 2005), in the context of a family law dispute, the court granted a permanent injunction to prohibit the wife's disclosure of communications she had illegally intercepted on a computer and to "prevent her from engaging in this activity in the future." There was no discussion of the appropriateness of the injunction in that decision, only a statement that one was entered. As I discussed on summary judgment, Florida law does not include the federal requirement that the recording be done for an illegal or tortious purpose but does require a showing that the person recorded had:

> a "reasonable" expectation of privacy of the persons recorded, as required under Florida's law consistent with the *Katz* factors. *See Katz v. United States*, 389 U.S. 347 (1967). As above, this challenge rests on disputed questions of material fact, considering the steps PPFA took

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[26] I agree with plaintiffs that an injunction imposed in response to proven violations of the law, which might incidentally impact speech, is not a prior restraint. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 n.2 (1994). But, as in *Madsen*, plaintiffs' proposed injunction sweeps too broadly and must be more narrowly tailored to match the conduct that caused plaintiffs the specific harms they sued over and on which they secured judgment.

> to restrict access to its conferences and the participants' experiences that their conversations were sensitive, private, and would not be recorded. That the conversations took place at a conference, in an exhibit hall, or in a lobby do not by themselves mean the conversations were not subject to a subjective and objectively reasonable expectation of privacy. All of the facts and the contexts for each recording have to be considered."

Dkt. No. 753 at 86. That the jury ultimately determined that defendants violated this statute, and that the subjects of the recordings had a reasonable expectation of privacy given the particular circumstances of each recording, does not provide a basis to prevent defendants from recording anyone, at anytime, anywhere "in" a "Planned Parenthood" conference, office, or clinic.

Recognizing the complexities presented by the breadth of plaintiffs' request for injunctive relief under the federal and Florida recording statutes, however, does not mean that injunctive relief is inappropriate. It does mean that the relief must be significantly narrowed. Plaintiffs object that narrowed relief is less clear and could lead to subsequent litigation over whether these defendants violated the terms of a narrowed injunction, but that is due to the nature of the claims on which they rest their request for injunctive relief and the scope of the relief requested.

E. Against Whom

As noted, plaintiffs seek to enjoin the specified conduct of each of the defendants (except Lopez), and those acting in concert or participation with them.[27] I conclude that plaintiffs have demonstrated a reason and need for injunctive relief against each of the defendants.

The evidence showed that CMP and BioMax were created for the purpose of carrying out the HCP and are still controlled by Daleiden. While CMP might have a broader mission (and may now or in the future undertake different "medical ethics" initiatives), the jury found it guilty of each of the claims asserted against it. Both entities should be restricted from engaging in that specific illegal conduct. The evidence showed that Daleiden took credit for the inception and formation of CMP and BioMax and directed the conduct of Merritt, Lopez, and the other non-defendant participants who made misrepresentations and infiltrated plaintiffs' conferences and offices. There is ample reason to enjoin Daleiden from engaging in the specific conduct that the jury and I found was illegal.

Defendants point to Merritt's unrebutted declaration that she did not intend to or have the ability to "go undercover" anymore given health and familial duties as reasons to deny injunctive relief against her. That declaration was insufficient to remove her from the reach of the RICO or UCL claims on summary judgment. The jury found her guilty of

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[27] Dkt. No. 1049 at 1 n.1.

each claim presented to them. Considering the evidence regarding Merritt's history, prior activities, and post-HCP activities, as well as her testimony on the stand, I find that narrowed injunctive relief is appropriately entered against her.

The same is true with Rhomberg. Considering his background and role with CMP, as well as the jury's conclusions that Rhomberg conspired on every substantive claim submitted to them, I find that narrowed injunctive relief is appropriately entered against him.

Newman was found to have conspired with the other defendants on the federal and Florida recording claims and in each of the trespass claims. The jury clearly took adverse inferences against him based on my instructions and the other evidence in the case. With respect to the UCL, as noted, the adverse inferences were corroborated by other evidence in the record. I consider only the corroborated evidence regarding Newman's role with CMP and the HCP, as well as his efforts to take credit for the Project, in finding that the narrowed injunctive relief is also appropriate imposed against him under the UCL.

Defendants argue that plaintiffs are impermissibly attempting to drag in other non-defendants under the injunction, pointing to plaintiffs' proposed language that the injunction covers not only "their officers, agents, servants, employees, owners, and representatives" but also "all other persons, firms, or corporations acting in concert or participation with them" and requires defendants to provide notice of this injunction to anyone acting in concert with them are all

impermissibly broad provisions. The injunctive relief language should track more closely the actual language of Rule 65(d)(2). But note that the Rule's language itself provides that an injunction may extend to those with notice who are "in active concert of participation" with defendants. I agree with plaintiffs that, given the history of defendants' employing the "undercover" tactics that the jury found were against the law in the past and advising others on the same, defendants should be required to provide a copy of the injunction to anyone who is acting in concert with them to violate the injunctive relief entered.

F. On Behalf of Whom

Plaintiffs seek an injunction benefitting not only the named plaintiffs' activities – wherever they occur – and the named plaintiffs' offices, but also the activities and offices of every non-plaintiff affiliate. Defendants complain that there is no basis in law – under the UCL, the law of trespass, or the federal or Florida recording statutes—to justify such broad relief to anyone other than the actual plaintiffs in this case. They point out that the affiliates are separate corporate entities from PPFA and that PPFA failed to provide evidence at trial that it was contractually bound to provide its affiliates security grants or other specific services. Looking only to the named plaintiffs in this case, defendants also argue that because PPLA and PPMM did not establish any sort of damage or succeed on any claim, those two plaintiffs are not entitled to injunctive relief under the UCL or any other claim.

Plaintiffs argue that such broad relief is necessary because, as shown at trial, PPFA was injured when its

affiliates were targeted by Defendants. The evidence showed that PPFA investigates intrusions and threats at affiliate locations, provides security grants and conducts security reviews for its affiliates in response to instructions and threats, and provides other support like threat and incident tracking. To provide full relief to PPFA and allow PPFA to protect its mission (even if it is not contractually required to provide all of these services to its affiliates), all of its affiliates must be covered by the injunction precisely because PPFA lacks an adequate legal remedy at law. Plaintiffs also contend that broad relief that "incidentally benefits" non-plaintiff-affiliates is justified because Defendants "targeted" not only high ranking PPFA staff but also affiliate staff as part of their goal to "destroy" Planned Parenthood.

Plaintiffs rely on only a few, inapposite cases. In *Price v. City of Stockton*, 390 F.3d 1105 (9th Cir. 2004), plaintiffs (six former tenants and one nonprofit organization representing residence of Single Resident Occupancy, SRO, hotels) sought to enjoin a city from violating federal and state statutes in closing SRO hotels. The district court granted broad injunctive relief enjoining the city from vacating, demolishing, or converting SRO Hotels and requiring the city to provide relocation assistance and replacement housing to all persons displaced. *Id.* at 1108. The city challenged the injunction as overbroad because it benefitted all displaced persons, even ones who were not named plaintiffs. The injunction was affirmed, with the Ninth Circuit noting that the city had to meet its obligations under the applicable laws and "remedy the harms shown by Plaintiffs, who include not only the

individual named displacees but also Stockton Metro Ministry, whose ability to serve a broader population of low-income and homeless people has been hampered by the City's activities." *Id*. at 1117. That situation is significantly different than the one here. We do not have the failure of the government to adhere to a set of laws that specifically protect the named plaintiffs and the non-plaintiffs represented by the association.

Nor do we have a situation where it would be impracticable for a government officer enforcing a law to know whether a particular person was a named plaintiff and, therefore, covered by an injunction. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (enjoining enforcement, as to all motorcycle riders, a "clear CHP citation policy in violation of the Fourth Amendment" because "the CHP policy regarding helmets is formulated on a statewide level, other law enforcement agencies follow the CHP's policy, and it is unlikely that law enforcement officials who were not restricted by an injunction governing their treatment of all motorcyclists would inquire before citation into whether a motorcyclist was among the named plaintiffs or a member of Easyriders, the plaintiffs would not receive the complete relief to which they are entitled without statewide application of the injunction.").[28]

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[28] Plaintiffs' cases discussing nationwide injunctions issued against the government, seeking to enjoin enforcement of laws or regulations and binding government officers are even more inapposite. *See, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) (addressing injunction against Secretary of Labor); *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018 (remanding for development of a record to support a

Instead, we have findings by the court and a verdict by jury that defendants harmed a specific set of plaintiffs based on their conduct in a limited number of states which violated a range of state laws and one federal law.

The record suggests that PPFA was injured by defendants' conduct targeted at its affiliates because PPFA responds to incidents (like the intrusions and recordings that occurred here) by providing affiliates with security services (security reviews and grants) and tracks and investigates security incidents and "threats" more generally. Plaintiffs rely on *Dairy Maid Dairy, Inc. v. U.S.*, 837 F. Supp. 1370 (E.D. Va. 1993), where the court noted that the plaintiffs' probable profits from a contract (which would not be recoverable as damages) supported injunctive relief forcing the government to implement a fair bidding process. *Id.* at 1381. Plaintiffs use that case to argue that injunctive relief covering the non-plaintiff affiliates is merited here, where the record shows that while PPFA provides security grants and other services to affiliates to investigate threats and harassment, PPFA could not otherwise recover that "grant" money as damages. But that one and quite inapposite case is a particularly thin reed on which to rest such broad relief. PPFA was able to recover some of the security costs it expended, even if it expended those costs investigating incidents at its affiliates. And I recognize that the jury did not award

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nationwide injunction against the government); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (discussing injunction of federal regulation against Secretary of HHS).

PPFA damages for the trespass at PPRM's clinic (seeking recovery of the security grant PPFA gave to PPRM to the cover the relocation and security costs for Dr. Ginde of PPRM following defendants' intrusion), but the lack of an award may well have been due to a failure of proof by the entity legally entitled to recover those grants (either PPFA or PPRM, if PPRM had elected to pursue damages).

Absent applicable case law in support – for example, cases granting injunctions to an association on behalf of individual members who are separate corporate entities – I will not extend the scope of injunctive relief here to protect the non-plaintiff affiliates. Plaintiffs have not shown a basis in law for that type of expansive relief.[29]

For the foregoing reasons, injunctive relief is warranted but will be limited to the plaintiffs who prevailed in in this action under the claims on which they recovered.

IV. CONCLUSIONS OF LAW

The conclusions of law supporting the finding of violation of California's Unfair Competition Law and the need for injunctive relief under the UCL, as well as under the laws concerning trespass of Florida,

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[29] As to PPLA and PPMM, who did not recover on any of their claims but who are plaintiffs based in California, plaintiffs argue they should be covered by the injunction because "they face the same threat of future harm as affiliates who did recover damages." Reply at 12 n.2. Plaintiffs cite no case in support.

Washington, D.C., Colorado, and Texas and the federal and Florida recording statutes, are as follows.

1. This Court and the jury have expressly found Defendants directly liable or liable as conspirators for trespass, breach of contract, fraud, and illegal recording.

2. The jury impliedly found that Defendants' activities pose a threat of continued criminal conduct.

3. My consideration of equitable relief must be consistent with the jury's express and implied findings.

4. Plaintiffs are entitled to equitable relief under the UCL that prohibits Defendants from repeating their unlawful and fraudulent business practices that occur in California or that occur out-of-state that causes harm in California.

5. Equitable relief is also warranted under Plaintiffs' claims for trespass under the laws of Florida, Washington, D.C., Colorado, and Texas and for violation of the federal and Florida recording statutes.

6. This court has power to and should enjoin the Defendants from engaging in trespasses and unlawful recordings in those jurisdictions under those jurisdictions' laws.

7. The court has power to and will grant injunctive relief in favor of the named plaintiffs who prevailed on claims as determined by the court or Jury.

8. Injunctive relief should be granted against all Defendants (other than Defendant Lopez)

9. The injunction should extend to all persons acting in concert or participation with the Defendants to engage in conduct prohibited by the injunction.

10. The First Amendment does not bar the limited injunctive relief the Court awards.

V. JUDGMENT AND INJUNCTION

For the foregoing reasons, the following judgment is HEREBY ENTERED:

Pursuant to Federal Rule of Civil Procedure 54, the Court enters judgment as follows.

1. Definitions

The following terms are defined as follows:

A. PPFA: Plaintiff Planned Parenthood Federation of America, Inc.

B. PPNorCal: Plaintiff Planned Parenthood Shasta-Diablo, Inc., dba Planned Parenthood Northern California.

C. PPMM: Plaintiff Planned Parenthood Mar Monte, Inc.

D. PPPSW: Plaintiff Planned Parenthood of the Pacific Southwest.

E. PPLA: Plaintiff Planned Parenthood of Los Angeles.

F. PPOSBC: Plaintiff Planned Parenthood of Orange and San Bernardino Counties, Inc.

G. PPCCC: Plaintiff Planned Parenthood of California Central Coast, fka Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties, Inc.

H. PPPSGV: Plaintiff Planned Parenthood Pasadena and San Gabriel Valley, Inc.

I. PPRM: Plaintiff Planned Parenthood of the Rocky Mountains.

J. PPGC: Plaintiff Planned Parenthood Gulf Coast, Inc.

K. PPCFC: Plaintiff Planned Parenthood Center for Choice.

L. All Plaintiffs: PPFA, PPNorCal, PPMM, PPPSW, PPLA, PPOSBC, PPCCC, PPPSGV, PPRM, PPGC, and PPCFC.

M. CMP: Defendant Center for Medical Progress.

N. BioMax: Defendant BioMax Procurement Services, LLC.

O. Daleiden: Defendant David Daleiden.

P. Newman: Defendant Troy Newman.

Q. Rhomberg: Defendant Albin Rhomberg.

R. Merritt: Defendant Sandra Susan Merritt.

S. Lopez: Defendant Gerardo Adrian Lopez.

T. All Defendants: CMP, BioMax, Daleiden, Newman, Rhomberg, Merritt, and Lopez.

2. Compensatory Damages on Each Claim

The Court enters judgment on each claim for damages as to All Plaintiffs and All Defendants as follows.

A. First Claim for Relief: Violation of RICO Act.

All Defendants are jointly and severally liable to PPFA in the amount of $1,259,370 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPGC in the amount of $61,851 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPOSBC in the amount of $56,547 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPPSGV in the amount of $27,315 in RICO trebled actual damages.

PPNorCal, PPMM, PPPSW, PPLA, PPCCC, PPRM and PPCFC shall take nothing against All Defendants under this First Claim for Relief.

B. Second Claim for Relief: Federal Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $52,917 in compensatory damages and $10,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPGC in the amount of $20,617 in compensatory damages and $10,000 in statutory damages, with PPGC having elected to accept statutory damages on the condition set forth below In Section III.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages and $10,000 in statutory damages, with PPOSBC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages and $10,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCFC in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPCCC in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPRM in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPPSW in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPNorCal in the amount of $10,000 in statutory damages.

PPMM and PPLA shall take nothing against All Defendants under this Second Claim for Relief.

C. Third Claim for Relief: Civil Conspiracy.

The Third Claim for Relief is based on all tort claims, except RICO, which has its own standard for conspiracy. Each Defendant's liability for conspiracy is addressed under each individual claim.

D. Fourth Claim for Relief: Breach of Contract (PPFA Exhibitor Agreements).

Daleiden, BioMax and CMP are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

PPFA shall take nothing against Merritt and Lopez under this Fourth Claim for Relief.

E. Fifth Claim for Relief: Breach of Contract (NAF Agreements).

Daleiden, Merritt, Lopez, BioMax, and CMP are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages.

F. Sixth Claim for Relief: Trespass.

Daleiden, Lopez, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

Daleiden, Merritt, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPRM in the amount of $1 in nominal damages.

Daleiden, Merritt, BioMax, and CMP, Rhomberg and Newman are jointly and severally liable to PPGC in the amount of $20,208 in compensatory damages.

G. Seventh Claim for Relief: Business and Professions Code § 17200.

Defendants are each liable for unlawful and fraudulent business practices that occurred in California and out-of-state unlawful and fraudulent business practices that caused harm in California.

H. Eighth Claim for Relief: Fraud.

All Defendants are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

All Defendants are jointly and severally liable to PPGC in the amount of $20,617 in compensatory damages.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages.

PPCFC and PPRM shall take nothing against All Defendants under this Eighth Claim for Relief.

I. Ninth Claim for Relief: California Penal Code § 632.

All Defendants are jointly and severally liable to PPFA in the amount of $148,080 in trebled compensatory damages and $20,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $27,315 in trebled compensatory damages and $20,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPNorCal in the amount of $10,000 in statutory damages.

PPPSW, PPMM, PPOSBC, PPGC, PPCFC, and PPRM shall take nothing against All Defendants under this Ninth Claim for Relief.

J. Tenth Claim for Relief: California Penal Code § 634.

PPFA, PPNorCal, PPPSW, PPMM, PPOSBC, PPGC, PPCFC, and PPRM shall take nothing against All Defendants under this Tenth Claim for Relief.

K. Eleventh Claim for Relief: Florida Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages and $1,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages and $1,000 in statutory damages, with PPOSBC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages and $1,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCCC in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPRM in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPGC in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPPSW in the amount of $1,000 in statutory damages.

Plaintiffs PPLA, PPNorCal, PPMM, and PPCFC shall take nothing against All Defendants under this Eleventh Claim for Relief.

L. Twelfth Claim for Relief: Maryland Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages and $1,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPGC in the amount of $409 in compensatory damages and $1,000 in statutory damages, with PPGC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCFC in the amount of $1,000 in statutory damages.

PPNorCal, PPPSW, PPMM, PPOSBC, and PPRM shall take nothing against All Defendants under this Twelfth Claim for Relief.

M. Thirteenth Claim for Relief: Common Law Invasion of Privacy.

All Plaintiffs shall take nothing against All Defendants under this Thirteenth Claim for Relief.

N. Fourteenth Claim for Relief: California Constitutional Right of Privacy.

PPFA, PPNorCal, PPPSW, PPMM, and PPOSBC shall take nothing against All Defendants under this Fourteenth Claim for Relief.

O. Fifteenth Claim for Relief: Breach of Contract (PPGC NDA).

Daleiden, BioMax, and CMP are jointly and severally liable to PPGC in the amount of $20,208 in compensatory damages.

PPGC shall take nothing against Merritt under this Fifteenth Claim for Relief.

PPCFC shall take nothing against BioMax, CMP, Daleiden, and Merritt under this Fifteenth Claim for Relief.

3. <u>Deduplicated Compensatory, Statutory, and Nominal Damages</u>.

After removing duplication of compensatory, statutory, and nominal damages awards among claims, the Court enters judgment for damages in the following amounts.

All Defendants are jointly and severally liable to PPFA in the amount of $1,291,370 calculated as follows:

- $1,259,370 in RICO trebled actual damages
- $10,000 in Federal Wiretapping statutory damages
- $20,000 in California Penal Code § 632 statutory damages
- $1,000 in Florida Wiretapping statutory damages
- $1,000 in Maryland Wiretapping statutory damages

All Defendants are jointly and severally liable to PPNorCal in the amount of $20,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $10,000 in California Penal Code § 632 statutory damages

All Defendants are jointly and severally liable to PPPSW in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPOSBC in the amount of $67,547 calculated as follows:

- $56,547 in RICO trebled damages
- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPCCC in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPPSGV in the amount of $58,315 calculated as follows:

- $27,315 in RICO trebled damages
- $10,000 in Federal Wiretapping statutory damages
- $20,000 in California Penal Code § 632 statutory damages

- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPRM in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

Daleiden, Merritt, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPRM for the additional amount of $1 in nominal damages.

All Defendants are jointly and severally liable to PPGC in the amount of $73,851 calculated as follows:

- $61,851 in RICO trebled damages
- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages
- $1,000 in Maryland Wiretapping statutory damages

All Defendants are jointly and severally liable to PPCFC in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping damages
- $1,000 in Maryland Wiretapping statutory damages

On several of Plaintiffs' claims, the jury awarded higher actual damages than the available statutory damages for Federal Wiretapping, California Penal Code § 632, Florida Wiretapping, and Maryland Wiretapping. Plaintiffs have elected statutory damages on these claims, but their election is conditioned on the survival of their award of actual damages on other claims that overlap the actual damages on the recording claims. Should the damages awards on the non-recording claims be vacated, reversed, remitted or otherwise altered, Plaintiffs reserve their right to elect their actual damages, in lieu of statutory damages, on their recording claims.

PPMM and PPLA shall take nothing against All Defendants.

4. Punitive Damages

In addition to compensatory, statutory, and nominal damages, the following Defendants are severally liable to PPFA, PPGC, PPOSBC, PPPSGV, PPCCC, PPCFC, PPPSW, PPNorCal, and PPRM for punitive damages in the following amounts.

A. Daleiden: $125,000.

B. Merritt: $25,000.

C. BioMax: $200,000.

D. CMP: $400,000

E. Newman: $50,000

F. Rhomberg: $70,000.

5. Costs and Attorneys' Fees

Plaintiffs are 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 attorney' fees, shall be determined in accordance with Local Rule 54.

6. Injunctive Relief

For the reasons stated in the Court' findings of fact and conclusions of law, the Court enters the following permanent injunction:

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.

IT IS SO ORDERED.

Dated: April 29, 2020

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

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-00236-WHO

[Filed April 29, 2020]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiffs,	)
v.	)
CENTER FOR MEDICAL PROGRESS, et al., Defendants.	)

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58(a), the following separate judgment is HEREBY ENTERED:

1. Definitions

The following terms are defined as follows:

A. PPFA: Plaintiff Planned Parenthood Federation of America, Inc.

B. PPNorCal: Plaintiff Planned Parenthood Shasta-Diablo, Inc., dba Planned Parenthood Northern California.

C. PPMM: Plaintiff Planned Parenthood Mar Monte, Inc.

D. PPPSW: Plaintiff Planned Parenthood of the Pacific Southwest.

E. PPLA: Plaintiff Planned Parenthood of Los Angeles.

F. PPOSBC: Plaintiff Planned Parenthood of Orange and San Bernardino Counties, Inc.

G. PPCCC: Plaintiff Planned Parenthood of California Central Coast, fka Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties, Inc.

H. PPPSGV: Plaintiff Planned Parenthood Pasadena and San Gabriel Valley, Inc.

I. PPRM: Plaintiff Planned Parenthood of the Rocky Mountains.

J. PPGC: Plaintiff Planned Parenthood Gulf Coast, Inc.

K. PPCFC: Plaintiff Planned Parenthood Center for Choice.

L. All Plaintiffs: PPFA, PPNorCal, PPMM, PPPSW, PPLA, PPOSBC, PPCCC, PPPSGV, PPRM, PPGC, and PPCFC.

M. CMP: Defendant Center for Medical Progress.

N. BioMax: Defendant BioMax Procurement Services, LLC.

O. Daleiden: Defendant David Daleiden.

P. Newman: Defendant Troy Newman.

Q. Rhomberg: Defendant Albin Rhomberg.

R. Merritt: Defendant Sandra Susan Merritt.

S. Lopez: Defendant Gerardo Adrian Lopez.

T. All Defendants: CMP, BioMax, Daleiden, Newman, Rhomberg, Merritt, and Lopez.

2. Compensatory Damages on Each Claim

The Court enters judgment on each claim for damages as to All Plaintiffs and All Defendants as follows.

A. First Claim for Relief: Violation of RICO Act.

All Defendants are jointly and severally liable to PPFA in the amount of $1,259,370 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPGC in the amount of $61,851 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPOSBC in the amount of $56,547 in RICO trebled actual damages.

All Defendants are jointly and severally liable to PPPSGV in the amount of $27,315 in RICO trebled actual damages.

PPNorCal, PPMM, PPPSW, PPLA, PPCCC, PPRM and PPCFC shall take nothing against

All Defendants under this First Claim for Relief.

B. Second Claim for Relief: Federal Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $52,917 in compensatory damages and $10,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPGC in the amount of $20,617 in compensatory damages and $10,000 in statutory damages, with PPGC having elected to accept statutory damages on the condition set forth below In Section III.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages and $10,000 in statutory damages, with PPOSBC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages and $10,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCFC in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPCCC in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPRM in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPPSW in the amount of $10,000 in statutory damages.

All Defendants are jointly and severally liable to PPNorCal in the amount of $10,000 in statutory damages.

PPMM and PPLA shall take nothing against All Defendants under this Second Claim for Relief.

C. Third Claim for Relief: Civil Conspiracy.

The Third Claim for Relief is based on all tort claims, except RICO, which has its own standard for conspiracy. Each Defendant' liability for conspiracy is addressed under each individual claim.

D. Fourth Claim for Relief: Breach of Contract (PPFA Exhibitor Agreements).

Daleiden, BioMax and CMP are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

PPFA shall take nothing against Merritt and Lopez under this Fourth Claim for Relief.

E. Fifth Claim for Relief: Breach of Contract (NAF Agreements).

Daleiden, Merritt, Lopez, BioMax, and CMP are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages.

F. Sixth Claim for Relief: Trespass.

Daleiden, Lopez, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

Daleiden, Merritt, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPRM in the amount of $1 in nominal damages.

Daleiden, Merritt, BioMax, and CMP, Rhomberg and Newman are jointly and severally liable to PPGC in the amount of $20,208 in compensatory damages.

G. Seventh Claim for Relief: Business and Professions Code § 17200.

Defendants are each liable for unlawful and fraudulent business practices that occurred in California and out-of-state unlawful and fraudulent business practices that caused harm in California.

H. Eighth Claim for Relief: Fraud.

All Defendants are jointly and severally liable to PPFA in the amount of $419,790 in compensatory damages.

All Defendants are jointly and severally liable to PPGC in the amount of $20,617 in compensatory damages.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages.

PPCFC and PPRM shall take nothing against All Defendants under this Eighth Claim for Relief.

I. Ninth Claim for Relief: California Penal Code § 632.

All Defendants are jointly and severally liable to PPFA in the amount of $148,080 in trebled compensatory damages and $20,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $27,315 in trebled compensatory damages and $20,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPNorCal in the amount of $10,000 in statutory damages.

PPPSW, PPMM, PPOSBC, PPGC, PPCFC, and PPRM shall take nothing against All Defendants under this Ninth Claim for Relief.

J. Tenth Claim for Relief: California Penal Code § 634.

PPFA, PPNorCal, PPPSW, PPMM, PPOSBC, PPGC, PPCFC, and PPRM shall take nothing against All Defendants under this Tenth Claim for Relief.

K. Eleventh Claim for Relief: Florida Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages and $1,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPOSBC in the amount of $18,849 in compensatory damages and $1,000 in statutory damages, with PPOSBC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPPSGV in the amount of $9,105 in compensatory damages and $1,000 in statutory damages, with PPPSGV having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCCC in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPRM in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPGC in the amount of $1,000 in statutory damages.

All Defendants are jointly and severally liable to PPPSW in the amount of $1,000 in statutory damages.

Plaintiffs PPLA, PPNorCal, PPMM, and PPCFC shall take nothing against All Defendants under this Eleventh Claim for Relief.

L. Twelfth Claim for Relief: Maryland Wiretapping.

All Defendants are jointly and severally liable to PPFA in the amount of $49,360 in compensatory damages and $1,000 in statutory damages, with PPFA having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPGC in the amount of $409 in compensatory damages and $1,000 in statutory damages, with PPGC having elected to accept statutory damages on the condition set forth below in Section III.

All Defendants are jointly and severally liable to PPCFC in the amount of $1,000 in statutory damages.

PPNorCal, PPPSW, PPMM, PPOSBC, and PPRM shall take nothing against All Defendants under this Twelfth Claim for Relief.

M. Thirteenth Claim for Relief: Common Law Invasion of Privacy.

All Plaintiffs shall take nothing against All Defendants under this Thirteenth Claim for Relief.

N. Fourteenth Claim for Relief: California Constitutional Right of Privacy.

PPFA, PPNorCal, PPPSW, PPMM, and PPOSBC shall take nothing against All Defendants under this Fourteenth Claim for Relief.

O. Fifteenth Claim for Relief: Breach of Contract (PPGC NDA).

Daleiden, BioMax, and CMP are jointly and severally liable to PPGC in the amount of $20,208 in compensatory damages.

PPGC shall take nothing against Merritt under this Fifteenth Claim for Relief.

PPCFC shall take nothing against BioMax, CMP, Daleiden, and Merritt under this Fifteenth Claim for Relief.

3. <u>Deduplicated Compensatory, Statutory, and Nominal Damages</u>.

After removing duplication of compensatory, statutory, and nominal damages awards among claims, the Court enters judgment for damages in the following amounts.

All Defendants are jointly and severally liable to PPFA in the amount of $1,291,370 calculated as follows:

- $1,259,370 in RICO trebled actual damages
- $10,000 in Federal Wiretapping statutory damages
- $20,000 in California Penal Code § 632 statutory damages
- $1,000 in Florida Wiretapping statutory damages

- $1,000 in Maryland Wiretapping statutory damages

All Defendants are jointly and severally liable to PPNorCal in the amount of $20,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $10,000 in California Penal Code § 632 statutory damages

All Defendants are jointly and severally liable to PPPSW in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPOSBC in the amount of $67,547 calculated as follows:

- $56,547 in RICO trebled damages
- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPCCC in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPPSGV in the amount of $58,315 calculated as follows:

- $27,315 in RICO trebled damages
- $10,000 in Federal Wiretapping statutory damages
- $20,000 in California Penal Code § 632 statutory damages
- $1,000 in Florida Wiretapping statutory damages

All Defendants are jointly and severally liable to PPRM in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages

Daleiden, Merritt, BioMax, CMP, Rhomberg, and Newman are jointly and severally liable to PPRM for the additional amount of $1 in nominal damages.

All Defendants are jointly and severally liable to PPGC in the amount of $73,851 calculated as follows:

- $61,851 in RICO trebled damages

- $10,000 in Federal Wiretapping statutory damages
- $1,000 in Florida Wiretapping statutory damages
- $1,000 in Maryland Wiretapping statutory damages

All Defendants are jointly and severally liable to PPCFC in the amount of $11,000 calculated as follows:

- $10,000 in Federal Wiretapping damages
- $1,000 in Maryland Wiretapping statutory damages

On several of Plaintiffs' claims, the jury awarded higher actual damages than the available statutory damages for Federal Wiretapping, California Penal Code § 632, Florida Wiretapping, and Maryland Wiretapping. Plaintiffs have elected statutory damages on these claims, but their election is conditioned on the survival of their award of actual damages on other claims that overlap the actual damages on the recording claims. Should the damages awards on the non-recording claims be vacated, reversed, remitted or otherwise altered, Plaintiffs reserve their right to elect their actual damages, in lieu of statutory damages, on their recording claims.

PPMM and PPLA shall take nothing against All Defendants.

4. Punitive Damages

In addition to compensatory, statutory, and nominal damages, the following Defendants are severally liable to PPFA, PPGC, PPOSBC, PPPSGV, PPCCC, PPCFC, PPPSW, PPNorCal, and PPRM for punitive damages in the following amounts.

A. Daleiden: $125,000.

B. Merritt: $25,000.

C. BioMax: $200,000.

D. CMP: $400,000

E. Newman: $50,000

F. Rhomberg: $70,000.

5. Costs and Attorneys' Fees

Plaintiffs are 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 attorney' fees, shall be determined in accordance with Local Rule 54.

6. Injunctive Relief

For the reasons stated in the Court' findings of fact and conclusions of law, the Court enters the following permanent injunction:

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) 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.

IT IS SO ORDERED.

Dated: April 29, 2020

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

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-00236-WHO

[Filed August 19, 2020]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,
Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,
Defendants.

ORDER ON POST-TRIAL MOTIONS

Re: Dkt. No. 1080

Following a five-week trial concerning defendants' targeting of plaintiff Planned Parenthood Federation of America (PPFA) and its affiliates through surreptitious recording of plaintiffs' staff members, the jury returned a verdict in favor of plaintiffs on November 15, 2019. Based on that verdict and on my findings of fact and conclusions of law supporting plaintiffs' Unfair Competition claim and injunctive relief, I entered judgment on April 29, 2020. Dkt. No. 1074. Defendants then moved pursuant to Rules 50(b), 59(a), and 59(e) for judgment as a matter of law, for a new trial, and to

amend the Judgment. Defendants' Joint Post Judgement Motions (Mot.), Dkt. No. 1080 at 1.

Before the trial started, either at the motion to dismiss stage, on summary judgment, or *in limine,* I had ruled on each of the legal issues raised by defendants' current motions. They identify no reason to revisit those well-trod issues. And their challenges to the jury's verdict based on a purported lack of evidence are not well taken. The jury was entitled to reject defendants' testimony and rely on the documentary and other evidence to find in favor of plaintiffs. Sufficient evidence exists for each of the jury's determinations in the verdict. Defendants' motions are DENIED.

BACKGROUND

The factual background regarding the inception and execution of defendants' Human Capital Project (HCP) – the plan to target plaintiff Planned Parenthood Federation of America (PPFA) and its affiliates through surreptitious recording of plaintiffs' staff members in order to expose plaintiffs' conduct in the collection and transfer of fetal tissue that defendants contend was illegal or unethical – and the resulting infiltration of the PPFA and National Abortion Federation (NAF) conferences, plaintiffs' clinics, and the release of videos featuring surreptitious recordings of plaintiffs' staff has been thoroughly explicated in prior orders; I will not repeat it. *See* Dkt. Nos. 753, 1073.[1]

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[1] Plaintiffs, as identified in the Final Preliminary Jury Instructions (Dkt. No. 850), are Planned Parenthood Federation of America (PPFA); Planned Parenthood: Shasta-Diablo, Inc. dba Planned

The legal theories underlying plaintiffs' claims against defendants have been repeatedly tested and, where appropriate, trimmed. Plaintiffs' theories were first tested on motions to dismiss and a related motion to strike under California's Anti-SLAPP law.[2] Those motions were decided in September 2016, in a 56-page opinion denying for the most part the motions to dismiss and the motion to strike. I did determine that plaintiffs could not assert mail or wire fraud predicate acts or acts based on 18 U.S.C. § 1028(a)(3) and §1028(a)(7) in support of their Racketeer Influenced and Corrupt Organizations (RICO) claims. *Id*. at 10–13. I also thoroughly reviewed defendants' arguments that their conduct was wholly protected under the First Amendment. *Id*. at 34–36. I rejected defendants' broad immunity argument but recognized that absent a defamation-type cause of action, plaintiffs could not seek reputational damages for "(lost profits, [or] lost

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Parenthood Northern California (PPNorCal); Planned Parenthood Mar Monte, Inc. (PPMM); Planned Parenthood of the Pacific Southwest (PPPSW); Planned Parenthood Los Angeles (PPLA); Planned Parenthood/Orange and San Bernardino Counties (PPOSBC); Planned Parenthood California Central Coast (PPCCC); Planned Parenthood Pasadena and San Gabriel Valley, Inc. (PPPSGV); Planned Parenthood of the Rocky Mountains (PPRM); and Planned Parenthood Gulf Coast (PPGC) and Planned Parenthood Center for Choice (PPCFC). Defendants, as identified in the Final Preliminary Jury Instructions, are the Center for Medical Progress (CMP), BioMax Procurement Services (BioMax), David Daleiden, Sandra Susan Merritt, Adrian Lopez, Albin Rhomberg, and Troy Newman.

[2] *See* California Code of Civil Procedure § 425.16, defining "strategic lawsuits against public participation" or SLAPP lawsuits.

vendors) stemming from the publication conduct of defendants." *Id*. at 36. I concluded that "discovery will shed light on the nature of the damages for which plaintiffs seek recovery" and that "[r]esolution of this issue is more appropriately addressed at summary judgment or trial." *Id*.[3]

Defendants appealed my denial of the anti-SLAPP motion (based on the same arguments that defendants made in their motions to dismiss the California and other state law claims). In an order dated May 16, 2018, the Ninth Circuit affirmed the denial of the anti-SLAPP motion challenging the sufficiency of plaintiffs' state law claims. Dkt. Nos. 262, 309.

After extensive discovery – and the resolution of numerous discovery disputes by Magistrate Judge Donna M. Ryu – the case proceeded to summary judgment. In a 137-page opinion, I granted in part and denied in part defendants' motions for summary judgment and granted in part and denied in part plaintiffs' motion for summary judgment. Dkt. No. 753 (Summary Judgment Order). Of particular significance to the arguments raised by defendants in their post-trial motions, I again considered defendants' argument both that their conduct was fully protected by the First Amendment and that all of the damages plaintiffs sought were barred by the First Amendment. *Id*. at 15–22. I concluded, distilling various lines of Supreme Court precedent but also persuasive cases from the

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[3] I also noted that some of the damages pleaded by plaintiffs in their First Amended Complaint might fail on summary judgment or trial due to the hurdle of "proximate cause." *Id*. at 33–34.

federal circuits and district courts, that plaintiffs' damages were limited but not barred. I found that plaintiffs would be entitled – assuming the jury agreed on the evidence submitted to them – to "intrusion" damages incurred to investigate and address the intrusion by defendants into the PPFA conferences and "security" damages incurred by plaintiffs with respect to their investigation of and subsequent measures taken to address the "targeting" of their staff members by defendants. *Id*. at 19-20.[4] I excluded numerous other categories of damages that plaintiffs sought as impermissible reputational damages or because they were caused only by the publication of the CMP videos.[5]

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[4] I agreed "with defendants that some of the damages plaintiffs seek here are more akin to publication or reputational damages that would be barred by the First Amendment. Others, however, are economic damages that are not categorically barred. Those that fall in the latter category result not from the acts of third parties who were motivated by the contents of the videos, but from the direct acts of defendants – their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff. Defendants are not immune from the damages that their intrusions into the conferences and facilities directly caused, nor from the damages caused by their direct targeting of plaintiffs' staff, that caused plaintiffs to bear costs in the form of private security for those staff members after plaintiffs became aware of defendants' ruse and recordings." *Id*. at 19.

[5] Significant categories of damages sought by plaintiffs were excluded from the case: "(1) costs of physical security assessments for plaintiffs' buildings and additional building and IT-security measures to physically protect plaintiffs' patients, information, offices, and clinics; (2) grants for security enhancements to affiliates experiencing increased security threats as a result of CMP's videos (PPFA only), other than personal security expenses for staff who were targeted by defendants; (3) costs of repairing

In the Summary Judgment Order, I also concluded that there was sufficient evidence to let the RICO claims proceed to trial despite defendants' challenges to the essentially undisputed facts regarding the production and transfer of the fake IDs, the disputed facts regarding the alleged continuity of the alleged predicate acts and the RICO enterprise, and the disputed roles of the alleged RICO conspirators. *Id*. at 28–34. On the recording claims, I determined the standards for establishing a reasonable expectation of privacy under each relevant statute and rejected defendants' argument concerning the lack of corporate standing of plaintiff-organizations to assert the recording claims when the defendants had targeted their staff with the aim of recording them discussing internal corporate matters. *Id*. at 77–101. I granted partial summary judgment to plaintiffs with respect to breach of PPFA's agreements by Daleiden and BioMax, denied it as to CMP because plaintiffs did not adequately brief the alter ego basis, and granted defendant Merritt and Lopez's motion because neither of those defendants signed the PPFA agreements. On the NAF agreements, I explained that evidence could show that plaintiffs were third-party beneficiaries. *Id*. at 45. Finally, as to the PPCG non-disclosure agreement, I held that the NDA prohibited disclosure

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and protecting PPFA website after hacking; (4) costs of repairing and protecting online appointment systems; (5) loss of revenue due to hack of the PPFA patient portal; (6) staff time spent monitoring threats and responding to protests and increased security incidents; (7) costs relating to vandalism to plaintiffs' offices and clinics; and (8) costs of the grief/stress hotline for staff related to the increase in threats." *Id*. at 20.

of "information reasonably understood – under an objective standard – as 'confidential under the circumstances of the disclosure,'" which would be determined by the jury. *Id.* at 53-55.[6]

Then came a slew of pretrial motions. In my September 12, 2019 Order ruling on pretrial motions, I explained the following:

> Journalism vs. a Smear Campaign. These are the dueling narratives of this case. Defendants argue that they were involved in traditional under-cover journalism in order to expose violations of the law by Planned Parenthood with respect to PPFA and its affiliates' fetal tissue transfer programs. Plaintiffs argue that the goal of defendants' Human Capital Project (HCP) was to smear plaintiffs with allegations they profited from the fetal tissue transfer programs in order to drive PPFA and its affiliates out of business. These narratives are not directly and significantly relevant to the remaining claims and defenses in this case that are to be decided by the jury. However, they are central to the context of and the background to this case. Therefore, defendants are entitled to characterize their conduct as a journalistic enterprise and plaintiffs are entitled to attack

[6] I granted Merritt and Lopez's motions as to the breach of contract claims based on contracts they did not sign and granted Rhomberg and Newman's motions as to breach of contract claims asserted through the civil conspiracy claim. *Id.* at 41–43, 50–51, 54–55, 135.

that in part by exploring defendants' past conduct and writings regarding abortion.

Illegal Conduct. The causes of action in this case concern whether the strategies chosen by the defendants with respect to the Human Capital Project broke the law and caused damage outside the First Amendment context. There are raging debates whether the videos show illegal conduct, whether 4 of 59 Planned Parenthood affiliates profited from selling fetal tissue, whether there have been any live births during abortion procedures at Planned Parenthood affiliates, and how government entities have responded to the HCP disclosures. Those debates are barely, if at all, relevant to the causes of action that will be tried to the jury. Evidence on those issues will be excluded under Federal Rule of Evidence 403 because it will confuse the jury about the issues it needs to decide, waste a significant amount of trial time, and be prejudicial.

The defense argues that illegality by plaintiffs in their fetal tissue programs is critically related to their intent (under the federal wiretapping claim), to the reasonable expectations of privacy in recorded conversations, to the newsworthiness of defendants' publications, and to the social utility of defendants' conduct. Plaintiffs have dropped their invasion of privacy claims and publication of private facts hook for the federal wiretapping claim, so newsworthiness and social utility are

no longer relevant to the claims and defenses to be decided by the jury. Similarly, while defendants' intent to violate RICO remains an element of the federal wiretapping claim, that intent must be established based on evidence defendants knew at the time of the inception of the HCP and prior to the first surreptitious recording. Defendants can present evidence of what they knew, what they believed, and how they carried out their journalistic endeavors through the HCP (the defense narrative discussed above) consistent with their intent. What defendants uncovered through the surreptitious recordings or through discovery in this case, and any expert opinion on that evidence, is not relevant.

Because the California Penal Code section 633.5 "reasonable belief" defense is an issue that will be decided by the jury – as relevant only to plaintiffs' Penal Code section 632 and 634 illegal recording and trespass claims – defendants Daleiden and Merritt may present evidence of what they knew or believed regarding plaintiffs' commission of violent felonies. That knowledge or belief must be based on what Daleiden or Merritt knew prior to their first surreptitious recording. Evidence regarding what Daleiden or Merritt learned following their first surreptitious recording cannot be relied on for this defense.

Evidence of possibly illegal conduct does not get into this case through the issue of reasonable

expectation of privacy under the recording claims. Defendants argue that precluding this evidence will:

> hamstring Defendants' ability to argue that the individuals they recorded lacked any expectation of privacy as understood by the federal, Florida, and Maryland recording statutes. Defendants' experts will need to explain how certain medical procedures work in order to explain how the individuals recorded knew they were discussing wrongful conduct. See *Brugmann v. State*, 117 So. 3d 39, 49 (Fla. Dist. Ct. App. 2013) (identifying eight-factor test for determining reasonableness of expectation of privacy, including illegal conduct, intent, and content of communication, upon collecting cases).

Dkt. No. 772 at 11. But they fail, as they did on summary judgment, to specifically identify *any* much less *each* of the particular and actionable recordings that show plaintiffs' staff members discussing *illegal* conduct. To the extent that one or two of the actionable recordings might show plaintiffs' staff members expressing interest or theoretical ability to engage in conduct that defendants contend is illegal (but plaintiffs contend is not), the evidence and opinions defendants seek to bring in (mostly through their proposed experts as discussed in more depth below) is vastly outweighed by the Rule 403 considerations identified above.

Finally, the accounting issues regarding the fetal tissue programs of the four affiliate-plaintiffs is not directly and significantly relevant to the remaining claims and defenses in this case. Delving into these contested but minimally relevant issues, such as the proper interpretation of 42 U.S.C. § 289g-2 and whether indirect costs can be considered in evaluating compliance with the statute, is significantly outweighed by a number of Rule 403 factors, including juror confusion and waste of time.

In short, compliance with or alleged violation of federal laws (including but not limited to 42 U.S.C. § 289g-2 and the Partial Birth Abortion Ban) and whether babies were born alive at Planned Parenthood clinics to facilitate the affiliates' participation in fetal tissue donation programs will be excluded under Rule 403. I will draft a limiting instruction, to be provided for counsel's review prior to the final Pretrial Conference on September 23, 2019, explaining that the truth of the allegations made in the HCP videos regarding whether plaintiffs profited from the sale of fetal tissue or otherwise violated the law in securing tissue for those programs are not matters for the jury to decide.

Newsworthiness. The newsworthiness of defendants' HCP, including the campaign and the videos, is no longer an issue for determination by the jury given that plaintiffs have dropped their invasion of privacy claims (Counts 13 and 14) and dropped the "publication

> of private facts" tort as a basis for liability under the federal wiretapping claim (Count 2). That does not preclude defendants from offering evidence that they believed at the commencement of the HCP that it would result in newsworthy information, or that in fact it generated attention in the media. However, the stories themselves will not be admissible under Rule 403.
>
> Government Investigations, Referrals, and Prosecutions. No evidence regarding government investigations, referrals, or prosecutions stemming from the HCP or otherwise will be admitted. Under Rule 403, the minimal relevance of this evidence to each side's narrative about this case is significantly outweighed by the dangers of unfair prejudice, confusing the issues, misleading the jury, and waste of time

Dkt. No. 804 at 1-4.

On September 29, 2019, in the Final Pretrial Minutes/Order I reminded the parties of the following:

> Truth
> If plaintiffs mention the term smear campaign in opening statements or closing arguments, that will not automatically open the door to the "truth" of the videos. The limiting instruction prepared by the Court is sufficient to remind the jury that the truth of the videos is not an issue for their decision. However, if plaintiffs intentionally use "smear" as a recurring theme

in their case, or otherwise place the truth of the videos repeatedly and directly at issue, they run the risk of opening the door to the matters that I have excluded from this trial.

Intent

Evidence regarding defendants' intent is admissible with respect to their intent to commit the RICO enterprise and to the competing narratives of the parties (whether defendants set out to harm these plaintiffs and/or to uncover illegal conduct through tools of journalism) and punitive damage defense generally. The relevant information regarding this intent includes: (i) the information defendants had about alleged illegal conduct by plaintiffs that defendants possessed at the inception of the CMP when the goals of the Project were laid out and the strategies for the Project identified; (ii) comments defendants made – at inception of project, during the project, and after the project – regarding the Project itself; (iii) the strategies defendants employed as part of the Project; and (iv) the steps that defendants took to inform government officials or members of law enforcement about their findings, which as noted below should be agreed-to as stipulated fact or facts (because the evidence regarding the response of government officials or law enforcement is and continues to be excluded under the prior motion in limine rulings under Rule 403). The Court has already prepared a limiting instruction regarding media accounts

> that were published following the release of the HCP videos.
>
> Section 633.5 defense. The only testimony that will be allowed regarding this defense must be based on information Daleiden or Merritt learned prior to the first recording any defendant made in California

Dkt. No. 835 at 2.

At the start of the trial, the jury was read the following Preliminary Instruction:

> PRELIMINARY INSTRUCTION NO. 18 – MATTERS NOT TO BE DECIDED BY THE JURY
>
> The claims and defenses in this case concern the strategies chosen and employed by the defendants. I need to emphasize what this case is not about. It is not about the truth of whether plaintiffs profited from the sale of fetal tissue or otherwise violated the law in securing tissue for those programs. It is not about whether any plaintiff actually engaged in illegal conduct. Those issues are a matter of dispute between the parties in the world outside this courtroom. In this courtroom your job is to consider the evidence related to the claims and defenses in this case in accordance with the instructions that I give you.

Final Preliminary Jury Instruction, Dkt. No. 850 at 19. I repeated this instruction frequently during the trial as a limiting instruction.

To provide evidence in support of defendants' intent and case narrative, the parties reached a Stipulation on Law Enforcement Contacts that was read to the jury on October 31, 2020. It identified each of defendant Daleiden's specific "contacts with members of law enforcement" and explained that he provided those "members of law enforcement with documents and recordings made by the Center for Medical Progress." Dkt. No. 928.

In light of defendant Newman's and the two CMP contractors' invocation of the Fifth Amendment privilege against self-incrimination and refusal to answer questions in discovery, plaintiffs requested a series of adverse inferences to be read to the jury. After reviewing the supporting evidence for each inference, and rejecting plaintiffs' requests for unsupported or ambiguous inferences, I issued a Final Order on Adverse Inferences on November 5, 2019. Dkt. No. 968. I read those adverse inferences to the jury and instructed at that time and in the Final Jury Instructions that "they may, but are not required" to, take the "specified inferences of fact" against Newman and the two contractors.

In an Order issued on November 11, 2019, I granted portions of plaintiffs' Rule 50 motion, finding that: (1) plaintiffs' employees and contractors are third-party beneficiaries of the NAF Exhibitor and Confidentiality Agreements; (2) defendants Merritt, Daleiden, BioMax, and CMP breached the NAF 2014 Confidentiality Agreement and defendants Daleiden, Lopez, BioMax, and CMP breached the NAF 2015 Confidentiality Agreement prohibiting "Videotaping or Other

Recording"; and (3) defendants Daleiden, BioMax, and CMP breached the NAF Exhibitor Agreements in 2014 and 2015 concerning the requirement to provide "truthful, accurate, complete, and not misleading" information. Dkt. No. 994 at 1.

The jury returned its verdict on November 15, 2020. It found defendants directly liable (or indirectly liable through conspiracy) for plaintiffs' claims of: (i) trespass (under the laws of Florida, Washington, D.C., Texas); (ii) Breach of PPFA's Exhibitor Agreements (EAs); (iii) Breach of NAF Agreements; (iv) Breach of PPGC Agreement; (v) Fraudulent Misrepresentations; (vi) False Promise Fraud; (vii) violation of the RICO Act, 18 U.S.C. §§ 1962(c) and 1962(d); (viii) violations of recording laws (Federal, California, Florida, Maryland); (ix) and punitive damages under Florida and Maryland law. Verdict, Dkt. No. 1016.[7]

On April 29, 2020, after a further round of briefing supported by citations to evidence admitted at trial, I issued a 48-page order containing findings of fact and conclusions of law on the UCL claim, concluding that "Defendants are each liable for unlawful and fraudulent business practices that occurred in California and out-of-state unlawful and fraudulent business practices that caused harm in California." Dkt. No. 1073 at 42. I rejected plaintiffs' request for overbroad and unsupported injunctive relief, granting instead narrow injunctive relief resting on the specific

[7] A detailed description of which plaintiffs prevailed against which defendants on which claims was laid out in the April 2020 Order on Equitable Relief. Dkt. No. 1073 at 2–3.

conduct each defendant engaged in (as found by the jury and supported by my findings under the UCL claim) in favor of only those plaintiffs who prevailed on their claims against those specific defendants. *Id*. at 47–48. I entered judgment encompassing the damages awarded by the jury and the injunctive relief. *See* Dkt. Nos. 1073, 1074.

LEGAL STANDARD

Judgment as a matter of law under Rule 50(b) is granted "only if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Winarto v. Toshiba Am. Elecs. Components, Inc*., 274 F.3d 1276, 1283 (9th Cir. 2001); Fed. R. Civ. P. 50(b). When evaluating such a motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 150 (2000). The Ninth Circuit has made clear that a court "cannot disturb the jury's verdict if it is supported by substantial evidence." *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999). Substantial evidence means "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion" from the same evidence. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (internal quotation marks omitted). "Thus, although the court should review the record as a whole, it must disregard evidence favorable to the moving party that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury." *Reeves*, 530 U.S. at 151. In other words, entry of judgment as a matter of law is warranted only "if the

evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro*, 833 F.3d at 1066 (internal quotation marks omitted).

Under Federal Rule of Civil Procedure 59(a)(1), a court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a). A trial court may grant a new trial, "even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). The decision to grant a new trial falls within the sound discretion of the trial court. *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010). However, a court should not grant a new trial unless it is "left with the definite and firm conviction that a mistake has been committed." *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987) (internal quotations omitted). On the other hand, a trial court may deny a motion for a new trial unless "there is an absolute absence of evidence to support the jury's verdict." *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (internal quotation marks omitted). In considering a Rule 59(a) motion, the court "is not required to view the trial evidence in the light most favorable to the verdict. Instead, the district court can weigh the evidence and assess the credibility of the witnesses." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014).

Under Federal Rule of Civil Procedure 59(e), a motion to alter or amend a judgment may be granted only: "(1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). In determining a Rule 59(e) motion, the "district court enjoys considerable discretion in granting or denying the motion" but "amending a judgment after its entry remains "an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per curiam).

DISCUSSION

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Compensatory Damages

As noted above, through pretrial orders I narrowly limited the damages plaintiffs were allowed to pursue to "security" damages for the personal security measures plaintiffs implemented for staff "targeted" by defendants and "infiltration" damages incurred to investigate and remediate defendants' intrusions into plaintiffs' conferences and clinics. The jury subsequently awarded compensatory damages to each of the plaintiffs that sought them based on the evidence admitted at trial. Defendants contend, however, that

there was insufficient evidence to allow the jury to do so.

1. Security damages

Defendants argue that plaintiffs at trial failed to "show that their security 'damages' were caused by anything other than publication of the videos, and publication damages are not recoverable." Mot. at 3. They cite testimony from witnesses who admitted that part of the reason some of the security measures were implemented was due to concerns about the particular staff members having been "spotlighted" by defendants' videos and how people other than defendants might react to the videos. Mot. at 3–5. However, in each instance there was evidence on which a reasonable juror could rely that staff who received the "security" services at issue or their affiliates were targeted by defendants' infiltrations and recordings. That is sufficient to remove this narrow category of damages from the otherwise excluded "publication" damages. That some of the security services were not put in place until after specific HCP videos were released subsequent to the initial videos (which in some instances was when a plaintiff learned that its staff had been recorded) does not undermine the evidence that the expenses were incurred in response to defendants' acts of targeting and recording these plaintiffs.[8] Similarly, that plaintiffs did not go out and

[8] Whether or not these targeted individuals or their organizations received threats from individuals who might have been motivated by the content of the HCP videos is likewise irrelevant. *But see* Reply at 1–2. There was, however, evidence at trial on which reasonable jurors were entitled to rely that given the history of

provide security damages for each staff member or affiliate that was conceivably targeted and/or recorded is irrelevant.[9]

There is sufficient evidence on which a reasonable jury could rely to find that plaintiffs' security damages were incurred as a direct result of defendants' conduct targeting and recording plaintiffs' staff. There is no ground to support defendants' motion for judgment as a matter of law given the evidence at trial.

2. Infiltration damages

Defendants also challenge the "infiltration" damages plaintiffs sought and were awarded by the jury, arguing as a matter of law that defendants cannot be liable for improvements to PPFA's conference and event security measures to "foil all possible" ways defendants might use to infiltrate plaintiffs' conferences and events in the future. I addressed and rejected this argument, and the cases defendants cite in support, in prior orders pre-trial. I will not address it again.

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violence against abortion providers the implementation of security measures for recorded staff was reasonable.

[9] Defendants contend that PPFA cannot be reimbursed for the $6,000 PPFA provided to PP Michigan to pay for Reputation.com, because that was a "voluntary" payment to its affiliate. Mot. at 12. Plaintiffs respond that these damages were not, in fact, awarded by the jury, and plaintiffs confirm they are not seeking them. Defendants do not address or dispute plaintiffs' assertions on reply.

Plaintiffs submitted ample evidence regarding what they did to investigate defendants' intrusions, why they hired Kroll Services and Thatcher Services, what investigations those entities did and what recommendations they made, and which of those recommendations PPFA implemented in light of defendants' actions and why. Similarly, there was evidence about PPFA's purchase of conference badge and ID scanners and the use of Lexis-Nexis to vet attendees. Defendants cross-examined plaintiffs' witnesses on each of these topics and argued that the expenditures were not necessary or were too remote in time or purpose from defendants' actions to be recoverable. They also attempted to establish, and argued to the jury, that plaintiffs knew or should have known that their existing security measures were insufficient and, therefore, that the amount of damages sought from defendants was unreasonable. The jury clearly disagreed. Based on the evidence at trial, there is no reason to revisit the issue as a matter of law. There was ample evidence on which reasonable jurors could rely to award the infiltration damages.

Finally, defendants argue that plaintiffs did not present any historical expenditures to provide a "baseline" of the conference and clinic security measures to allow the jury to assess what reasonable infiltration damages should be awarded. There was, however, evidence that plaintiffs hired new consultants to address a new and different threat, so evidence regarding past expenditures would have been of limited, if any, utility. In any event, the defendants were free to (and did) attempt to make that point and

argue to the jury that these expenses were unreasonable. The jury rejected that argument.

Defendants are not entitled to judgment as a matter of law or a reduction in the amount of compensatory damages sought by and awarded to plaintiffs by the jury. The damages are amply supported by the evidence at trial and are sufficiently directly tied to the actions of defendants.[10]

B. Punitive Damages

Defendants contend that plaintiffs failed to introduce sufficient evidence to meet the standards for imposing punitive damages under the laws of Florida and the other relevant jurisdictions.

Under Florida law, the jurors had to find by "clear and convincing evidence that the Defendant was guilty of intentional misconduct or gross negligence, which was a substantial cause of injury to the Plaintiffs." Final Jury Instructions at 97. Defendants do not take issue with the instruction. Instead, they argue (consistent with their theory of the case) that no evidence supports the imposition of punitive damages under Florida law because their purpose in attending PPFA's Florida conferences was "journalistic" and their intent was to investigate and expose potential illicit or illegal conduct in the sale and transfer of fetal tissue.

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[10] Defendants only general Rule 50(b) argument regarding trespass that is not tied to Rhomberg or Newman is that "plaintiffs failed to adduce sufficient evidence" for a reasonable jury to find that any defendants' trespass caused any actual damage. Mot. at 20. That argument fails for the reasons just discussed.

The jurors rejected that narrative in favor of the evidence supporting plaintiffs' theory that defendants were not journalists but activists who intentionally engaged in fraud and misrepresentations in order to harm and destroy plaintiffs.[11]

Defendants separately argue that punitive damages cannot be awarded against Merritt, who did nothing in Florida. But she did engage in substantial conduct in Maryland, which creates a sufficient basis to include her in the punitive damages award. Defendants point to no error in the instructions (the instructions, for example, did not indicate that Merritt had directly engaged in any conduct in Florida).

Defendants then argue that punitive damages were likewise without evidentiary support for the claims related to the federal recording statute and under Maryland's law, as the jurors were instructed that they had to find "clear and convincing evidence that the Defendant engaged in that conduct with malice, oppression, or fraud." Final Jury Instructions (Dkt. No. 1006) at 95-96.[12] Again, this argument relies on

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[11] These dueling narratives do not, contrary to defendants oft-repeated argument, turn on the truth of allegations levelled against plaintiffs in the HCP videos. They do, however, implicate defendants' intent at the inception and during the HCP, a topic that was extensively addressed by witnesses and exhibits from both sides during the trial.

[12] Defendants mention site visits in Colorado and Texas, but the jury was never instructed about punitive damages based on conduct in those jurisdictions. Therefore, conduct in those states is not at issue. In reply, defendants appear to take aim at the Verdict Form, criticizing it because it did not ask the jury to

defendants' rejected characterization of their conduct as journalists protected by the First Amendment. Their legal arguments have been repeatedly rejected; there was sufficient evidence on which jurors could reasonably rely to find malice, oppression, or fraud.

Next, defendants note that the jury was instructed that in weighing whether to impose punitive damages under federal and Maryland law, it should consider "[i]n view of that Defendant's financial condition, what amount is necessary to punish him and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a Defendant has substantial financial resources." *Id*. at 96. Similarly, under Florida law, the jurors were instructed that in determining whether to impose punitive damages, one of the factors to be considered is "the financial resources of Defendants," however, "you may not award an amount that would financially destroy Defendants." *Id*. at 97. Defendants argue that since no evidence regarding the financial condition of any defendant was introduced at trial, punitive damages could not have been awarded under federal or Maryland law.

The law contradicts that argument. Cases from Florida and Maryland explain that information regarding a defendant's financial conduction is not a precondition to an award or instead is a burden of

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identify under which state laws punitive damages were awarded. Reply at 8. But the jury instructions, which the jury is presumed to follow, did. Final Jury Instructions at 95-97; *see also Cheney v. Washington*, 614 F.3d 987, 997 (9th Cir. 2010).

evidence placed on defendants who want to ensure punitive damages are not "excessive". *See, e.g., Brooks v. Rios*, 707 So. 2d 374, 376 (Fla. 3d Dist. App. 1998) ("evidence of a defendant's net worth … is not a prerequisite for such an award."); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 275 (2004) ("plaintiff has no obligation to establish a defendant's ability to pay punitive damage"); *see also Brooks*, 707 So. 2d at 376 ("A defendant against whom punitive damages are sought, however, must present evidence as to his or her net worth at trial to preclude a jury from assessing an unduly harsh penalty, as well as to preserve his or her right to argue the excessiveness of the punitive award on appeal.").

Finally, defendants note that punitive damages are unconstitutional when the harms at issue were inflicted on non-parties. They argue the jury may have impermissibly considered the harm to non-parties when imposing punitive damages because they heard testimony from plaintiffs' witnesses about their personal mental and emotional state after viewing or being made aware of the HCP videos. However, the Supreme Court case on which defendants rely points out that jurors may take into account whether "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few" but that courts must provide defendants the ability to object and seek relief from the risk that a jury might punish it for its harm to others, through instructions or other rulings. *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007). Defendants here did not seek such relief. *See, e.g., Sony BMG Music Entm't. v. Tenenbaum*, 660 F.3d 487, 506 n. 20 (1st Cir. 2011) (*Philip Morris*

argument waived where defendant did not request a specific instruction).

The jury *was instructed* to focus on the harm caused to "plaintiff" when assessing punitive damages. Final Jury Instructions at 95-96. There was also a legitimate, different purpose for the testimony to which defendants object; to support the reasonableness of the damages plaintiffs incurred for the security and infiltration measures plaintiffs took in response to defendants' conduct. There is no indication that the jury was impermissibly punishing defendants for their harm to non-parties.

Defendants are not entitled to judgment as a matter of law or other relief based on the award of punitive damages.

C. RICO

Under RICO, defendants argue initially that plaintiffs' evidence fails to show that the predicate acts of production and transfer of fake IDs "directly caused" plaintiffs' economic losses. They assert that the damages sought under RICO – the security and infiltration damages identified above – were instead caused by a "long series of acts" separated from the transfer and production of the IDs by too many steps. Mot. at 16–19; Reply at 4–7.

The line of cases that defendants identify in their reply in support of their "one-step" causation argument have been discussed numerous times; I will not repeat those discussions here. Reply at 4–7. Suffice it to say, the evidence at trial was consistent with plaintiffs' characterization of the evidence at summary judgment:

the production and transfer of the fake IDs was the crucial act *by defendants* that allowed *defendants* entry into the conferences (presenting their IDs) and their introduction to plaintiffs' staff, who were then targeted *by defendants*. While there were stages of defendants' plan between the production and transfer of the IDs, from the presentment of those IDs at the conferences and clinics up to the defendants' achievement of their goal (the surreptitious video recordings), there was sufficient evidence that the fake IDs were the crucial component to achieve their goals, and that directly and proximately caused plaintiffs' damage to their business or property rights sufficient for RICO liability.[13]

Defendants also dispute the sufficiency of evidence on the pattern/open-ended continuity RICO element, arguing that all of their testimony related to the production and transfer of the fake IDs showed a "one-time" occurrence that is not likely to repeat.[14] However,

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[13] Plaintiffs' RICO damages are not undermined merely because the jury awarded similar or the same amount of damages under RICO and the trespass, breach of contract, and fraud claims. Defendants' actualized goal of infiltrating and surreptitiously recording plaintiffs – of which the production and transfer of fake IDs was a necessary and critical part – violated different statutes and caused similar and in some instances the same damages. That proximate cause is satisfied under RICO simply means the causal link for the damages under the other claims is easily satisfied.

[14] I will not address defendants' argument that they could not have violated 18 U.S.C. § 1028 because they did not steal anyone's actual identity. This argument should have been raised pre-trial – as their other RICO predicate act challenges repeatedly were at the motion to dismiss, summary judgment, or *in limine* stages – but defendants failed to do so.

there was sufficient evidence on which a reasonable jury could rely to establish open-ended continuity, including the longstanding opposition between plaintiffs and defendants, the history and context of each defendant's past conduct, the defendants' conduct since the conclusion of the HCP, and CMP's status as an ongoing entity. That each defendant's name is now well-known to plaintiffs only increases the likelihood that these individuals will produce or transfer or present fake IDs for themselves or others they are working in concert with. *See* Findings of Fact and Conclusions of Law (Dkt. No. 1073) at 27.[15]

Defendants are not entitled to judgment as a matter of law on the RICO claim.[16]

D. Fraudulent Misrepresentation

Defendants make several arguments that judgment as a matter of law should be entered in their favor on the fraud claims. First, defendants argue their conduct cannot be considered fraudulent under *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). I have rejected this argument several times and will not revisit it, except to say that the jury clearly concluded based on sufficient evidence that defendants'

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[15] Relatedly, that the defendants have not – during the pendency of this litigation – attempted to produce, transfer, or present fake IDs does not "prove" there is no open-ended continuity, but only that defendants decided to avoid doing so while litigating this and the criminal matters pending in state court.

[16] Specific challenges made by Lopez, Merritt, and Rhomberg to the evidence regarding their connection to the RICO claims will be addressed below.

fraudulent conduct caused ample "legally cognizable harm."

The second argument is that plaintiffs adduced insufficient evidence of reliance (actual reliance under the laws of Florida and reasonable reliance under the laws of California, Colorado, Texas, and D.C.). There was ample testimony at trial that defendants would not have been allowed access to the conference, clinics, or lunch meetings absent their misrepresentations (the false names, their fake positions at the non-operational front company BioMax, and their false intent for securing that access). Defendants argue that plaintiffs' failure to exercise reasonable diligence (for example, their failure to run background checks on the names of the individuals and company) precludes a finding of reasonable reliance. They introduced evidence of what they characterized as plaintiffs' deficient security measures and failures and repeatedly argued this point. The jury rejected that argument based on sufficient evidence.

E. Recording Claims

1. Entity Standing

Defendants assert at various points that none of the plaintiff entities had "corporate" standing to sue over defendants' recordings of their staff members. In particular, they challenge the corporate standing of the plaintiff entities for the six recordings taken at the PPFA Conference in Washington, D.C. They argue that the respective entity-plaintiffs lacked standing because they failed to introduce evidence (namely the audio of the clips) to show that those being recorded were

disclosing corporate information or were targeted by defendants based on their relationships with the entity-plaintiffs. They also challenge the evidence regarding the targeting of Nucatola and Drummond-Hay at the 2014 NAF Conference, and whether those recorded conversations disclosed internal business matters. Similarly, defendants contend that there was insufficient evidence of targeting or disclosure of internal information by the four individuals captured in the eight recordings in Florida.

Defendants' argument fails. There was ample evidence that they were specifically targeting staff of PPFA and Planned Parenthood affiliates *because* those staff members could divulge information about the internal matters of PPFA and the affiliates. That directed targeting and the fact that they recorded staff members from each of the relevant plaintiffs is sufficient.[17] However, there was also significant evidence – from clips played with audio at trial, testimony from those recorded, and testimony from defendants themselves about the questions they asked and the information they sought to uncover – establishing that defendants asked about and staff disclosed internal matters of the plaintiff entities. Indeed, that was the goal of the recordings in support

[17] That defendants recorded everyone they encountered during the conferences and visits due a technical need to keep the devices always on does not undermine the substantial evidence that the plaintiffs were specifically targeted by defendants given the stated purpose and goals of the Project. Similarly, that in some of the videos the individuals recorded approached the BioMax exhibit does not negate the fact that sufficient evidence showed defendants were at those conferences to target and record plaintiffs' staff.

of the Project. The totality of the evidence was sufficient to establish corporate standing.

2. Federal

Defendants challenge whether there was sufficient evidence that the intent or the purpose of the recordings was to violate civil RICO – as required under the federal statute – when, according to defendants, their purpose was a journalistic effort to expose illegal conduct in the sale and transfer of fetal tissue. As discussed, there was sufficient evidence regarding defendants' intent to focus on PPFA and its affiliates for their surreptitious recordings in order to put them out of business through the RICO enterprise alleged.

Defendants also challenge the sufficiency of evidence showing that those recorded had a subjective expectation of privacy that was objectively reasonable. They identify six recordings taken at the 2015 PPFA National Conference where there was no evidence regarding the content of the recorded discussions or testimony from the recorded individuals. They contend that there could not be any expectation of privacy where two other conference attendees (Nguyen and Castle) were recorded in "crowded areas" of the conference where other people could have theoretically overheard part of the conversations. They claim that there was no evidence of subjective expectations of privacy for the two individuals recorded in the "reception area" of the PPRM clinic (Johnstone and Ginde) and assert that there was no evidence of expectations of privacy for the two PPGC receptionists or for Farrell at the PPGC clinic.

With respect to the 2015 PPFA National Conference, there was significant evidence introduced regarding the security measures that PPFA undertook relevant to creating a subjective and objectively reasonable expectation of privacy including, most significantly, restricting access to conference spaces to attendees bearing conference badges and employing door monitors where the challenged recordings were made. Witnesses testified that these measures gave them an expectation of security and privacy in their interactions with other conference attendees, given evidence that the purpose of these conferences was to provide a secure and safe space to discuss their occupations. They plausibly testified that they would not expect to be surreptitiously recorded or overheard by those adverse to them when having conversations within those areas.

The same evidence, both general (security measures) and specific (attendees at those conferences testifying as to their expectations of privacy given the very purpose of those conferences), was adduced for each conference. The jury could reasonably rely on the totality of that evidence to establish both the subjective expectation of privacy and its objective reasonableness. There was also testimony from conference attendees about subjective expectations of privacy at those conferences that jurors could rely on to determine subjective expectations, even though each recorded individual did not testify.

Significant evidence regarding the security and access measures at the clinics was also introduced, including the requirement for prior appointments to

access the facilities, the use of guards and screening devices further restricting access, the use of key cards and locked doors to access meeting rooms and clinic spaces, and – at PPGC – the prior signing of the NDA required by Farrell. All of this evidence, in addition to the testimony of individuals recorded during the clinic visits, was sufficient, even if every person recorded did not testify regarding her specific expectation of privacy.

3. California

Defendants argue that plaintiffs submitted insufficient evidence of Nucatola's expectation of privacy at the 2014 NAF meeting under California law because she admitted that there were unknown people standing behind her during her conversation at the BioMax booth in the exhibitor area and that there was insufficient evidence that Drummond-Hay had a reasonable expectation of privacy when she spoke to defendants in a crowded room. However, these conversations took place in the restricted areas of the conference. As noted above, there was significant evidence supporting a reasonable expectation of privacy in these circumstances despite the chance that some other conference attendee or hotel staff (both of whom had signed different confidentiality agreements) could possibly have overheard some part of a conversation.[18]

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[18] Defendants point to Judge Hite's ruling in the state court criminal proceedings dismissing two criminal counts under California Penal Code section 632 because the conversations at issue – one taken in an elevator and another recorded in the main hotel lobby at the NAF conference in "areas open to the public and not part of the conference"– lacked "probable cause" of confidentiality, namely a reasonable expectation that the

Defendants also challenge the jury's finding of a reasonable expectation of privacy during the lunch meeting at a restaurant where Gatter and Felczer were recorded and the lunch meeting at a restaurant where Nucatola was recorded, given the fact that both recordings were made in public restaurants and the speakers did not testify that they lowered their voices or changed topics when waitstaff or others might overhear. Defendants note that the Hon. Christopher C. Hite in the criminal proceedings in California state court dismissed the Section 632 claim regarding one of the lunches based on his findings that the individual recorded made no effort to confine her conversation to the defendants and testified that she did not believe the conversation was controversial or contained any questionable conduct necessitating a confidential communication. Dkt. No. 1080-2.

The jury here reached a different conclusion than Judge Hite on that one lunch. It heard some similar but also some different testimony than was presented in the criminal proceedings, including that the individual recorded was seated with her back to the wall, allowing her to see nearby tables, and that she never noticed anyone interested or listening-in to their conversation.[19] This claim was submitted to the jury on

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conversation was not being overheard or recorded. Dkt. No. 1080-2. Defendants do not argue on this motion that any of the NAF recordings that the jury found violated California law were recorded in similar circumstances.

[19] On the record before him, Judge Hite concluded that there was no evidence that the recorded individual had a "relationship with the defendants prior to lunch" or had "vetted" defendants prior to

instructions not challenged post-trial. Based on a different record than Judge Hite had, the jury found liability.

4. Florida

Similarly, defendants challenge the expectation of privacy showing for two recordings of Nucatola made during receptions at the conferences that were restricted to conference attendees and for her discussion with defendants at the BioMax booth in the restricted-access exhibitor hall. But Nucatola's specific testimony about her expectation of privacy at these conferences as well as the general testimony regarding the access-restrictions and security measures was sufficient. The same is true for defendants' challenges to the recordings of Gatter, Gupta, VanDerhei, Smith, Moran, Nguyen, Russo, Ginde, and Sigfried. Many of these witnesses testified about their expectations of privacy at the Florida conferences, although some did not. The jury was entitled to rely on the access-restriction and other security measures implemented by PPFA, as well as the specific testimony regarding subjective expectations of privacy, to conclude that

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the lunch. Dkt. No. 1080-2. In this trial, on the other hand, there was evidence that Daleiden, Merritt, and BioMax were vetted through their infiltration and appearance at the April 2014 NAF Conference, which was where the recorded individual first met Daleiden and Merritt and learned about BioMax. This was before the lunch meeting with defendants that occurred shortly thereafter.

each recording at issue violated the expectations of the privacy of those recorded.[20]

5. Maryland

Finally, defendants' sufficiency challenges to the recordings that the jury concluded violated Maryland law also fail. The recordings at issue, again, were taken in restricted-access conference areas. That the rooms in which the conversations occurred were crowded or noisy does not defeat the significant evidence establishing a reasonable expectation of privacy based on the security-access measures and testimony from some of those who were recorded at the conference.

F. Breach of Contract

1. CMP Alter Ego

Defendants contend that plaintiffs failed to adduce sufficient evidence to hold CMP liable for violation of any of the contracts at issue under the doctrine of alter ego liability. They argue that California law does not recognize "reverse veil piercing" and that there was an insufficient showing of the requirements of traditional veil piercing, namely a sufficient unity of interest and ownership such that separate personalities of the

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[20] One specific and potentially distinguishing factor identified by defendants regarding the recording of Gupta during a dinner at the October 2015 Conference was the presence of guests, but that does not alter the reasonableness analysis. Testimony established that the dinner guests had to be registered along with the attendees and wore badges. Similarly, that there could have been guests "within sight" of an outdoor reception in a restricted-access area does not undermine Siegfried's expectation of privacy in a conversation with attendees in the restricted-access area.

individual and corporation no longer exist and treating the acts of the corporation alone will sanction fraud, promote injustice, or cause an inequitable result.

Defendants assert that the first prong cannot be met because the CMP Board of Directors did not even know about BioMax. Mot. at 35. However, there was evidence that CMP's Board members knew a front business (BioMax) had been created as a necessary step in the HCP and the jury was entitled to rely on that evidence. On the second prong, defendants argue that there was no evidence that Daleiden or BioMax would be unable to pay any award in this case and/or that injustice would result. But BioMax was, as the jury implicitly found, a fake "front" business, not a real business with any operations. Undisputed evidence at trial demonstrated that all of the contractors were paid by CMP. Allowing CMP to escape liability when it is the entity that funded the HCP, as shown by admissible evidence at trial, would result in injustice.

Plaintiffs also note that CMP could be held liable on an agency theory. I agree. There was sufficient evidence at trial for the jury to conclude that CMP was the undisclosed principal funding the HCP: it paid the expenses of the front entity (BioMax) including the salaries of the contractors who misrepresented themselves as BioMax employees when they were in reality contractors paid by CMP.

2. PPFA Exhibitor Agreements

Defendants argue, resting on their challenge to the compensatory damages addressed above, that the breach claim fails because no damages were suffered as

a result. More specifically, they contend that Nucatola's security damages cannot be supported by this breach claim when the only videos of Nucatola released by HCP stemmed from her lunch with defendants and that PPFA was not entitled to "essential monitoring" damages. I have addressed and rejected those arguments earlier in this Order.

3. NAF Exhibitor and Confidentiality Agreements

In addition to their general argument that no compensatory damages stemmed from these breaches, addressed and rejected above, defendants contend that PPFA does not have standing to assert breach of the NAF agreements as "fourth-party" corporate beneficiaries, irrespective of whether its staff (who were taped) were appropriate third-party beneficiaries. Mot at 36–37. Their argument rests mostly on rationales already rejected (Daleiden's subjective belief about who was protected by the EAs, the "failure" of NAF to provide a list of attendees prior to defendants' agreeing to the EAs, etc.). There was significant evidence that PPFA's staff were targeted by defendants seeking to uncover information about PPFA's operations in violation of and using means expressly prohibited by the EAs. The evidence also established that PPFA is itself a member of NAF, whose interests are expressly addressed and protected by the NAF agreements. That is sufficient.

4. PPCG NDA

Defendants attack the breach of the PPCG NDA claim by arguing that plaintiffs failed to show that

defendants secured "confidential information" during their recording at PPGC's clinic. In support, defendants point exclusively to Daleiden's subjective testimony that he did not believe any of the subjects discussed disclosed confidential information. But the standard is not subjective, it is objective. There was sufficient evidence from Farrell and Nguyen on which reasonable jurors could rely to conclude that the recipients should have reasonably understood the information disclosed to be confidential.

As to actual damages, defendants argue that none was shown to have resulted from the PPGC breach because one witness testified in her lay opinion that the videos – not the intrusion – caused the harm to PPGC and publication damages have been barred. But substantial evidence supports the damages awarded to PPGC as incurred to protect specific staff members who were specifically targeted by defendants.

G. Fifth Amendment Privileges

Defendants argue that the potential adverse inferences read to the jury – resulting from Newman and the two CMP contractors' refusal to answer questions based on the Fifth Amendment – "violated Newman's rights and prejudiced all Defendants." Mot. at 39. They reassert their prior arguments that plaintiffs failed to identify the inference, show the inference was tied to an actual question asked of each, provide independent admissible evidence in support, show a "substantial need" for the inference, and that there was no other source for the information covered by the inference. *Id*. In addition to the alleged prejudice to Newman from the improper inferences, the other

defendants assert that they too were prejudiced by the three sets of inferences because the jury likely drew adverse inferences against them from Newman's and the two contractors' refusal to answer questions. *Id*. at 40.

I found that a number of narrowly drafted, specific inferences were appropriate after reviewing multiple rounds of briefing addressing caselaw and the identification of underlying and supporting facts. I rejected plaintiffs' request for overbroad or unsupported inferences and considered all and accepted some of defendants' objections to each proposed inference. Dkt. Nos. 806, 823, 838, 951, 953, 956, 964, 968. At the end of the process, I found:

> The inferences, identified below, are supported by the questions asked by plaintiffs in the depositions that Newman, Baxter, and Davin refused to answer under the Fifth Amendment. The inferences go to core, disputed issues regarding the defendants' intent, knowledge, and conduct in this case relevant to the claims arising under federal and the laws of Texas, Colorado, Florida, Maryland, and the District of Columbia, but not relevant to the claims arising solely under California law. Other evidence in this case, including admitted documentary evidence, support the existence of the facts that plaintiffs seek to establish through the inferences. Because of the nature of inferences, generally going to the defendants' intent and knowledge, the inferences cannot be otherwise adequately established through less burdensome

> means. There is no unfair prejudice to Newman, Baxter, Davin, or any of the testifying defendants from allowing the inferences identified below.

Dkt. No. 968 at 1. I read those inferences to the jury on November 6, 2019, Dkt. No. 1008, and instructed the jury that they were "permitted but not required to draw the inference that the withheld information would have been unfavorable to" Newman, Baxter and Davin and that if "a witness who asserts the Fifth Amendment is associated closely enough with a defendant, you may but are not required to draw an adverse inference against the defendant." Trial Tr. 3458:22-24; 3463:6-19. I instructed that for "claims based on California law, you may not consider that, or speculate about why" Newman or the contractors "invoked the Fifth Amendment and refused to answer." *Id*., 3458:10-13; 3464:4-6.

In the Final Jury Instructions, I instructed the jurors that they were permitted to but not required to draw the adverse inferences. *See* No. 8 at 30 ("in civil cases, you are permitted, but not required, to draw the inference that the withheld information would have been unfavorable to the Defendant"); No. 9. at 31 ("If a witness who asserts the Fifth Amendment is associated closely enough with a Defendant, you may, but are not required to, draw an adverse inference against the Defendant."). I also instructed that no inferences should be drawn with respect to claims arising under California law. *See* No. 8 at 30 ("For claims based on California law, you may not consider that, or speculate about why, Newman invoked the Fifth Amendment and

refused to answer."); No. 9 at 31 ("For claims based on California law, you may not consider that, or speculate about why, Baxter or Davin invoked the Fifth Amendment and refused to answer.").

These instructions limited the scope of the allowable inferences and were provided after fully considering and rejecting defendants' "other evidence is sufficient" arguments. In Reply, defendants claim that Newman's stipulation to some facts eliminated the need for any additional inferences from him. Reply at 19. But I rejected that argument when it was first made. A defendant cannot avoid inferences by attempting to admit favorable, more limited facts, and to ignore unfavorable ones in an attempt to use the Fifth Amendment as both a shield and a sword.

Defendants' request for post-trial relief based on the adverse inferences is DENIED.

H. Civil Conspiracy

Defendants argue that there was insufficient evidence either of "an agreement which is a substantive violation of RICO (such as conducting the affairs of an enterprise through a pattern of racketeering)" or of "defendant's participation or agreement to participate in two predicate offenses." *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993) (internal quotations to *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984) omitted). As discussed below, there was sufficient evidence that each defendant knew that to effectuate the goal of the HCP, defendants needed to gain access to plaintiffs' conferences, facilities, and staff, and that false identities and fake IDs were, therefore, required.

Given the defendants' backgrounds, including their roles in prior undercover operations against abortion providers and the evidence regarding each defendants' knowledge of the use of those false identities during the HCP, the evidence was sufficient.

Second, defendants argue generally that they cannot be guilty of conspiring to conduct what they characterize was a lawful undercover investigation. That characterization was rejected by the jury.

I will now turn to the defendant-specific challenges brought by Lopez, Merritt, Rhomberg, and Newman.

I. Lopez and Merritt

1. RICO

Defendants Lopez and Merritt argue, first, that they cannot be liable under RICO because there was insufficient evidence that they were involved in the "operation or management" of the RICO enterprise. However, there was sufficient evidence that both knew from the HCP's inception that their goal was to use misrepresentations to gain access to conference and clinics and plaintiffs' staff more generally in order to surreptitiously record plaintiffs' staff. There was sufficient evidence of these defendants' knowledge for the jury to find that they joined the Project with the goal to harm and end the viability of plaintiffs' operations. These two defendants were, as evidenced throughout the trial, key operatives whose participation was crucial to the Project and defendants' more general goal. It does not matter that neither Lopez nor Merritt was the "ringleader" and that they followed Daleiden's directions where to go and whom

they should target. They did not need to be in charge; they only needed to have significant roles in operating the RICO enterprise, which they did. That is sufficient.

Concerning their knowledge and intent that at least one member of the enterprise would commit two or more predicate acts, the evidence supports that Lopez knew of and that Merritt both knew of and used the fake IDs. Merritt received and used one of the fake IDs and was with Daleiden when he repeatedly used his fake ID. Lopez was with Daleiden at four conferences when Daleiden repeatedly used his fake ID and Lopez had to publicly refer to Daleiden by the name on that fake ID during those conferences. From this evidence, the jury could reasonably conclude that both Lopez and Merritt knew and intended that the fake ID predicate acts would be committed.

2. Conspiracy

The final argument concerning Lopez and Merritt is that their conduct is protected by the "agent immunity rule." I addressed and rejected this legal argument on undisputed facts on summary judgment. I will not discuss it further.

J. Rhomberg

1. Conspiracy/RICO

Rhomberg argues that the evidence against him is insufficient for the RICO conspiracy claim. Defendants admit that he knew about plans to infiltrate conferences and meet with abortion providers and do not dispute the evidence that Daleiden called Rhomberg during the PPGC visit, where Daleiden

identified himself as Sarkis to Rhomberg. Instead, defendants contend that the evidence is insufficient to show Rhomberg's knowledge of the intent of his co-conspirators to commit the predicate fake ID acts. They point to Daleiden's testimony that he created his fake ID and procured and transferred the other two fake IDs without the knowledge or participation of any of the other defendants.

To repeat, the jury was entitled to disbelieve Daleiden's testimony. It could instead focus on Rhomberg's background and prior involvement with the anti-abortion movement, his position as a board member of CMP, his receipt of the HCP plans discussing infiltration and surreptitious recordings by actors using false names, the call from Daleiden at PPGC, and his responses to updates on the progress of the Project. It was entitled to consider these factors as evidence to conclude that Rhomberg knew that his co-conspirators would commit the fake ID predicate acts.

2. Conspiracy/Fraudulent Misrepresentations

Regarding the conspiracy under the fraudulent misrepresentation claim, Rhomberg argues that plaintiffs failed to show that he knew about and agreed with the plan that other defendants would "intentionally misrepresent [themselves] to plaintiffs in a manner that would be tortious." Defendants note that I instructed the jury that "Plaintiffs contend that Defendants made three general categories of false statements of fact: (1) Defendants' use of fake names; (2) Defendants' provision of fake identifications; and (3) statements suggesting BioMax was a legitimate

tissue procurement organization." Final Jury Instructions at 47.

Given the evidence of Rhomberg's knowledge and agreement to the scope and intent of the Project, as well as the establishment of the "front" company and use of "moles," there was sufficient evidence for the jury to rely on to find Rhomberg's knowledge and agreement to those frauds against PPFA, its affiliates, and its staff generally. While Rhomberg may not have known to which specific staff members the misrepresentations would be made (or the specific logistical details), he knew the target generally, the goal, and that the misrepresentations would be made. That is sufficient. There was likewise sufficient evidence of promissory fraud. Rhomberg may not have directed the Project, but he was aware of its goals and methods, including the use of false statements to "infiltrate," as outlined in Project proposals and in updates provided to him as a member of the CMP Board.

3. Conspiracy/Recordings

Rhomberg asserts that plaintiffs failed to provide sufficient evidence that he knew and agreed that his co-conspirators intended to infiltrate plaintiffs' conferences and clinics and make surreptitious recordings in violation of federal, California, Florida, and Maryland law. Rhomberg relies on Daleiden's testimony attempting to "walk back" other evidence regarding his co-conspirators' knowledge of, agreement with, and contributions to the methods and goals of the Project, including as addressed above the objectives of the RICO enterprise. But the jury was entitled to

disregard Daleiden's testimony. The other evidence that reasonable jurors could rely on established Rhomberg's knowledge that "infiltration" was going to occur and that "undercover" recordings were going to be and were made of plaintiffs' staff members at conferences and at clinics around the country in order to produce "gotcha videos." The jury was entitled to reject Rhomberg's testimony that he was "impressed" by Daleiden's "checking" with lawyers and theologians prior to undertaking the recordings.

More fundamentally, Rhomberg knew and encouraged the specific conduct – surreptitious recordings at conferences, clinics, and lunches – for which the jury found him liable as a conspirator. He may not have known, in advance, the specific circumstances for each recording made (which under the relevant jurisdictions impact the reasonableness of an expectation of privacy), but there was sufficient evidence to find him liable as a conspirator for the recordings which the jury determined violated the underlying recording laws.

4. Conspiracy/Trespass

For similar reasons, the evidence regarding Rhomberg's knowledge of the goals and methods of the Project, the updates provided to him as a board member of CMP including updates on "site visits," and his receipt of the call from Daleiden and subsequent conversation during the PPGC visit, is sufficient to hold Rhomberg liable for conspiracy to trespass.

K. Newman

1. Evidence

Newman argues first that there was no evidence (other than the inferences) showing that he had any real knowledge about the goals, methods, or conduct of the Project. He relies almost exclusively on the trial testimony of Daleiden, which attempted to walk back *other* evidence regarding Newman (and Rhomberg), including their touted purpose on CMP's Board in light of their backgrounds (which for Newman included undercover and surreptitious recording operations against abortion providers), their receipt of and input on the Project proposals and road maps regarding the design and methods used in the Project, the updates on the Project provided to them during board meetings, and Newman's claims of credit for the Project when the CMP videos were released. The jury was entitled to reject Daleiden's testimony (as well as the testimony from the HCP public relations consultant, Byran) and rely on the other, sufficient evidence, and draw reasonable inferences therefrom.

2. Conspiracy/RICO

There was sufficient evidence on which the jury could rely to find that Newman had the knowledge and intent that at least one member of the enterprise would commit two predicate acts of producing and transferring fake IDs. As with Rhomberg, the jury was entitled to disregard Daleiden's testimony and instead focus on the evidence of Newman's background and prior involvement with the anti-abortion movement – including his extensive experience running undercover

operations and conducting surreptitious recordings of abortion providers – as well as Newman's touted position and reason for his selection as a board member of CMP, his receipt of the Project roadmap, HCP plans, and updates that repeatedly discussed infiltration and surreptitious recording by "moles" and actors, and his claim of credit for and direction of the Project itself.

3. Conspiracy/Fraudulent Misrepresentations

Newman again relies on Daleiden's testimony concerning the conspiracy/fraudulent misrepresentation and false promises claims. The jury was entitled to reject Daleiden's testimony in favor of other evidence supporting the conclusion that Newman knew – in light of his past experiences, the reason for being sought out by Daleiden to serve on CMP's Board, and his claim of credit for the Project – that misrepresentations to plaintiffs and their staff members were an expected and necessary component of the Project and that they in fact occurred throughout the Project as the "actors" achieved their repeated intrusions based on their misrepresentations and false promises, and that the front company BioMax became a "trusted" entity. That is sufficient.[21]

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[21] Newman also argues in passing that because he could not be liable for conspiracy to breach the contracts at issue, he could not be liable for false promises fraud even if he knew and intended his co-conspirators to lie in their agreements with plaintiffs. However, his liability for false promise fraud is separate from the breach of contract claims; it implicated different duties and conduct. The conspiracy claim based on this fraud stands.

4. Conspiracy/Trespass

Newman argues, first, that he cannot be held liable on a conspiracy theory for the trespass or recording violations because he was excluded from those claims in the Amended Complaint. This argument was raised and rejected on summary judgment, where Newman identified no actual prejudice from any alleged confusion over which claims were asserted against him as a conspirator, and I will not revisit it here. On the question of evidence in support, there was sufficient evidence on which reasonable jurors could rely that he knew and intended that his co-conspirators would trespass at the conferences and clinics in light of the methods and goals of the Project identified in communications at the Project's inception and as the Project was carried out.

5. Conspiracy/Recording

In addition to the rejected failure to plead argument, Newman raises the same arguments as Rhomberg that he cannot be held liable as a conspirator to violate the various recordings laws at issue unless there is direct evidence that he knew his co-conspirators intended to record in violation of specific state's laws. I reject them for the same reasons. There was sufficient evidence regarding Newman's knowledge of and encouragement of his co-conspirator's aim to infiltrate and surreptitiously record at conferences, clinics, and lunches to sustain the jury's determination regarding his liability for conspiracy to violate the recording statutes.

6. Punitive Damages

Finally, Newman contends that the punitive damages awarded against him cannot stand because of Daleiden's testimony attempting to undercut the other evidence of Newman's significant role and involvement in the Project. He also argues that because the evidence established only that he was motivated to join CMP and advise on the Project in order to uncover illegal or unethical conduct by plaintiffs, any allegation that his conduct was malicious or grossly negligent is defeated. However, there was sufficient evidence for the jury to rely on to find that Newman's conduct with respect to CMP and the Project merited his inclusion in the punitive damages award.

Defendants' motion for judgment as a matter of law under Rule 50(b) is DENIED.

II. MOTION FOR A NEW TRIAL

Defendants move for a new trial arguing, first, that the jury's verdict and the Judgment are contrary to the clear weight of evidence for the reasons raised in their Rule 50(b) motion. I reject those arguments for the reasons described above. The verdict is not contrary to the clear weight of the evidence, is not based upon false evidence, and a new trial is not necessary to prevent a miscarriage of justice.

Defendants also move for a new trial based on mostly unidentified but allegedly erroneous "evidentiary rulings," including my rulings excluding from trial unidentified footage that defendants contend would have shown "illegal conduct" by plaintiffs that defendants contend should have been admitted to

corroborate defendants' statements regarding the purpose of the HCP. Prior to each day of trial, and often at breaks during trial days, I reviewed tens to hundreds of pages of defendants' proposed evidentiary submissions (deposition designations and counter-designations) as well as the videos defendants wished to play in court. I issued specific rulings each day on those matters. Defendants have chosen not to identify any of those specific evidentiary rulings in their post-trial challenge.[22] Defendants are not entitled to a new trial based on their generalized objections to my evidentiary rulings.

Finally, defendants move for a new trial based on allegedly excessive damages. But the punitive damages awarded based on the jury instructions (identifying the factors the jury had to consider in order to impose punitive damages under federal, Florida, and Maryland laws only) were supported, were not excessive, and were not imposed to punish defendants for harm to non-parties.

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[22] Defendants point only to Docket No. 878 (where Rhomberg objected to the application of the "Party-Witness Testimonial Non-Consultation Rule") and Docket No. 879, where Lopez responded to plaintiffs' objections to evidence Lopez intended to use during his testimony. Lopez argues that the proposed video evidence was relevant to both Lopez's motive to participate in the Project and to show recordings in crowded conference areas that undermined the recorded-individual's expectation of privacy. Some of the evidence was allowed – as was significant other evidence supporting defendants' beliefs and intent – and some was not based on Rule 403 grounds. Defendants do not identify which rulings were erroneous.

Defendants' motion for a new trial under Rule 59(a) is DENIED.

III. MOTION TO ALTER OR AMEND JUDGMENT

Finally, plaintiffs raise five arguments in favor of altering or amending the Judgment.[23]

A. PPRM nominal damages for trespass

Defendants argue first that PPRM is not entitled to nominal damages of $1 because the verdict form did not ask the jurors to award a specific amount of nominal damages. However, I determined that nominal damages were mandatory for the trespass at issue as a matter of law. Therefore, the issue was not submitted to the jury. The Judgment appropriately includes $1 in nominal damages to PPRM.

B. Election of remedies

Defendants argue that plaintiffs cannot recover both punitive damages and statutory damages for the same recording claims. However, as each relevant statute allows both punitive and statutory damages,

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[23] Instead of arguing and fully supporting each specific objection to the Judgment within the 70 pages allowed for their post-trial brief, defendants instead attempt to incorporate prior arguments and refer to Dkt. No. 1033. I have reviewed, again, Dkt. No. 1033. However, I only address arguments defendants have supported (with statutory or case citations) and do not address unsupported arguments or arguments made only in passing (*i.e.*, defendants' assertion that the Judgment contains some unidentified "duplication" of damages and the passing objection to plaintiffs' "conditional" election of remedies).

that duplication is permissible. *See* Fla. Stat. Ann. §§ 934.10(1)(a)-(d) (may recover equitable relief; actual damages or $1,000 in statutory damages (whichever is higher); punitive damages; and reasonable attorney's fees and costs); Md. Code Ann., Cts. & Jud. Proc. §§ 10-410 (a)(1)-(3) (may recover actual damages or $1,000 in statutory damages (whichever is higher); punitive damages; and reasonable attorney's fees and costs); 18 U.S.C. §§ 2520(b)(1)-(3) (may recover equitable relief; "damages under subsection (c) and punitive damages in appropriate cases"; and reasonable attorney's fees and costs).

Defendants contend that plaintiffs cannot be awarded damages for the same recordings under both the federal and state recording laws, but that is permissible.[24] They argue that plaintiffs cannot be awarded statutory damages "on top of the actual damages determined by the jury" that plaintiffs have elected to receive under RICO because the damages stem from the same conduct. However, the compensatory damages elected are RICO damages (and not under the contract or tort claims, unless the RICO damages are reversed on appeal). The statutory damages flow from the recording claims.

Finally, defendants argue that the California statutory damages for the recording claim are limited to $5,000 per lawsuit and not per recording. *See*

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[24] *Peake v. Chevron Shipping Co., Inc.*, C 00-4228 MHP, 2004 WL 1781008, at *3 (N.D. Cal. Aug. 10, 2004), the only case relied on by defendants, addresses duplicate recovery under tort and contract claims and not recovery under the laws of two separate jurisdictions (federal and state).

Franklin v. Ocwen Loan Servicing, LLC, No. 18-CV-03333-SI, 2018 WL 5923450, at *7 (N.D. Cal. Nov. 13, 2018), *order clarified*, No. 18-CV-03333-SI, 2019 WL 452027 (N.D. Cal. Feb. 5, 2019) (limiting Cal. Penal Code § 632 damages to $5,000 per class member irrespective of the number of violations); *but see Ronquillo-Griffin v. TELUS Communication, Inc.*, No. 17-cv-129-JM (BLM), 2017 WL 2779329 (S.D. Cal. June 27, 2017) (allowing $5,000 statutory damages per violation). Here, I conclude – especially given that multiple recordings were taken by multiple defendants at different locations and at different times – that damages per violation are appropriate under Section 632.

C. Election between Statutory, Trebled, and Punitive Damages

Defendants argue that plaintiffs cannot seek punitive damages that are duplicative of the RICO trebled damages because the RICO trebled damages are themselves sufficiently punitive. But Ninth Circuit law is to the contrary. *See, e.g., Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997) ("a plaintiff may receive both treble damages under RICO and state law punitive damages for the same course of conduct."). Defendants' supposition that the jury "could have" assessed punitive damages on conduct that occurred in California – despite clear jury instructions directing the jury to consider punitive damages only for the federal, Florida and Maryland claims – is unfounded.

D. RICO

Defendants re-raise their argument, rejected above, that the damages were not sufficiently directly related to the RICO predicate acts. There is no need to consider this argument again.

E. Injunction

Finally, defendants challenge the narrow injunction I entered following further briefing based on the verdict and the UCL Findings of Fact and Conclusions of Law. As noted above, plaintiffs sought an overbroad and vague injunction that was not adequately cabined or tied to the specific illegal conduct the jury found that the defendants committed against specific plaintiffs. Nonetheless, defendants argue that the much narrower and specific injunction I entered is contrary to the evidence, based on the arguments I reject above. There are no grounds raised in this motion to justify altering the narrow and specific injunctive relief I ordered in the Judgment.

Defendants' motion to alter or amend the Judgment under Rule 59(e) is DENIED.

CONCLUSION

Defendants' motion for judgment as a matter of law, for a new trial, and for amendment or alteration of the Judgment is DENIED. Motions for attorney fees and costs are due fourteen days from the date of this Order. Defendants' obligation to post a bond to secure the Judgment on appeal is due fourteen days from the date of this Order.

IT IS SO ORDERED.

Dated: August 19, 2020

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

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-00236-WHO

[Filed August 23, 2019]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,
Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,
Defendants.

ORDER ON PENDING MOTIONS

Re: Dkt. Nos. 595, 598, 600, 601, 602, 603, 605, 606, 609, 611, 641, 643

INTRODUCTION

At the core of this case are defendants' undisputed actions in infiltrating conferences of plaintiff Planned Parenthood Federation of America (PPFA) and other organizations as well as two PPFA-affiliated facilities (who are also plaintiffs) and the intentional targeting of particular staff members employed by PPFA or the PPFA-affiliate plaintiffs in order to surreptitiously record conversations with the conference attendees and

plaintiffs' targeted staff. Defendants contend that all of their efforts were part of the Human Capital Project (HCP or Project) "to investigate, document, and report on the procurement, transfer, and sale of aborted fetal tissue." Declaration of David Daleiden ISO MSJ (Daleiden MSJ Decl.) [Dkt. No. 609-1] ¶ 3; Declaration of David Daleiden ISO Oppo. (Daleiden Oppo. Decl.) [Dkt. No. 659-2] ¶ 3. In July 2015, the public phase of the Project began with defendants' publication of a series of curated videos, including recordings of plaintiff' staff from the conferences, from the facilities, and from lunch meetings. Daleiden MSJ Decl. ¶ 57.[1]

On July 17, 2019, the parties argued seven motions for summary judgment, one special motion to strike the complaint, a *Daubert* motion, and a motion to strike an expert. After reviewing the record laid out in the motions, certain issues are beyond dispute. Defendants set out to damage Planned Parenthood with a scheme that involved creating a phony corporation and false identities, infiltrating conferences and facilities, ignoring confidentiality agreements, and trading on

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[1] The plaintiffs are Planned Parenthood Federation of America (**PPFA**); Planned Parenthood: Shasta-Diablo, Inc. dba Planned Parenthood Northern California (**PPNorCal**); Planned Parenthood Mar Monte, Inc. (**PPMM**); Planned Parenthood of the Pacific Southwest (**PPPSW**); Planned Parenthood Los Angeles (**PPLA**); Planned Parenthood/Orange and San Bernardino Counties (**PPOSBC**); Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties (**PPSBVSLO**); Planned Parenthood Pasadena and San Gabriel Valley, Inc. (**PPPSGV**); Planned Parenthood of the Rocky Mountains (**PPRM**); and Planned Parenthood Gulf Coast (**PPCG**) and Planned Parenthood Center for Choice (**PPCFC**).

relationships established under false pretenses for the purpose of secretly videotaping individuals without their consent in the hopes of getting them to make damaging statements. There are distinctions between which defendants are responsible for what acts, but there is no doubt that several defendants committed fraud, breached contracts, and trespassed at the conferences and in the Planned Parenthood facilities. However, given scope of the claims and the manner in which the issues were framed on this motion, even partial summary judgment is not feasible on most of those claims.

A harder question is to what extent Planned Parenthood was damaged by defendants' conduct. While it is beyond dispute that Planned Parenthood expended hundreds of thousands of dollars in order to protect their staff and enhance security after the publication of some of the videos that defendants took, much of that expense was incurred in anticipation of and in response to a marked increase of third-party threats and security incidents. Planned Parenthood cannot recover for reputational damages or "publication" damages under the First Amendment, but there is no bright line in the precedent establishing when a category of damages should be analyzed by proximate cause or the First Amendment.

This Order draws the line for compensable damages between those caused by defendants' direct conduct and those caused by third parties. The potentially recoverable damages are for personal security costs for individuals targeted by the defendants and for measures to investigate the intrusions and upgrade the

security measures meant to vet and restrict future access to the conferences and facilities. Excluded are more general expenses to upgrade physical security at Planned Parenthood facilities as well as the time and expense plaintiffs incurred in responding to the threats and acts of third parties following release of the videos. This Order also addresses the myriad of other issues generated in the ten motions before me.

[*Table of Contents Omitted in Printing of this Appendix.*]

BACKGROUND

I. CREATION OF CMP AND BIOMAX, AND USE OF FALSE IDENTITIES TO ALLOW DEFENDANTS TO INFILTRATE THE CONFERENCES AND FACILITIES

Defendant David Daleiden established the Center for Medical Progress (CMP) in 2013 for the "purpose of monitoring and reporting on medical ethics and advances, with a special focus on contemporary bioethical issues that impact human dignity, such as induced abortion and aborted fetal tissue and organ harvesting." Daleiden MSJ Decl. ¶ 2.[2] He invited defendants Troy Newman and Albin Rhomberg to be

[2] Plaintiffs object to paragraphs 2-5 of Daleiden's MSJ Decl., and paragraphs 2-5 of Daleiden's Oppo. Decl. based on hearsay; speculation as to feelings, thoughts, and intentions of others; and as improper lay opinion. Dkt. No. 697. These objections are OVERRULED as to the portions of the declaration I rely on. In general, I will address the parties' evidentiary objections [Dkt. Nos. 659-1, 697, 698-1, and 706] only to the extent I discuss the objected-to evidence. All other objections are DENIED as moot.

directors. Declaration of David Daleiden April 16, 2019 (Daleiden Depo. I, Declaration of Diana Sterk ISO MSJ (Sterk Decl.), Ex. 8) at 109-110. In March 2013, Newman, Daleiden, and Albin Rhomberg formed CMP as a California not-for-profit corporation. Daleiden Depo. I at 180:25-182:10. Daleiden was CMP's CEO and Director. *Id*. Application of CMP to California Secretary of State & Articles of Incorporation (CMP AoI), Ex. 15 to Sterk Decl. [Dkt. No. 607]; Declaration of David ISO Anti-SLAPP Motion (Daleiden Anti-SLAPP Decl. [Dkt. No. 600-2]) ¶ 2. Newman was the Secretary of CMP.[3] CMP AoI, NAF0001805. Rhomberg was the CFO. CMP AoI NAF0001805; Deposition of Albin Rhomberg March 14, 2019 (Rhomberg Depo. I, Sterk Decl., Ex. 14) at 115:9-20. Newman, Daleiden, and Rhomberg each served on CMP's board. CMP AoI, NAF0001804, 1805; Rhomberg Depo. I at 115:9-20.[4]

Through CMP, Daleiden inaugurated HCP in 2013 in order to "investigate, document, and report on the procurement, transfer, and sale of aborted fetal tissue."

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[3] Plaintiffs repeatedly cite pages from Newman's deposition where Newman invoked the Fifth Amendment and refused to answer most questions about his role with CMP and knowledge of the Project as evidence in support of their motion or in opposition to defendants' motions. Plaintiffs contend that each of Newman's refusals to answer should be construed against him and defendants. As described below, plaintiffs have not laid out an adequate foundation to create specific inferences based on Newman's invocation of the Fifth Amendment. Prior to trial, plaintiffs must lay that foundation and identify with specificity each inference they seek to put in place against Newman for trial.

[4] Defendant Lopez helped Daleiden create a logo for CMP. Declaration of Gerardo Adrian Lopez [Dkt. No. 603-1] ¶ 5.

Daleiden MSJ Decl. ¶ 3; Daleiden Anti-SLAPP Decl. [Dkt. No. 600-1] ¶ 3. HCP intended to use "undercover journalism tools" such as hidden cameras and misrepresentations about identities to secure entrance to Planned Parenthood conferences and facilities. Daleiden MSJ Decl. ¶¶ 23, 39.

HCP project proposals, shared with Newman and Rhomberg in early 2013, explained the Project's plan to infiltrate Planned Parenthood and National Abortion Federation (NAF) conferences and facilities to implement "creative scenario-based 'gotcha' stings" and "undercover stings" to catch "fetal traffickers, especially Planned Parenthood clinics" violating laws regulating the procurement and transfer of fetal tissue, create "outrage" at Planned Parenthood (and researchers), deliver a "major public relations blow to Planned Parenthood," promote "defunding efforts for Planned Parenthood," and initiate criminal prosecution and investigations of clinics, wholesalers, and doctors. 2013 Project Proposal (Proposal, Sterk Decl. [Dkt. No. 608-1], Ex. 12), CM05623, 05635; *see also* March 2013 Project Proposal (Sterk Decl., Ex. 80). The "foundational goal" of the Project was to target and "hurt" Planned Parenthood. Planned Parenthood affiliates were specific targets, as were "high-level PP national officials." *Id*. CM05635, 2015 Project Roadmap, CM04988 (Sterk Decl. Ex, 16).

Rhomberg was on the HCP "Team" as an "expert" at acquiring hidden and hard-to-access documentation about the abortion industry; Newman was on the team given his experience in investigating, seeking disciplinary action against, and shutting down abortion

clinics. Proposal, CM0536. Plaintiffs allege that Newman assisted Daleiden and CMP with fundraising and advised on Project goals, undercover activities, use of fake names and IDs, and other actions "throughout the three-year undercover investigation" for the Project.[5] Rhomberg assisted Daleiden in fundraising and strategized with consultants to ensure that the secretly recorded videos had maximum impact. Rhomberg Depo. at 128-129. He also advised on CMP's undercover activities. *Id*. at 89, 226:7-227:11.

As part of the Project, Daleiden set up a phony front company called BioMax Procurement Services, LLC (BioMax), as a "wholly-owned entity of CMP," created by CMP to further the Project. April 2014 Report, CM04229 (Sterk Decl., Ex. 17) ("We have established a front organization (BioMax Procurement Services) that purportedly supplies medical researchers with human biological specimens."); Summer 2014 Roadmap

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[5] CMP and Newman produced a number of communications between Newman and Daleiden, showing that after the release of the initial Project videos, Newman took substantial credit for various aspects of the Project. *See* Newman Dep. Ex. 44 (Mayo MSJ Opp. Decl. Ex. 48) (commenting that the first video "has exceeded our expectations" and reminding the email recipients that "[t]his is about Planned Parenthood. Putting them in jail. Defunding them. Taking down their empire."); Newman Dep. Ex. 28 at 1 (Mayo MSJ Opp. Decl. Ex. 25) (characterizing the videos as "the end result of a three year undercover investigation by" his organization [Operation Rescue]. He explained that "it was my project for the past three years."); Newman000056, Newman Dep. Ex. 29 at 1 (Mayo MSJ Opp. Decl. Ex. 26) (press release drafted by Newman explaining that he "advised project leader David Daleiden throughout the three-year undercover investigation" and "was integral in directing the project.").

CM07126 at 7128 (Sterk Decl. Ex. 18); Deposition of David Daleiden April 17, 2019 (Daleiden Depo. II, Sterk Decl., Ex. 9) at 19-20, 31-21; Daleiden Anti-SLAPP Decl. ¶ 3. He filed Articles of Organization with the California Secretary of State, asserting that the purpose of the LLC was to engage in "any lawful activity for which a limited liability company may be organized." Daleiden Oppo. Decl., Ex. RR;[6] Daleiden Depo. II at 60:25-61:15. In his filings with the state, he listed "Susan Tennenbaum," as the manager of the LLC, although there was no such person, and signed that name for the "organizer." *Id*. at 60-63; *see also* Ex. RR.

Daleiden created a website, business cards, and promotional materials for BioMax, and a Facebook page for BioMax "founder" Susan Tennenbaum. Daleiden Depo. I at 232:1-6. CMP paid defendant Sandra Susan Merritt "thousands of dollars" to be "Susan Tennenbaum," BioMax's CEO. *See* Deposition of Sandra Merritt (Merritt Depo., Sterk Decl., Ex. 24) at 310:21-312:3. Brianna Baxter used the name "Brianna Allen" and posed as Tennenbaum's assistant, niece, and a part-time procurement technician for BioMax. CM0346 (Sterk Decl. Ex. 61); Daleiden Depo. II at 45:1-50:9. Lopez was paid to attend the conferences as a contractor by CMP, where his job was to facilitate introductions for Daleiden as "Sarkis."

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[6] Plaintiffs object to Ex. RR and Daleiden's description of it (Daleiden Oppo. Decl.¶ 4) as improper lay opinion, confusion, and hearsay to the extent it is offered for the truth. Those objections are OVERRULED given my limited reliance on RR.

Declaration of Gerardo Adrian Lopez [Dkt. No. 603-1], ¶¶ 5, 6, 8, 9.

Daleiden created and solicited the production of fake California drivers' licenses (IDs) with the fake names for himself (Sarkis), Merritt (Tennenbaum), and Baxter (Allen). For his own, he used an expired driver's license and typed "Robert Dauod Sarkis" over his name. Daleiden Depo. I at 227:14-229:19. Through Craigslist, Daleiden located a service in Southern California that he paid to produce phony driver's licenses with the names Susan Tennenbaum and Brianna Allen. *Id*. at 230-233. Daleiden, Merritt, and Baxter used these fake IDs to gain access to the NAF and PPFA conference and facilities as described below. Lopez used his own, authentic ID.

As the Project progressed, defendants Rhomberg and Newman participated in Board meetings or calls with Daleiden every few months to discuss and receive updates on the progress of the Project. April 2014 Report, CM04229 (Sterk Decl., Ex. 17) (describing establishing BioMax as a "front" that "purportedly supplies" biological specimens and "infiltration" of NAF conference and recording 30 plus hours of conversations with Planned Parenthood affiliates and "Planned Parenthood/NAF officials"); May 2015 Roadmap, CM09373, CM05551 (Sterk Decl., Exs. 25, 26); *see also* Declaration of Sharon D. Mayo ISO Opposition to MSJs [Dkt. No. 662-1], Ex 32 (Rhomberg Depo. Ex. 76, July 2013 emails from Daleiden and sent to Rhomberg and others regarding a donor who objected to deception involved in the Project); Mayo MSJ Oppo. Decl., Ex. 33 CM17821 (April 2015 email

between Daleiden, Rhomberg, Newman and others about "incredibly successful site visits" to Planned Parenthood locations warning that they "will probably get suspicious within the next month or so").

II. PLAINTIFFS' CONFERENCES AND FACILITIES

A. PPFA Conferences and Security Measures

PPFA hosts several national conferences. Declaration of Deborah Nucatola (Sterk Decl., Ex. 2) ¶ 3. Planned Parenthood physicians and staff attend these conferences for educational purposes and to have frank conversations with colleagues. *Id.* ¶ 4. PPFA takes steps to provide a confidential environment and limit attendees to those who share its mission. *Id.* For example, it requires attendees to register in advance and does not permit on-site registrations. Declaration of Vikky Graziani (Sterk Decl., Ex. 7) ¶ 3. Names of attendees are checked in advance against staff lists and membership lists. *Id.* Attendees not affiliated with PPFA or other member groups must provide two references to be admitted. *Id.*

On site at conferences attendees must show photo identification to receive their badge and registration materials. Security staff monitors doors and access points to "ensure only those with badges enter." Graziani Decl. ¶ 5. The "front-line" reception and security staff also check attendees and exhibitors against a "lookbook" list of "known anti-abortion groups

and individuals." Deposition of Brandon Minow (Minow Depo., Sterk Decl., Ex. 78) at 295-97; 300-301.[7]

PPFA conferences are held in hotel conference rooms and spaces that it reserves pursuant to contracts. Declaration of Brandon Minow (Sterk Decl., Ex. 6) ¶ 5; *see also* Minow Depo. Exs. 1911 (Sterk Decl., Ex. 3 "Miami Contract"), 1916 (Sterk Decl., Ex. 4 "Orlando Contract"), 1921 (Sterk Decl., Ex. 5 "DC Contract"). The contracts "typically" require the conference hotels to disclose the names of groups with space reserved at the same time and to refrain from renting space to any group that, in PPFA's judgment, would create a threat of harm. Minow Decl. ¶ 6; Miami Contract at 12; Orlando Contract at 7; DC Contract at 12. The hotel contracts also contain confidentiality clauses to which hotel staff are required to adhere. Miami Contract at 12; Orlando Contract at 7; DC Contract at 12.

PPFA invites a limited number of businesses whose products or services are relevant to reproductive health care to exhibit their products or services at the conferences. Exhibitors must register in advance and provide the names of any representatives who will attend the conference and who agree to PPFA's terms and conditions. Graziani Decl. ¶ 4. Most exhibitors are

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[7] Defendants object to these portions of the Minow Deposition under FRE1002. That objection is OVERRULED. Defendants generally challenge the "strength" of these vetting and admission procedures and specifically object to Minow's testimony and the lack of evidence regarding the "lookbook" because the existence of it was not addressed in the Graziani Declaration. Newberg/ Rhomberg Oppo. at 2-4. The objection too is OVERRULED.

"repeat exhibitors known to PPFA." *Id*. Where an exhibitor is unknown to PPFA, staff checks whether partner organizations, such as NAF, have knowledge of them. *Id*.

B. Defendants' Infiltration of Conferences, Facilities, and Meetings

Defendants first gained entrance as "Brianna Allen and Susan Tennenbaum of BioMax" to attend at the Association of Reproductive Healthcare Providers (ARHP) meeting in Denver, Colorado in September 2013. Defendants used the contacts BioMax gained at that meeting to make contacts with NAF staff, who "encouraged" BioMax to attend NAF's April 2014 conference in San Francisco, California. Daleiden MSJ Decl. ¶ 9; Sterk Decl. Ex. 30 (email correspondence re NAF meeting)[8]; Daleiden Depo. II at 87-89. Daleiden, Merritt, and non-party Baxter (posing as Brianna Allen) secured access to that conference using their fake California driver's licenses and recorded staff members of plaintiffs during that conference. Daleiden Depo. I at 249:9-19. Defendants used those contacts, including Dr. Deborah Nucatola of PPFA, whom they met at the NAF conference and later had lunch with in July 2014, to access PPFA conferences, specifically: (1) the PPFA North American Forum on Family Planning in Miami, Florida in October 2014, where defendants Daleiden and Lopez recorded conference participants and presentations; (2) the PPFA Medical

[8] Defendants object to Ex. 30, arguing the comments by Davis and Hart are hearsay and lack foundation. The objection is OVERRULED.

Director conference in Orlando, Florida in February/March 2015, where Daleiden and Lopez attended and recorded; and (3) the PPFA national conference in Washington, DC in March 2015, where Daleiden and Lopez attended and recorded. Defendants also obtained access to NAF's annual meeting in Baltimore, Maryland in April 2015 where Daleiden, Lopez, and Merritt recorded plaintiffs' staff.

On July 25, 2014, taking advantage of the introduction Daleiden secured at NAF's 2014 conference in San Francisco, Daleiden (posing as Sarkis) and Merritt (posing as Tennenbaum) met with Nucatola at a Southern California restaurant. Daleiden and Merritt surreptitiously recorded that meeting. On February 6, 2015, Daleiden and Merritt recorded a lunch meeting with Dr. Mary Gatter, the medical director of PPPSGV, and her colleague Laurel Felczer of PPPSGV, at a Pasadena restaurant.

On April 7, 2015, posing as Sarkis and Tennenbaum from BioMax, Daleiden and Merritt accessed the Denver Facility of PPRM and had a meeting with Dr. Savita Ginde, a medical director at PPRM. During this visit, Daleiden and Tennenbaum gained access to a conference room in a secure wing of PPRM's administrative offices, the patient treatment and laboratory areas of PPRM's co-located health center and its medical research program office. Daleiden and Merritt surreptitiously recorded during that visit. On April 9, 2015, Daleiden and Merritt, posing as Sarkis and Tennenbaum from BioMax, secured a meeting with Melissa Farrell and gained access to the Houston facilities of PPGC and PPCFC, including to private

office and clinic space. To gain that access, Daleiden provided his fake California driver's license, identifying him as Sarkis, and Merritt used a fake California driver's license, falsely identifying her as Tennenbaum. Daleiden and Merritt recorded during that visit.

III. PUBLICATION OF THE VIDEOS, THIS LAWSUIT AND CLAIMS

The first video containing portions of defendants' surreptitious recordings was released to the public on July 14, 2015. Daleiden MSJ Decl. ¶ 57. That release and the subsequent releases of additional HCP videos generated significant press coverage and resulted in Congressional and other government investigations into the sale of fetal tissue and whether laws had been broken. *Id*. ¶¶ 57-96.[9]

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[9] Defendants repeatedly point out that following the release of the HCP videos, Congressional investigations began and, as a result of referrals from those investigations, two fetal tissue procurement companies pleaded guilty to violating laws. Daleiden MSJ Decl., ¶ 75. But, other than for PPGC, defendants do not identify or argue on these motions that any other plaintiff in this case was found by any investigative or law enforcement body to have possibly violated any law or regulation. As to PPGC, defendants rely on the conclusions of the Fifth Circuit's now-depublished decision in *Planned Parenthood of Greater Texas Fam. Plan. and Preventative Health Services, Inc v. Smith*, 913 F.3d 551, 554 (5th Cir. 2019). In that case, the Fifth Circuit affirmed an agency decision, based in part of the HCP videos of PPGC, to terminate Medicare provider status based on evidence that PPGC violated ethical standards imposed under Texas law. That opinion is under *en banc* review. Plaintiffs object to Daleiden's declaration and exhibits regarding investigations following the release of the HCP videos "to the extent offered to prove the truth of any matter asserted." I do not rely on Daleiden's declaration or the exhibits he

Plaintiffs filed this lawsuit in January 2016. The claims asserted in the FAC are:

Count 1: Violation of Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1962(c) and 1962(d)) by all plaintiffs against all defendants;

Count 2: Violation of 18 U.S.C. § 2511 by all plaintiffs against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 3: Civil Conspiracy by all plaintiffs against all defendants;

Count 4: Breach of Contract by PPFA Against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 5: Breach of Contract by PPFA, PPNC PPPSW, PPMM, PPOSB, PPGC, and PPCFC against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 6: Trespass by PPFA, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 7: Violations of Calif. Bus. & Profs. Code § 17200, et seq. for Unlawful, Unfair, and Fraudulent Acts by all plaintiffs against all defendants;

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attaches for the truth of any governmental findings, but only as to the existence of the investigations. The objections are OVERRULED.

Count 8: Fraudulent Misrepresentation by PPFA, PPGC, PPCFC, and PPRM Against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 9: Violation of California Penal Code § 632 by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Coconspirators;

Count 10: Violation of California Penal Code § 634 by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Coconspirators;

Count 11: Violation of Section 934 Title XLVII of the Florida Criminal Procedure Law by all plaintiffs against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 12: Violation of § 10-402 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, And Unknown Coconspirators;

Count 13: Invasion of Privacy: Intrusion Upon A Private Place by All Plaintiffs Against Daleiden, Merritt, Lopez, CMP, BioMax and Unknown Co-Conspirators;

Count 14: Invasion of Privacy: California Constitution Art. I § I by PPFA, PPNC, PPPSW, PPMM, and PPOSB against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators;

Count 15: Breach of Non-Disclosure and Confidentiality Agreement by PPGC and PPCFC against BioMax, Daleiden, and Merritt.

Plaintiffs clarify, in their combined Opposition to defendants' six separate motions for summary judgment as well as in their Reply in support of their own motion for partial summary judgment, that claims by particular plaintiffs against specific defendants have been dropped. Those dropped claims are:

- Count 4 - Breach of PPFA Contracts as to Merritt. Pls. Reply MSJ at 8 n.9.
- Count 6 – Trespass against Merritt with respect to the PPFA conferences, but not as to the intrusions into PPRM and PPGC/PPCFC. Pls. Oppo. MSJ at 40 n.27.
- Counts 9 & 10 - California recording claims as to PPPSW, PPGC, PPRM, PPOSBC, and PPMM. Pls. Oppo. MSJ at 52 n.35.
- Count 11 – Illegal Recording under Florida law as to Merritt only, but also as to the claims by PPNorCal, PPMM and PPLA staff. Pls. Oppo. MSJ at 66 n.50.
- Count 12 – Maryland wiretapping claim as to PPNorCal, PPPSW, PPMM, and PPOSBC. Pls. Oppo. MSJ at 79 n.59.

LEGAL STANDARD

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding the motion, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

DISCUSSION

I. MOTIONS FOR SUMMARY JUDGMENT

The defendants move for summary judgment on multiple grounds for each of the fifteen claims alleged. Plaintiffs move for summary judgment or partial summary judgment on a narrower set of claims:

trespass, fraudulent misrepresentation, California's unfair competition law, breach of contract as to PPGC's nondisclosure agreement (NDA), the RICO predicate offenses, and also defendants' California Penal Code § 633.5, unclean hands, and public policy affirmative defenses.

A. Damages

CMP, on behalf of all defendants, moves generally for summary judgment on all counts on which plaintiffs seek "damages."[10] Defendants argue that all of the claims fail because causation is lacking or is too distant, or that the causal chain was broken by acts of third parties. Defendants also argue that the First Amendment protection for publications on matters of public interest precludes any award of the damages that plaintiffs seek in this case because plaintiffs' damages flow solely from the actual or feared response of third parties to the publication of the HCP videos. Defendants point out that none of the damages sought were incurred prior to the publication of the videos.[11]

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[10] Defendants apportioned their motions and briefing so one party (or Rhomberg/Newman jointly) could address specific issues in-depth and the remaining defendants could simply "join" those arguments. In addressing these arguments, I will endeavor to identify the party that briefed it, but then refer to the argument being made on behalf of defendants generally.

[11] That is true except for some discrete security enhancements that defendants claim plaintiffs incurred or planned for prior to the release of the first HCP video and prior to plaintiffs realizing that defendants had infiltrated conferences and facilities and recorded their staff. Those costs are not recoverable under any of theory in this case.

Defendants rely most heavily on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (*Food Lion III*). In that case involving ABC's undercover journalism regarding Food Lion's food handling practices, Food Lion wanted to use "non-reputational tort claims (breach of duty of loyalty, trespass, etc.) to recover compensatory damages," which the court characterized as "publication damages" "for items relating to its reputation, such as loss of good will and lost sales." *Id.* at 522. The district court excluded those damages based on the lack of proximate cause to the tort claims because the damages were caused by loss of customer confidence given the food handling practices disclosed by the undercover reporters, not from the tortious newsgathering acts of the reporters themselves. The Fourth Circuit affirmed under "the First Amendment principle" that precludes "publication damages" from non-reputational torts that are not pleaded to heightened standards (including actual malice) that the First Amendment imposes on defamation claims. *Id.*[12]

Defendants argue that the damages plaintiffs seek here are the same; they stem from the public's reaction (or feared or expected reaction) to the contents of the HCP videos and should have been sought through a

[12] The principle was recognized by the Supreme Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), where the Court rejected the attempt to seek emotional distress damages under a tort theory to avoid the higher "actual malice" standard for proving defamation as to a public figure under *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

defamation claim.[13] *See La Luna Enterprises, Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999 ("Plaintiff's complaint alleges damages . . . for injury to plaintiff's reputation allegedly caused by defendants' fraudulent conduct. . . . If allowed to proceed on this claim, plaintiff could succeed regardless of its defamation claim and the truth or falsity of the broadcast. Such a result threatens to circumvent the constitutional requirement that a media defendant may not be held liable to a private figure for reputational injury caused by publication of defamatory statements that are true and at least not negligently reported."); *see also Council on Am.-Islamic Rel. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 332 (D.D.C. 2011) (recognizing "the principle that the special protections that the First Amendment affords defendants charged with defamation may also extend to other kinds of legal claims where the plaintiff seeks damages for reputational or emotional harm allegedly flowing from the publication of protected speech").

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[13] Reputational damages have been disclaimed by all plaintiffs. Dkt. No. 420 (disclaiming "reputational damages such as loss of goodwill or loss of revenue," as well as "expenses to protect [Planned Parenthood's] brand and reputation."). Defendants' repeated attempts to characterize the damages that plaintiffs *are* continuing to seek as barred "reputational" damages based on the lay testimony of plaintiffs' witnesses are not persuasive. *Compare* Rhomberg/Newman MSJ at 6-10; *with Howard v. HMK Holdings, LLC*, CV175701DMGJPRX, 2018 WL 3642131, at *5 (C.D. Cal. June 11, 2018) (asking deposition witnesses to make a "law-to-fact application that is beyond the competence of most lay persons," "by memory and on the spot," without the aid of counsel is improper (relying on *Rifkind v. Superior Court*, 22 Cal. App. 4th 1257 (1994)).

Plaintiffs reply with cases discussing the general and well-accepted rule that simply claiming the mantel of a journalist does not give someone a license to trespass, illegally record, or otherwise commit violations of generally applicable laws.[14] The more difficult question is, in light of plaintiffs' failure to file a defamation claim, where to draw the line between impermissible defamation-like publication damages that were caused by the actions and reactions of third parties *to the HCP videos* and permissible damages that were directly caused by the breaches of contract, tortious acts, and acts of targeted recording in which defendants indisputably engaged as part of the Project.

Plaintiffs attempt to draw that line as one limited to "reputational" damages that seek to compensate for harm to reputation or state of mind and argue that the mere fact that injury is caused in response to someone learning something from a publication does not turn that injury into impermissible "reputational damages." They cite *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), where reporters breached their promise that Cohen would not be identified as a source and

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[14] "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *see also Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("the media have no general immunity from tort or contract liability"); *Council on Am.-Islamic Rel. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 330 (D.D.C. 2011) ("[T]he protections afforded by the First Amendment, far reaching as they may be, do not place the unlawful acquisition of information beyond the reach of judicial review.").

identified him in their articles. After he was publicly identified in the resulting news articles, he was fired by his employer. The Court held that because he sought damages for the breach of the promise that caused him to lose his job and lowered his earning capacity, and did not attempt to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim, his claim for damages (loss of his job and loss of future employment opportunities) was not barred by the First Amendment. That is so even though Cohen's immediate injury was most directly caused by a third party (his employer) in response to the publication of his name as a source.[15]

Plaintiffs also rely on the First Circuit's decision in *Veilleux v. Natl. Broad. Co.*, 206 F.3d 92, 129 (1st Cir. 2000). There, plaintiffs alleged that defendants portrayed them in a distorted, untrue manner in a "Dateline NBC" television program concerning the perils to highway users caused by tired long-distance truck drivers. Plaintiffs' voluntary participation in the program was secured by defendants' false promises that the show would not include a group critical of the trucking industry, Parents Against Tired Truckers (PATT). The First Circuit allowed recovery of damages, including lost trucking customers, under the common law misrepresentation claim but limited recovery to

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[15] The *Food Lion III* opinion itself distinguished the damages allowed in *Cowles* from those sought by Food Lion because plaintiff "in seeking compensation for matters such as loss of good will and lost sales, is claiming reputational damages from publication, which the *Cowles* Court distinguished by placing them in the same category as the emotional distress damages sought by Falwell in *Hustler*." 194 F.3d at 523.

plaintiffs' "pecuniary losses" caused by statements that PATT would not be included in the program "because that did not offend the First Amendment."

District court opinions have attempted to draw similar lines. For example, in *Steele v. Isikoff*, 130 F. Supp. 2d 23, 29 (D.D.C. 2000), the plaintiff brought a number of claims against a reporter and publishers based on her allegations that she spoke with the reporter on a promise of "confidentiality" and that the conversation would be "off the record." The court recognized that some of plaintiffs' damages, including reputational damages, might be barred by the First Amendment, but because plaintiff alleged some "occupational injury" as in *Cohen*, the case would be allowed to proceed beyond the motion to dismiss stage except for the claim to "reputational damages." *Id*. at 29. In doing so, the court explained: "Viewed in tandem, *Hustler* and *Cohen* divide claims against the news media by categorizing the damages sought. If a party seeks damages for harm to reputation or state of mind, the suit can only proceed if that party meets the constitutional requirements of a defamation claim. If a party seeks damages for non-reputational harms, which include lost jobs and diminished employment prospects, then the First Amendment does not bar suit as long as the claims are brought under generally applicable laws." *Id.*

In *Smithfield Foods, Inc. v. United Food and Com. Workers Intern. Union*, 585 F. Supp. 2d 815 (E.D. Va. 2008), a union undertook a campaign against a particular anti-union employer. The court distinguished damages that were more "economic" in

nature from ones that were more "reputational" in nature, ignoring the labels the plaintiff used to characterize his damages. The court noted that, "Smithfield has placed its damages into five categories, which include: (1) the 'direct' expenses realized by Smithfield as a result of the corporate campaign; (2) customer specific lost profits; (3) a loss of free advertising on the Oprah Winfrey show; (4) nationwide lost profits; and (5) the cumulative abnormal returns on Smithfield's stock price." *Id*. at 817. Attempting to "determine whether each of Smithfield's asserted damages are either 'reputational' or 'economic' in substance," the court concluded that of "the five categories of damage identified by Smithfield, only the alleged loss of free advertising on the Oprah Winfrey show asserts a claim for purely economic damages. That particular component of Smithfield's damages is based solely on the loss of a business expectancy caused by the Defendants active interference and is not based on any harm to Smithfield's reputation." *Id*. at 824. All other damages were disallowed as being impermissibly based on the public's reaction to the union's campaign. *Id*.

Considering these cases – and their somewhat inconsistent analyses of the line between impermissible reputational or publication damages and allowable economic or pecuniary damages – I agree with defendants that some of the damages plaintiffs seek here are more akin to publication or reputational damages that would be barred by the First Amendment. Others, however, are economic damages that are not categorically barred. Those that fall in the latter category result *not* from the acts of third parties

who were motivated by the contents of the videos, but from the *direct* acts of defendants – their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff. Defendants are not immune from the damages that their intrusions into the conferences and facilities directly caused, nor from the damages caused by their direct targeting of plaintiffs' staff, that caused plaintiffs to bear costs in the form of private security for those staff members after plaintiffs became aware of defendants' ruse and recordings. Defendants' "lack of recoverable damages" theories do not entitle them to summary judgment.

The allowable damages – subject to proof and defenses at trial (including whether the damages were reasonably incurred or unnecessary as "voluntarily incurred") – include costs to investigate the intrusions and to implement access-security measures (*e.g.*, improved screening or background check procedures, implementation of new or improved protocols for access to conferences or facilities) to prevent future surreptitious intrusions. Also allowed are personal security costs for staff whom defendants targeted (*e.g.*, costs of personal security guards, costs to temporarily or otherwise relocate residences, and costs to improve physical security at personal residences). In this context, "targeted" means staff who were intentionally recorded by defendants – most obviously Nucatola, Ginde, Gatter, and Farrell – but also any other staff who, upon realizing that they had likely been recorded by defendants when they had conversations with BioMax representatives, incurred personal security costs paid for by plaintiffs. Nominal and statutory damages are separately allowable.

The excluded damages are: (1) costs of physical security assessments for plaintiffs' buildings and additional building and IT-security measures to physically protect plaintiffs' patients, information, offices, and clinics; (2) grants for security enhancements to affiliates experiencing increased security threats as a result of CMP's videos (PPFA only), other than personal security expenses for staff who were targeted by defendants; (3) costs of repairing and protecting PPFA website after hacking; (4) costs of repairing and protecting online appointment systems; (5) loss of revenue due to hack of the PPFA patient portal; (6) staff time spent monitoring threats and responding to protests and increased security incidents; (7) costs relating to vandalism to plaintiffs' offices and clinics; and (8) costs of the grief/stress hotline for staff related to the increase in threats.[16]

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[16] At the hearing, plaintiffs argued that the First Amendment does not bar them from seeking damages for the costs PPGC incurred to respond to government investigations because they flow from defendants' violation of the PPCG NDA and, as a result, defendants knowingly, voluntarily, and intelligently waived any First Amendment rights they otherwise would have. Defendants raise a further defense to that narrow category of damages: that allowing those damages would impermissibly infringe on their First Amendment rights of petition to seek redress from the government. Regardless, I find that PPGC's costs of responding to the government investigations (which presumably stemmed from the publication of the videos, but also defendants' direct provision of information to government agencies) cannot be recovered as a breach of contract remedy for a different reason. The discretion inherent in governmental decisions whether to prosecute or investigate a potential violation of law generally breaks any existing causal chain. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 263 (2006) ("Herein lies the distinct problem of causation in cases

Defendants also move for summary judgment on the issue of "incitement or threat damages," arguing there is no basis to impose those sorts of damages on them because there is no evidence that any defendant made threats or caused harm to plaintiffs' facilities or staff, or that any defendants directly encouraged or incited others to do so. I agree that plaintiffs have not uncovered any evidence of that kind of conduct by defendants. However, given my analysis above regarding allowable damages, this argument is

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like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking."); *see also Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir .1981) (noting police officers "are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted"). I recognize that this is not a 42 U.S.C. section 1983 claim were damages are sought against government actors, but the concept of the break in the causal chain in light of the inherent discretion of investigators and prosecutors is similar.

inapposite.[17] The only allowable damages are those that are directly tethered to defendants' own conduct.

Defendants move for summary judgment on "causation," seeking to exclude damages that "were most directly" caused by third parties, including damages that plaintiffs incurred because plaintiffs expected and, according to plaintiffs, saw, a spike in third parties reacting threateningly or violently towards plaintiffs and their staff following the release of the Project videos. Given the exclusion of the damages identified above, this argument has lessened force. That said, the causal nexus for the damages categorically allowed will still need to be shown at trial. I will address this issue further when I discuss the particular claims at issue later in this Order.

Finally, defendants move to preclude plaintiffs categorically from seeking damages covering "increased security." Defendants argue that no costs for increased security are recoverable, relying on *People v. Silva*, No. C080378, 2016 WL 4761936 (Cal. Ct. App. Sept. 13, 2016). There, the California Court of Appeal concluded

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[17] As discussed below with respect to defendants' motion to strike the testimony of plaintiffs' expert David S. Cohen, the history of anti-abortion activists targeting abortion providers and the historical consequences of that targeting are permissible areas of testimony from Cohen. That testimony is relevant to whether the steps plaintiffs took after they learned of defendants' intrusions and the steps plaintiffs took to provide personal security for members of their staff that were targeted by defendants were reasonable. Cohen will not be permitted to testify whether these defendants intended, by their actions, to incite threats or violence against plaintiffs or their staff or whether defendants' actions proximately caused the allowable damages.

that a criminal defendant, who was convicted of assault and burglary from his forced entry into a youth hostel, was not liable to pay for an improved secure entry system for the youth hostel as "restitution." The court recognized that "[t]he installation of a new security system may well have been a prudent step by the hostel management, but to award that by way of restitution would leave the hostel better off, and thus constitutes an improper windfall." *Id.* at *3.

People v. Silva's discussion of the permissible scope of criminal restitution under California law is of limited to no utility here in considering the damages issues under various states' laws for the trespass, tort, and recording claims or in considering whether the access security and personal security measures plaintiffs implemented following their discovery of the intrusions and recording were reasonable and allowable. That the systems implemented by PPFA or PPGC following the intrusions were new or improved does not make them unrecoverable as a matter of law. Plaintiffs may seek the narrow categories of access-security improvements and personal security expenses I have identified, and defendants may argue to the jury that they were unreasonable, unnecessary, or speculative.[18]

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[18] I have already rejected defendants' argument that plaintiffs' damages are so complex or so difficult to apportion that expert testimony is required. Dkt. No. 613. Defendants raised this same argument on these motions and at the hearing. There is no need to revisit this issue. Plaintiffs will be required to appropriately limit and prove up the damages they seek (as permitted under this Order). The jury will decide whether the damages sought have been adequately supported and their decision may be reviewed, if appropriate, through post-trial motions.

B. RICO (Count 1)

All plaintiffs allege that all defendants violated the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1962(c) and 1962(d). The elements of a RICO claim are: (i) the conduct of (ii) an enterprise that affects interstate commerce (iii) through a pattern (iv) of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c); *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). The conduct must be the proximate cause of harm to the victim. Under Section 1964(c), plaintiffs must also allege that they have been injured in their "property or business" by reason of the alleged racketeering activities.

CMP argues, on behalf of defendants, that plaintiffs have failed to meet the predicate act requirement or make a sufficient showing of causation between the predicate acts and the claimed RICO damages. In addition, defendants Rhomberg, Newman, and Lopez assert that they are not individually liable under the direct RICO claim or the RICO conspiracy claim. Plaintiffs cross-move for partial summary judgment on the RICO predicate acts only.

1. RICO Predicate Acts

Defendants argue that the RICO claim fails because the predicate acts alleged under the federal Identity Theft Statute lack any connection to interstate commerce or were not the result of the requisite pattern of continuous prohibited acts. Plaintiffs contend that they have sufficiently met the minimum

showing required for an interstate nexus and the undisputed evidence shows an open-ended conspiracy.

a. Interstate Commerce

Defendants first argue that summary judgment is appropriate because there is no evidence that any defendants committed cognizable predicate acts, meaning acts that affected interstate commerce as required by federal Identity Theft Statute, 18 U.S.C. § 1028.[19] That showing can be made with evidence that fake IDs were produced or transferred through means of interstate commerce or use of the U.S. mails, and the interstate nexus is satisfied by a "minimal showing." *See, e.g.*, *U.S. v. Klopf*, 423 F.3d 1228, 1238 (11th Cir. 2005) (noting Fourth, Sixth, Eighth, and Eleventh Circuits require only a minimal nexus to interstate commerce).[20]

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[19] Following my Order on plaintiffs' motion to dismiss, the only remaining predicate acts allowed under 18 U.S.C. §§ 1028 are subsections (a)(1) and (a)(2), which prohibit knowing production or transfer of fake identification. *See* 18 U.S.C. § 1028 ("(a) Whoever, in a circumstance described in subsection (c) of this section – (1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document; (2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority.").

[20] Subsection (c)(3) of the statute provides: "(c) The circumstance referred to in subsection (a) of this section is that – . . . (3) either – (A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce, including the transfer of a document by electronic means; or (B) the means of identification, identification document, false identification

Defendants contend that undisputed facts show that both the production of the fake IDs and their transfer were done entirely in California and that the U.S. mails were not used. There is undisputed testimony from Daleiden that he produced the Robert Sarkis identification himself at his home in California. Daleiden Depo. I 227:14–229:19; Daleiden MSJ Decl. ¶ 116. He approached a person in California to produce the documents for Merritt and Baxter under the names "Susan Tennenbaum" and "Brianna Allen." Daleiden Depo. I 230:4–231:24, 232:19–233:15; Daleiden MSJ Decl. ¶ 116. Those documents were hand delivered to Daleiden, and he hand delivered them to Merritt and Baxter in California. Daleiden MSJ Decl. ¶¶ 116–17. He paid for these documents in cash. *Id*. ¶ 116.

Plaintiffs point out that Daleiden used Craigslist – an internet site – to arrange for the purchase of the fake IDs for Merritt and Baxter, and argue that is a sufficient connection to establish the "minimal nexus" to interstate commerce. Daleiden Depo. I at 230-231. They rely on *U.S. v. Agarwal*, 314 Fed. App'x 473 (3d Cir. 2008) (unpublished), which found that evidence reflecting a defendant's "use of the Internet, an instrumentality of interstate commerce, to make arrangements to purchase the fraudulent identification card," was proof of a nexus to interstate commerce. *Id*. at 475; *but see id*. (noting there was also evidence the components of the IDs travelled in interstate commerce).

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document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section."

Defendants challenge plaintiffs' reliance on the unpublished and out-of-circuit *Agarwal* decision that also relied on additional jurisdictional connections. Defendants, instead, analogize to *U.S. v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007), where the court held that evidence that defendant's website was uploaded to servers in different states "supports the conclusion that Defendant electronically sent threats and social security numbers to internet servers located across state lines," and concluded that the "interstate transfer of information by means of the internet" satisfied the jurisdictional elements for the statute. *Id*. at 953 (citing § 1028(c)(3)). Defendants argue that the *Sutcliffe* court, like *Agarwal*, found additional jurisdictional connections (use of servers located in different states, sending threats across state lines) to meet the showing there, and that those connections are wholly absent here.

In addition to Daleiden's use of the internet to secure the IDs for Merritt and Baxter, plaintiffs contend that because use of the fake IDs was "integral" to the scheme to "defraud" plaintiffs – as the fake IDs were necessary to gain access to the conferences and clinics – that use also provides the nexus to interstate commerce. Plaintiffs cite *U.S. v. Klopf*, 423 F.3d 1228 (11th Cir. 2005), where the Eleventh Circuit explained and adopted the Eighth Circuit's expansive interpretation of acts that establish jurisdiction. *Id*. at 1238. The *Klopf* court noted,

> The Eighth Circuit also has given § 1028(c)(3)(A) an expansive interpretation by noting that "the statute presents two options: possession may be

> 'in' interstate commerce or it may 'affect' interstate commerce." *United States v. Jackson*, 155 F.3d 942, 947 (8th Cir.1998). The *Jackson* court concluded that the government demonstrates that possession of unlawful identity documents, such as stolen driver's licenses, affected interstate commerce by proof that possession 'was integral to [defendant's] scheme to defraud businesses and banks operating in interstate commerce.' *Id*. Therefore, fraudulently inducing a bank to issue a credit card through fraudulent identification documentation would be sufficient evidence of a § 1028(a) violation to satisfy § 1028(c)(3)(A).

Id. Plaintiffs contend, and there can be no dispute, that the creation and transfer of the fake IDs by Daleiden's efforts was integral to defendants' scheme to defraud PPFA and others who were operating in interstate commerce.

Relatedly, plaintiffs suggest that while the "possession and intended use" prong of §1028(a)(3) is no longer in play, *see* September 2016 Order at 11, undisputed facts show that Daleiden, Merritt, and Baxter used their IDs to gain access to restricted spaces in various states. Evidence supports plaintiffs' position that the intent of the defendants in creating and transferring the IDs and the alleged criminal enterprise was to affect interstate commerce. Plaintiffs rely on *U.S. v. Villarreal*, 253 F.3d 831 (5th Cir. 2001), where the defendant transferred a false birth registration card to an undercover agent whom he knew would possibly use that card to travel outside of

the state. Although the transfer took place wholly in one town, "[p]resumably, the Mexican National would have used the Registration Card to remain in the United States and possibly travel between the United States and Mexico or beyond Texas," so a "rational trier of fact could have found beyond a reasonable doubt that the transfer would have been in or affected interstate or foreign commerce had" the purchaser not been an undercover agent, and jurisdiction was satisfied. *Id*. at 834-35; *see also U.S. v. Agarwal*, 314 Fed. Appx. 473, 475 (3d Cir. 2008) (unpublished) (noting the "record establishes that the identification card at issue [procured in Pennsylvania] could have been used to gain access to facilities at a branch campus in California").

Defendants assert that both *Jackson* and *Klopf* are distinguishable, as those cases addressed substantive provisions where "possession" with "intent to use" were elements and, therefore, the intent of the defendant was relevant even if the interstate use was never consummated. They point out that unlike the sections addressed in those two cases, the provisions here (sections 1028(a)(1) and (a)(2)) govern only production or transfer that is "in or affects" interstate commerce, and the eventual or intended use is irrelevant. Defendants also contend that the *Villareal* court got it wrong when it imported the concept of use from other inapposite cases into the "transfer" prong of section 1028(a)(2).

Instead of *Villareal*, defendants contend that I should follow *U.S. v. Della Rose*, 278 F. Supp. 2d 928 (N.D. Ill. 2003). There, the district court considered

whether the "government provide[d] sufficient evidence that the production of the false identification document was in or affects interstate commerce" under a section 1028(a)(3) charge. *Id*. at 930. Because there was no evidence of any out-of-state activity – the defendant drafted a legitimate check against funds belonging to his intrastate client and had a third-party use the false ID to cash the check at an intrastate, local bank – the jurisdictional nexus was not met. But here, distinguishing this case from *Della Rosa*, the ultimate target of the alleged fraud was not intrastate, although some California entities and persons were targeted. Instead, PPFA and entities across state lines were not only targeted, but successfully infiltrated.[21]

Recognizing the absence of Ninth Circuit authority but also that only a "minimum nexus" with interstate commerce is required under this statute, I find that plaintiffs have established the requisite interstate connection. Daleiden admitted that he used the internet to secure two of the IDs, the defendants intended to affect interstate commerce in creating the false IDs, and the defendants used those IDs across state lines. Plaintiffs have adequately established this element of the RICO predicate act as a matter of law,

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[21] The *Della Rose* court itself distinguished *Villareal* concluding, "In the case before the Court, we need not engage in supposition: the Defendant did accomplish his intended goals. Yet there is no evidence that the accomplishment was in or affected interstate commerce beyond the cashing of a check at a bank. *Villarreal*, too, is readily distinguished." *Della Rose*, 278 F. Supp. 2d at 932. Here, of course, the undisputed evidence is that the use of the fake IDs was central to accomplishing defendants' goals to infiltrate conferences and clinics in different states.

and their motion for partial summary judgment is GRANTED in this limited respect.[22]

b. False under 18 U.S.C. § 1028(d)(4)

Defendants also argue that summary judgment cannot be granted on this predicate act because given the poor quality of the fake IDs, they could not be considered "commonly accepted" as a matter of law. Daleiden describes the fake IDs for "Sarkis," "Tennenbaum," and "Allen" as produced on copy paper with rigid thick PVC of "laughable quality" such that they could not be considered of sufficient quality under 18 U.S.C. § 1028(d)(4).[23] Daleiden Decl. ¶ 118; *see also* CMP MSJ at 11 n.7.

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[22] As such, I do not need to address plaintiffs' alternate predicate acts, mail fraud and wire fraud under 18 U.S.C. §§ 1341, 1343 committed for the purpose of trespassing at the conferences. *See* Plaintiffs' MSJ at 27-29. Defendants object to plaintiffs' newly raised theory, arguing that it is barred as it was not expressly pleaded in the SAC. Nor do I need to reach plaintiffs' argument, made in passing and without any case law support, that showing the IDs to gain access to the PPFA and NAF conferences or to gain access to clinics is a "transfer" covered by the statute. Finally, I likewise need not reach the assertion – disputed by defendants – that Daleiden used the fake IDs to secure debit cards (impacting interstate commerce) in aid of the enterprise.

[23] Under 18 U.S.C. 1028(d)(4): "the term 'false identification document' means a document of a type intended or commonly accepted for the purposes of identification of individuals that--(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and (B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, []."

Defendants rely on *U.S. v. Spears*, 697 F.3d 592 (7th Cir. 2012), *reh'g en banc granted, opinion vacated*, 11-1683, 2013 WL 515786 (7th Cir. Jan. 14, 2013), and *opinion reinstated in part on reh'g*, 729 F.3d 753 (7th Cir. 2013). There, the Seventh Circuit discussed the "commonly accepted for the purposes of identification" that "appears to be" but was not issued by a state, elements of section 1028(d)(4). The court held that the fake driver's license there was "sufficiently realistic that a reasonable jury could conclude that it appears to be issued by the State of Indiana." *Id*. at 594-95.

I am not convinced that "sufficient quality" is an element or defense of this claim. The statute itself ties "commonly accepted" not to the quality of the fake document but to the type of document. A driver's license is one commonly accepted for the purposes of identification of individuals. Absent more persuasive authority than the dicta in *U.S. v. Spears*, defendants' arguments about the shoddy quality of their particular fake IDs does not preclude summary judgment to plaintiffs on the existence of predicate acts under section 1028 or require summary judgment in defendants' favor.

c. Pattern

Defendants also contend that plaintiffs have not identified evidence of a pattern of continuous prohibited predicate acts. They argue that the evidence shows at most "sporadic production or transfer of fake IDs" and that there is neither evidence that the acts of using or transferring the fake IDs occurred over a substantial period of time ("closed-ended continuity") nor evidence that defendants will continue to engage in

the act of producing or transferring fake IDs in the future ("open-ended continuity"). *See H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (discussing requirements to show either closed- or open-ended continuity with respect to predicate acts).

Plaintiffs respond that they are relying on "open-ended" continuity, which only requires showing that the predicate acts "threaten repetition." *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1526 (9th Cir. 1995) (discussing open-ended continuity). They argue that the pattern here is open-ended because defendants have not disavowed future attempts to infiltrate plaintiffs' conferences and facilities, defendants' goals are to "finish off PP" and "end abortion" using "moles and spies," and that they intend to "release more damning evidence."[24] Given the former and continued requirement of IDs for access to plaintiffs' conferences and facilities, plaintiffs argue that the use of false IDs by these defendants to seek further infiltration is almost guaranteed.

Defendants respond that open-ended continuity cannot be established because there was one use of the fake IDs to secure the recordings and information for the now-concluded Human Capital Project. They claim that their limited conduct is similar to that in *Jarvis v. Regan*, 833 F.2d 149, 153 (9th Cir. 1987), where defendants made misrepresentations, through mail and

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[24] Newman Dep. Ex. 39 (Mayo MSJ Opp. Decl. Ex. 17, July 2015 emails from Newman); Newman Dep. Ex. 50 (Mayo MSJ Opp. Decl. Ex. 24, emails from Newman).

wire fraud, in order to fraudulently secure a federal grant to be used to oppose one specific ballot measure.

The facts in *Jarvis*, however, are obviously different than the ones here. While the Project may, if defendants are to be believed, be over, defendants' zealous activism against plaintiffs is not. There is evidence from which a reasonable juror could conclude that defendants will attempt similar tactics to those at play in this case (use of fake ID and false identification in order to personally or help others gain access to plaintiffs' conference and facilities) again in the future. Defendants dispute that characterization of their future intents, repeatedly asserting that the work of the Project is "complete" and "finished." This only demonstrates that there is a dispute of material fact. Plaintiffs have presented sufficient evidence to satisfy the open-ended continuity prong because a reasonable juror could rely on it to determine that defendants present a continuing threat of infiltration either by personal use of fake IDS or by assisting others' use of fake IDs to target plaintiffs in the future. A jury must decide whether to believe plaintiffs' characterization of the facts or defendants' characterization that their plan "came to fruition" with the Project and their acts are not likely to repeat.[25] Neither party is entitled to

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[25] Defendants' reliance on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 820 (M.D.N.C. 1995) is not persuasive given the context of this case. There, the court held that a "series of predicate acts occurring over a six month span and directed at one victim cannot be said to possess closed continuity." *Id*. at 820. Not only are plaintiffs here alleging open-ended continuity, unlike in *Food Lion* where there was no dispute that the "acts of mail and wire fraud were part of a limited purpose, to obtain information

summary judgment concerning the pattern element of predicate acts under Section 1028.

2. RICO Proximate Causation of Injury/Damage

Defendants then argue that plaintiffs have failed to show that the predicate acts proximately caused their RICO injuries. As noted in my September 2016 Order, the "proper referent of the proximate-cause analysis" is the predicate acts alleged. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 461. As to that directness requirement, after reviewing the relevant case law I concluded:

> I agree that plaintiffs may not be able to recover for damages that were not directly caused by the actions of defendants, but caused instead by intervening actions of third parties who were motivated by the videos and press released by the Human Capital Project. For example, the damages plaintiffs incurred because their website was hacked by a third-party would appear to be too distant, too far down the causal chain, for plaintiffs to seek them under RICO. But other damages alleged – including the increase in security costs at conferences, meetings, and clinics that plaintiff incurred

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from Food Lion to be aired on PTL," but there is a dispute as to defendants' future intents to again infiltrate plaintiffs' conferences and facilities. *Id.*

> when they learned about defendants' infiltration of their conferences, meetings, and clinics – are much more directly tied to defendants' conduct and do not raise the problem of intervening actions of third-parties.

September 2016 Order at 16. I indicated that "[h]ow far the actual causal link stretches for each category of damages plaintiffs' allege is something that will need to be developed in discovery and tested on summary judgment." *Id*. at 16-17. I also noted, in passing, "whether foreseeability can still be considered is questionable in light of *Hemi Group LLC v. City of New York, New York*, 559 U.S. 1 (2010), which rejected the idea that proximate cause under RICO could 'turn on foreseeability.'" *Id.* at 16.

In these motions, defendants argue that foreseeability and intent are irrelevant under the RICO proximate cause analysis (Dkt. No. 596-6 at 14-19). Plaintiffs dispute that, arguing that post-*Hemi* cases, most significantly *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018), recognize that foreseeability and intent remain relevant. Dkt. No. 661. In *Fields*, the Ninth Circuit considered the proximate cause required under the civil remedies provision of the Anti–Terrorism Act (ATA, 18 U.S.C. § 2333(a)), which the panel determined was identical to proximate cause required under RICO. *Id*. at 745. The court recognized "that foreseeability is another of the 'judicial tools' in the proximate cause toolshed," but for "purposes of the ATA, it is a direct relationship, rather than foreseeability, that is required." *Id.* at 747 (relying on *Hemi* and *Anza*). Therefore, while foreseeability is not irrelevant, the

"touchstone" for both the ATA and RICO is the directness of the connection between defendants' act and plaintiffs' injuries. *Id.* at 748.

Plaintiffs also argue that the "one-step" litmus test for proximate cause used in *Hemi* (which, according to defendants, precludes any damages that are caused by more than one-step away in the causal chain) was clarified by the *Fields* court to apply only where the harm at issue is most immediately suffered by third parties. Dkt. No. 661 at 2. That is certainly a distinguishing characteristic between this case and the facts in *Hemi* and *Fields*; the harms at issue here were suffered not by third parties but by plaintiffs.[26] However, I did not conclude at the motion to dismiss stage and I do not conclude now that a strict one-step requirement is all that is allowed for proximate causation under RICO. Instead, my focus remains on the "touchstone" of directness.

That said, as explained in the analysis of damages in Section A above, I agree with defendants that certain categories of damages sought by plaintiffs are not recoverable under the First Amendment. For the damages that are allowable, sufficient evidence exists for a reasonable juror to conclude that those damages were directly caused by defendants' actions in

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[26] *See also Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (finding that "the necessary direct relationship between the plaintiff and the defendant is missing in this case" where the harm was suffered most directly by a third party, and recognizing that allegations of "specific intent" to harm plaintiff not enough "to override the necessity to evaluate the directness of injury").

infiltrating conferences and facilities and their targeting plaintiffs' staff members. Given the allegedly necessary role the false IDs played in allowing defendants their initial introductions to key members of plaintiffs' staff – at the NAF 2014 conference among others – and then for access to PPFA's conferences (and at least PPGC's facilities) in order to target plaintiffs' staff in aid of the Project, a reasonable juror could determine that defendants' conduct directly caused these categories of expenses. Any failure of evidence concerning the allowed categories of damages will be determined by the jury or on post-trial motions.

3. **Rhomberg, Newman, and Lopez**

Separately, defendants Rhomberg, Newman, and Lopez move for summary judgment arguing that because none of them committed a predicate act, they cannot be liable for RICO conspiracy under 18 U.S.C. §1962(d). In order to prove a RICO conspiracy claim, a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States*, 522 U.S. 52, 65 (1997). A defendant must also have been "aware of the essential nature and scope of the enterprise and intended to participate in it." *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir.1993) (internal quotation marks omitted). Therefore, plaintiffs must prove either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). "The

illegal agreement need not be express as long as its existence can be inferred from the words, actions, or interdependence of activities and persons involved." *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002).

None of the three defendants played a direct role in securing or using the three fake IDs at issue, but each is potentially liable for RICO conspiracy. While Lopez used his own ID to gain access to the conferences, certain aspects of his role that he admitted to create a dispute of material fact concerning his knowledge of or expectation that those with him at those conferences had procured and used fake IDs. Lopez introduced Daleiden under the false name Sarkis and made connections for Daleiden under that name. Given that Lopez himself had to use an ID matching his registered name to gain entrance to the conferences, a reasonable jury could conclude that he expected that those using false names were also using fake IDs. This evidence is sufficient to support a conspiracy under 18 U.S.C. § 1962(d). Although Lopez professed no direct knowledge of the others' use of fake IDs (Lopez MSJ Decl. ¶ 9) and testified that he thought Daleiden might just be using another of his "casual" names as Sarkis (Lopez Depo. at 114-117), his statements at best go to a credibility determination. Jurors will decide whether to believe his current testimony or whether the circumstantial evidence discredits him.[27]

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[27] Merritt also argues that the fact she played no direct role in producing or transferring the fake IDs shields her from liability under RICO. Merritt Oppo. at 15-17. But her connection to the fake IDs (securing one from Daleiden and using it multiple times

The issue regarding Rhomberg and Newman is closer. They contend that there is no evidence that they took any steps (or were in agreement) with Daleiden's efforts to procure and transfer fake IDs to use in the alleged criminal enterprise. Rhomberg initially refused to answer questions about the fake IDs, but was eventually compelled to do so. Even though Rhomberg denied knowledge about efforts to procure, transfer, and use the fake IDs, Daleiden admitted that he sought out Rhomberg for his experience with the type of "undercover operation" he was considering. At the inception of the project, Daleiden sent Rhomberg (and Newman) proposals describing the use of undercover operatives to create "stings" and "gotcha" videos where "trained actors" pretend to be "fetal traffickers" to gain access to plaintiffs' conferences, meetings, and staff. 2013 Project Proposal; Mayo MSJ Oppo. Decl. Ex. 31. Rhomberg was also kept informed of "deceptions" being used against plaintiffs and Daleiden's meetings with "targets" who might become suspicious. Rhomberg contends that being given high-level overviews of the Project a few times a year is insufficient to show

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for purposes of furthering the alleged RICO enterprise) is even more direct than for Lopez. The RICO conspiracy claim survives as to Merritt as well. In light of that conclusion, whether or not Merritt can be directly liable under RICO (as opposed to liable under only the conspiracy provision) will be determined at trial. Given the overlap in relevant evidence and my doubts that the dicta in *United States v. Christian*, 356 F.3d 1103, 1107 (9th Cir. 2004) relied on by Merritt but regarding a different statute and the issue of probable cause, establishes the correct framework for determining what is a "transfer" is under section 1028, both the direct and conspiracy RICO claims may proceed to trial with respect to Merritt.

knowledge or consent, but there is enough disputed evidence to let the jury decide whether Rhomberg must have known about the use of the fake IDs. Any disclaiming of knowledge about the use of fake IDs by Rhomberg, as well as Daleiden's minimizing Rhomberg's role in the Project (Daleiden MSJ Decl. ¶¶ 121-126), at most raise questions of material fact for resolution by the jury.

Similarly, the minimal but significant undisputed evidence regarding Newman's knowledge of the scope and methods to be used in the Project could lead a reasonable juror to conclude that he knew that fake identification was going to be used in order to orchestrate and make the "gotcha videos" and allow the "trained actors" to "pose" as "fetal traffickers" and access the otherwise restricted conferences and meetings at issue. Specifically, Newman received project proposals from Daleiden that outlined the plan to infiltrate and surreptitiously record conferences and meetings, and he claimed he was "integral" to and "planned" the Project with Daleiden. *See, e.g.*, 2013 Project Proposal (circulated to both Newman and Rhomberg). That is sufficient to allow plaintiffs to ask the jury to resolve the depth of Newman's knowledge of and the scope of his agreement to the RICO conspiracy, and specifically the use of the fake IDs.[28]

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[28] For purposes of this civil litigation, plaintiffs contend that inferences may be drawn against Newman because he asserted the Fifth Amendment right against self-incrimination and refused to answer questions regarding his knowledge of the procurement and use of the fake IDs. Newman counters that no Fifth Amendment inference may be drawn against him because plaintiffs have failed to meet all the requirements to impose such an inference,

In sum, plaintiffs have established a minimal but sufficient nexus to interstate commerce with respect to the predicate acts under 18 U.S.C. §§ 1028(a)(1) and (a)(2). The remainder of the parties' cross-motions on the elements of the RICO claim are DENIED.

C. Breach of Contracts

BioMax moves, on behalf of the defendants, for summary judgment on each of plaintiffs' breach claims: the breach of PPFA's Exhibit Agreements (EAs) (Count 4), the breach of NAF's contracts, brought by the plaintiffs whose staff were recorded as third-party beneficiaries under the NAF contracts (Count 5), and the breach of the PPGC/PPCFC NDA signed by Daleiden on behalf of BioMax to secure entry for himself and Merritt (Count 15). Plaintiffs move for partial summary judgment for liability for the breach of the PPFA EAs and the PPGC NDA only; they do not

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including that no "independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *see also id.* at 1265 ("no negative inference can be drawn against a civil litigant's assertion of his privilege against self-incrimination unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information."). It seems apparent that for some of the questions asked of Newman in his deposition, including requests to authenticate or discuss correspondence that Newman apparently drafted, Newman's testimony is required and no other source is available. However, plaintiffs have not fully engaged with the requirements necessary to support their request for various and unspecified adverse inferences. **What inferences are or are not appropriate at trial, with respect to any defendant's assertion of the Fifth Amendment privilege and refusal to answer in this case, should be addressed *in limine*.**

move for summary judgment as to the breach of the NAF agreements. Plaintiffs acknowledge that the amount of their recoverable damages under the two claims on which they move must be determined by the jury, but contend that undisputed facts show that liability should be entered in their favor as to the PPFA EAs and the PPGC NDA.

1. Breach of PPFA Exhibitor Agreements (Count 4)

There is no dispute that Daleiden, on behalf of BioMax, agreed to Exhibitor Agreements for each of the three PPFA conferences at issue. Miami EA, Sterk Decl., Ex. 66; Orlando EA, Sterk Decl., Ex. 67; and DC EA, Sterk Decl., Ex. 68. He signed the Miami EA using the Brianna Allen pseudonym. Given the representations about the existence and purpose of BioMax plus the referral from Dr. Nucatola, PPFA allowed BioMax to register as an exhibitor for the Miami conference. Graziani Decl. ¶ 7; Nucatola Decl. ¶ 7.[29] Daleiden used the name "Robert Sarkis" and provided the fake California drivers' license at the registration table. Daleiden Depo. II at 114:7-19. Lopez

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[29] Defendants dispute the "strength" or efficacy of the screening and vetting measures undertaken by PPFA prior to the intrusions, noting that it only took one recommendation from Nucatola (based on defendants' attendance at the NAF conference) to get BioMax into the Miami conference in 2014 and no further recommendations to get into the other conferences. *See* Rhomberg/Newman Oppo. [Dkt. No. 652] at 2-4. Defendants also object to paragraph 7 of the Nucatola Declaration as "contradicting prior deposition testimony." Dkt. No. 659-1. That objection is OVERRULED.

used his own ID. Both recorded participants at the conference. Daleiden also registered BioMax as an exhibitor at the Orlando conference, listing Sarkis and Lopez as the attendees. Sterk Decl. Ex. 42 (MeDC Registration). In February 2015, he registered BioMax as an exhibitor for the DC conference using the false Brianna Allen email at BioMax. CM00915 (Sterk Decl. Ex. 46). He identified Sarkis and Lopez as the attendees.

The PPFA EAs for the Miami and Orlando conferences both provide in their first paragraphs that all exhibits and sponsored meetings were to be "educational and informative, emphasizing information about products and services useful to the registrants' practice and beneficial to the interests of their clients and patients." Sterk Decl., Ex. 66 (Miami EA)[30]; Ex. 67 (Orlando EA). Paragraph 12 of the Miami EA and Paragraph 11 of the Orlando EA both require, under "Exhibit Space," that the exhibits be "of an educational nature." *Id.*

All three EAs at issue, including the EA for the DC conference, required that exhibitors "comply with all applicable federal, state and local laws and regulations

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[30] For example, the Miami EA on page 1 provided "The exhibits and sponsored meetings must be educational and informative, emphasizing information about products and services useful to the registrants' practice and beneficial to the interest of their clients and patients." On page 2, the Miami EA obligated exhibitors to "show only products manufactured or represented by their company in the regular course of business," only show exhibits "of an educational character . . . for use in the attendee's medical practice, teaching, or research".

in performance of its respective obligations pursuant to this Agreement, including, without limitation, laws related to fraud, abuse, privacy, discrimination, disabilities, samples, confidentiality, false claims and prohibition of kickbacks." DC EA ¶ 16; Orlando EA ¶ 3; Miami EA at 3.

The Miami EA's choice of law provision requires application of Colorado law, the Orlando EA requires application of Florida law, and the DC EA requires application of the laws of Washington, DC. Both sides agree that the elements of a breach of contract claim are identical under all three jurisdictions' laws: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach.

a. Duty/Breach

BioMax, on behalf of all defendants, argues that EAs did not impose any obligation that BioMax (or presumably Daleiden or Lopez) breached as an "exhibitor," and notes that none of the EAs expressly prohibited defendants from recording or publishing recordings of the conferences or otherwise required defendants to keep any information they learned confidential. Plaintiffs respond that defendants breached the EA requirements regarding (1) the "educational nature" of the exhibits, as required by the Miami EA and the Orlando EAs, as well as the requirement to show "products" under the DC EA and, relatedly, (2) the "rights and duties" sections – requiring both PPFA and the Exhibitors to comply with "laws related to fraud, abuse, privacy."

Defendants reply, first, that there is a "disconnect" between the Exhibit Space "duties" sections for Exhibitors and the more general "rights and duties" section because plaintiffs do not have evidence that BioMax or any defendant violated any federal, state, or local law in performing its "actual obligations" as set forth in the Exhibit Space sections of the EAs. Accepting defendants' hinging of the "rights and duties" section to violations of Exhibit Space "duties," plaintiffs *have* evidence of such violations because BioMax's "products" and exhibits were wholly fictional and neither educational nor useful to participants. In addition, although the DC EA does not clearly define "exhibitor duties" as the other two EAs do, it still requires exhibitors to have "products" that BioMax did not have. The company was a front and never had any of the products or services that were described in the BioMax brochures and described orally by Daleiden and Lopez to conference attendees. Sterk Decl. Ex. 22 (Screenshot from FNNI0773_20150227061943 at 6:42:35 showing BioMax brochures and business card on Exhibitor table); Daleiden Depo. II at 24-25.

Defendants' only response to the undisputed evidence that BioMax was a front company offering no real products or services is that a PPFA witness (Minow) "admitted" that conference participants would be interested in learning about fetal tissue procurement, the topic of Daleiden's and Lopez's conversations with participants. Minow Depo. 46:22-47:3 (Declaration of Gregory R. Michael, Ex. 53). Interest in a topic is materially different than hearing

about that topic from representatives of a fake company who never provided that product or service.[31]

Defendants also contend that they could not have breached the EAs because their requirements terminated at the end of each conference, and therefore any post-conference conduct (such as the release of the videos) could not have breached those contracts. BioMax MSJ at 10. But numerous breaches of the contractual provisions occurred *during* the conferences, specifically when defendants pretended to represent a real company, provided no real educational content, and exhibited no "useful" products. This argument does not work.

Defendants next assert that the general "legal rights and duties" provisions in the EAs (requiring both PPFA and the Exhibitors to comply with "laws related to fraud, abuse, privacy") are ineffectual and void, relying on a line of cases recognizing that contractual provisions requiring parties to "obey the law" have no legal effect. However, as I held on the motion to dismiss, a contract is void for lack of consideration only where the promise not to break the law is the *only*

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[31] Defendants also argue that the "educational nature" language only applies to "sponsors" and not "exhibitors" like BioMax. BioMax MSJ at 8-9. But the relevant language, under the "unlabeled sponsorship section" states: "The exhibits and sponsored meetings must be educational and informative" – and defendants admit that they were there to *exhibit*. This language applies to exhibitors like defendants.

contractual promise, which is not the case with the PPFA EAs. September 2016 Order at 21.[32]

Finally, even if the "legal rights and duties" section is not void, defendants argue that there is no breach of that section here because the "fraud" (if any) committed by defendants was not done with respect to the defendants' Exhibitor obligations under the EA. BioMax Reply at 3.[33] I rejected that argument above because there is no dispute that defendants' exhibits and products were not educational, useful, or actual as the EAs required they be.

The undisputed, material facts establish that BioMax and Daleiden breached the PPFA EAs.

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[32] The case defendants rely on in CMP's MSJ are no different. *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 715 (N.D. Cal. 2014) ("Defendants are correct. In California, a promise to refrain from unlawful conduct is unlawful consideration. . . . Thus, a contract that includes such a promise as consideration is illegal, and thus void."); *see also Schaefer v. Williams*, 15 Cal.App.4th 1243, 1246–47 (1993) (holding that a contract cannot be premised on a promise to not break the law); *Floor Seal Technology, Inc. v. Sinak Corp.*, 156 Fed. Appx. 903, at *1 (9th Cir.2005) (same).

[33] This section required PPFA and exhibitors to "comply with all applicable federal, state and local laws and regulations in performance of its respective obligations pursuant to this Agreement, including, without limitation, laws related to fraud, abuse, privacy, discrimination, disabilities, samples, confidentiality, false claims and prohibition of kickbacks." DC EA ¶ 16; Orlando EA ¶ 3; Miami EA at 3.

b. Damages: First Amendment/ Publication Damages

Daleiden separately argues, on behalf of all defendants, that damages from any breach of the EAs are barred by the First Amendment because plaintiffs' damages flow from the subsequent publication of the videos and not from the breach of the EAs themselves. Defendants argue that in discovery responses PPFA identified the following categories of damages stemming from the breach of its contracts: (1) physical and IT-related security costs, including costs related to safeguarding taped individuals; (2) cost of repairing, cleaning up, or replacing damages to buildings and personal property arising from vandalism, arson, and other security incidents; (3) lost revenue stemming from lost opportunities to treat patients due to the unavailability of the Planned Parenthood online appointment scheduling system because of a hack; (4) and other costs related to defendants' alleged wrongful conduct, staff time responding to the videos, security training for health center staff, and legal and other vendor fees. *See* Declaration of Michael Millen ISO Rhomberg and Newman's Motion for Summary Judgment (hereinafter "Millen Decl."), Ex. 101 (Damages Chart), at 9-10.

Defendants assert it is "undisputed" that these damages were allegedly and "substantially" caused by the publication of the videos alone and not by the narrower breach of the EAs at issue. As previously discussed, to the extent plaintiffs seek damages that stemmed from publication of the videos, those damages are not recoverable given the First Amendment

protections for publications, even under a breach of contract claim based on the PPFA EAs.[34] On the other hand, damages that resulted from *defendants'* own actions are not barred by the First Amendment.[35]

c. Damages: Causation Related to Breach

Relatedly, defendants contend that none of plaintiffs' non-publication damages is recoverable because they were not caused by the breaches of the EAs. Plaintiffs argue that even if some of their damages are precluded, significant damages remain that are directly tied to the cost of investigating how defendants breached their contracts and remedying any future possible breaches at their conferences. *See* Minow Depo. at 95:17–24. They contend that the amount of those damages, and defendants' defenses thereto (*e.g.*, damages were unnecessary or not related

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[34] I reject plaintiffs' argument made in passing that "state action" is necessary for First Amendment protections to apply in the context of breach of contract claims based on the PPFA EAs. *See* Pls. Oppo. MSJ at 22. The cases identified by plaintiffs deal with enforcement of settlement agreements and are inapposite to the claims here. *See United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 942–43 (6th Cir.1995) (no state action triggered by plaintiff's suit to enforce a settlement agreement barring disparagement of the parties' products); *Merrell v. Renier*, No. C 06 404 JLR, 2006 WL 3337368, at *7 (W.D. Wash. Nov. 16, 2008) (no state action from attempt to enforce settlement agreement limiting picketing).

[35] As noted above, defendants' reliance on the testimony of plaintiffs' lay witnesses who, when asked about whether various plaintiffs' damages "resulted from the publication of the videos," linked some of plaintiffs' damages to "the videos" is not persuasive.

to the breaches of the EAs), should be resolved at trial. I agree.

Finally, plaintiffs assert that even if all actual damages claims are barred (which as noted above they are not), PPFA is nonetheless entitled to nominal damages for the breach under each relevant jurisdictions' laws. *Patel v. Howard Univ.*, 896 F. Supp. 199, 205 (D.D.C. 1995) (plaintiff may recover nominal damages even if it "suffered no loss as a result of the breach," applying District of Columbia law) (citations omitted); *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 481 (Colo. App. 2003) ("Nominal damages are recoverable for a breach of contract even if no actual damages resulted or if the amount of actual damages has not been proved."); *Muroff v. Dill*, 386 So. 2d 1281, 1283 (Fla. Dist. Ct. App. 1980) (noting plaintiffs were "entitled to nominal damages once the breach of contract had been established, notwithstanding the absence of evidence regarding the correct measure of damages").

Defendants do not dispute PPFA's theoretical entitlement to nominal damages, but say they should not be able to seek them "in light of their repeated failure to demonstrate how Defendant breached any contractual obligations." As discussed above, that assertion is not true. *See supra.* Even if plaintiffs' damages might be found by the jury or on post-trial motions to be too vague or speculative, nominal damages are still available and have been adequately supported on this record. *See, e.g.*, *Klayman v. Judicial Watch, Inc.*, 255 F. Supp. 3d 161, 167 (D.D.C. 2017) ("If the plaintiff establishes breach of contract, but . . .

proof of damages is vague or speculative, then the party is entitled to no more than nominal damages.") (internal quotations omitted).[36]

d. Lopez, Rhomberg, and Newman

As noted, Daleiden and BioMax are liable for breach of contract. CMP did not move for summary judgment on the ground that none of the contracts were signed on its behalf, and plaintiffs simply assert that CMP is directly liable for each of the breach claims. It is not clear under what theory plaintiffs contend that CMP is liable, but I assume it is on an alter ego theory as the "parent" of non-existent BioMax and as the entity through which costs for the project were paid. However, because plaintiffs did not fully engage on this issue with respect to CMP on this or the other breach claims, plaintiffs are not entitled to summary judgment against CMP.

Lopez specifically moves for summary judgment, arguing that he cannot be bound to any PPFA contracts because he never signed one and that he cannot be considered the alter ego of BioMax. Lopez Oppo. at 8-9. Plaintiffs respond that the PPFA EAs covered and bound "employees" and "agents" of the Exhibitors, and therefore Lopez is bound as the agent of BioMax. However, plaintiffs do not cite any cases that could

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[36] Merritt separately argues that she cannot be liable for any breach as to PPFA because she did not sign any of the EAs on behalf of BioMax, and civil conspiracy cannot be used as a hook for breach of contact claims. Plaintiffs admit that Merritt cannot be liable for breach of the PPFA exhibitor agreements. Pls. Reply MSJ at 8 n.9.

hold Lopez *individually* liable (as opposed to the person or entity actually signing the contract, here Daleiden as BioMax) even if he was considered an employee, agent, or contractor of signatory BioMax.[37] In that light on this record and given plaintiffs' failure to provide apposite case law, Lopez's motion for summary judgment regarding his liability for this claim is GRANTED.

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[37] At the hearing, plaintiffs identified *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1120 (E.D. Cal. 2012) as supportive authority. There, the court recognized a line of California authority "holding non-signatories may be bound by the terms of an agreement if they are agents of a signatory." *Id*. at 1120. In *Sanchez*, the individual defendants were agents of the city of Fresno and were liable for their individual actions in violating a Settlement Agreement agreed to by Fresno. That context (government agents taking actions on behalf of the government) is obviously different than here. The *Sanchez* court, itself, relied solely on *Rowe v. Exline*, 153 Cal.App.4th 1276, 1284 (2007), where the California Court of Appeal held, in a "matter of first impression," that individual corporate directors "who were not signatories to arbitration agreement but were sued as alter egos of corporation, were entitled to compel arbitration of breach of contract claim." *Id*. at 1284-85; *see also id*. (discussing other cases allowing agents of corporations to enforce arbitration agreements). And at the hearing plaintiffs cited an arbitration case from Texas, binding an adult child who brought a personal injury action to an arbitration agreement signed by the parent/homeowners. *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005). These arbitration agreement cases offer little persuasive analysis for this situation, where plaintiffs seek to bind employee/contractors to agreements signed by their purported employers. The result would be different if plaintiffs asserted a sufficient alter ego theory of liability but, as noted, they no longer pursue that theory as to Merritt or Lopez.

Finally, plaintiffs expressly assert that Rhomberg and Newman are liable for breach of contract as "alter egos" of BioMax, given their roles with CMP. Pls. MSJ at25 n.24; *see also id.* at 16 n.15 (citing alter ego cases). There are two problems. First, plaintiffs never identified Rhomberg and Newman as defendants on this claim. As a result, they did not affirmatively move for summary judgment on it; they argue that allowing plaintiffs to pursue this claim against them individually would be prejudicial. Second, plaintiffs almost wholly fail to engage with any case law addressing alter ego liability and fail to offer the facts they have uncovered with respect to these defendants to support their alter ego theory. *See* Pls. Oppo. MSJ at 43-44 (asserting CMP is alter ego of BioMax); Pls MSJ at 16 n.15 & 25 n.24.

The sum of plaintiffs' alter ego showing as to Rhomberg and Newman is their assertion that CMP, as the parent of a company formed solely for a fraudulent purpose, is liable as the alter ego of BioMax. They contend that Rhomberg and Newman, as directors of CMP, are directly liable for the breaches (and, as discussed below, trespasses) committed by BioMax and the other individual defendants. Because CMP was established to "perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose," the corporation's acts are deemed "to be those of the persons or organizations actually controlling the corporation." *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1341 (Cal. App. 4th Dist. 2009) (citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th 523, 538 (2000)).

Plaintiffs fail to address the multi-factor test required to establish alter ego liability. They also fail to acknowledge my determination in the related *NAF v. CMP* case, Case No. 15-cv-3522, that NAF's allegations of "alter ego" liability against Newman were insufficient. NAF argued for alter ego liability, as plaintiffs assert here, that where 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).[38] In my November 2018 Order, when I addressed whether NAF had adequately pleaded its breach of contract claim against Newman as the "alter ego" of CMP as the "alter ego" of BioMax, I noted the complexity that neither Newman nor CMP signed any of the contracts at issue while BioMax and Daleiden

[38] 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 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.

and the other co-conspirators did, using pseudonyms. November 2018 Order at 24. I also noted that there were no allegations that Newman was an officer of BioMax (the entity that did enter into the contracts), although there were allegations that Newman was responsible with Daleiden for creating, setting up, and directing the activities of BioMax. *Id.* Given the lack of allegations regarding Newman's role with BioMax and the absence of any apposite cases (permitting what would be in essence a finding of two-level alter ego), I dismissed the breach of contract-alter ego theory as to Newman, but allowed the breach of contract direct liability claim to proceed under an agency theory of direct liability. *Id.* at 25.

Plaintiffs ignore the case law, my prior analysis in the related *NAF* case, and any facts regarding how liability flows up from BioMax through CMP and then to CMP officers Rhomberg and Newman. Plaintiffs have not done enough to secure summary judgment against Rhomberg and Newman on this (or the other) breach claims. That, and because neither of these defendants was named in any of the breach claims, not only precludes plaintiffs' motion for summary judgment but requires me to hold that this claim cannot be asserted against either of them.[39]

Defendants' motion for summary judgment as to Count 4 and PPFA's contracts is DENIED, except as to

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[39] Nor can Rhomberg or Newman be held indirectly liable for the breaches of contract under the Conspiracy cause of action (Count III) discussed below. Plaintiffs admit their conspiracy claim is grounded in defendants' fraudulent conduct underlying their tort claims.

Merritt, Lopez, Rhomberg, and Newman. Plaintiffs' motion for partial summary judgment on liability as to BioMax and Daleiden for breach and nominal damages under this claim is GRANTED. Whether CMP can be held liable for these breaches under the alter ego theory will be determined at trial. The amount, if any, of actual damages available will also be determined at trial.

2. **Breach of NAF Contracts (Count 5)**

This breach claim is brought by PPFA, PPNC, PPPSW, PPMM, PPOSBC, and PPGC/PPCFC as alleged third-party beneficiaries under NAF's Exhibitor Agreements (NAF EAs) and the required NAF non-disclosure agreements (NAF NDAs) for NAF's February 2014 and March 2015 conferences. Defendants move for summary judgment, challenging these plaintiffs' standing as third-party beneficiaries, and arguing that there was lack of consideration for the separate NAF NDAs, the NAF agreements are void for vagueness, there is a lack of evidence that defendants breached the NAF EAs or NAF NDAs, and there is a lack of recoverable damages flowing from any breach. Plaintiffs do not move for partial summary judgment on this breach claim, presumably because they concede that disputes of material fact exist.

Daleiden signed the NAF EAs in February 2014 and March 2015, a few weeks before the California and then the Maryland NAF conferences. Sterk Decl. Ex. 31; Daleiden Depo. II at 87:7-24, 88:20-89:16. This claim is also based on the NAF NDAs that Daleiden, Merritt, and Baxter allegedly signed as "Sarkis," "Tennenbaum," and "Allen" prior to attending the 2014

Meeting and that Daleiden, Merritt, and Lopez allegedly signed prior to attending the 2015 meeting. The NDAs contain a provision prohibiting videotaping or recording of "meetings or discussions" at the conferences. NAF NDA (2015), Sterk Decl. Ex. 40. The NAF contracts do not contain choice of law provisions, and therefore the parties agree that the law of the jurisdiction where each contract was performed (California and Maryland) applies.

a. Third Party Beneficiary Status

Under California law, a "contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559. Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. *Jones v. Aetna Cas. & Sur. Co.*, 26 Cal. App. 4th 1717, 1725 (1994); *see also Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1023 (2009) ("Ultimately, the determination turns on the manifestation of intent to confer a benefit on the third party."); *Northstar Fin. Advisors, Inc. v. Schwab Investments*, 781 F. Supp. 2d 926, 942 (N.D. Cal. 2011) ("Under California law, a contract must be clear in its intention to benefit a third party in order for that party to establish beneficiary status." (emphasis in original)).

Defendants argue, first, that plaintiffs, as attendees at the conferences, could not have been intended beneficiaries to those contacts because the specific

conference participants (the actual people who would, in fact, be attending) were "unknown" to both defendants and each other. Therefore, "omitting" those very people as express beneficiaries from the express language of the contract would be "unnatural." Defendants also contend that there is no evidence in the language of the NAF EA that PPFA or anyone else was an intended beneficiary because the NAF EA discusses only NAF and does not imply "benefits" to anyone else. Finally, defendants argue that the NAF NDA has no language conveying an intent to benefit attendees (as opposed to NAF itself) much less the employers or associations of those attendees.

Reviewing these same contracts on defendants' motion to dismiss, I concluded that the "intent of NAF to benefit plaintiffs is plausibly pleaded and supported facially by the agreements at issue," and that plaintiffs could plausibly be "third party beneficiaries [because] they are included within the class of 'people' who were required to sign and abide by, and as a result receive protection from, the NAF confidentiality agreements." Sept. 2016 Order at 24.

Defendants have not pointed to any unconsidered legal arguments or undisputed evidence that would cause me to reconsider my plausibility conclusion based on the contractual language itself. Indeed, that conclusion is only strengthened if I look to more recently uncovered extrinsic evidence. *Software Design & Application, Ltd. v. Price Waterhouse,* 49 Cal. App. 4th 464, 470 (Cal. App. 1st Dist. 1996) (noting even if a contract is integrated "extrinsic evidence is admissible [] where relevant to prove a meaning to

which the language of the instrument is reasonably susceptible"); *see also* Deposition of Nichelle Davis at 233:23–234:3 (Mayo MSJ Opp. Decl. Ex. 39) ("Davis Depo.") (noting the purpose of the NAF confidentiality agreements was to "protect all members and attendees at the conference"); 240:25–241:5 (purpose was to ensure confidentiality). However, because intent is generally a question of fact and plaintiffs did not move on this claim, it goes to the jury for final resolution.

Finally, while defendants may not have known each Planned Parenthood-affiliated entity and staff member who would be in attendance, defendants cite no case law showing that level of specific knowledge is a requirement for intent and third-party beneficiary status. In addition, there is ample evidence that defendants knew some of them would be; indeed defendants' own documents show their intent to target plaintiffs and plaintiffs' staff at the NAF conferences. *See, e.g.*, Sterk MSJ Decl. Ex. 16 (Roadmap for Project Release, "We will exhibit at the NAF Annual Meeting in Baltimore from April 17 to 21 . . . This will be our last opportunity to network with new targets of interest, and to communicate in person with high-level PP national officials.").

Defendants dispute the meaning and implication of this testimony. Their position confirms the material facts in dispute concerning their intent and knowledge. Summary judgment is not warranted on the third-party beneficiary issue.

b. Consideration

Defendants argue that the NAF NDA lacks separate consideration because, in their view, consideration to access the conference as Exhibitors was secured by signing by the EA only. Once the EA was signed for each conference, defendants reason that they were required to be given access to each conference and, therefore, that no separate "consideration" was given for the later-signed NDA. Defendants point to language in the EA that when the EA was "countersigned by NAF, this serves as a contract for exhibit space and the following [Exhibitor Agreement] are expressly incorporated here." They also note that the exhibit fee was required to be paid at the time the EA was submitted and was "non-refundable" so that could not act as consideration for the subsequently required NDA. Once the EA was signed and the exhibit fee paid, according to defendants, NAF had promised defendants entrance as an Exhibitor. Nothing else was communicated to them until they arrived on-site to register and enter and were forced to sign the NDAs.

Defendants made the same argument in opposing NAF's motion for a preliminary injunction in the related *NAF* case, 15-3522. When considering it, albeit on a more limited evidentiary record, I concluded, "Nothing in the language of the EAs or [NDAs], or the other facts in the record, support defendants' argument that upon signing the EAs, NAF had the legal obligation to permit Daleiden's group access to the

meetings without further requirement." February 2016 Order in Case No. 15-3522, Dkt. No. 354.[40]

Defendants do not identify any other new, materially different facts to support their lack of consideration argument except their own testimony that once the registration fee was paid and EA signed, they expected they would be admitted. Daleiden MSJ Decl. ¶¶104-107.[41] However, to the extent that defendants' subjective intent is relevant to consideration, that points only to disputes of fact for resolution by the jury.[42]

In Reply, defendants raise one new argument: that the NAF agreements fail "due to fraud in the inception/execution" because NAF hid the need to sign the NDA from defendants until they arrived at the conferences. As an initial matter, this would apply (if at all) only to the 2014 NDA. But defendants cite *no evidence* that NAF intended a fraud or intended to hide the requirement of the NDA to coerce exhibitors into paying their fees and then turn them away if they did

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[40] Evidence submitted by plaintiffs on these motions establish that NAF required an NDA for all attendees. Davis Depo. at 186:6 - 187:12.

[41] Plaintiffs object to paragraph 107 about the scope and coverage of the NAF NDAs as improper lay opinion/conclusion of law. That objection is OVERRULED as to consideration.

[42] If defendants' subjective expectations about admission are relevant, they apply at most to the 2014 NAF conference. They could not have had a reasonable expectation that they would be admitted in 2015 without a BioMax representative signing another NDA.

not sign the NDAs. Instead, considering the language of the EAs and other registration forms, as well as the *context* of the conferences themselves and the expectations of participants (the discussion of sensitive aspects of their abortion practices),[43] defendants' contention that they were fraudulently tricked into signing an NDA so they could enter to perpetrate their breach (and fraud) is meritless.

Defendants' lack of consideration arguments fail to support summary judgment on this claim.

c. Void for Vagueness

Defendants separately argue that the EA is void for vagueness because the EAs do not define the term "confidential information." They admit that the EAs obligate exhibitors to hold in trust and confidence "any confidential information received in the course of exhibiting at the NAF Annual Meeting and [to] agree not to reproduce or disclose confidential information." Minow Depo. Exs. 1922, 1923. But they assert that because there is no definition of the boundaries of that confidential information, the EAs could be construed to cover even mundane and publicly known information making them impermissibly vague and overbroad.

I rejected similar arguments at the preliminary injunction stage in the related *NAF* case. February 2016 Order at 23-25. On this round of motions, defendants have not shown that the EAs (or NDAs) are so vague that a court cannot appropriately enforce them (or the parties cannot understand them) or that

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[43] *See also* Davis Depo. at 233:23–234:3; 240:25–241:5.

they have been enforced in a way that makes their application to defendants here unreasonable. There is no need to revisit those arguments.[44]

Defendants also raise a few evidentiary-based arguments to argue that NAF's own actions indicate that the information sought and secured by defendants at the NAF conference was not confidential and that the EAs and NDAs should not be enforced against them. They claim that NAF allowed some individuals to access the conferences without personally signing an NDA because others in the group had signed it. Michael Decl., Ex. 57 (noting production of only a limited number of NDAs). In addition, they contend that because NAF only cursorily investigated new exhibitors by reviewing a company's website and failed to conduct any further investigation into companies who wanted to exhibit at their conferences, vetting has been inconsistent and these NAF agreements should, therefore, not be enforced against defendants. Plaintiffs dispute the extent of non-enforcement and the efficacy

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[44] On these motions, plaintiffs identify the NAF provisions in the EA and NDA that they argue adequately define what conduct is prohibited and what information is confidential. They note that cases require that "[t]o be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." *Ladas v. California State Auto. Assn.*, 19 Cal. App. 4th 761, 770 (Cal. App. 1st Dist. 1993). On this second consideration of the same overbreadth arguments, defendants point to no cases invalidating broad, but defined, non-disclosure agreements like the ones at issue here. And even if the agreement could be considered overbroad in some respects, as noted in my previous Order, California law allows courts to reasonably interpret the terms.

of vetting new vendors or exhibitors; the record does not support summary judgment in defendants' favor.

d. Breach

BioMax also argues on behalf of defendants that it (presumably Daleiden) reasonably understood that the "confidential information" covered by the EAs and NDAs was limited to trade secret and/or proprietary information shared at the conference, and did not include the type of information secured by defendants for the purpose of the Project's "collection of opinions, statistical data, and criminal investigation." Daleiden Decl., ¶ 108. Defendants contend that at most the NAF NDA prohibited the dissemination of trade secret information and plaintiffs cannot prove (and do not contend) that any trade secret information was published in the HCP videos.

There are a number of weaknesses with this argument. First, defendants' pinched interpretation of the NAF EAs and NDAs is not accurate. The NDAs prevented attendees from, for example, *making* video, audio, or other recordings of meetings or discussions. Sterk Decl. Ex. 40 ¶ 1. Defendants do not dispute that their conduct violated that provision.

Second, the broader provisions in the EAs and NDAs protect against release of essentially all information learned at the conference, absent agreement of NAF. As discussed, these provisions are not problematic when reasonably construed by a court to cover confidential or sensitive information but not publicly known mundane information. What is a reasonable construction here depends on the context of

the industry and claims at issue. *See, e.g.*, *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 691 F.3d 821, 834 (6th Cir. 2012) (noting that "confidential information of any kind" is "most certainly general and should be interpreted as part of the sequence to refer to "other secret information of Plaintiffs which involves the manner in which the business is operated").[45]

Finally, Paragraph 15 of the EAs obligates exhibitors to "identify, display, and/or represent their businesses, products, and/or services truthfully, accurately, and consistently with the information provided in the Application." Sterk Decl. Ex. 31 ¶ 15. Defendants argue that the terms "truthfully" and "accurately" are modified by the clause "with the information provided in the Application," suggesting that any representations regarding defendants' identity or BioMax at the conferences need only mirror the misrepresentations listed on the exhibitor application forms. According to Daleiden, this is exactly what BioMax and he understood those terms to mean. Daleiden MSJ Decl. ¶108. That subjective interpretation is simply not reasonable as a matter of law, given the industry context and the reason for these contracts. Interpreting "with the information provided in the Application" as modifying only

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[45] *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 575–76 (Cal. App. 2d Dist. 2009), where the court limited the non-compete agreement to cover only trade secret information is not helpful because it addressed California's strong policy in favor of employee mobility and strict construction of non-compete agreements codified in Cal. Bus. & Prof. Code §16600.

"consistently" is the reasonable, objective interpretation. NAF presumably relied on the information provided in the Application to allow Exhibitors to exhibit their products and services. More fundamentally, Daleiden's subjective intent is legally irrelevant. *Winet v. Price*, 4 Cal. App. 4th 1159, 1166-67 & n. 3 (Cal. App. 4th Dist. 1992) ("[E]vidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language.").[46]

Defendants are not entitled to summary judgment on breach.

e. Damages

Defendants repeat their argument that the damages being sought by plaintiffs are barred by the First Amendment as publication damages. I addressed those arguments above. Defendants also argue that no damages could arise *after* the expiration of the NAF contracts (which according to defendants occurred at the end of the conference), and any other damages are barred by the lack of proximate causation flowing from breach of the NAF contracts.

As an initial matter, defendants do not dispute that nominal damages are available under both California and Maryland law. Plaintiffs also assert that their damages from being recorded at NAF's conferences – in violation of various provisions of the EAs and NDAs –

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[46] Plaintiffs object to paragraph 108 and Daleiden's subjective intent as improper lay opinion and conclusion of law. That objection, based on contract interpretation, is SUSTAINED.

led to other damages, including statutory damages for the illegal recordings under Maryland and California law. *See, e.g.*, *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (Cal. App. 3d Dist. 1959) ("A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him.").

Further, defendants' contention that any obligations under the NAF agreements terminated at the end of each conference relies only on the contracts' lack of an express duration statement and on NAF's requirement that exhibitors and attendees sign the same EA and same NDA year after year, conference after conference. Neither case law nor language from the contracts at issue supports these arguments. As to the lack of an express termination date, that reasonably suggests only that the agreements exist beyond the duration of the conferences. In addition, because there were breaches both within the duration of the conferences and, for the NDA, following the conference, defendants' unsupported argument fails. Finally, the reasonable implication from the fact that new EA and NDAs were required each year is that new information would be disclosed at each subsequent conference, hence the need for newly signed EAs and NDAs. The proximate cause arguments fail.

Defendants are not entitled to summary judgment for this claim on damages. I note that plaintiffs argue with respect to the breach of contract claims based on NAF's NDAs that the damages analysis described in Section A above should not apply because defendants expressly waived their First Amendment rights by

knowingly, voluntarily, and intelligently agreeing to the NDAs. As this issue was not adequately addressed or briefed on these motions, I do not determine it in this Order. **It should be raised in a motion *in limine* prior to trial**.

f. Merritt

Finally, Merritt argues that she cannot be liable for any breach as to the NAF contracts because, as with the PPFA EAs, she did not personally sign them; Daleiden signed the "Tennenbaum" name onto the NAF EAs. While Merritt is correct as to the EAs, there is evidence – from Merritt's own recordings – that she personally signed at least the NDA that allowed her entrance into the 2014 NAF conference. Mayo MSJ Oppo. Decl. Ex. 41 (Merritt Depo. Ex. 417), Ex. 42 (audio file).[47] The breach claim with respect to that NAF NDA can proceed against Merritt.

More broadly, plaintiffs contend that because the NAF agreements by their own terms apply to the "officers, employees, and agents" of Exhibitors, Merritt remains on the hook for all NAF breaches. But, as with Lopez and Count 4, plaintiffs cite no case law that would hold anyone other than the signatories (BioMax or Daleiden) liable for breach of the EAs or NDAs absent an exception to the general rule that only signatories are responsible for breaches of contract.

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[47] The facts that Merritt testified she had "no recollection" of signing it during her deposition, and that this recording is audio only and (according to Merritt) "muffled," raise, at most, a dispute of material fact.

Merritt is a defendant only for purposes of the NDA that she signed.[48]

Defendants' motion for summary judgment on the breach of the NAF agreements is DENIED.

3. **Breach PPCG/PPCFC Contract (Count 15)**

PPCG/PPCFC brings this claim alleging a breach of the Non-Disclosure Agreement (PPCG NDA) Daleiden signed (using Tennenbaum's signature) to gain access to the PPFC/PPCFC facilities in Houston. Both sides move for summary judgment on this claim, with plaintiffs reserving for trial the issue of the amount of damages exceeding nominal damages. Plaintiffs argue that defendants Daleiden, Merritt, CMP, and BioMax breached the PPGC NDA by recording for the purpose of disclosing PPGC/PPCFC's confidential information and then disclosing information by posting those recordings as part of the HCP.

The PPGC NDA provides, "[A]ll information disclosed by [PPCG] to the Recipient [BioMax] shall be deemed to be 'Confidential Information.' In particular, 'Confidential Information' shall be deemed to include (i) all written information of [PPCG], and (ii) all oral information of [PPCG], which in either case is identified at the time of disclosure as being of a confidential or proprietary nature or is reasonably

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[48] Somewhat similarly, Lopez claims that he did not violate the 2015 NAF NDA because he did not "publish" anything and simply turned over all of his recordings to Daleiden. However, the NDAs prohibited recording, which Lopez indisputably did.

understood by the Recipient to be confidential under the circumstances of the disclosure." Sterk Decl., Ex. 54 (PPCG NDA, Dkt. No. 607-6]) ¶ 1. The PPGC NDA clarified that "[t]he term 'confidential Information' shall not be deemed to include information that (a) is or becomes a part of the public domain through no act or omission of the Recipient; (b) is lawfully disclosed to the Recipient by a third party without restriction on disclosure; or (c) is independently developed by the Recipient without breach of this Agreement." *Id.* ¶ 2. The NDA restricted BioMax's use of the Confidential Information to "evaluate, negotiate and consummate" scientific research programs and provided BioMax "shall not disclose to any third party or use any Confidential Information for any other purpose." *Id.* ¶ 3.

The PPCG NDA required that BioMax "not disclose or permit its Representatives [defined as employees, agents, consultants and others] to disclose any Confidential Information," other than to help consummate the research programs. *Id.* ¶ 5. Finally, the PPCG NDA provided that any breach could cause an "irreparable injury" and entitle PPCG to equitable remedies. *Id.* ¶ 10.

a. Breach

Defendants argue that there is no evidence of a breach of the PPCG NDA because plaintiffs never identified to defendants "at the time of disclosure or otherwise" what specific oral information plaintiffs considered to be confidential, and the NDA covers only release of designated "confidential information." In addition to the failure of PPCG to contemporaneously

identify what information it considered confidential, defendants contend that PPCG has failed to show a breach because plaintiffs have not identified any confidential information that was contained in the recordings from the PPCG published by defendants.

Plaintiffs rely on the first sentence from Paragraph 1 of the PPGC NDA to argue that *all* information disclosed is "Confidential Information," despite the "in particular language" in Paragraph 1 further defining what is covered. Under that broader interpretation, plaintiffs argue that breach cannot be disputed because the HCP videos heavily featured Farrell and Tram Nguyen from PPCG/PPCFC.

Under Texas law, which governs the PPCG NDA, the written contract is construed "to determine the parties' intent as expressed in the writing, not the parties' present interpretation," and terms are given "their plain, ordinary, and generally accepted meaning unless the contract shows that the parties used them in a technical or different sense." *In re Mktg. Inv'rs Corp.*, 80 S.W.3d 44, 48 (Tex. App. 1998) (internal citations omitted). Unambiguous contracts are construed as a matter of law, and courts should not "rewrite contracts to insert provisions parties could have included or imply restraints for which they did not bargain." *Id.*

Here, I find that the first "all information" sentence of the NDA is expressly modified and further defined by the second "in particular" sentence. Therefore, in order to be "Confidential Information" protected by the PPCG NDA, the information must have been identified as confidential by a PPGC representative at the time of disclosure or be information reasonably understood –

under an objective standard – as "confidential under the circumstances of the disclosure." There is no dispute that no one at PPCG identified any particular information disclosed as "confidential." However, given the context of the disclosures here (made only after the NDA was executed, "mostly behind" closed doors, in a secure environment), and given the context of the discussion, defendants are not entitled to summary judgment of non-breach even if they subjectively believed the information disclosed did not qualify as confidential.[49] That issue is for the jury.

Finally, while defendants argue that the information disclosed on-site and at the restaurant in Texas "mixed personal topics with professional topics," precluding a finding that any "Confidential Information" was misused by defendants contrary to the terms of the NDA (*e.g.*, was recorded and subsequently disclosed for purposes irrelevant to a scientific research program), that just proves that material questions of fact remain.[50] Whether

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[49] Plaintiffs also argue that if I reject their position that all information disclosed is "Confidential Information" under the first sentence, the import of the second sentence goes to the jury because ambiguous contractual provisions are interpreted by the jury. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983) ("When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue."). I do not find that the PPGC NDA is ambiguous. I find that the second sentence clearly modifies and defines the first.

[50] Contrary to defendants mischaracterization, plaintiffs have identified arguably "Confidential Information" that defendants recorded and otherwise "used" in alleged violation of the PPGC

information received by defendants during the site visit should have been "reasonably understood" by defendants to be "Confidential Information" covered by the NDA and whether it was used by defendants (disclosed through the HCP videos or otherwise) contrary to the purposes of the NDA are questions to be resolved by the jury.[51]

b. PPCFC Standing

Defendants also challenge the standing of PPCFC to assert a breach of the PPCG NDA, because the NDA itself does not mention PPCFC; "Disclosing Party" is defined solely as PPCG. *See MCI Telecomm. Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999) ("A court will not create a third-party beneficiary contract by implication. [ ] The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied.").

Plaintiffs respond that because PPCFC's offices are "included within" PPGC, and both entities' spaces were recorded, the fact that PPCFC was separately incorporated from PPGC (pursuant to requirements under Texas law) should not undermine PPCFC's standing. I disagree. Plaintiffs cite no supporting Texas law or point to any language in the NDA that shows

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NDA. *See* Pls. MSJ Reply [Dkt. No. 694] at 15 n.16. Again, whether that information qualifies as "Confidential Information" that was misused will be decided by the jury.

[51] Plaintiffs have clarified that the PPCG NDA breach claim is not based on any information disclosed at the restaurant.

PPCFC was a third party "clearly intended" to benefit from the NDA as required under Texas authority. PPCFC does not have standing to bring this breach claim.

c. Merritt

Separately, Merritt argues that she cannot be liable for any breach of the PPCG NDA because she did not sign it; instead it is undisputed that Daleiden signed it using the signature of Merritt's fake persona Susan Tennenbaum. Plaintiffs respond that the clear terms of the NDA bound BioMax's agents and employees, therefore Merritt should be bound because she purported herself to be BioMax's CEO during the PPGC visit. Plaintiffs, however, cite no authority, much less apposite authority that would hold an individual – even one purporting to be the CEO of a company – liable under an NDA which she did not sign. Summary judgment is GRANTED to Merritt on this narrow claim.[52]

d. Damage

Finally, defendants argue that there is no evidence of actionable damage stemming from the breach of the PPCG NDA because the only harms plaintiffs have identified (responses to threats) stem from the actions of third parties that are either barred as publication damages or for lack of proximate cause. However, as

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[52] As noted above, with respect to Lopez, plaintiffs' only cases purporting to bind non-signatories are an inapposite line of cases arising in the context of who may compel or be bound by arbitration agreements.

above, plaintiffs are entitled to nominal damages. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 664–65 (Tex. 2009) ("we agree that nominal damages may be recovered for breach of contract."). In addition, as I have noted, damages for security measures implemented for targeted staff (*e.g.*, Farrell and Nguyen) are actionable as linked directly to defendants' actions targeting and recording those staff members. What damages are appropriate – within the boundaries I have outlined – is for the jury to decide.[53]

Defendants' motion for summary judgment on the PPCG breach claim and plaintiffs' motion for summary judgment are DENIED, except for the limited respect that Merritt is not liable for any breach.

4. Defendants' Public Policy Defense

Finally, plaintiffs contend that summary judgment in their favor is warranted on defendants' public policy defense to each of plaintiffs' breach of contract claims. The laws of the jurisdictions at issue – Florida, Colorado, Washington, DC, California, and Texas – provide that whether a contract is against public policy "is a question of law to be determined from the circumstances of the particular case." *Bovard v. Am. Horse Enterprises, Inc.*, 201 Cal. App. 3d 832, 838 (Cal. App. 3d Dist. 1988); *Jankowiak v. Allstate Prop. & Cas.*

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[53] Plaintiffs' argument that because the NDA characterizes a violation as "irreparable injury," they need not demonstrate any actual damages is not particularly persuasive, as that provision contemplates injunctive or other equitable relief like "specific performance." PPCG NDA ¶ 10.

Ins. Co., 201 S.W.3d 200, 209–10 (Tex. App. 2006) ("Whether a contract violates public policy is a question of law we review de novo."); *Calvert v. Mayberry*, 440 P.3d 424, 429 (Colo. 2019), reh'g denied (May 20, 2019) ("We review de novo whether a contract violates public policy.").

In opposition, defendants argue that summary judgment is not appropriate on this defense because there are material disputes of fact that I cannot resolve on the record before me. The first is whether defendants' waivers of their free speech rights by signing the contracts were "knowing, voluntary, and intelligent." *See, e.g., Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993), *as amended* (Mar. 8, 1994) ("First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent."). Defendants bear the burden of proof on this affirmative defense. They do not dispute that the agreements each personally signed were done so knowingly and voluntarily, and plaintiffs submit evidence that they were.[54]

Defendants also contend that because the NAF NDA was presented "immediately" before entering the conference, the "record does not establish that Defendants had enough time to formulate an intention to breach the NDA." BioMax Oppo. at 13. They offer no evidence (through declaration or citation to deposition testimony) in support and ignore that at least the 2015

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[54] Sterk MSJ Decl. Ex. 40 (Lopez NAF NDA); Lopez Depo. at 224:4-10 (Mayo Decl. ISO Opp. to Anti-SLAPP Ex. 4); Sterk MSJ Decl. Ex. 31 (2014 NAF EA); Daleiden Depo. II at 86-89.

NAF NDA was signed after defendants had a year's warning that one was required. The undisputed evidence is that the defendants who signed the agreements did so knowingly and not as the result of coercion or ignorance, even if they subjectively believed that they would not be bound by them as a matter of public policy. *See* February 2016 Preliminary Injunction Order at 29 (rejecting subjective intent as part of public policy defense).

As to the "free speech" issue raised by defendants, as I noted in the Preliminary Injunction Order in the related *NAF* case, whether a contract, or more specifically a non-disclosure agreement, should be enforced despite a claim that enforcement would impinge on First Amendment rights depends on weighing "the competing public interests in determining whether to enforce confidentiality agreements that restrict First Amendment rights." February 2016 Order at 29 (also relying on *Leonard v. Clark*, 112 F.3d 885, 890 (9th Cir. 1993), *as amended* (Mar. 8, 1994) ("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.'") (internal quotation omitted); *see also Perricone v. Perricone*, 292 Conn. 187, 221-22 (Conn. 2009) (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.").

Weighing the evidence at the preliminary injunction stage in the *NAF* case, I concluded that "balancing the significant interests at stake on both sides supports enforcement of the confidentiality agreements at this juncture." February 2016 Order at 29. Reviewing the public policy justifications asserted by both sides, I concluded:

> 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 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. 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.

Id. at 34-35.[55] Plaintiffs contend the same result should be found here. Defendants merely characterize these findings as from a "separate case" whose findings I am free to disregard. BioMax Oppo. at 12.

Instead, defendants assert that because of their subjective interpretation of the contracts and their individual beliefs that they would not be bound by them, there are disputes of material fact whether any defendant "intended" to breach them. Those arguments are based on the same "void" for vagueness or lack of breach arguments addressed and rejected above. More significantly, they have no relevance to whether public policy would excuse a breach found by the trier of fact.

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[55] I also noted "[a]t 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." *Id*. at 34. Here, defendants do not make that sort of as applied challenge. But even if they did, it would not succeed because the severity of the breaches – the use of a fake company to surreptitiously record and disclose significant amounts of footage that showed no misconduct – makes this case more akin to *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1062 (9th Cir. 2011), where the Ninth Circuit declined to adopt a public policy defense to invalidate an NDA based on plaintiff's subsequent use of some of the materials to file a qui tam action, because any such exception "would not cover [the] conduct given her vast and indiscriminate appropriation of" information covered by the NDA.

Defendants also argue that the agreements are "void" because their "purpose is the concealment of criminal activity." BioMax Oppo. at 11. But they cite no evidence from either the face of the contracts or from any witness to support that purpose. Indeed, the undisputed evidence is that the purpose of the contracts was to protect the security of participants and the confidentiality of information discussed or shared. Davis Depo. at 240:25–242:22, 249:22–250:14;[56] Deposition of Melissa Farrell (Sterk MSJ Decl. Ex. 52) at 192:2-193:4; Declaration of Melissa Farrell [Dkt. No. 607-6] ¶¶ 3–4.

Defendants next rely on cases that voided contracts as against public policy where the contracts on their face "directly contravened" public policy. Those cases are inapposite, as each of involved a contract that "directly contravened" statutory or regulatory public policy. *See, e.g., Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 209–10 (Tex. App. 2006); *Bovard v. Am. Horse Enterprises, Inc.*, 201 Cal. App. 3d 832, 838 (Cal. App. 3d Dist. 1988). Here, there is no evidence that the contracts at issue "directly contravene" the public policy behind "the federal and state statutes illegalizing the sale of fetal tissue." BioMax Oppo. at 12.

Defendants then shift to a more "as applied" challenge, arguing that the public policy defense is relevant where the application of an agreement "results

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[56] Defendants object to lines 249:22-250:14 of the Davis deposition as irrelevant, a legal conclusion, lacking foundation, and speculation. The objections are OVERRULED.

in the concealment of criminal activity." BioMax Oppo. at 14–16. Defendants argue that HCP footage reveals evidence of illegal activity, citing the Fifth Circuit's now depublished decision in *Planned Parenthood of Greater Texas Fam. Plan. and Preventative Health Services, Inc v. Smith*, 913 F.3d 551, 554 (5th Cir. 2019), *reh'g en banc granted sub nom. Planned Parenthood of Greater Texas Fam. Plan. and Preventative Health Services, Inc. v. Smith*, 914 F.3d 994 (5th Cir. 2019). There, the panel upheld an agency decision terminating Medicare provider agreements with PPFA affiliates including PPCG based "largely on undercover video footage of graphic discussions with Planned Parenthood personnel concerning the prospective sale of liver, thymus, and neural tissue from fetuses aborted during the second trimester of pregnancy. The videos justified terminating the affiliates' provider agreements, the agency contended, because they *indicated noncompliance with accepted medical and ethical standards*." *Id.* at 554. While that decision relied heavily on the preceding italicized phrase, the opinion did not indicate that the HCP videos included evidence of any criminal wrongdoing. Defendants also point me to the recordings of Nguyen and Farrell from PPCG as showing evidence of illegal activity. These excerpts were reviewed by the Hon. Donna M. Ryu, who concluded they did not, in fact, contain evidence of actual criminal wrongdoing regarding the sale or transfer of fetal tissue. Dkt. No. 441 at 7.[57]

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[57] Two of the statutes cited by defendants as evidence that Farrell admitted to "possible" illegality focus on "researcher certifications," not requirements imposed on abortion providers. The third

Reviewing the issue as a matter of law and based on the full record before me, I GRANT plaintiffs' motion as to defendants' public policy defense to plaintiffs' claims of breach of contract. The public policy defense is not applicable as a matter of law.

D. Trespass (Count 6)

Plaintiffs assert trespass claims based on three sets of intrusions: trespass claims by PPFA for intrusions into the hotels at two conferences in Florida and the conference in Washington, DC; a trespass claim by PPRM for the intrusion into their facilities in Denver, Colorado; and a trespass claim by PPGC/PPCFC for the intrusion into their facilities in Houston, Texas.[58]

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imposes obligations on attending physicians, which Farrell indisputably is not. BioMax Oppo. at 16.

[58] The undisputed evidence shows that: (1) Daleiden and Lopez "attended" the PPFA conference in Miami in October 2014, Daleiden MSJ Decl. ¶ 53; (2) Daleiden and Lopez "attended" the PPFA conference in Orlando in February 2015, Daleiden MSJ Decl. ¶ 54; (3) Daleiden and Lopez attended the PPFA conference in Washington, DC in March 2015, Declaration of Jeffrey M. Trissell [Dkt. No. 603-2] ¶3vii; (4) Merritt did not attend or record at any PPFA conferences in Florida or Washington, DC, Daleiden MSJ Decl. ¶ 132; (5) Daleiden and Merritt accessed the PPRM facilities in Denver, Colorado on April 7, 2015, Trissell Decl. ¶ 3viii; and (6) Daleiden and Merritt accessed the PPCG/PPCFC facilities in Houston, Texas on April 9, 2015, Trissell Decl. ¶3ix. Plaintiffs object to paragraph 3 of the Trissell Decl. as hearsay, lacking foundation, lack of personal knowledge, and improper lay opinion. However, I only rely on that paragraph to the extent is explains the timeline for the intrusions and which defendants were individually involved; facts not in dispute. Plaintiffs did not provide (or did not draw my attention to) a similarly helpful chart.

Both sides move for summary judgment on the trespass claims.[59] Plaintiffs contend that the only question for trial is the amount of damages (in addition to nominal damages), for each intrusion. They argue that because damages is not an element of a trespass claim in any of the jurisdictions, summary judgment on liability should be entered in their favor. Defendants raise various legal defenses to the elements and contend that summary judgment should be entered in their favor.

1. **PPFA**

On behalf of the defendants, Lopez argues that no defendant can be liable for trespass at the PPFC conferences in Washington, DC and Florida under those jurisdictions' laws. Defendants contend that the trespass must "interfere" with "the owner's possessory interest" in the property and that because these conferences were held at hotels, plaintiffs had no possessory interest of their own to exercise and did not in fact exercise sufficient possessory interest because they could not exclude the hotel owners and staff. Minow Depo. 112:21-113:6–10 ("We had exclusive use of the spaces that we contracted and are able to arrange for our own access control in those spaces" but PPFA did not "have the right to exclude, you know,

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The objections are OVERRULED to the limited extent of my reliance on paragraph 3. **As a pretrial matter, the parties should consider preparing a joint chart based on undisputed facts containing this basic information.**

[59] The basic elements of the trespass claim are not in dispute: an intrusion upon the property of another without permission.

caterers and housekeeping staff, et cetera."). In addition, because the right to possess and control must be exclusive and the hotels maintained various rights and placed contractual limitations on PPFA's rights to the space (to switch rooms, to approve PPFA's uses, etc.), Lopez argues that plaintiffs did not have sufficient control or sufficient rights to exclude as a matter of law.[60]

These is no dispute that "a recognized possessory interest is the 'key requirement' for a successful claim

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[60] For example, under the Miami hotel contract: the hotel retained the right to "reassign conference rooms"; "show" the meeting space; provide PPFA access only to "the meeting space"; require approval and the right to set up rigging; preclude PPFA from providing its own food, drinks, or decorations; preclude PPFA from using the premises for any purpose other than its conference; and refuse the right for "entertainment" it deemed incompatible with its image. Sterk Decl., Ex 3 (Miami Contract). The Orlando conference hotel contract was described as one for "meeting room rental"; precluded PPFA from "bring[ing] any food or beverage into the function space" or removing "[f]ood and beverage . . . from the reserved function space"; and precluded PPFA from "us[ing] any items in the function space that create any amplified noise, smell, or visual effect other than decorations without advance notification and written approval." Ex. 53, PPFA Depo., 89:13–90:24; Sterk Decl., Ex. 4 (Orlando Contract). The D.C. conference hotel contract: stated that "[s]pecific meeting rooms cannot be guaranteed and are subject to change"; required PPFA to guarantee that its "use of function space will not create any unreasonable disturbance to other guests or meetings"; precluded PPFA from using "smoke or fog machines, dry ice, confetti cannons, candles, incense" or other items "without advance approval from Hotel"; precluded PPFA from "bring[ing] alcoholic beverages into the Hotel for [the] Event"; and required "prior approval for [PPFA to] bring any food or non-alcoholic beverages from outside sources into [the] Hotel." Sterk Decl., Ex. 5 at 12 (DC Contract).

of trespass." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. App. 2014) (internal citation omitted). "A 'possessory interest' is defined as '[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.'" *Id*. (quoting Black's Law Dictionary 1203 (8th ed.2004)); *see also Annex Indus. Park, LLC v. Corner Land, LLC*, 206 So. 3d 739, 741 (Fla. Dist. Ct. App. 2016) ("exclude unauthorized persons from interfering with that right").

Defendants cite no cases defining the scope of the "exclusive" right to possess and exclude in the context of rented space in hotels or conference facilities. Instead they rely on cases that recognize a distinction between the rights conferred by a lease and the rights conferred by a license, identifying that a key feature of a lease is the right to exclude even the owner. *See Turner v. Fla. State Fair Auth.*, 974 So. 2d 470, 473 (Fla. 2d Dist. App. 2008) ("A license does not confer an interest in the land but merely gives the licensee the authority to do a particular act on another's land" and recognizing that a tenant under a lease "is one who has been given a possession of land which is 'exclusive even of the landlord'" and a licensee "is one who has a 'mere permission to use land, dominion over it remaining in the owner and no interest in or exclusive possession of it being given' to the occupant."); *Harnett v. Washington Harbour Condo. Unit Owners' Ass'n*, 54 A.3d 1165, 1172 n.2 (D.C. App. 2012) (discussing the distinction between leases (generally assignable, confers exclusive use on a tenant "against all the word, including the owner") and licenses (generally not assignable, is a "privilege," "conveys no estate or

interest, and is revocable," and does not confer exclusive possession)); *see also Young v. Harrison*, 284 F.3d 863, 868 (8th Cir. 2002) (in context of evictions, "[m]any jurisdictions draw a distinction between a tenant and a hotel guest by reasoning that the tenant acquires an interest in the real estate and has the exclusive possession of the leased premises, whereas the guest acquires no estate and has mere use without the actual or exclusive possession."). Because the contracts at issue reserve a number of rights to the hotels – including the right of hotel staff to be in the spaces reserved by PPFA – defendants contend that the required "exclusive" possessory interest for trespass cannot be established as a matter of law.

Plaintiffs similarly cite no cases arising in the context of hotels or conferences but rely on cases giving "tenants" or signatories to leases the right to exclude; those cases are not helpful because plaintiffs have not established that PPFA could be considered a tenant. Pls. Oppo. MSJ at 34.[61] In my Tentative Rulings and

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[61] Plaintiffs' cases simply recognize the rights of tenants to exclude. *See Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999) (*tenants* have standing to sue for trespass); *Coddington v. Staab*, 716 So. 2d 850, 851 (Fla. Dist. Ct. App. 1998) ("Generally, as to a lessee of real property, the proper measure of damages for trespass includes the *lessee's* loss of use and enjoyment of the land.") (emphasis added); *see also Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 424 (Tex. 2015) (recognizing that an owner or "possessory interest holder" generally "has the right to exclude all others from use of the property"); *Kelly v. Bd. of County Commissioners of Summit County*, 17CA0431, 2018 WL 2436836, at *3 (Colo. App. May 31, 2018), as modified (June 14, 2018), *cert. granted sub nom. Bd. of Assessment Appeals v. Kelly*, 18SC499, 2019 WL 1026366 (Colo. Mar. 4, 2019 (discussing the "traditional

Procedure outline filed before the hearing, I asked plaintiffs to identify cases that supported their position that the hotel contracts were akin to leases, as opposed to licenses, or cases otherwise in support of their right to control the hotel spaces. Dkt. No. 718. At the hearing, plaintiffs identified *Prestige Restaurants and Ent., Inc. v. Bayside Seafood Rest., Inc.*, 09-23128-CIV, 2010 WL 680905, at *5 (S.D. Fla. Feb. 23, 2010), *aff'd sub nom. Prestige Restaurants and Ent., Inc. v. Bayside Seafood Restaurant, Inc.*, 417 Fed. Appx. 892 (11th Cir. 2011), which itself relied on *Turner*, 974 So. 2d 470. In *Prestige*, the court determined as a matter of law that the contract at issue was more akin to a license to operate a nightclub on part of a combined nightclub-restaurant property, and not a "a right of exclusive possession or occupancy" that would be conferred by a lease. *Prestige*, 2010 WL 680905, at *5

Plaintiffs then focus on the language of three hotel contracts at issue. Plaintiffs assert that the contracts gave PPFA the right to control access to the reserved spaces in the hotel and the "right to exclude" people from those spaces and that is sufficient. Miami Contract at 12; Orlando Contract at 7; DC Contract at 12. There are unique provisions in each of the contracts that distinguish them from mere licenses. For example, the contracts require the hotels to refrain from booking

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benefits of real property *ownership*, including the rights to exclude"); *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 258 (Cal. App. 4th Dist. 2017), *as modified* (Nov. 6, 2017) ("Generally, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership.").

guest rooms or facilities space to individuals or groups with "conflicting" views to PPFA that PPFA believes could create a threat of harm to it or the attendees. Those provisions allow PPFA to exercise a right to prior approval before the hotel can provide rooms or facility space to those individuals or groups. Miami Contract at ECF pg. 13 ("Other Conflicting Bookings"); Orlando Contract at 7 (same); DC Contract at 12 (same). Significantly, the contracts also provide that all hotel staff (as well as hotel agents, vendors, etc.) are bound by confidentiality agreements with PPFA. *Id*.

After reviewing the language of the contracts and undisputed circumstances surrounding their performance, which is an issue of law for the court,[62] I conclude that because the contracts on their face provide PPFA the express right to exclude (other than hotel staff and agents of the hotel who are allowed access by the contract but covered by contracts' confidentiality agreements), they confer sufficient "possessory interest" for a trespass claim. Plaintiffs had authority under the contracts: (1) to exclude others from being able to book rooms or facility space at the hotels during the PPFA conference; (2) to restrict the hotels ability to change or reallocate rooms/spaces without PPFA's approval (Orlando and Miami); (3) to prevent the hotels from "showing" the conference

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[62] *See Prestige*, 2010 WL 680905, at *4 (the "intention of the parties concerning whether a contract is a lease or a license is determined by an 'objective interpretation' of the writings and surrounding circumstances" and is a "a question of law").

spaces to potential clients during PPFA sessions;[63] (4) to require the contractual confidentiality of hotel staff who were there to provide services to PPFA and its attendees; and (5) during its use of the conference facilities, PPFA was allowed to restrict who could access those reserved areas.[64] All of that undisputed evidence provides sufficient evidence of their possessory interest as a matter of law. That possessory interest is not undermined by the reservation of certain, limited rights (*e.g.*, to approve certain vendors PPFA might want to use) to the hotels.[65]

2. **Consent and Misrepresentation to Secure Access**

Daleiden separately argues, on behalf of all defendants, that common law trespass under Texas and Colorado law fails because plaintiffs "consented" to defendants' entry. Defendants recognize that both jurisdictions allow trespass claims where consent may have been improperly induced, as alleged here. *See, e.g., Landry's, Inc. v. Animal Leg. Def. Fund*, 566 S.W.3d 41, 64 (Tex. App. 2018), *reh'g denied* (Dec. 31, 2018) ("Consent will be negated if 'the person

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[63] Minow Depo. at 65:7-22.

[64] Plaintiffs also point out that in the DC contract, PPFA is given the right to assign its rights under the contract with approval of the hotel, which is typically a term used in leases and not licenses. *See* DC Contract at 13.

[65] Plaintiffs admit that Merritt is entitled to summary judgment to the limited extent of the claim for trespass based on infiltration of the three PPFA conferences. Pls. Oppo. MSJ at 40 n.27.

consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.'") (quoting Restatement (Second) of Torts § 892B(2) (1979)). But defendants attempt to avoid that rule by arguing that the mistake must be "substantial" and cannot result from "mistakes concerning other matters."

Defendants contend that the "consent" to enter by both PPGC/PPCFC and PPRM, as well as PFFA for the conferences, was conditioned on the representation that defendants were representatives from a fetal tissue procurement company when, in fact, they were journalists. Defendants assert that because Daleiden and Merritt's lies to gain access to those facilities were "protected speech" there can be no civil liability under any jurisdictions' laws pursuant to the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

The issue before the *Wasden* court was different. There, the court struck down part of an overbroad criminal statute. As *Wasden* affirmed with respect to the trespass claim, journalists or others acting undercover do not have carte blanche to lie or misrepresent themselves to gain access to an otherwise secure or private facility. Moreover, if I applied *Wasden* as broadly as defendants suggest, it would not help them because plaintiffs have evidence (and a reasonable juror could find) that defendants intended

to trespass for purposes of their material gain and to inflict harms on plaintiffs (tortious or contractual); the concerns expressed by the *Wasden* court striking down part of that law are satisfied by the evidence here. *Id.* at 1194.

Defendants then argue that under *Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995), even when fraud is used to gain access, trespass cannot be penalized as long as access is to areas that are commonly accessed by clients seeking services. In *Desnick*, the court rejected the claim for trespass where test patients, wearing hidden cameras, "entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal communications with strangers." *Id.* at 1352. Defendants similarly rely on *Pitts Sales, Inc. v. King World Productions, Inc.*, 04-60664-CIV-COHN, 2005 WL 4038673, at *4 (Bankr. S.D. Fla. July 29, 2005), which rejected trespass claims based on an undercover reporter gaining access not "to special areas" of the business operation but to "areas that were open to anyone expressing a desire to join or travel with Pitts Sales" that were "easily accessible to others" including hotel rooms, travel vans, and hotel rooms where numerous agents were present. *Id.* at 4. The court in *Pitts Sales* also relied on the fact that plaintiffs' hiring practices – through which the reporter gained admission to the "open areas" – were "far from rigorous," based on minimal and unchecked information provided by the prospective employee. *Id.*; *see also Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*,239 Mich. App. 695, 708–09 (Mich. Ct. App. 2000)

("Stern entered only those areas of plaintiffs' shop that were open to anyone seeking transmission repair services and videotaped plaintiffs' employee engaging in a professional discussion with her.").[66]

The facts here are significantly different from those in *Desnick*, *Pitts Sales*, and *American Transmission*. To start, the PPFA conferences had more rigorous screening requirements for access than for employment in *Pitts Sales*, including verification of identification and screening procedures, although defendants' challenge the level and efficacy of these measures. Both the context of the intrusions into PPGC/PPCGC and PPRM facilities (facilities that provide access to abortions, family planning, or healthcare services) and the areas accessed by Daleiden and Merritt (*e.g.*, private office, labs, etc. that included areas where even clients seeking those services did not have access) distinguish this case from *Desnick* (where the clients were seeking ophthalmic services) and *Pitt Sales* (employees of plaintiff and plaintiffs' *competitors* picked up materials and gathered to prepare for magazine sales jobs), and *American Transmission* (only filmed in publicly accessible spaces).[67] These cases do

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[66] It was significant to the *Pitt Sales* court that competitors of Pitts Sales also had access to many of the same areas that the defendant reporter had access to as an employee. *Id.* at *5; *see also IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 126 (D.D.C. 2018) ("the fact that Defendants entered a *public* space makes any fraud or mistake about their intentions irrelevant to the issue of consent") (emphasis in original).

[67] This distinction also applies to *Food Lion III,* where the Fourth Circuit was clearly concerned about turning every

not foreclose the trespass claims here with respect to PPFA's conferences or PPRM and PPGC/PPCFC's facilities.

Separately, defendants contend that because PPGC/PPCFC also conditioned its consent to enter on defendants' separate agreement to maintain confidentiality, PPCG/PPCFC can only seek relief through its breach of contract claim, not through trespass. The only case defendants rely on dealt with

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misrepresentation on a resume into a basis for trespass. *Food Lion III*, 194 F.3d at 518 ("we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work. Moreover, if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass.") That is not what is at issue here. The misrepresentations were not simply resume misrepresentations. Defendants used false identifications and misrepresentations about a fake company operating in an industry where discretion and confidentiality are expected if not contractually required. Defendants cannot ignore the context. *Cf. Shiffman v. Empire Blue Cross and Blue Shield*, 681 N.Y.S.2d 511, 512 (N.Y. App. Div.1998) (reporter who gained entry to medical office by posing as potential patient using false identification and insurance cards could not assert consent as defense to trespass claim "since consent obtained by misrepresentation or fraud is invalid"). With respect to the common law trespass claims, *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993) (Smith, J.) is inapposite. In that case, where the plaintiff let a film crew into her home along with government investigators based upon the misrepresentation that the film crew was filming for the DA's office, the court dismissed the trespass claim despite the consent being induced in part by fraud. *Id*. at 757. Here, not only was there no consent to recording – the purpose of defendants in entering the conferences and facilities is undisputed– but California law is not at issue.

the inapposite situation of prosecution for criminal trespass. *See Lilly Industries, Inc. v. Health-Chem Corp.*, 974 F. Supp. 702, 709 (S.D. Ind. 1997) ("a person who obtained possession to land through a fraudulent contract cannot be prosecuted for trespass"). In any event, the contract was not the only step in securing PPGC/PPCGC's consent to enter. Daleiden and Merritt used false identification and misrepresentations about BioMax to induce PPGC/PPCFC's "mistaken" consent to defendants' entry. Those misrepresentations were not collateral to the mistaken consent, they were the reason for it.

3. **Damages**

Next, Merritt argues on behalf of defendants that all trespass claims fail for failure to show recoverable damages (*e.g.*, damages that are not barred publication damages, discussed above). Defendants do not dispute that each jurisdiction where there is a common law trespass claim (Florida, DC, Texas, and Colorado) allows an award for nominal damages. Therefore, summary judgment on "damages" is not appropriate given that plaintiffs seek nominal damages. *See Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 120 (Tex. App. 2015), *opinion modified and supplemented*, 474 S.W.3d 481 (Tex. App.--El Paso 2015); ("[T]respass against a possessory interest . . . does not require actual injury to be actionable and may result in an award of nominal damages") (internal quotation omitted);[68] *but see Med. Lab. Mgmt.*

[68] Defendants' cases discussing necessity to prove actual damages under Texas law do not address nominal damages. *See, e.g.*, *City*

Consultants v ABC, 306 F.3d 806 (9th Cir. 2002) (dismissing trespass claim that only sought publication damages and noting that plaintiffs did not request nominal damages).[69]

In addition, certain plaintiffs have identified recoverable damages, such as upgrades in access-security and screening procedures to prevent future infiltrations to conferences incurred by PPFA (Minow Depo. at 95) and PPGC (Deposition of Jeffrey Palmer at 289, Sterk Decl., Ex. 53), and personal security damages for targeted staff. The amount of those damages, if any, will be determined by the jury.[70]

Defendants also argue that PPGC cannot maintain a trespass claim for nominal damages because it has consistently represented that it is seeking "only"

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of Mineral Wells v. McDonald, 141 Tex. 113, 118-119 (Tex. 1943); *S.W. Airlines Co. v. Farechase, Inc.*, 318 F. Supp. 2d 435, 442 (N.D. Tex. 2004).

[69] *Boston Prop. Exch. Transfer Co. v. Iantosca*, 720 F.3d 1 (1st Cir. 2013) relied on by Merritt is inapposite because it did not address trespass or nominal damages.

[70] Defendants repeatedly argue that various plaintiffs, including PPGC/PPCGC in particular, have not adequately identified the sources of their damages so that defendants have clarity on whether the "security" damages they seek are for now-disallowed physical upgrades to the facilities (security cameras) or access-security upgrades (new systems for screening visitors). But that may be worked out at trial or through post-trial motions. The burden of demonstrating that various invoices/categories of damages are recoverable within the bounds that I have adopted rests with plaintiffs.

injunctive relief.[71] Plaintiffs respond that PPFA suffered damage from the PPRM trespass because PPFA gave a grant to PPRM to improve its facility-access-security following the intrusion. Declaration of Kevin Paul (Sterk. Decl., Ex. 47) ¶ 4.[72] Plaintiffs contend that PPFA has the ability to seek those damages under Colorado law regarding subrogation as a result of PPRM's intrusion. Pls. Oppo. MSJ at 40 n.27. If subrogation is applicable on these facts, the question remains whether PPRM can allege its trespass claim, not whether PPFA can recover the grant it paid to PPRM under a claim it brings in its own right. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 833 (Colo. 2004), *as modified on denial of reh'g* (June 7, 2004) (noting that subrogation allows the party seeking the recovery to file its own action). That said, under Colorado law, damages is not an element of the trespass claim. PPRM may seek injunctive relief under this claim.

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[71] In response to an interrogatory asking plaintiffs to "State the specific amount of claimed damages that falls within each category (for instance, 'cost of additional security including physical and IT-related to protect Plaintiffs' offices, clinics, and staff')" identified by plaintiffs in a prior interrogatory response, plaintiffs asserted various objections and, subject to amendment, disclosed that "PPRM seeks only injunctive relief." Millen Decl., Ex. 101 at 10 n.2. In that same document, plaintiffs disclosed that PPFA was seeking recovery of grants it gave to its affiliates including PPRM for security measures in response to defendants' intrusions. *Id*. at 10.

[72] Defendants object to paragraph 4 of the Paul Declaration on lack of personal knowledge, lack of foundation, and hearsay. The objection is OVERRULED as to the narrow information I rely on.

4. **Merritt**

Merritt also claims that she is entitled to summary judgment on trespass because she did not attend any of the PPFA conferences. Plaintiffs do not dispute this and no longer pursue the trespass claim against Merritt with respect to the PPFA conferences.

5. **Rhomberg and Newman**

Plaintiffs admit that neither Rhomberg nor Newman entered any of the properties at issue but nonetheless assert that they can be liable under a few, again raised in passing, theories. The first is liability under the theory that a "person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally present at its commission, is liable equally with him who commits it." *Engler v. Hatch*, 472 P.2d 680, 682 (Colo. App. 1970) (citing Am.Jur. Trespass § 33). The second is that "[t]acit consent is enough to prove a conspiracy against a director or officer of a corporation, so long as the director or officer 'concurred in the tortious scheme with knowledge of its unlawful purpose.'" *Schwartz v. Pillsbury Inc.*, 969 F.2d 840, 844 (9th Cir. 1992) (quoting *Wyatt v. Union Mortg.* Co., 24 Cal. 3d 773, 785 (Cal. 1979) (which recognized that "[d]irectors and officers of a corporation are not rendered personally liable for its torts but may become liable if they directly ordered, authorized or participated in the tortious conduct")).

The third is under the alter ego doctrine. As noted above, with respect to the breach causes of action, plaintiffs argue that CMP, as the parent of BioMax, is

liable as the alter ego of BioMax. They then contend that Rhomberg and Newman, as directors of CMP, are directly liable for the trespasses of CMP and BioMax because CMP was established to "perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose" and therefore the corporation's acts are deemed "to be those of the persons or organizations actually controlling the corporation." *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1341 (Cal. Ct. App. 2009) (citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th 523, 538 (Cal. Ct. App. 2000)). Plaintiffs recognize that there are material disputes of fact as to the roles Rhomberg and Newman played with respect to BioMax through their positions as officers and directors of CMP and their relationship, control, or support of the actual trespassers.

However, as with the breach of contract claim, there are a number of problems with plaintiffs' attempts to pin this claim directly on Rhomberg and Newman. To start, as with the breach of contract claims, this claim is not brought against Rhomberg and Newman in the FAC. The FAC identifies the defendants as Daleiden, Merritt, Lopez, CMP, and BioMax. FAC at 53. Second, addressing their roles with CMP and potential alter ego liability, Rhomberg and Newman again rely on my November 2018 Order rejecting the sufficiency of alter ego liability for NAF's breach of contract claim alleged against Newman.

In plaintiffs' reply in support of their motion for summary judgment on trespass, plaintiffs do not address alter ego liability as to Rhomberg or Newman

and say only that they agree there are disputes of material facts over the connections between Rhomberg and Newman and the "trespassers."[73] However, their mere assertion that Rhomberg and Newman can be directly liable for the trespass claim based on an alter ego theory of liability through their roles at CMP has not been supported by caselaw or facts. On this record, and in light of plaintiffs' failure to plead Rhomberg's and Newman's liability on these claims in the FAC, I hold that this claim cannot be directly pursued against Romberg and Newman individually.[74]

In sum, plaintiffs' request for partial summary judgment for liability with respect to BioMax, Daleiden, and Lopez for trespass into PPFA's conferences is GRANTED. The only issues for trial are whether CMP is directly liable and the amount of actual damages.

Plaintiffs' request for partial summary judgment against BioMax, Daleiden, and Merritt for the trespasses to PPGC/PPCFC and PPRM is GRANTED. The only issues for trial are whether CMP is directly liable and actual damages. Whether PPRM is entitled

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[73] Plaintiffs do not address alter ego liability in their opposition to defendants' motions for summary judgment. Plaintiffs do, however, discuss Rhomberg and Newman's acts in furtherance of the "conspiracy" relevant to the RICO claim (First Count) and the Conspiracy claim (Third Count).

[74] As discussed below under the Conspiracy count, Rhomberg and Newman may be held indirectly liable if plaintiffs prove at trial their knowledge of, agreement to, or support of the fraudulent conduct that enabled the trespasses and other tortious conduct.

to injunctive relief for this claim will be determined post-trial.

Defendants' motions for summary judgment on the trespass claim are DENIED, except that partial summary judgment is GRANTED with respect to Merritt and trespass at the PPFA conferences and as to Lopez with respect to direct liability for the PPCG/PPCFC and PPRM trespasses. I also hold that Rhomberg and Newman are not directly liable for trespass.

E. Fraudulent Misrepresentation (Count 8)

This claim is based primarily on defendants' representations to the various plaintiffs of their identities (which were indisputably false)[75] and of who and what BioMax did and could do (which likewise were indisputably false).[76] Defendants move for

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[75] It is undisputed that Lopez used his real identification and did not make misrepresentations as to his identity. But, it is also undisputed that Lopez introduced and referred to Daleiden as Sarkis to plaintiffs' staff at the conferences and discussed and touted the services of BioMax, which were false. Lopez Decl. ¶¶ 8-9.

[76] Categorized generally, the challenged false statements and omissions presumably include: (1) Daleiden, Merritt, and Baxter's statements to plaintiffs' staff when they registered as or pretended to be Sarkis, Tennenbaum, and Lopez of BioMax and their statements about their roles at BioMax; (2) Daleiden, Lopez, and Merritt's representations to plaintiffs' staff at the conferences, facilities, and lunches that BioMax wanted to obtain tissue to provide to researchers, when that intention or ability did not exist; (3) Daleiden, Merritt, and Lopez handed out business cards and other materials on behalf of the "front" company BioMax; (4) the

summary judgment with respect to plaintiffs PPFA, PPRM, PPGC/PPCFC, and PPPSGV's fraud claims under the laws of the five relevant jurisdictions: Florida and DC (PPFA conferences), Colorado and Texas (facility intrusions), and California (meetings with Nucatola and Gatter). Plaintiffs also move for partial summary judgment on liability, leaving only the issue of damages from the fraudulent misrepresentations for trial.

1. **PPPSGV**

As an initial matter, defendants point out that PPPSGV was not identified as a plaintiff asserting the fraud claim in the FAC with respect to defendants' representations to Gatter and Felczer during their lunch meeting, and therefore, summary judgment must be entered for defendants as to PPPSGV and the lunch meeting. While it is true that PPPSGV was not identified as a plaintiff in the FAC for this claim, plaintiffs have consistently identified PPPSGV as the entity asserting this claim. Because at "the summary judgment stage, Defendants had ample notice of [this claim], and the issue did not require further discovery," amendment should be allowed. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014). There is

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defendants concealed the purpose for attending the conferences, facilities, and lunch meetings, which was to record and publish videos of plaintiffs' staff; (5) defendants concealed recording devices and failed to disclose they were recording conversations with plaintiffs' staff; and (6) defendants filed documents with the California Secretary of State to create BioMax misrepresenting that the purpose of the LLC was to engage in "any lawful activity," and listing Tennenbaum as the manager.

no evidence of bad faith, undue delay, or prejudice to defendants from this claim. *Id*. at 1154 (noting leave to amend should be allowed where there is no evidence of bad faith, undue delay, or prejudice). Given the lack of prejudice flowing from plaintiffs' mistake and because defendants have had ample opportunity to seek discovery from PPPSGV and Gatter, this claim remains in this case.[77]

2. Elements of Fraudulent Misrepresentation and Framing of this Claim

Plaintiffs, but not defendants, move for summary judgment on the elements of their fraudulent misrepresentation claim. The parties do not dispute the basic elements of the fraud claim under the various jurisdictions' laws.[78] Defendants, however, draw distinctions between affirmative fraudulent misrepresentations (about BioMax and employee status) and fraudulent omissions and concealment (failing to disclose surreptitious recording and true purpose). Under fraudulent concealment, there must generally be a fiduciary or contractual relationship between the parties that imposes the duty to disclose on defendants. *See, e.g., Deteresa v. Am. Broad.*

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[77] To the extent there is a dispute over whether PPFA can assert a fraud claim based on the misrepresentations made to secure the lunch meeting with Nucatola, *see* CMP Mot. at 3, CMP Oppo. at 9, that claim is fairly encompassed in the FAC and is actionable.

[78] Daleiden points to some minor distinctions between the jurisdictions, but those distinctions do not matter for purposes of these motions. Daleiden Oppo. at 16-17.

Companies, Inc., 121 F.3d 460, 467 (9th Cir. 1997) (discussing fraudulent concealment claims under California law). In their motion for summary judgment, plaintiffs do not address specifically the requirements of a fraudulent concealment claim, *but do* identify "concealments" they claim support Court 8 and presumably support their motion for summary judgment. Pls. MSJ at 19:18-23. However, given plaintiffs' failure to address the legal requirements for fraudulent concealment in their motion, summary judgment is not appropriate on Count 8 in this respect.

Second, and even more problematic for plaintiffs' motion for summary judgment on the affirmative misrepresentations, is that plaintiffs have not adequately framed the actionable misrepresentations they seek judgment on. They have not provided me with a concise list identifying the specific *actionable* affirmative misrepresentations as to each plaintiff. Instead, they generally assert that unspecified defendants made actionable misrepresentations about BioMax in the PPFA EAs and *perhaps* other application materials submitted to PPFA prior to the conferences. They generally assert that defendants (Daleiden, Merritt, Lopez) made misrepresentations when showing up at the conferences and facilities and presented false identification to unidentified staff. They generally assert defendants (Daleiden, Merritt, Lopez) made oral misrepresentations to various unidentified staff about BioMax. They generally assert defendants (Daleiden, Merritt, Lopez) made oral misrepresentations to various unidentified staff about

their identities and roles at BioMax.[79] This broad-brush approach is wholly insufficient to support the "judgment" plaintiffs seek.

In opposition, defendants make similarly broad responses on the elements of falsity, materiality, and reliance. Looking to those broad defenses, some are specious. For example, Daleiden's assertion that because BioMax might have attempted to secure and sell fetal tissue (as it had represented to some of plaintiffs' staff that BioMax *had*) cannot defeat falsity. Daleiden Oppo. at 18-21. Similarly, Daleiden's contention that use of the Sarkis name (and presumably the use of the fake ID bearing that name) was his "common law" practice and right (relying on wholly inapposite "doing business as" cases), is not a defense to falsity as a matter of law. But because I have not been presented with a manageable way to rule on each actionable statement as to each of the elements in play, I will not further consider plaintiffs' motion on this claim or defendants' oppositions.

Plaintiffs have failed to identify in their motion **but will be required to do so for the jury** the specific written or oral statements they believe are actionable misrepresentations, why each was false, why each was material, who reasonably relied on each, and what recoverable damage was caused from one or more

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[79] In Reply, plaintiffs identify with more specificity *some* of the actionable statements. Pls. MSJ Reply at 29-30. But then they go on to say "[t]hese statements—and everything else they told Plaintiffs about BioMax—were indisputably false" and "Plaintiffs therefore have proven that Defendants' representations about Lopez were false." *Id.* at 30, 31.

misrepresentations to specific plaintiffs. Plaintiffs' motion for summary judgment on fraudulent misrepresentation is DENIED.

3. ***Wasden***

Defendants argue that any fraudulent conduct they engaged in – with respect to use of the false identities and portraying BioMax as a real company when it was undisputable fake – is protected conduct as a matter of law under the Ninth Circuit's recent decision in *Animal Leg. Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). I disagree. In *Wasden*, the Ninth Circuit did not immunize misrepresentations made to aid undercover journalism (assuming that is what defendants were engaged in for the HCP). *Wasden*, instead, applied strict scrutiny to invalidate as overbroad a statute that criminalized entry into an agricultural production facility for "misrepresentation." *Id.* at 1194; *see also id.* at 1195 ("The hazard of this subsection is that it criminalizes innocent behavior, that the overbreadth of this subsection's coverage is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists."). *Wasden* did not impact laws of general applicability, like common law fraudulent misrepresentation. *Id.* at 1190 ("However, the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability.").

The *Wasden* court was also careful to distinguish regulation of misrepresentations that are done for personal gain or cause cognizable harm. *Id.* at 1195, 1199. Plaintiffs have pointed to disputed evidence that defendants' goals here were not "legitimate

journalism," but instead to create "public outrage" to assist defendants' fundraising and ultimate goal to put plaintiffs out of business. *See supra*. I cannot resolve those issues on these motions but note that plaintiffs' assertions are fervently denied by defendants.

4. **Damages**

Defendants also argue plaintiffs' failure to show that they suffered any consequential damages proximately caused by defendants' specific misrepresentations that are not barred publication damages is fatal to their fraud claim. *See e.g., Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1008 (Cal. App. 6th Dist. 2016), *as modified* (Mar. 11, 2016) ("Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages." (internal quotation omitted)); *see also Kurinij v. Hanna & Morton*, 55 Cal. App. 4th 853, 866 (Cal. App. 2d Dist. 1997) (*rejecting* argument that nominal damages award could not sustain jury verdict because "without actual damages, there is no fraud," where the nominal award represented jury's determination of fact of actual damage).

However, after removing the damages that I have found are not recoverable (*see supra*),[80] the potentially

[80] Defendants also argue that under Florida, District of Columbia, and California common law harm caused by CMP's truthful publication of PPFA's wrongdoing cannot be attached to the fraud claim because any damage was caused by defendants' gathering information they intended to publish. But the cases defendants rely on do not stand for that broad of a proposition. Instead, in

recoverable damages are on their face like those allowed in *Comm. On Children's TV, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 220 (1983).[81] Plaintiffs have evidence that they expended funds directly as a result of the frauds to investigate them, remedy them, and protect against their repetition in the future with respect to access to their conferences and facilities. *See, e.g., Blackburn v. Sturgeon Services Intern., Inc.*, 1:13-CV-00054-JLT, 2014 WL 1275919, at *8 (E.D. Cal. Mar. 27, 2014) (citing California law that allows for recovery of tort damages where "those acts causing the

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Pitts Sales, Inc. v. King World Prods., Inc., 383 F. Supp. 2d 1354, 1364 (S.D. Fla. 2005), there was no evidence that particular misrepresentations caused the particular damages plaintiff sought (the administrative costs associated with hiring the reporters and the wages paid to the reporters). In *Steele v. Isikoff*, 130 F. Supp. 2d 23, 35 & n.10 (D.D.C. 2000) under District of Columbia common-law, there were no allegations of proximately caused damages in that media-fraud case because plaintiffs' own lie caused the damages she claimed. Similarly, in *Frome v. Renner*, No. 97 CIV 5641, 1997 WL 33308718, at *2 (C.D. Cal. Oct. 1, 1997), the plaintiff failed to show how the reporter's misrepresentation affected the doctor-patient relationship, because the doctor treated the reporter just like any patient.

[81] In that case, the court rejected the claims of organizations like the California Society of Dentistry for Children who "spent funds to counter the influence of defendants' [fraudulent] advertising" because those "organizational expenditures were voluntary in character and not the result of any legally cognizable injury to the organization" itself, but allowed the claims brought by the targets of the fraud, the parents and children who purchased sugary cereals. *Id.* at 220. Here, of course, there is ample evidence that plaintiffs were both the target of the frauds and the ones who spent money to investigate and rectify the consequences of the frauds.

damage were the necessary or legal and natural consequence of the wrongful act."). Plaintiff also, upon learning of the deception, paid for personal security expenses for some of their employees who were targeted by defendants for recording. Those expenses – at least on this record – are tied *directly* to defendants' conduct and plaintiffs' reactions to discovering it. That some of those staff members who were targeted by defendants' conduct may have *also* received threats from third parties in response to the videos and those threats were part of the motivation for paying for additional personal security measures does not break the causal chain for purposes of this motion. On this record, the access-security measures and personal security measures that I have outlined above are pecuniary damages that flow directly from defendants' own actions, and not the intervening actions of third parties.

Defendants' repeated claims that plaintiffs' security improvement expenses were "merely voluntary" or were required because of previously identified or well-known weaknesses in plaintiffs' access-security measures at their conferences or facilities, or based on unreasonable fears of future intrusions, are defenses to the amount of damages to be argued to the jury. These arguments do not entitle defendants to summary judgment on fraud damages. *See, e.g., City Sols., Inc. v. Clear Channel Commun.*, 365 F.3d 835, 840 (9th Cir. 2004) (noting the causal relationship between

fraudulent misrepresentations and damages is an issue "properly left to a jury").[82]

5. CMP, Rhomberg, and Newman

CMP separately argues that it cannot be liable because it, as an entity, did not make any affirmative misrepresentations. Similarly, Rhomberg and Newman argue that this claim fails as to them individually because they did not make any identified false misrepresentations on which plaintiffs relied.

CMP's liability for purposes of this claim is based, first, under civil conspiracy, which has been adequately supported by disputed evidence. Second, there is ample evidence that the purpose of CMP was to assist (and indeed pay for) BioMax, Daleiden, Merritt, and Lopez's fraudulent activities committed in order to gain access to plaintiffs' conferences, facilities, and staff. The fraud claim against CMP is based in large part on *its own* conduct and affirmative acts. Rhomberg and Newman's indirect liability for fraudulent misrepresentation is based on the civil conspiracy theory, which as discussed

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[82] The fraud claim was reversed on appeal after trial in the *Food Lion* case because the plaintiff could not show that their "administrative costs were an injury caused by reasonable reliance on the misrepresentations" of the journalists. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 513 (4th Cir. 1999); *but see Pitts Sales, Inc. v. King World Productions, Inc.*, 383 F. Supp. 2d 1354, 1364 (S.D. Fla. 2005) (concluding based on facts not in dispute that plaintiff had not reasonably relied on misrepresentations "to its injury" of alleged costs of hiring journalists as employees "as required to prove a claim for fraud under Florida law").

below has been adequately supported by disputed evidence.

6. **Merritt**

Merritt argues that the fraud claim against her should be dismissed because it is undisputed that she was not involved in and did not participate in the editing and publication of the CMP videos. Merritt MSJ at 17-18. However, she was directly involved in numerous acts of fraud: she presented false identification, purported to be someone she was not, and purported to represent a real company when it was fake. That Merritt claims she was merely a contract employee of CMP, hired for her acting skills, and played no role in the editing or release of the HCP videos, are not defenses to the fraud claims based on her own conduct.

F. Illegal Recording Claims

Defendants move for summary judgment on each of the recording claims.

1. **Federal (Count 2)**

Plaintiffs allege that defendants Daleiden, Merritt, Lopez, CMP, and BioMax violated 18 U.S.C. § 2511, the federal Wiretap Act, by intercepting plaintiffs' and their staffs' communications without their consent in order to further their RICO conspiracy and to invade the privacy of plaintiffs' staff. 18 U.S.C. § 2511(1), (2)(d); FAC ¶¶ 164-165, 169(a)(b). Section 2511 applies to anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic

communication." 18 U.S.C. § 2511(1)(a). In determining whether communications are "uttered under circumstances justifying an expectation of privacy," courts consider the factors identified by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), specifically: "whether the communications . . . "were uttered by a person (1) who has a subjective expectation of privacy, and (2) whose expectation was objectively reasonable." *U.S. v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

a. Purpose of Committing a Crime or Tort

Because defendants were participants in the recorded conversations, the recordings can violate the Act only if they were intercepted for the purpose of committing criminal or tortious acts. 18 U.S.C. § 2511(2)(d); *see Sussman v. American Broadcasting Cos*., 186 F.3d 1200, 1202 (9th Cir.1999) ("the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception – its intended use – was criminal or tortious." (internal quotations and citation omitted)); *see also id*. 1202–03 ("Where the taping is legal, but is done for the purpose of facilitating some further impropriety, such as blackmail, section 2511 applies. Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere."). Significantly, an illegal purpose does not have to be the sole purpose of the recording. *See Med. Laboratory Mgt. Consultants v. Am. Broad. Companies, Inc*., CIV-95-2494-PHX-ROS, 1997 WL 405908, at *5 (D. Ariz. Mar. 27, 1997) (the "statute does not provide that

secretly recording a conversation would not be illegal if it were motivated simultaneously by a legitimate objective *and* a criminal purpose." (emphasis in original)). The purpose or purposes of the recordings are generally questions for the jury. *Brown v. Am. Broad. Co., Inc.*, 704 F.2d 1296, 1305 (4th Cir. 1983) (the "purpose in taping and broadcasting the meeting of November 2 clearly presents a factual issue for the jury.").

Defendants, through Lopez, argue that because there was no illegal purpose in the recording – *e.g.*, no purpose to further violate RICO or further invade anyone's privacy – there can be no liability under the federal statute. As discussed above, the RICO claim against defendants survives and the elements of pattern and damages will go to trial.

As to invasion of privacy, defendants argue that the only further potential invasion that could be alleged by plaintiffs as having been intended by defendants is tortious publication of the recordings.[83] There is no evidence, for example, that the recordings were intended to be used to secure additional records. The

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[83] The elements of the tortious disclosure of private facts or tortious publication are: (1) the disclosure of the private facts must be a public disclosure; (2) the facts disclosed must be private facts, and not public ones; (3) the matter made public must be one which would be offensive and objectionable to a reasonable person of ordinary sensibilities; and (4) "due to the supreme mandate of the constitutional protection of freedom of the press even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy." *Sipple v. Chron. Publg. Co.*, 154 Cal. App. 3d 1040, 1045–46 (Cal. App. 1st Dist. 1984).

only tort that followed the recordings is, theoretically, the publishing of those recordings as part of the Project. Defendants claim that plaintiffs cannot satisfy the elements of that tort because there is no evidence that defendants when making the recordings intended or had the purpose of publishing "private facts," which they claim they did not. Defendants also point out that the facts disclosed by the recordings must be truly private. So, for example, the publication that someone was gay, a fact that was known by hundreds in his community given his activities, was not disclosure of "private facts." *Sipple,*154 Cal. App. 3d at 1048 (Cal. App. 1st Dist. 1984) ("since appellant's sexual orientation was already in public domain and since the articles in question did no more than to give further publicity to matters which appellant left open to the eye of the public, a vital element of the tort was missing rendering it vulnerable to summary disposal."); *see also Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 448 (Cal. App. 4th Dist. 2004) (publication of a person's physical factures are not confidential).

Defendants argue that none of the recordings during the conferences could have disclosed "private" facts because they were disclosed at the conferences to other conference attendees and covered information "well known to others in the industry." Lopez MSJ at 16. However, they paint with too broad a brush. Defendants' insistence – without any citations to the videos themselves – that no private facts sufficient to sustain a tortious disclosure claim were in fact broadcast is contrary to the record.

Defendants' other arguments against any finding that defendants' intended to commit a tortious disclosure are also unpersuasive. They argue that because defendants' intent was to disclose illegal conduct, the surreptitious recordings were "legal means" that preclude application of the statute. The cases they rely on, again, do not support that broad of an argument. *See, e.g., Moore v. Telfon Commun. Corp.*, 589 F.2d 959, 966 (9th Cir. 1978) ("Congress did not intend to prohibit recording a conversation when its purpose was to preserve evidence of extortion directed against the recorder to be used later for the purpose of terminating a franchise agreement.").

Finally, defendants argue that the disclosures here must be considered newsworthy as a matter of law because of the press, investigations, and prosecutions that stemmed from the HCP disclosures. That defense may preclude liability as to some of the recordings, but contrary to defendants' broad assertions of the "newsworthiness" of the HCP *as a whole*, defendants do not cite *any specific recordings of plaintiffs* to show that those specific recordings were newsworthy for the reasons defendants assert. That *some* subset of the videos recorded and published of plaintiffs' staff might have contained newsworthy content does not immunize the recording and publication of all of the videos.

Of course, the actual intent of defendants is hotly disputed. Plaintiffs are allowed to elicit testimony to attempt to prove that defendants' intent *at the time of the recording* was not to disclose truthful, newsworthy facts about these plaintiffs but to misinform and distort the activities of these plaintiffs as part of a "smear"

campaign. Defendants strenuously disagree with that characterization. That highlights the material questions of fact that preclude determining newsworthiness as matter of law at this juncture. In the end, whether defendants had an illegal purpose in mind when making the recordings – as their sole purpose or as a purpose in addition to a legitimate purpose – will be determined by the jury. *See, e.g., Boddie v. Am. Broad. Companies, Inc.*, 731 F.2d 333, 338 (6th Cir. 1984) (disputes as to defendants' intent under wiretapping statute to be decided by the jury).

b. Circumstances or Exhibition of Expectation of Privacy

Defendants also argue that there was no "exhibition" of an expectation of privacy by those taped, so the federal claim fails. They contend that the federal statute requires the speakers to "visibly or audibly" communicate that their particular conversation was confidential or off the record. Lopez MSJ at 17. I disagree that there has to be some kind of verbal or physical "exhibition" of an expectation of privacy announced by each person being recorded under the federal (or the Florida) statutes.[84] In support of this argument, defendants cite no federal cases adopting or discussing the affirmative "exhibition" test" under

[84] In the declarations, filed in support of their motions for summary judgment, both Lopez and Daleiden assert that during their taping they never heard or saw any "verbal" or "physical" signs showing any participants "expectation of privacy." Declaration of Gerardo Adrian Lopez (Dkt. No. 603-1) ¶ 16; Daleiden MSJ Decl. ¶¶ 53-54.

Section 2511.[85] Instead, looking to the circumstances surrounding *each* recording, the question is whether the person being recorded had a subjective expectation of privacy and whether that expectation was reasonable under the circumstances. *U.S. v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

There is testimony from those recorded that they expected their conversations at the conferences and meetings to be private for a variety of reasons, including the confidentiality agreements governing the conferences and meetings and their experiences in the industry. *See* Pls. Oppo. MSJ 67-68 (citing deposition testimony). At trial, defendants can challenge those assertions through evidence, for example, that certain

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[85] The case interpreting Florida law that Daleiden cites in support, *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319 (11th Cir. 2017), explained that the Florida statute requires "that the expectations of privacy needed to trigger application of the statute must be exhibited; in other words they must be 'shown externally' or 'demonstrated.'" In *McDonough*, the claim failed with respect to plaintiff's video recording a police chief during a meeting the chief himself called, noting that "Chief Rolle set no ground rules for the meeting he elected to call. At no point did anyone from the HPD suggest that the meeting was confidential or 'off the record.' Nor was there advance notice or published or displayed rules that established confidentiality and certainly none that prohibited note taking or recordings. It is therefore clear to us that because Chief Rolle failed to 'exhibit' the expectation of privacy that is required by the statute, the government is not entitled to invoke it and McDonough did not violate it." *Id*. at 1319. Rather than announcing some new test for expectation of privacy, the court was conducting the typical contextual analysis of the evidence, looking at the circumstances of the recording. One would reasonably expect that a meeting with a public official would not be confidential, absent any statement to the contrary.

conversations were so loud they could have been overhead by others in publicly accessible spaces (restaurants, lobbies, etc.). That some of plaintiffs' witnesses admitted in deposition that there was a "chance" hidden cameras could be snuck into the conferences or that a Planned Parenthood employee might "turn against the organization" does not defeat the reasonable expectation of privacy as a matter of law.

c. Subjective and Objective Expectations of Privacy

Defendants argue that plaintiffs have failed to show sufficient evidence of the subjective privacy expectations of the employees recorded in any of the 147 segments of video plaintiffs assert are actionable. Defendants claim that plaintiffs approached only a few of the recorded employees to inquire about their subjective beliefs – Doe1005, Deborah VanDerhei, and Cecile Richards.

However, plaintiffs submit evidence of the steps they took to restrict access to their conferences that could create a subjective expectation of privacy in conversations between participants.[86] They identify testimony from some of their staff on subjective expectations about the security of their conversations with vetted attendees at the conferences. *See* Deposition of Deborah VanDerhei at 125-126, 346

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[86] *See* Pls. Oppo. MSJ 67, citing evidence regarding PPFA security measures. Defendants challenge the efficacy of those measures and whether they were always implemented. But those disputes simply raise material issues of fact.

(Mayo MSJ Oppo. Decl., Ex. 56); Deposition of Mary Gatter at 282-284 (Mayo MSJ Oppo. Decl., Ex. 53).[87] They also point to testimony regarding steps NAF took to restrict access to their conferences,[88] and the subjective beliefs of participants that NAF created "a safe space to talk to colleagues." Deposition of Tram Nguyen at 129-132, 424-26 (Mayo MSJ Oppo. Decl., Ex. 60);[89] Deposition of Deborah Nucatola at 428-430 (Mayo MSJ Oppo. Decl., Ex. 49).[90] That evidence is enough to create disputes of material fact as to subjective beliefs on expectations of privacy at the PPFA and NAF conferences.

On whether those expectations of privacy were reasonable, defendants break their challenges down into three sets of locations. Defendants first question the reasonable expectations for conversations recorded at restaurants (the California lunch meetings) and in the lobby or bar of hotels (the Florida conferences). As to these "public space" recordings, defendants argue that there can be no objective expectation of privacy as

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[87] Defendants object to 284:13-22 of the Gatter deposition as an impermissible legal conclusion or opinion. The objections are OVERRULED.

[88] *See* Pls. Oppo. MSJ 68, citing evidence regarding NAF security measures.

[89] Defendants object to 424:25-425:15,425:22-426:9, and 426:13-23 as "leading," vague and ambiguous, irrelevant, and based on an incomplete hypothetical. The objections are OVERRULED.

[90] Defendants object to these portions of Nucatola's deposition as irrelevant, lacking personal knowledge, calling for speculation, and "leading." Those objections are OVERRULED.

a matter of law. But the cases they rely on consider contextual facts in addition to the fact that the recorded conversation was in a public and open space. *See, e.g., Wentz v. Project Veritas*, 617CV1164ORL18GJK, 2019 WL 1716024, at *5 (M.D. Fla. Apr. 16, 2019 (noting a third party "was present during the entirety of the conversation. Unsurprisingly, background noise can be heard throughout the conversation."); *U.S. v. Gonzalez*, CRIM 07-748 (FSH), 2008 WL 4837468, at *2 (D.N.J. Oct. 31, 2008) (facts that a third party was present and the conversation conducted on a cell phone, added to conclusion that there was no "reasonable expectation of privacy under the circumstances"); *see also U.S. v. Giraudo*, CR 14-534 CRB, 2016 WL 4073243, at *8-9 (N.D. Cal. Aug. 1, 2016), *order clarified*, 225 F. Supp. 3d 1078 (N.D. Cal. 2016) (noting under a Fourth Amendment analysis courts have found a "reasonable expectation of privacy in a hushed conversation on the courthouse steps" and rejecting argument presented without supporting expert testimony that "bystanders" could have "overheard the sensitive conversations").[91]

So too here. The context of each recording must be analyzed based on its specific facts. *Per se* summary judgment as a matter of law is inappropriate. *Cf. Safari Club Intl. v. Rudolph*, 862 F.3d 1113, 1124 (9th Cir. 2017) (rejecting argument that "there can be no

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[91] Defendants' cases involving arrests in "public places" based on probable cause are wholly inapposite. *See, e.g.*, *U.S. v. Watson,* 423 U.S. 411, 423 (1976); *Smith v. Bd. of County Com'rs for County of Otero, N.M.*, 316 Fed. Appx. 786, 788 (10th Cir. 2009) (unpublished).

objectively reasonable expectation of confidentiality because the conversation occurred in a place that was open to the public. That contention is at odds with California authority viewing privacy as relative.").[92]

Second, defendants urge more directly with respect to recordings at the conferences that the only comparable cases are ones discussing an employee's expectation of privacy in common areas of his workplace. They contend that those cases hold that employees have objective expectations of privacy only in personal offices, lockers, or filing cabinets set aside for their personal use and no expectation in shared areas. In the conference context, defendants assert that translates into privacy only in hotel rooms or other rooms where "individual participants in a conversation had taken steps to exclude non-participants from overhearing." Lopez MSJ at 20.

Again, even in the context of the employee-recording cases the particular facts and the context of the

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[92] The subjects of the lunch meetings, Gatter and Nucatola, testified that their expectation of privacy in the restaurant conversations was based on their seating locations (in booths or far from other customers) and their conduct (refraining from discussing sensitive information when waitstaff were near). *See* Pls. Oppo. MSJ at 76-77. For the conversations recorded in the hotel bar, plaintiffs submit that only one other group was in the bar that group was not close, and that group could not overhear the recorded conversations. *See* Recordings # 22-23, 32-33. PPFA's witness also testified the music playing in the bar, and other noise added to the expectation of privacy in the bar conversation. Minow Depo. 211-12. Defendants object to this portion of Minow's testimony as speculative, lack of personal knowledge, and opinion. The objections are OVERRULED.

recordings matter. *See, e.g., Gray v. Royal*, 181 F. Supp. 3d 1238, 1253 (S.D. Ga. 2016) (finding no reasonable expectation of privacy where employee recorded speech occurred on office telephones and could be overheard by others, speech concerned office affairs, plaintiffs' speech was not phrased in way showing "that they were communicating confidential matters," plaintiffs worked office doors open, spoke at normal volume, and plaintiffs took no other steps to shield the contents of their communications); *see also Tancredi v. Malfitano*, 567 F. Supp. 2d 506, 510 (S.D.N.Y. 2008) ("Whether a public employee has a reasonable expectation of privacy depends on the context of the employment relationship and must be determined on a 'case-by-case basis.'").[93]

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[93] The Fourth Amendment search cases relied on by defendants are not particularly helpful, as "courts have found that an action for violation of the anti-wiretap statute may be maintained even in the absence of an expectation of privacy as generally understood in the Fourth Amendment search and seizure context." *Walker v. Darby*, 911 F.2d 1573, 1578 (11th Cir. 1990). These cases, however, highlight that a fact-bound analysis determines the scope of any Fourth Amendment right. *See, e.g.*, *People v. Thompson*, 205 Cal. App. 3d 1503, 1509 (Cal. App. 5th Dist. 1988) ("The floor underneath the three-inch lip of a counter is not normally used to store personal belongings, records, receipts or anything else."); *Martinez v. State*, 880 S.W.2d 72, 77 (Tex. App. 1994) (noting the record "does not indicate that Martinez had any financial, proprietary, possessory, or other interest in the automobile dealership. Indeed, the evidence shows that he was only one of several employees there and had no ownership interest in the business or the shed where the cocaine was seized."); *Faulkner v. State*, 317 Md. 441, 448 (1989) ("[u]nder all of these circumstances, including particularly Faulkners disclaimer of any expectation of privacy in the second locker" and acknowledged right of management to search lockers, no reasonable expectation of privacy).

Here, the context is that PPFA and NAF restricted the right of access to their conferences to people working in the field or who provide helpful products to those working in the field, NAF additionally imposed NDAs on conference attendees, and participants relied on those measures to provide them some security and confidence that they could share information with others in their field when discussing topics that were confidential or sensitive in nature. Some of those conversations may have taken place in particular circumstances that negated the reasonable expectation of privacy as to those specific conversations. But defendants are not entitled to a finding that none of the conference participants had a reasonable expectation of privacy in any of their conversations that were recorded by defendants as a matter of law.[94]

Moreover, employees can have reasonable expectations of privacy in their office spaces, in particular closed spaces like personal offices and conference rooms, and reasonable expectations that they would not be surveilled in their office spaces.[95] Similarly, conference participants may have a reasonable expectation of privacy in conversations held in the restricted-areas of the conferences as well as a

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[94] At the hearing, plaintiffs noted that they are not asserting claims based on recordings made at the Association of Reproductive Healthcare Providers ("ARHP") meeting in Denver in 2013.

[95] *Cf. U.S. v. Taketa*, 923 F.2d 665, 676 (9th Cir. 1991 (Under Fourth Amendment analysis, defendants "has no general privacy interest in O'Brien's office, but he may have an expectation of privacy against being videotaped in it.").

reasonable expectation that they would not be surveilled or recorded during those conferences.

Third, defendants discuss the recordings taken at the PPRM and PPGC/PPCFC offices. They argue that "information shared with" defendants was the sort of information that plaintiffs might have shared coworkers or potential business partners and that type of information "cannot be private." They cite only cases arising in the inapposite context of governmental informers. Those cases hold that there is no Fourth Amendment violation (and no reasonable expectation of privacy) when a criminal defendant voluntarily shares information with an informant or when someone under government investigation voluntarily shares information with the government. *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1220 (9th Cir. 2019) ("use of a government informant under the invited informer doctrine—even if not in good faith in the First Amendment sense—does not implicate the privacy interests protected by the Fourth Amendment."); *Stewart v. Evans*, 351 F.3d 1239, 1244 (D.C. Cir. 2003) (no Fourth Amendment violation). Those cases are wholly inapposite to the facts here.[96]

The record shows that the staff of PPRM and PPCG/PPCFC intended their conversations to be private and had no expectations that those conversations would be recorded. The evidence

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[96] *See Walker v. Darby*, 911 F.2d 1573, 1578–79 (11th Cir. 1990) (noting that "courts have found that an action for violation of the anti-wiretap statute may be maintained even in the absence of an expectation of privacy as generally understood in the Fourth Amendment search and seizure context").

regarding the steps Daleiden and Merritt had to take to set up those meetings and gain entry both into PPRM and PPGC/PPCFC, including showing ID, being personally escorted into the secure-parts of the facilities, and the signing of the PPGC NDA, all indicate circumstances of a reasonable expectation of privacy of those that were recorded. Defendants' motion for summary judgment on the federal claim is DENIED.

2. **Florida (Count 11)**

Unlike the federal statute, under Florida law there is no element of subsequent use or disclosure or purpose to commit a criminal or tortious act. But, as with the federal claim, Lopez argues that the Eleventh Circuit in *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319 (11th Cir. 2017) recognized a separate requirement that those taped must "show externally" and "demonstrate" their expectation that they would not be recorded under Florida law. I have rejected that argument. The Eleventh Circuit in *McDonough* simply looked to the facts in that case – including the facts that the conversation at issue was invited by a public official and took place in a public department – in determining that there was no demonstrated expectation of privacy. Defendants cite no case under Florida law imposing an "affirmative" requirement for anyone (other than perhaps public employees) to visibly or audibly communicate that a particular conversation

was confidential or "off the record." This challenge, as with the federal statute, fails.[97]

Defendants also argue, exhibition or demonstration aside, that there is no evidence of a "reasonable" expectation of privacy of the persons recorded, as required under Florida's law consistent with the *Katz* factors. *See Katz v. United States*, 389 U.S. 347 (1967).[98] As above, this challenge rests on disputed questions of material fact, considering the steps PPFA took to restrict access to its conferences and the participants' experiences that their conversations were sensitive, private, and would not be recorded. That the conversations took place at a conference, in an exhibit hall, or in a lobby do not by themselves mean the conversations were not subject to a subjective and objectively reasonable expectation of privacy. All of the

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[97] Under the Florida law, "oral communication" is defined "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." Fla. Stat. § 934.02 (2016). Consistent with the federal statute, "what matters under Florida law" is that "if the person whose conversation or voice is being recorded expects that their conversation or voice will not be recorded and the circumstances justify that expectation and society is prepared to accept that expectation as reasonable, a violation of section 934.03 has occurred regardless of whether the recorded words are of a private nature or privileged content." *LaPorte v. State*, 512 So. 2d 984, 986 (Fla. 2d Dist. App. 1987).

[98] Considering whether the communications, "were uttered by a person (1) who has a subjective expectation of privacy, and (2) whose expectation was objectively reasonable." *U.S. v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

facts and the contexts for each recording have to be considered. *See, e.g., Abdo v. State*, 144 So. 3d 594, 596 (Fla. 2d Dist. App. 2014) (noting that "conversations occurring inside an enclosed area or in a secluded area are more likely to be protected") (internal citation omitted).

The motion for summary judgment on the Florida statute fails, except as to Merritt. It is undisputed that Merritt never recorded in Florida and, therefore, she cannot be directly liable for this claim.

3. **Maryland (Count 12)**

This claim is based on recordings defendants made at the 2015 NAF Annual conference in Baltimore, Maryland. Under the Maryland statute, Maryland Code, § 10–402(a)(1) of the Courts and Judicial Proceedings Article, defendants admit that there is no "exhibiting" concern of privacy requirement that they wrongly contend exists under the Florida and federal statutes, but argue that there is no evidence of a "reasonable" expectation of privacy of the persons recorded as required under Maryland law consistent with the federal *Katz* factors.[99] For the reasons just described with respect to the federal and Florida

[99] Section 10–402(a)(1) makes it unlawful for a person "willfully to intercept" a wire, oral, or electronic communication, but willfulness does not require "knowledge on the part of the defendant that his or her action is unlawful—that it is prohibited by the statute." *Deibler v. State*, 365 Md. 185, 188 (2001); *id*. at 199 (adopting the federal and "moderate conception of the required mental state—purposeful conduct, requiring neither a bad motive nor knowing unlawfulness").

statutes, the motion for summary judgment on Maryland law fails.[100]

4. **Standing and Dropped Claims**

Defendants argue that there are standing problems for some of the claims. At the hearing, plaintiffs conceded they were not asserting claims: (1) for recording Taylor on behalf of PPRM; (2) for recording David on behalf of PPFA; (3) for recording staff of PPNorCal, PPMM, or PPLA under Florida law; and (4) for recording staff of PPNorCal, PPPSW, PPRMM, and PPOSBO under Maryland law.

5. **California (Counts 9-10)**

The California recording claims are based on recordings defendants made of plaintiffs' staff during the 2014 NAF conference in San Francisco, as well as based on the recordings Daleiden and Merritt made during the two lunch meetings with Gatter/Felczer and Nucatola in Southern California. The persons who were recorded are alleged to be staff of PPFA, PPNorCal, PPCG/PPCFC, and PPPSGV.[101]

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[100] Merritt brings a separate challenge, arguing that prior to the discovery cutoff, plaintiffs failed to identify any video segments that she personally recorded in Baltimore as actionable. Merritt MSJ at 19-20. Merritt contends that it was only after the discovery cutoff that plaintiffs identified five videos recorded by Merritt. However, as explained below addressing the motion to strike, the claims based on these recordings remain.

[101] Plaintiffs admit that they no longer assert claims under California law for secret recordings of staff of PPPSW, PPGC/PPCFC, PPRM, PPOSBC, or PPMM. Pls. Oppo. MSJs at 52 n.35

a. Violation of Penal Code section 632 (Count 9)

California Penal Code section 632(a) prohibits the use of a recording device "to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another." "Confidential communication" is defined in Section 632(c) as "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 made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." "[W]hether a communication is confidential is a question of fact normally left to the fact finder." *Safari Club Intl. v. Rudolph*, 862 F.3d 1113, 1126 (9th Cir. 2017).

"A section 632 violation is committed the moment a confidential communication is secretly recorded regardless of whether it is subsequently disclosed." *Lieberman v. KCOP TV, Inc.*, 110 Cal. App. 4th 156, 164 (Cal. App. 2d Dist. 2003). Statutory damages for violation of section 632, therefore, occur upon recording and actual damage evidence is not required. *Id.* at 167. Actual damages may be awarded, but those "must relate directly to the surreptitious recording," for example from emotional distress or outrage upon discovering the recording, or to recoup legal expenses

to recover the recording, but damages incurred from any subsequent broadcast are generally not allowed under the statute. *Id*.

In addition, California Penal Code section 633.5 provides an exception. It does not "prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking . . . or a [domestic violence] violation." *See, e.g.*, *In re Trever P.*, 14 Cal. App. 5th 486, 488 (Cal. App. 5th Dist. 2017), review denied (Nov. 15, 2017) (allowing admission of recording where the "victim's mother reasonably suspected such a crime when she arranged to make the recording.").

i. Standing & Reasonable Expectation of Privacy

Daleiden, on behalf of defendants, argues that the California statute is substantively different from the federal, Florida, and Maryland statutes addressed above because the question is not reasonable expectation of privacy in general, but the narrower question of reasonable expectation that the communication would not be "overheard or recorded." That is generally a question of fact, subject to individualized proof. *See Hataishi v. First Am. Home Buyers Protec. Corp.*, 223 Cal. App. 4th 1454, 1457 (Cal. App. 2d Dist. 2014); *but see Reynolds v. City and County of San Francisco*, C 09-0301 RS, 2012 WL 1143830, at *6 (N.D. Cal. Mar. 30, 2012), *aff'd*, 576

Fed. Appx. 698 (9th Cir. 2014) (unpublished) (considering the undisputed circumstances, summary judgment appropriate where "no reasonable trier of fact could conclude that Reynolds retained an expectation of privacy in his conversation with the stalking suspect that was reasonable, from either a subjective or objective perspective."). That a conversation was recorded in a public place does not mean a claim is barred. *See Safari Club Intl. v. Rudolph*, 862 F.3d 1113, 1126 (9th Cir. 2017) ("privacy is relative and, depending on the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location.").

Nonetheless, defendants contend that each of the conversations identified as actionable by plaintiffs *could* have been overheard and therefore no reasonable expectation of privacy exists as to any of them as a matter of law. They also contend that some of the employees were not speaking on behalf of their employers or about their employer's internal matters during the recordings and, for those, the employer would not have standing. *See, e.g., Bona Fide Conglomerate, Inc. v. SourceAmerica*, 14CV00751-GPC-DHB, 2016 WL 3543699, at *6 (S.D. Cal. June 29, 2016 (finding standing where defendant "was allegedly recording SourceAmerica employees—including its former general counsel and compliance officer—regarding SourceAmerica's internal matters.").

PPPSGV Claim/Gatter and Felczer lunch. Defendants argue that Gatter and Felczer, who were recorded at a restaurant in Southern California, were not "employees" of any of the plaintiffs asserting this

claim, and, instead, attended the meeting on behalf of plaintiff PPPSGV who is not listed as a plaintiff asserting this claim in the FAC. Defendants contend, therefore, that PPPSVG cannot assert the Penal Code claim (nor the invasion of privacy claim) on behalf of Gatter or Felczer. Merritt MSJ at 21-22.

Plaintiffs have consistently asserted during discovery and all phases of litigation subsequent to the FAC that they intend to base the California recording claim in significant part on this lunch, and PPPSGV claimed damages from the lunch recordings. In addition, defendants actually deposed Gatter about the circumstances surrounding the lunch meeting. They had adequate notice of all facts relevant to this claim. Even if leave to amend were necessary to correct the failure of plaintiffs to identify PPPSGV as the entity asserting this claim, amendment is granted because of the lack of prejudice to defendants.

Defendants next assert that Gatter and Daleiden agree that parts of the lunch meeting conversation could be overhead by wait staff. Daleiden Decl. [Dkt. No. 609-1], ¶ 22 ("Multiple times, wait staff approached and serviced our table and remained at the table while our conversation continued. During the course of our conversation, there were other restaurant patrons seated nearby our table. I noted that I could overhear the conversations of restaurant patrons seated around us, and therefore concluded that they could overhear us as well. I attended Dr. Gatter's deposition in this case and I agree with her that the third parties in the

restaurant could overhear our conversation.").[102] They argue that neither Gatter nor Felczer, therefore, had a reasonable expectation that the communication would not be "overheard or recorded" as a matter of law.

Plaintiffs respond that Gatter believed the conversations she and Felczer had at that lunch were private and confidential. The restaurant was "largely empty," the party was seated in a booth, and there was loud music playing. Those facts would inhibit others from overhearing the conversations. Gatter Decl. [Dkt. No. 95] ¶ 5. Gatter also cautioned defendants to be "discrete" when wait staff were near; she did not disclose confidential information when the wait staff could overhear. Gatter Depo. at 269-274, 279-281. These different characterizations of the circumstances, and the reasonableness of Gatter's beliefs, raise material disputes of fact precluding summary judgment on these claims.

PPFA Claims/Nucatola. Nucatola was recorded during a lunch meeting in Southern California by Daleiden and Merritt and at the NAF 2014 conference in San Francisco. Defendants argue that Nucatola admitted in her deposition that she attended the lunch meeting in her "personal capacity," that she was not authorized to disclose any confidential PPFA information at the lunch, and that she did not disclose any confidential information at the lunch. In light of Nucatola's "admissions," Daleiden and Merritt argue that she could not have disclosed any information

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[102] Plaintiffs object to paragraph 20-22 as to whether others could overhear as speculative. Those objections are OVERRULED.

about PPFA and that PPFA does not have standing to pursue this claim on her behalf with respect to the lunch meeting.

In response, plaintiffs point out that the Penal Code section 637.2 expressly defines corporations as persons who can sue, and cases have explained that corporations have standing where recordings were made of their employees discussing the corporation's "internal matters." *See Bona Fide Conglomerate, Inc. v. SourceAmerica*, 14CV00751-GPC-DHB, 2016 WL 3543699, at *6. It is undisputed that Nucatola attended the 2014 NAF conference in San Francisco – where she was recorded[103] – as an employee of PPFA. It was her introduction to Daleiden and "BioMax" at that conference which led directly to the lunch meeting. There is also evidence that Nucatola was targeted by defendants precisely because she could and did divulge information about PPFA's practices, and the HCP videos featured Nucatola's PPFA business card in its segments about Nucatola. Pls. Oppo. MSJ at 54-55 (citing evidence of text accompanying YouTube video from HCP); *see also* Mayo Oppo. Decl., Ex. 51 (transcript of Nucatola recording).[104] Finally, plaintiffs

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[103] Plaintiffs note that defendants do not dispute that Nucatola testified at her deposition that she attended the NAF Conference, where she was recorded, as both a PPFA and PPLA employee, and that she was employed by PPFA at that time. Those two Nucatola recordings (#68-69), are subject to defendants' motion to strike but, as discussed below, remain in this case.

[104] Defendants object to the transcript on the grounds of lack of authentication and as it was not previously produced. The objections are OVERRULED. **To the extent the parties are**

assert that it was the disclosure of PPFA's internal matters by Nucatola at the lunch meeting that impacted it and supports its standing.

All of this shows that there are questions of fact whether Nucatola attended the lunch meeting in her "personal capacity" and whether the information disclosed was about PPFA's internal matters sufficient to provide PPFA standing.[105]

As to reasonable beliefs and whether their lunch conversation could be overheard, defendants argue that Nucatola also repeatedly confirmed in her deposition that their conversation could be overhead by wait staff. However, while parts of the conversation were overheard, Nucatola testified that her position in the booth at the back of the restaurant allowed her to perceive when she might be overheard and that she "stopped talking" about sensitive information when wait staff approached. Nucatola Depo. 243-246. As with the Gatter/Felczer recordings, the different characterization of the circumstances, and the reasonableness of Nucatola's beliefs, raise material disputes of fact.

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going to introduce or otherwise rely on transcripts of recordings at trial, they shall meet and confer to provide an agreed-to transcription unless there are material differences that preclude agreement.

[105] Merritt separately argues that Nucatola did not disclose "confidential information," but whether disclosure of "internal matters" was sufficient to confer standing on PPFA and whether the "communication" was reasonably expected to be confidential are issues for the jury.

The final video segment that is a basis of PPFA's California recording claim is Doe1023, and video #35. Defendants address this segment in passing, contending that PPFA's witness undermined this claim because that witness – when showed the video – "agreed that [he] potentially could be overheard." Minow Depo. at 265-267. But the deponent also pointed out the loud level of background noise, refused to agree that any particular conversation could be overheard, and explained the general expectation of confidentiality amongst attendees. *Id*. Again, whether some of all of the recorded conversation could be overheard, and whether the individual actually involved had reasonable beliefs that the conversations, or the sensitive parts of those conversations, could or could not be overheard, raise material disputes of fact precluding summary judgment.

PPNorCal's Claims. Defendants assert that PPNorCal lacks standing because Doe8002 is not an employee of PPNorCal but "merely a contract abortion provider" and because PPNorCal testified that it does not generally pay for "contract providers" to attend conferences and had no specific knowledge whether Doe8002 attended the NAF conference on behalf of PPNorCal. Plaintiffs respond that Doe8002 was a part-time physician; while PPNorCal classifies such part-time physicians as "contractors," they are nonetheless considered "staff." Plaintiffs also submit evidence that PPNorCal expected its providers, like Doe8002, to routinely attend these conferences as part of their PPNorCal duties. Plaintiffs also point out that Doe8002 was asked about and divulged information about PPNorCal's internal matters, which is sufficient to

confer standing. There are, again, disputes of fact as to PPNorCal's standing to pursue this claim.

Defendants next argue that the conversations of Doe8001 and Doe8002 could both be overheard. But the only evidence to support this comes from the questioning of PPNorCal's Rule 30(b)(6) witness, who speculated that people passing by the conversation might have been able to overhear it. Again, that creates a question of fact for the jury to weigh. Simply because the conversations at issue were recorded in an exhibit hall where many people were conversing and milling about does not necessarily make the recorded communications not confidential or fatally undermine a reasonable belief of privacy. Additional factors, including that NAF restricted access to the exhibit hall during the conference and that the participants were vetted (having signed confidentiality agreements and secured access badges), raise material questions of fact precluding summary judgment. *See, e.g., Safari Club Intl.,* 862 F.3d at 1125 (the fact a conversation took place in public place was to be weighed in connection with the context of who parties believed they were speaking to among other factors).

PPGC/PPCFC's Claims. Defendants contend that no individual shown in video #2 is affiliated with PPCFC because PPCFC's Rule 30(b)(6) witness could not identify PPCFC's lead educator (Doe9001) in that recorded segment. However, Doe9001identified *herself* as an employee of Planned Parenthood "from Houston" in the recording. While defendants object that this identification is "hearsay," and instead want PPGC to be bound to its Rule 30(b)(6) witness's failure to

recognize Doe9001, there is a sufficient dispute of fact to confer standing and allow this segment to remain in the case.[106]

ii. Intentional Communications

Defendants assert that the California statute, unlike the federal, Maryland, and Florida statutes discussed above, requires malintent; evidence that defendants intended to record a conversation that they knew others could not reasonably overhear. In support, Daleiden explains that he has been acutely aware of Section 632 since the inception of the HCP and that he even had to present evidence to donors that CMP would not violate Section 632. He directed that "CMP personnel only videotape in California at large tradeshows and in public restaurants." Daleiden Decl. ¶ 19. Because Daleiden had "no purpose or desire" to record confidential conversations in California, he argues that summary judgment must be granted.

As support, defendants rely on *People v. Super. Ct. of Los Angeles County*, 70 Cal. 2d 123, 133 (1969). There, the court noted that it was "not the purpose of the statute to punish a person who intends to make a recording but only a person who intends to make a recording of a confidential communication" and rejected argument that "the mere intent to activate a tape recorder which subsequently 'by chance' records a

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[106] Daleiden also challenges any California recording claims asserted by PPRM and PPOSBC, but plaintiffs have clarified they are no longer pursing those claims on behalf of those entities. Pls. Oppo. MSJ at 52 n.35.

confidential communication is sufficient to constitute an offense." That case does not address malintent, but chance intent. More recent opinions have confirmed that the "test of confidentiality is objective. [The recorder's] subjective intent is irrelevant." *Coulter v. Bank of Am.*, 28 Cal. App. 4th 923, 929 (Cal. App. 4th Dist. 1994). Therefore, even if Daleiden had the intent to avoid recording what *he* perceived were confidential communications because of the risk, his mere belief that by recording in public places he would not violate the statute does not immunize his actions. These recorded conversations were not "by chance" but were intended. Whether all of the participants to them had an objectively reasonable expectation that they were "confidential communications" under Section 632 will be determined at trial.[107]

iii. 633.5

Both sides move for summary judgment on defendants' affirmative defense under Penal Code section 633.5. Defendants argue that because Daleiden and other CMP personnel had reasonable beliefs that plaintiffs were engaged in violent felonies against fetuses and women and that the purpose of each recording was to secure evidence related to those suspected felonies, defendants are entitled to summary judgment. Defendants rely on their contention that the

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[107] There is also evidence that Rhomberg advised Daleiden to choose "a quiet corner table, alcove, et cetera" for the meetings "so you can have some good private conversation, without too much noise." Mayo Oppo. Decl., Ex. 58 (May 2015 email). Plaintiffs argue that this shows Daleiden himself took steps to increase the privacy of the conversation, despite the public location.

goal of the HCP was to uncover federal crimes regarding sale of fetal tissue, brought about in part by violations of the Partial Birth Abortion Ban and practices dangerous to women. Daleiden MSJ Decl. ¶¶ 23 – 52.[108] However, whether the defendants genuinely believed the targets of their recordings would disclose evidence regarding commission of violence felonies during the recorded conversations and whether those beliefs, if genuinely held, *were* reasonable, are questions of fact for the jury to decide, weighing evidence of what the defendants knew at the time they first started recording for the HCP, how they selected their targets, and who their targets were.

That said, whether defendants secured evidence of the commission of violent felonies in some or all of the conversations is not material. The focus is on what the defendants knew *at the time* they made their first recording for the HCP. *People v. Parra*, 165 Cal. App. 3d 874, 879–80 (Cal. App. 1st Dist. 1985) (concluding that the "recording was clearly for the purpose of obtaining evidence of appellant's intent to carry out her prior written threats of physical violence; that [recorder] did not succeed in accomplishing such purpose does not alter that purpose. Thus, [recorder's] uncontradicted testimony of why he recorded the appellant's voice was sufficient to except that recording from the prohibition of section 632.").

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[108] The parties dispute whether a violation of the Partial Birth Abortion Ban, 18 U.S.C. § 1531 would qualify as a "violent felony" covered by Section 633.5. I need not resolve that to decide this motion, but will simply assume it could.

Plaintiffs seek summary judgment on the inapplicability of this defense. They argue that this section does not apply to any of the recorded conversations because defendants had no reasonable belief that the individuals they actually recorded were the ones who had or might commit a violent felony. They point out that the statutory scheme uses the word "person" in Section 632(a) – which as noted is broadly defined to include corporations and others – but "another party" in Section 633.5. Plaintiffs assert that use of the narrower term "party" was an intentional effort to limit the exception to situations where the recorder reasonably believed that the specific person they were recording was the one who had or might commit the violent felony. They contend that there is no evidence in the record that defendants had any specific belief that any of the staff defendants' recorded at NAF 2014, many of whom the defendants came across by happenstance, had personally committed or might commit the violent felonies identified by defendants (violence to a fetus made illegal under the Partial Birth Abortion Ban or violence to a woman). Nor is there evidence that defendants had specific knowledge that Gatter or Nucatola personally committed or planned to commit one of those felonies other than that they had "participated in fetal tissue procurement." Fetal tissue procurement, by itself, is not a violent felony. *See* Pls MSJ at 31 (citing evidence in record showing defendants' lack of knowledge regarding specific staff prior to the recordings).

Defendants respond, first, that whether any defendant's belief was "reasonable" is inherently a question of fact to be resolved by the jury. Second, they

dispute plaintiffs' narrow interpretation of "party" in Section 633.5. They proffer, instead, that the reasonable belief necessary is only that the recording might obtain evidence relating to the commission of a violent felony by a person, not just the person being recorded.

Defendants rely on *People v. Suite*, 101 Cal. App. 3d 680 (Cal. App. 1st Dist. 1980), but in that case – where a criminal defendant sought to exclude the police recording of his calls of bomb threats – the Court of Appeal noted first that it "was ludicrous" for the defendant to argue his calls were confidential communications because "[s]urely a telephone call to the law enforcement officials of a state university, threatening that a bomb has been placed and set to go off in a university building, is not a confidential communication within the meaning of the statute." *Id.* at 688. To dispel all doubt about whether the call was a confidential communication, the court simply held in that particular circumstance, a "bomb threat unquestionably involves the potential for such violence" under Section 633.5. The court did not in any way reach the question of whether Section 633.5 exempted from 632 recordings of persons who were not personally suspected of committing any crimes.

Defendants then argue that section 632(a)'s only use of "person" as opposed to "party" – the distinction relied on by plaintiffs – is in reference to the "person" who does the recording in violation of the statute, not in reference to the "party" who was recorded. They point out that to provide plaintiffs with standing in the first instance, as a corporation defined as a "person" in

Section 632(b), plaintiffs necessarily define "person" and "party" coextensively. Defendants contend that plaintiffs' motion should be denied because they merely recorded the "corporations" who are the plaintiffs here in order to secure evidence that defendants reasonably believed would show those corporations commit violent felonies.

Moving beyond the statutory construction issue, the parties spend much time disputing the evidence that Daleiden had regarding the commission of violent felonies prior to recording plaintiffs' staff. However, it is undisputed that neither Daleiden nor any other defendant had evidence that any plaintiff or their staff members had violated the Partial Birth Abortion Ban, harmed a woman in order to harvest fetal tissue, or committed any other violent felony covered by Penal Code section 633.5. Daleiden did have evidence that some affiliates had sold fetal tissue, but that is not a violent felony. Daleiden MSJ Decl. ¶¶ 29-31, 42.[109] Daleiden also had evidence that two companies, who had contracts with two plaintiff-affiliates at different points and who shared staff with plaintiff-affiliates, might have secured tissues from unidentified abortion providers that had possibly violated the Partial Birth Abortion Ban. *Id*. ¶¶ 32-34, 40, 42-46. But defendants point to no evidence that those companies secured those particular tissues from any Planned Parenthood

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[109] Plaintiffs object to the paragraphs of Daleiden's declaration where he discusses his "evidence of violent felonies" arguing the statements are hearsay to the extent offered for truth, but I do not rely on these statements for the truth of the matters asserted. The objections on that ground are OVERRULED.

affiliate or plaintiff staff member, or even that those tissues were secured by those companies during the general times that plaintiff-affiliates had contracts with them. Instead, Daleiden made assumptions that, given his belief as to the percentages of times fetuses are born alive and the "financial incentives" some abortion clinics might sell tissue, that some Planned Parenthood affiliates must be engaging in violent felonies. *Id*. ¶ 38. As to Merritt, the only other individual defendant who actually recorded in California, her knowledge was apparently based exclusively on what Daleiden told her as well as her "general" knowledge from being active in the anti-abortion movement for decades. Merritt Depo. 47-55.

On this record, although defendants' "evidence" is based on inferences and assumptions, I cannot say as a matter of law that no juror could find that what defendants Daleiden and Merritt believed about plaintiffs committing violent felonies was unreasonable as a matter of law. That is inherently a question of fact that goes to the jury. Plaintiffs' motion for summary judgment on the Section 633.5 defense is DENIED.

iv. Individual Defendants

There is no dispute that Daleiden and Merritt are appropriate, identified defendants under this claim. BioMax (as the front company they purported to represent) and CMP (as the real company who they represented and who paid Merritt as a contractor) are likewise appropriate and identified defendants.

Lopez is also identified as a defendant on this claim. Plaintiffs argue that any belief Lopez had about

plaintiffs' commissions of violent felonies came through Daleiden and, therefore, was inherently unreliable. Pls. MSJ at 31 n.30. It is undisputed that Lopez did not record anyone in California. Plaintiffs have not identified any alter ego or agency theory as to Lopez. Therefore, the only possible way Lopez could be liable is under the Conspiracy claim (Count 3), that defendants agreed to "defraud Plaintiffs and to injure Plaintiffs with a pattern of fraudulent and malicious conduct" in connection with setting up and making fraudulent misrepresentations about BioMax, securing access to plaintiffs' conferences and staff through misrepresentations, engaging in an ongoing campaign to surreptitiously videotape plaintiffs' staff, and by creating, transferring, and maintaining false identities and documentation to obtain access to conferences and facilities. FAC ¶ 173. The conspiracy claim expressly encompasses surreptitious recordings. Given the allegations against Lopez, this claim survives as to him only for a conspiracy to violate Penal Code section 632.

Similarly, while Rhomberg and Newman are not identified as defendants to this claim, plaintiffs do assert that Rhomberg's and Newman's beliefs as to the alleged commission of violent felonies are "inherently unreliable." Pls MSJ at 31 n.30. As CMP was named as a defendant, plaintiffs may be hinging Rhomberg and Newman's direct liability on an alter ego theory. Consistent with the analysis above, plaintiffs have failed to raise undisputed or material disputed facts in support of a finding of alter ego as to Rhomberg or Newman. Instead, as with Lopez, Rhomberg and Newman may be held indirectly liable under the conspiracy claim. *See* FAC ¶ 173 ("co-conspirators

knowingly and willfully conspired and/or agreed among themselves to defraud Plaintiffs and to injure Plaintiffs with a pattern of fraudulent and malicious conduct, including . . . engaging in an ongoing campaign to surreptitiously videotape Plaintiffs' staff in violation of law").

b. Criminal Trespass Under Penal Code § 634, with intent to violate § 632 (Count 10)

The violation of California Penal Code section 634 is based on the alleged trespass to the NAF 2014 conference in San Francisco, with the "intent" to illegally record the video segments identified above under Section 632.[110] Section 634 covers "trespasses on property for the purpose of committing any act, or attempting to commit any act" in violation of Section 632. Defendants, through Daleiden, argue that this claim fails because plaintiffs have not shown that NAF had a sufficient "possessory" interest in the 2014 conference facilities, and therefore, the right to be able to exclude others from the San Francisco conference. Defendants also argue that the Section 634 claim fails because the Section 632 claim fails, plaintiffs were not injured by any criminal trespass, and the claim is impermissibly duplicative of the Section 632 claim as it seeks the same damages.

Defendants argue that for the same reasons the common law trespass fails as to PPFA's conference hotels and possessory interest, the claim fails with

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[110] The restaurant recordings of Gatter/Felczer and Nucatola are not alleged as grounds for the Section 634 claim.

respect to NAF's lack of adequate possessory interest. Defendants contend that plaintiffs have no evidence regarding NAF's possessory interest, they simply assume it "based on the risk that [PPFA] was aware of at the time." Minow Depo. at 159-160. However, as I have discussed with respect to the similar PPFA conference contracts, the evidence established a sufficient possessory interest. Here, defendants do not identify any provision in the NAF contract that indicates that NAF had less possessory interest in its conference space than PPFA did under its contracts, or any other reason why the analysis should be different with respect to the NAF conference.

With respect to the Section 632 claim and duplication, defendants note that the provision allowing for a civil action, Cal. Penal Code section 637.2, provides: "Civil action by person injured; injunction:" "(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts . . . ." They argue that this language allows for *one* recovery for the violation of "this section" and that means one claim stemming from the NAF conference. *Franklin v. Ocwen Loan Servicing, LLC*, 18-CV-03333-SI, 2018 WL 5923450, at *7 (N.D. Cal. Nov. 13, 2018), order clarified, 18-CV-03333-SI, 2019 WL 452027 (N.D. Cal. Feb. 5, 2019) (concluding Cal. Penal Code section 637.2 "does not provide per violation statutory damages"). Plaintiffs respond that at this juncture they are allowed to plead claims in the alternative, and if they fail on Section 632 with the jury, they may nonetheless recover under Section 634. I agree.

Finally, with respect to injury flowing to these plaintiffs from the NAF 2014 conference trespass, defendants argue that the only harm from the trespass could be injury to the hotel or NAF, but not plaintiffs. However, the statute itself notes, "It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages." Cal. Penal Code § 637.2(c). Similarly, the fact that "publication damages" are not available, as outlined above, does not mean plaintiffs cannot seek a remedy under this section.

Separately, Merritt argues that plaintiffs have identified no videos that she personally recorded during the 2014 NAF conference as being actionable and, therefore, this claim fails as to her. However, the statute covers trespass "for the purpose," and there is a material dispute of fact as to Merritt's purpose. She is not out of this claim on summary judgment.

G. Invasion of Privacy

Defendants move for summary judgment on the two "invasion of privacy, intrusion on seclusion" claims. I will address each in turn.

1. Intrusion on a Private Place (Count 13)

The first intrusion claim under "common law," is brought by all plaintiffs against defendants Daleiden, Merritt, Lopez, CMP, and BioMax. As alleged in the Amended Complaint, this claim is based on defendants' intrusions at the PPFA conferences (in Miami, Orlando, and Washington, DC) and the NAF conferences (in San Francisco and Baltimore), as well

as on the intrusions in the PPGC/PPCFC facility in Texas and the PPRM facility in Colorado.

In opposition, however, plaintiffs only discuss this claim with respect to the intrusions into facilities in Colorado and Texas (addressing only Colorado and Texas law) and with respect to the taped lunches with Gatter and Nucatola (under California law). Plaintiffs do not address the intrusion claim with respect to their conferences. In my Tentative Ruling and Procedure Order (Dkt. No. 718), I asked plaintiffs to confirm whether they were dropping these claims with respect to the conferences. In response, they clarified that they were pursuing the invasion of privacy claim under Colorado law for PPRM and for PPGC under Texas law, and presumably although not stated, the common law claims for Gatter and Nucatola under California law. July 17, 2019 Hearing Transcript at 55. I will confine my analysis accordingly.

a. Privacy Interest Under Colorado and Texas Law

Lopez contends that the intrusion claims fail under Colorado and Texas law because no "private information" was gleaned from anyone during the recordings at either PPMM or PPCG/PPCFC. These were instead "business meetings" about business proposals that cannot form the basis of an invasion of privacy claim. *See Smith v. Colorado Interstate Gas Co.*, 777 F. Supp. 854, 857 (D. Colo. 1991) (dismiss "intrusion of seclusion" claim because "the allegations do not involve invasions of Smith's personal solitude or personal affairs. . . . Instead, the allegations concern Smith's business affairs."); *see also Patton v. United*

Parcel Serv., Inc., 910 F. Supp. 1250, 1276 (S.D. Tex. 1995) (no intrusion on seclusion case where defendants demanded plaintiff answer questions during business hours and on business premises regarding business investigation).

In opposition, plaintiffs dispute the assertion that Colorado or Texas protect only intrusions which disclose "private information." Instead, they argue these states follow the Restatement (Second) of Torts § 652B (1981), which provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1065 (Colo. App. 1998) (adopting § 652B); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (applying § 652B test).[111] However, even if

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[111] Defendants also rely on *Morrison v. Weyerhaeuser Co.*, 119 Fed. Appx. 581, 589 (5th Cir. 2004) (unpublished). That case rejected an invasion of privacy claim in connection with an investigation into a workplace accident when a supervisor insisted on attending a medical exam following the accident. *Id.* at 589 (because plaintiff testified "he did not have an expectation of privacy in anything that occurred at the examination" room and it was "doubtful that Morrison had a reasonable expectation of privacy in information sought by the employer as part of an investigation directly related to its business interests."). Defendants also rely on *Pascouau v. Martin Marietta Corp.*, 185 F.3d 874 (10th Cir. 1999). In that case the court confirmed that "Colorado law requires" plaintiff "to show that another person 'has intentionally intruded, physically or otherwise, upon [her] seclusion or solitude,' and that a reasonable person would consider such intrusion offensive," but explained that the "tort of intrusion into seclusion requires more than a mere

disclosure of private information is required to sustain the intrusion torts under Colorado and Texas law, plaintiffs submit evidence that at least some of the information disclosed during defendants' visits to the PPGC/PPCFC and PPRM facilities could be considered "private" by those recorded. Pls. Oppo. MSJ at 83.

That theme was continued by plaintiffs during the hearing where they posited that given the context of this industry and the sensitive nature of the information being discussed – which is more personal, more private, and akin to medical information – Colorado and Texas laws would protect it from invasion. Plaintiffs point to no specific facts or specific content from any of the videos at issue to support their argument that the information disclosed by PPRM or PPCG/PPCFC is akin to "personal" information covered by the tort. Instead, they admit that defendants sought and received "sensitive information about the rate and types of abortions procedures performed, how Plaintiffs work with research partners, and Planned Parenthood policies and internal considerations about fetal tissue donation." *Id*. That information is not "private" to any *person* in particular – and therefore not personal – although it may be considered confidential and sensitive by PPRM or PPCG/PPCFC.

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inquiry that reveals nothing." *Id*. at *14 (invasion claim failed where plaintiff had been asked sexually suggestive questions but which were not answered because "liability attaches only to an unconsented invasion through physical or other means that actually gleans private information."). These cases support defendants' position that the information actually disclosed must be private to the person disclosing it.

When asked at the hearing to identify any cases that covered corporate information of the type disclosed here, plaintiffs identified *Arroyo v. Rosen*, 102 Md. App. 101 (Md. Spec. App. 1994).[112] In that case, the invasion of privacy verdict was upheld based on the disclosure of a confidential report issued by a University committee concluding a professor may have falsified data in published articles. *Id.* at 106. While the underlying investigation and disclosure occurred in the context of a business (a university), the information disclosed was *personal* to the professor. Plaintiffs have no evidence of a similar intrusion into private affairs or concerns with respect to the PPRM and PPFC tapings.

Summary judgment is GRANTED to defendants on Count 13 with respect to claims under Colorado and Texas Law.

b. California Common Law Claims

Plaintiffs are also asserting common law invasion claims for the taping of Gatter and Nucatola at the lunches in Southern California. Under California law, the "intrusion tort" has "two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." *Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 914 (1999). "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Id.* at 918. And, particularly relevant to this case, the *Sanders* court noted that "that a person may

[112] Plaintiffs and defendants agree that Maryland law is consistent with Colorado and Texas law with respect to intrusion claims.

reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication's contents." *Id*. at 915. Taken together, whether a "reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances. In addition, liability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." *Id*. at 911.

Lopez, arguing on behalf of the defendants, essentially admits that with respect to the recording of Gatter and Nucatola, this question goes to the jury. Nonetheless, defendants challenge the standing of PPPSGV and PPFA to assert these claims on behalf of Gatter and Nucatola and assert that the newsworthiness of the information uncovered in those recordings precludes the California claims as matter of law.

i. Standing

Defendants argue that plaintiffs cannot establish the required "associational" or third-party standing sufficient to assert the intrusion claims on behalf of their staff who were recorded. Plaintiffs respond that the PPPSGV and PPFA have standing to pursue the claims under California law with respect to the taping of their employees at the lunch meetings. Standing, they argue, exists because: (1) PPPSGV and PPFA have alleged "injury in fact" to themselves – at a minimum they incurred costs with respect to personal security for these targeted staff; and (2) they are a "proper

proponent" of the legal rights on which the claim is based. Pls. Oppo. MSJ at 83.[113] Plaintiffs also argue that considering the threats that these individuals, including Gatter and Nucatola, experienced following the disclosures, the individuals were reluctant to be named as plaintiffs themselves, a concern well recognized under California law. *See, e.g.*, *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 143 Cal. App. 4th 1284, 1298 (Cal. App. 1st Dist. 2006) (concluding employer had standing to assert privacy claims on behalf of employees, in part because "[i]t is unlikely that employees who had already been targeted by SHAC USA would permit themselves to be further targeted by becoming a named party to a lawsuit.").[114]

Whether PPPSGV and PPFA are proper proponents of the rights of Gatter and Nucatola, and therefore

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[113] Plaintiffs rely on *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), which considered those two factors to determine whether a physician had third-party standing to challenge laws regarding abortion on behalf of himself and his patients. Lopez's reliance on cases recognizing that corporations do not "a common law right to privacy and therefore cannot bring an action for invasion of privacy" is not helpful as those cases do not discuss the third-party standing asserted here. *See, e.g.*, *Coulter v. Bank of Am.*, 28 Cal. App. 4th 923, 930 (Cal. App. 4th Dist. 1994).

[114] Daleiden argues *Novartis* is distinguishable from this case because there are no allegations that any particular defendants have harassed any particular plaintiffs, but that is disputed, particularly with respect to Gatter and Nucatola, who reasonable jurors may believe were specifically targeted for recording by these defendants.

whether they have standing to assert this claim on their behalf goes to the jury.

ii. Newsworthiness

Finally, defendants argue that the intrusion claims fail as a matter of law in light of defendants' recording for their journalistic purposes and public dissemination of newsworthy information. Relatedly, defendants contend that given their journalistic intents there can be "no debate" that their intrusions were not "offensive" under California law.

It is well settled that "the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws" like the invasion of privacy claim asserted here. *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 238 (1998), *as modified on denial of reh'g* (July 29, 1998). Defendants nonetheless ask me to weigh the newsworthiness versus offensiveness factors now and find that newsworthiness outweighs any offensiveness here on summary judgment because of the danger of "jury overreach." Lopez Mot. at 9 (citing *Diaz v. Oakland Trib., Inc.*, 139 Cal. App. 3d 118 (Cal. App. 1st Dist. 1983)). But the *Diaz* court confirmed that in intrusion cases, newsworthiness is measured in a common law right to privacy claim, "along a sliding scale of competing interests: the individual's right to keep private facts from the public's gaze versus the public's right to know" and is generally a question for the jury. *Id.* at 133. The opinion recognized that courts may check the "risk of prejudice" through "close judicial scrutiny at the stages of litigation such as summary judgment, directed verdict, and judgment

notwithstanding the verdict" to correct against "jury overreaching." *Id.*

This is not one of those atypical situations where newsworthiness versus privacy can be determined as a matter of law at summary judgment. *But see Sipple v. Chron. Publg. Co.*, 154 Cal. App. 3d 1040, 1050 (Cal. App. 1st Dist. 1984) (record failed to present any triable issue of fact, therefore "trial court could determine as a matter of law that the facts contained in the articles were not private facts within the purview of the law and also that the publications relative to the appellant were newsworthy."); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) (determining newsworthiness as a matter of law where "the public has demonstrated an intense interest in, and concern about, Iraqi prisoner abuse scandals," "Defendants' intrusion into an ostensibly private matter was negligible," and "Plaintiffs voluntarily assumed a position of public notoriety"); *Baughman v. State of California*, 38 Cal. App. 4th 182, 190 (Cal. App. 2d Dist. 1995 ("The investigation of this serious crime pursuant to a search warrant is a defense which justifies the invasion of his privacy as a matter of law.").

Putting aside plaintiffs' assertion that defendants are not journalists to whom these protections apply, there are material disputes regarding whether all, some, or none of content of the recordings from these lunch meetings that *were published* were newsworthy or were newsworthy enough to overcome Gatter and Nucatola's privacy interests. That defendants' recordings made news and that *some* of the evidence

uncovered during the Project from *some* of its targets might have led to successful prosecutions or changes in governmental policy does not – on the record presented on these motions – foreclose the intrusion claims as a matter of law concerning these specific plaintiffs based the recordings of them.[115]

Defendants' motion for summary judgment on Count 13 under California law is DENIED.

2. California Constitution, Article I (Count 14)

The second claim is for invasion of privacy in violation of Article I of the California Constitution. In the FAC, the claim was asserted by PPFA, PPNorCal, PPPSW, PPMM, and PPOSBC against Daleiden, Merritt, Lopez, CMP and BioMax. It is unclear which plaintiffs assert this claim at this juncture. Plaintiffs dropped their California Penal Code illegal recording claim as to PPPSW, PPOSBC, and PPMM (as well as others), admitting that staff of those plaintiffs were not recorded in California. Pls. Oppo. MSJ at 52 n.35. In the summary judgment briefing, defendants assert that conduct outside the boundaries of California cannot

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[115] Defendants repeatedly assert that the truth of the HCP publications must be assumed as true for all purposes in this litigation, because plaintiffs have not filed a defamation-type claim to contest the truth. The "assume as true" standard, however, is relevant when assessing the tort and contract claims on the question of whether the damages sought are barred publication damages. For the purposes of that analysis, truth is assumed. But defendants cite no cases applying an assumption of truth to the offensiveness and related newsworthiness analyses under these causes of action.

form the basis of this claim. Daleiden MSJ at 11. Plaintiffs did not respond but instead focus, for purposes of the California invasion of privacy claim, on the taping of Gatter and Nucatola in California. Therefore, I will similarly limit the scope of this claim and accordingly my analysis to PPPSVG and PPFA with respect to the taping of Gatter and Nucatola at the Southern California restaurants.

An invasion of privacy claim under the California Constitution "requires three essential elements: (1) the claimant must possess a legally protected privacy interest . . .; (2) the claimant's expectation of privacy must be objectively reasonable . . .; and (3) the invasion of privacy complained of must be serious in both its nature and scope." *County of Los Angeles v. Los Angeles County Employee Rel. Com.*, 56 Cal. 4th 905, 926 (2013). "If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests." *Id.* (relying on *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 26 (1994)).

Defendants, through Daleiden, argue that this claim fails because defendants did not intrude on any "extremely private content," plaintiffs lack standing to assert the interest on behalf of their employees, and the newsworthiness outweighs the privacy intrusion.

As to the privacy interest in the information disclosed, plaintiffs argue that all they need to show is an interest in "precluding the dissemination or misuse of sensitive and confidential information." *Id.* at 927 (characterized as "informational privacy" by the *Hill* court). "The reasonableness of a privacy expectation

depends on the surrounding context. We have stressed that 'customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.'" *County of Los Angeles v. Los Angeles County Employee Rel. Com.*, 56 Cal. 4th at (quoting *Hill*, 7 Cal. 4th at 37).

Defendants counter that none of the information disclosed by Gatter or Nucatola is confidential or sensitive. I disagree. On this record, plaintiffs have raised material questions of fact whether the information disclosed by Gatter and Nucatola can objectively be considered sensitive and confidential. *See, e.g.*, Nucatola Depo. at 234–235, 244 (discussing abortion procedures and witness' practice of not discussing abortion "in front of other people"); Gatter Depo. at 272:5–15; 273:1–3 (identifying tissue donation and number and types of procedures PPPSGV performs as confidential information).[116]

As to the reasonableness of Gatter and Nucatola's expectations of privacy, recognizing that the recorded conversations took place in restaurants does not automatically defeat a reasonable expectation. *See, e.g.*, *Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 914 (1999) (no bar to common law invasion claim

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[116] Defendants argue the information disclosed must be "extremely sensitive" and cite cases where, indeed, extremely sensitive information was at issue like possible HIV or sexually transmitted disease status. Daleiden MSJ at 10. However, there is no requirement that the information be "extremely sensitive." For example, in *County of Los Angeles v. Los Angeles County Employee Rel. Com.*, 56 Cal. 4th 905, public employees had a privacy interest in their home addresses and contact information.

based simply because recording was in area where others who were not parties to the conversation were present). Whether Gatter and Nucatola had reasonable expectations concerning the content of their conversations or that those conversations would not be recorded are issues to be resolved by the jury based on testimony regarding the context of the conversations, *e.g.*, did they speak in low voices, did they choose tables away from other patrons, did they continue to discuss the information when servers drew near, etc.[117]

In his motion, Daleiden makes similar lack of third-party standing and newsworthiness overcoming offensiveness arguments as Lopez made with respect to the common law claims. Those arguments are rejected for the same reasons.[118]

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[117] The cases relied on by defendants in support of summary judgment on the reasonableness issue are readily distinguishable. *See, e.g., Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 448 (Cal. App. 4th Dist. 2004) (no reasonable expectation of privacy for information shown on a publicly observable computer screen in a "cyber café"); *Gonzales v. Uber Techs., Inc*., 305 F. Supp. 3d 1078, 1090 (N.D. Cal. 2018), *on reconsideration*, 17-CV-02264-JSC, 2018 WL 3068248 (N.D. Cal. June 21, 2018 ("Plaintiff consented to the tracking of his vehicle through his cellphone when he signed up to be a Lyft driver."); *see also In re Yahoo Mail Litig*., 7 F. Supp. 3d 1016, 1038 (N.D. Cal. 2014) (discussing "high bar" cases holding that disclosure of "routine commercial information" like home addresses, geolocation data, and device identifier information do not state an actionable claim for invasion of privacy).

[118] Under the California Constitution balancing test, "[a]n otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. . . . Conversely, the invasion may be unjustified if the claimant can point to "feasible and effective alternatives" with "a

Defendants' motion for summary judgment on Count 14 is DENIED regarding the claims of PPPSGV and PPFA for the recordings of Gatter and Nucatola, but is GRANTED concerning the dropped claims of other plaintiffs.

H. Civil Conspiracy (Count 3)

Plaintiffs admit that the basis of this count is defendants' tortious conduct, specifically, defendants' "pattern of fraudulent and malicious conduct." Pls. Oppo. MSJ at 16-17 n.11; FAC ¶ 173.

1. Rhomberg and Newman

Rhomberg and Newman argue that this claim fails as to them because corporate directors cannot be liable for tortious conduct unless the director "specifically authorized, directed, or participated in the allegedly tortious conduct." *Frances T. v. Village Green Homeowners Ass'n*, 42 Cal. 3d 490, 508 (1986)). However, "[t]acit consent is enough to prove a conspiracy against a director or officer of a corporation, so long as the director or officer concurred in the tortious scheme with knowledge of its unlawful purpose." *Schwartz v. Pillsbury Inc.*, 969 F.2d 840, 844 (9th Cir. 1992) (citation and internal quotation marks omitted); *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1380 (2000) ("A corporate director or officer's participation in tortious conduct may be shown not

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lesser impact on privacy interests." *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 40 (1994). All of these issues, again, are disputed and subject to material disputes of fact.

solely by direct action but also by knowing consent to or approval of unlawful acts").

Plaintiffs have adduced thin but sufficient evidence that these two defendants could have authorized, directed, or encouraged the specific fraudulent behaviors of Daleiden, BioMax, and the other individual defendants. The implications from that evidence, as well as the implications of defendants' assertions of the Fifth Amendment, are strenuously debated and raise material, disputed questions of fact on civil conspiracy. But there is sufficient evidence to get these issues to the jury.[119]

2. **Lopez**

Lopez generally argues that he cannot remain a defendant to numerous claims in which he had "no direct participation" through the conspiracy claim. He admits that he directly participated in accessing and surreptitiously recording during the three PPFA

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[119] Rhomberg and Newman also argue that plaintiffs' claim based on their roles as corporate directors of CMP fails because plaintiffs have not proved and cannot "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). I addressed and rejected this exact argument in my November 2018 Order in the related *NAF* case, explaining, "[t]hat 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. . . . That type of allegation is not required where the individual defendant is alleged to hav[e] knowingly directed or otherwise affirmatively help cause the tortious conduct, as in this case." November 2018 Order at 26 (case citations omitted). The same is true here.

conference (although he did not sign any agreements with PPFA) and the 2015 NAF conference (where he admits he signed the NAF NDA). Those events were held in Florida, the District of Columbia, and Maryland. However, he argues that because he did not personally engage in any tortious conduct in California, Texas, or Colorado, he cannot be liable for the other defendants' tortious conduct in those jurisdictions. As plaintiffs point out, Lopez played a key role from the start of the Project, as a procurement technician for "BioMax" and assisting Daleiden in making introductions for Daleiden as Sarkis and helping Daleiden target plaintiffs' staff and high-level officials at the conferences. Plaintiffs assert that these deceptions were material and supported the deceptions that followed (*e.g.*, Daleiden and Merritt's infiltration of plaintiffs' facilities and setting up the lunch meetings). I agree. The evidence is sufficient to send the conspiracy claim with respect to Lopez to the jury.[120]

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[120] Lopez cannot rely on the "agent immunity rule" that a corporate agent cannot generally be liable for conspiring with his principal operating within his duties for the corporation for the corporation's advantage. That rule does not fit onto the facts as characterized by Lopez himself; a mere "contractor" for CMP hired to play a role and who had no interest in the work of CMP beyond receiving his wages. Lopez Decl. ¶ 12. Lopez cannot ignore than in performing his "role" he allegedly committed numerous acts of fraud and other tortious conduct. *See, e.g.*, *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490, 508 (1986) ("the corporate fiction, however, was never intended to insulate officers from liability for their own tortious conduct.").

Defendants' motion for summary judgment on civil conspiracy is DENIED.

I. Unfair Business Practices (Count 7)

Defendants (through the motions of Rhomberg/ Newman and CMP) and plaintiffs both move for summary judgment on this Count.

1. Evidence of Unfair Acts

CMP argues on behalf of the defendants that the claim under the "unfair prong" fails because defendants' conduct did not threaten to violate antitrust principles and the value of its conduct outweighed any actual harm to plaintiffs. This argument only applies to the "unfair prong." As discussed above, I have found sufficient evidence that the defendants engaged in both illegal and fraudulent conduct, which are separate prongs under the UCL.[121] Therefore, I do not need to reach the unfair prong.

This issue is not appropriate for resolution at this juncture in any event. Whether defendants' intent to expose illegal acts and conduct outweighs the harm to consumers is a subject of significant material dispute. Whether UCL-cognizable unfair acts occurred and

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[121] With respect to fraudulent conduct, there is sufficient disputed evidence that Rhomberg and Newman knew of, directed, or otherwise encouraged fraudulent conduct sufficient to meet the fraudulent prong of the UCL. As a defense to "fraud," Rhomberg and Newman rely, again, on the Ninth Circuit's *Wasden* case. As discussed above, *Wasden* does not give defendants or anyone else free reign to commit fraud or other torts in efforts to uncover information, even if that information is of significant public interest.

what the social utility of those acts were is hotly debated and best determined post-trial after all the evidence has come in.

For similar reasons, I will not reach the issue of whether plaintiffs have – on undisputed facts – shown that defendants *have* engaged in fraudulent or illegal acts under the UCL. In support of their motion for summary judgment on this claim, plaintiffs focus on a number of misrepresentations that Daleiden and CMP made to the California Secretary of State regarding both CMP and BioMax and arguing that those misrepresentations violated provisions of California law, establishing liability. Pls. Reply MSJ at 24-25; *see also* Daleiden Oppo. Decl., Ex. RR. But because liability for fraudulent or illegal under the UCL is a question for me and not the jury to determine, I need not reach it here. Instead, I will reach it on a full evidentiary record following trial.

2. **Lost Money or Property**

Separately, Rhomberg and Newman argue on behalf of the defendants that plaintiffs have not demonstrated that they "lost money or property" as required under the UCL. However, plaintiffs point out that their right to exclude and manage their intellectual property were both diminished by defendants' actions. *See Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 323 (2011) ("There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to

which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary."). Similarly, plaintiffs contend (although defendants dispute) that they were required to spend resources investigating and responding to the security breaches, expenses that "would otherwise have been unnecessary." *Id.*; *see also Witriol v. LexisNexis Group*, C05-02392 MJJ, 2006 WL 4725713, at *6 (N.D. Cal. Feb. 10, 2006) ("costs associated with monitoring and repairing credit impaired by the unauthorized release of private information" confer standing under UCL).[122] This is sufficient to defeat defendants' motion for summary judgment on this issue.

That plaintiffs are not seeking damages under the UCL (and have disclaimed an intent to seek damages from reputational injury) does not impact their *standing* under the UCL to seek injunctive relief in light of the (disputed) evidence that plaintiffs lost money and property.

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[122] Rhomberg and Newman's cases are inapposite. In *Hall v. Time Inc.*, 158 Cal. App. 4th 847 (Cal. App. 4th Dist. 2008), as modified (Jan. 28, 2008), the claim failed for lack of an "injury in fact" where the plaintiff did not adequately allege any loss. *Id.* at 855 ("He expended money by paying Time $29.51—but he received a book in exchange. He did not allege he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it."); *see also Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1062 (N.D. Cal. 2007) ("plaintiffs have not previously identified any loss of money or property in connection with their unfair competition claims, and cannot now attempt to establish such a loss").

3. Business Acts and Conduct Outside of California

Rhomberg and Newman argue that this claim fails as to each of them because they did not personally commit any unlawful, unfair, or fraudulent "business practices." More generally, they contend on behalf of defendants that there were no "business practices" that any defendant engaged in with respect to each plaintiff, defendants cannot be liable for "unfair business acts" because there is "no market" – presumably a for-profit market – for fetal tissue, and that any acts taken by or on behalf of BioMax or CMP could not, as a matter of law, constitute unfair business acts.

Plaintiffs have shown that Rhomberg and Newman – as well as CMP, BioMax, and Daleiden – engaged in practices that on their face can be considered "business practices" under the UCL. There is evidence, some of it disputed, showing that defendants' intent and purpose was to set up BioMax as a fictitious company operating in a real industry in competition with other companies (including Stem Express and other targets of the HCP). There is evidence that defendants made misrepresentations to the California Secretary of State as part of setting up the "front" company BioMax as well as websites, business cards, and business brochures that plaintiffs disputedly relied on to provide defendants access to *their* conferences and businesses. These acts by defendants on their face are *business* acts. There is also evidence, some disputed, that the *purpose* of both CMP and the HCP (including the creation of the fake BioMax company) was to run

plaintiffs' businesses out of business. These allegations are sufficient to bring a claim under the UCL.

As to the California connection, both CMP and BioMax are *based* in California. That the conduct of these California-located entities' had impacts both inside and outside of California does not create a jurisdictional problem to asserting the UCL claim against defendants.[123]

4. **Injunctive Relief**

Defendants generally argue that plaintiffs are not entitled to injunctive relief under Section 17200 because plaintiffs have no evidence that there is an "imminent threat" of harm from future violations. They also contend that plaintiffs can only obtain an injunction against activity in California, and there is no evidence of any ongoing or imminently threatened activity in California.

Whether and what injunctive relief is appropriate under the UCL, on behalf of which plaintiffs, and against which defendants, is more appropriately determined post-trial based on the evidence adduced at trial. It is premature to determine those matters now.

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[123] Defendants' reliance on the wage and hour *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1208 (2011) case does not help them. There the adoption of an erroneous overtime classification policy was not the cause of the out-of-state plaintiffs' harm, it was the failure to pay overtime to those out-of-state plaintiffs. Here, however, there are allegations of fraudulent conduct by these defendants in communications of the California Secretary of State and other alleged improper business practices *in California* that adequately tether jurisdiction in this state.

The potential availability of injunctive relief cannot be foreclosed because plaintiffs have some (albeit disputed) evidence of defendants' past and future intent with respect to plaintiffs' businesses and their need for continued use of fraud (including false identities) to continue to "investigate" or attempt to "infiltrate" plaintiffs' businesses.

5. **Rhomberg, Newman, Merritt, and Lopez**

The individual defendants, other than Daleiden, make a number of arguments specific to themselves that they should be excluded from the UCL claim.

Merritt argues, and her counsel repeatedly emphasized at the hearing, that there is no chance that she will undertake similar conduct against plaintiffs again. She declares that she has a currently-impaired physical condition, is busy with her family, and has expressly disclaimed any intent to go "undercover" again. Given plaintiffs' upgrades to their security and screening services, she contends there is particularly little support for an injunction under the UCL against her. *See* Supplemental Declaration of Sandra Susan Merritt [Dkt. No. 667-1] ¶¶ 6, 8; *see also id.* ¶ 9 ("I do not have the time, interest, desire or physical ability to participate in any undercover investigation, including of any Plaintiff in this action. I have no plans or intention of participating in any undercover investigation, of Plaintiffs or otherwise, in the future."). But plaintiffs respond that Merritt's frequent (continuing into 2019) speeches against Planned Parenthood, her residency in California, her "long history" of similar undercover work by herself and

assisting others, and her other anti-abortion activities, undermine those disclaimers. There are obvious disputes as to material facts concerning Merritt, and it is not appropriate to exclude her from this claim now.

Rhomberg and Newman make a similar request because they allege that there is no evidence or dispute of material fact about their future intent to engage in similar conduct against plaintiffs. But given Rhomberg's and Newman's longstanding and very public opposition to plaintiffs and expressed intent to ensure plaintiffs are run out of business, there is even less reason to exclude them from the UCL claim before trial.

Finally, Lopez argues that he cannot be covered by an injunction under the UCL because he did not record in California or commit any torts or crimes in California. But he was paid by CMP, a California company, and he pretended to be a procurement technician from California for a fake company purporting to be based in California. These undisputed facts are sufficient to keep Lopez as a defendant on this claim at this juncture. Whether any injunction will be justified against him or any other defendant will be determined following the trial testimony and verdict of the jury on the other claims.

In sum, defendants' motion for summary judgment and plaintiffs' motion for summary judgment on the UCL claim are DENIED.

J. Defendants' Unclean Hands Affirmative Defense

Plaintiffs argue that defendants' unclean hands affirmative defense fails as a matter of law because the "illegal or unethical conduct" defendants allege that plaintiffs committed does not "directly relate" to plaintiffs' claims against defendants. "Under this doctrine, plaintiffs seeking equitable relief must have acted fairly and without fraud or deceit as to the controversy in issue." *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 877 (9th Cir.2000) (internal quotation marks and citations omitted). Thus, the unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties." *Kendall-Jackson Winery, Ltd. v. Super. Ct.*, 76 Cal. App. 4th 970, 979 (Cal. App. 5th Dist. 1999), *as modified on denial of reh'g* (Jan. 3, 2000).

For this defense to apply, defendants must show that plaintiffs engaged in racketeering activities, trespass, fraud, secret recordings, or unfair business practices of the sorts in which defendants engaged. Defendants identified, in their discovery responses, the

illegal or unethical conduct they believe plaintiffs are engaged in as violating laws regarding abortions and fetal tissue procurement. That conduct – even if true – does not directly relate to the rights and equities plaintiffs are asserting against defendants here. In their opposition, defendants further identify mistreatment of pregnant women, infants, and fetuses as illegal or unethical conduct, but that too does not relate directly to the affirmative claims being pursued by plaintiffs.

I have previously indicated that the unclean hands defense did not apply given the allegations in this case. *See* Dkt. No. 501 at 10, *affirmed* Dkt. No. 533 at 3-4. Nothing in defendants' opposition calls that decision into question. That the HCP videos have led to multiple government investigations (and indeed some criminal pleas from entities who are not parties in this case) does nothing to bring defendants' allegations regarding *plaintiffs'* illegal or unethical conduct (which, again, have not been substantiated against *these* plaintiffs) into the sort of "direct relation" to the causes of actions plaintiffs' assert in this case. Instead, defendants are attempting to "try the general morals of the parties," which is beyond the scope of this affirmative defense. *Kendall-Jackson Winery, Ltd.*, 76 Cal. App. 4th at 979.

Plaintiffs' motion for summary judgment as to the unclean hands defense is GRANTED.

II. DEFENDANTS' ANTI-SLAPP MOTION

In conjunction with their motions for summary judgment, defendants filed a special motion to strike under California's anti-SLAPP statute, California Code

of Civil Procedure § 425.16. Dkt. No. 600. This is defendants' second special motion to strike. Defendants assume that they are entitled to file this successive motion to strike because it is "evidentiary based" and filed in conjunction and on materially identical bases as their individual motions for summary judgment under Rule 56, whereas their first special motion to strike was based on deficient pleading arguments considered under the Rule 12(b)(6) standard. Defendants admit that they are filing this separate, successive motion for two purposes only: to seek the "boons" of the statute's attorney fees and automatic appeal provisions. Anti-SLAPP Motion at 2.

In my Tentative Ruling and Procedure Order issued before the hearing, I asked the parties to identify any cases that support allowing defendants to file a successive special motion to strike given the posture of this case. Neither side provided authority that in federal court a successive anti-SLAPP motion can be filed at the summary judgment stage after the close of full, not simply expedited, discovery and based on arguments fully co-extensive with the contemporaneous motions for summary judgment.

As the legislative history and cases interpreting the anti-SLAPP statute confirm, the purpose of the fee provision is to provide a significant disincentive to filing frivolous or weak suits seeking to quash speech. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001) ("The fee-shifting provision was apparently intended to discourage such strategic lawsuits against public participation by imposing the litigation costs on the party seeking to 'chill the valid exercise of the

constitutional rights of freedom of speech and petition for the redress of grievances.'"). The justification for the interlocutory appeal and stay provisions is routinely described as providing a route for early review and appellate consideration of free speech and petition cases. *DC Comics v. P. Pictures Corp.*, 706 F.3d 1009, 1014 (9th Cir. 2013) (recognizing interlocutory appeal necessary because "[w]ithout [it], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated." (internal quotation omitted)). Defendants benefitted from that early review procedure by having their first anti-SLAPP motion considered by me in the first instance and then by the Ninth Circuit on interlocutory appeal. Defendants *chose* to base their anti-SLAPP motion to strike on a Rule 12/insufficiency of the pleadings argument; they lost at both levels.[124]

Now defendants file a second special motion and assert materially identical arguments to their motions for summary judgment. Nothing in the structure or the history of the California anti-SLAPP statute countenances this approach. *See Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism,* 4 Cal. 5th 637, 639–40 (2018) (Because "the anti-SLAPP statute is designed to resolve these lawsuits early, but not to permit the abuse that delayed motions to strike might entail, we conclude . . . a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action."); *Sweetwater Union High Sch. Dist. v. Gilbane*

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[124] I note that Merritt, in fact, made evidence-based arguments and did not limit her first anti-SLAPP motion to legal sufficiency.

Bldg. Co., 6 Cal. 5th 931, 945 (2019) (addressing difference between summary judgment motions under California law and anti-SLAPP motions, noting "Chief among them is that an anti-SLAPP motion is filed much earlier and before discovery."); *see also id.* at 949 ("Ultimately, the SLAPP Act was 'intended to end meritless SLAPP suits early without great cost to the target' . . . not to abort potentially meritorious claims due to a lack of discovery.").

The Ninth Circuit's requirement that courts allow sufficient discovery before addressing an evidence-based anti-SLAPP special motion to strike stems from a concern that the anti-SLAPP statute otherwise impermissibly conflicts with the protections available to non-movants under the Federal Rules.[125] Allowing for an immediate interlocutory appeal at this juncture of the case would similarly and impermissibly conflict with the Federal Rule provisions governing the limited circumstances where interlocutory appeals are appropriate as well as Federal Rule of Civil Procedure 1's mandate for the "just, speedy, and inexpensive determination of every action."

Defendants identified three cases in response to my request before the hearing that counsel for both sides provide authority addressing the propriety of a successive special motion to strike in circumstances similar to ours, but none of them provide guidance

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[125] *See Planned Parenthood Fedn. of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018), *and cert. denied sub nom. Ctr. for Med. Progress v. Planned Parenthood Fedn. of Am.*, 139 S. Ct. 1446 (2019).

given the procedural posture of this case. In *Manufactured Home Communities, Inc. v. County of San Diego*, 606 F. Supp. 2d 1266, 1268 (S.D. Cal. 2009), *aff'd*, 655 F.3d 1171 (9th Cir. 2011), the district court initially *granted* a special motion to strike and entered judgment in defendants' favor. When that judgment was reversed on appeal, the district court considered and granted in full the "renewed" motion to strike. In *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003), the Ninth Circuit recognized that because "the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression" that substantive right – exercised on a sixty-day timeframe in state court – meant that a denial in federal court was subject to interlocutory review under 28 U.S.C. § 1291. In *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 191 (2005), the California Supreme Court decided that, under California law, trial court proceedings on the merits are stayed following an appeal from the denial of an anti-SLAPP motion.

Plaintiffs' cases were slightly more helpful. For example, in *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999), the Ninth Circuit concluded that there was no "direct collision" between the anti-SLAPP statute's special motion and fees provisions and Federal Rules 8, 12, and 56 because "if successful, the litigant may be entitled to fees pursuant to § 425.16(c). If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id*. at 972. The court, therefore, failed "to see how the prior application of the anti-SLAPP provisions will

directly interfere with the operation of Rule 8, 12, or 56. In summary, there is no 'direct collision" here.'"[126]

Here, however, I am addressing an anti-SLAPP motion to strike that not only is fully co-extensive with Rule 56 summary judgment motions but was also filed on the eve of trial, much later than the California legislature believed anti-SLAPP motions should be heard. *See* Cal. Code Civ. Proc. § 425.15(f) ("The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."); *see also Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 65 (2002) (recognizing that "early resolution is consistent with the statutory design 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target'. . . a purpose reflected in the statute's short time frame for anti-SLAPP filings and hearings.").[127]

This case is set for trial on October 2, 2019. It appears that at least one of reasons defendants filed this successive motion is their desire to delay trial. I do

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[126] Plaintiffs also cited *Fid. Natl. Title Ins. Co. v. Cothran*, B258692, 2016 WL 1162192, at *1 (Cal. App. 2d Dist. Mar. 23, 2016) (unpublished), where the California Court of Appeal held that a party "may not use a second anti-SLAPP motion to challenge the same allegations" that were challenged in the first anti-SLAPP motion.

[127] I recognize that the Ninth Circuit has held that the strict timeframe under section 425.16(f) for filing a special motion to strike does not apply in the Ninth Circuit. *See Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016). I cite this as a recognition of the California legislature's common-sense concern that these motions be brought and resolved early in the life of the case.

not intend to delay this case any further. I can decide any appropriate motions for attorneys' fees after the trial. Defendants' special motion to strike is DENIED. None of the state law claims are stayed. All claims that survive this Order will proceed to trial as scheduled.

III. DEFENDANTS' MOTION TO EXCLUDE COHEN

Defendants move to strike and exclude the testimony of plaintiffs' expert, Professor David S. Cohen. Dkt. No. 641. Cohen has been designated by plaintiffs to testify on the following opinions: "Because of the Center for Medical Progress Videos Created by Defendants, Plaintiffs and Other Abortion Providers Around the County Faced Increased Targeted Harassment." His report discusses the "History of Violence and Harassment of Abortion Providers and its Impact on Medical Providers and Staff in this Field." Cohen Expert Report [Dkt. No. 641-4]. He opines that "splashing recordings of abortion providers across the internet in deceptive and inflammatory videos had uniquely devastating impact on abortion providers everywhere, including plaintiffs" and the CMP videos "do not exist in a vacuum" but within the context of a history of violence against providers, and "no one with any familiarity with the word of abortion, including Defendants, could have possible been unaware of this context and what impact the videos would have on abortion providers, including the possibility of violence, a possibility realized here." *Id*.

Cohen has taught constitutional and gender law at Drexel University for 13 years and in addition to his academic work, he "represents and counsels" clinics

and individuals in cases arising out of harassment including violations of the Federal Access to Clinic Entries (FACE) law. His area of expertise is the history of anti-abortion violence and its current effect on abortion providers. In particular, he opines that "targeted harassment" of individual abortion providers and the making of "egregious claims" against them "with the implicit message that something must be done" are the tactics "that in the past have triggered those on the fringes of the anti-abortion movement to engage in violence." *Id*.

A. Advocate-Witness Rule

Defendants initially argue that Cohen's testimony must be excluded under the "advocate-witness" rule because he has served as "counsel" in capacities related to this case. The advocate-witness rule "prohibits an attorney from appearing as both a witness and an advocate in the same litigation. *See United States v. Prantil*, 764 F.2d 548, 552–53 (9th Cir.1985). The policies underlying this rule "are related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir.1998); *see also U.S. v. Sayakhom*, 186 F.3d 928, 943 (9th Cir. 1999), *amended*, 197 F.3d 959 (9th Cir. 1999).

Defendants contend Cohen crosses that line because, first, he has been counsel to three East Coast Planned Parenthood affiliates for over 20 years. Those affiliates are not plaintiffs in this case. Second, he has engaged in public and private advocacy against the defendants in this case, including publishing an "open

letter" to Planned Parenthood affiliates less than one week after the HCP videos were first released advocating that the Planned Parenthood affiliates sue CMP. He also sent a letter to then California Attorney General Kamala Harris urging her to investigate CMP and suggesting legal reasoning for the AG to consider. One or both of these letters were sent through colleagues of Cohen to three of the individuals recorded: Nucatola, Gatter, and Ginde. Cohen responded to this "group" and kept them informed of his efforts to get YouTube to take down the CMP videos.[128]

Third, Cohen was retained by Nucatola and other individuals recorded in the videos for legal advice. He asserted the attorney-client privilege in his deposition in response to questions regarding his conversations with people recorded in the videos and refused to identify some of the people to whom he provided counsel. Fourth and finally, defendants point out that Cohen has filed three amicus briefs, including in the related *NAF* case (on behalf of the Southern Poverty Law Center and Feminist Majority) in support of the preliminary injunction issued in the *NAF* case as well as in the unrelated University of Washington FOIA case brought by CMP. Those briefs, according to defendants, "bear a striking resemblance" to his expert

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[128] Defendants characterize Cohen's statements in these communications as "baseless," relying on deposition testimony from Cohen where he admitted to having no information about any of Planned Parenthood or its affiliates' dealings with fetal tissue procurement companies or whether the CMP videos had been deceptively edited.

report in this case. Defendants contend that Cohen's status as amicus counsel means that he has a fiduciary duty to ensure that defendants lose, which crosses the line from expert to advocate.

Plaintiffs respond that because Cohen has not sought to be both a witness and advocate in the same litigation – *e.g.*, this case – the advocate-witness rule does not apply. Each of the cases relied on by defendants and plaintiffs that discuss the rule involved an attorney who was counsel and then who was or likely could have been a witness in the same case. Here, Cohen's amicus briefs were filed in other cases. He has not represented any of the plaintiffs (which are all entities) in this case or any clinic in a similar case. Plaintiffs also argue that Cohen did not actually assert the attorney-client privilege during his deposition, but merely indicated that he would assert the privilege if defense counsel pursued and demanded answers to specific questions.[129]

Finally, plaintiffs argue that even though Cohen's politics are clearly pro-choice and he advocates for legal protection for abortion and clinics, that does not undermine his ability to give "valid, historically grounded and empirically researched testimony" here. *See Planned Parenthood Southeast v. Strange*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014) (admitting testimony

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[129] I note that whether or not Cohen formally invoked the attorney-client privilege and whether defense counsel should have pushed him or his counsel to more clearly invoke that privilege, it is undisputed that Cohen did not answer questions about the advice he gave to Nucatola or others who had been recorded by the defendants in this case.

from sociologist who had personal opposition to abortion restrictions, which were at issue).[130]

The facts of this case do not fit squarely into the confines of the advocate-witness rule and I will not bar Cohen's expert testimony on that basis. That said, as discussed below, defendants' motion to exclude will be granted in part under Federal Rule of Evidence 702.

B. FRE 702

Defendants also move to exclude Cohen's testimony under Federal Rule of Evidence 702 because Cohen did not use a reliable methodology, did not have sufficient data, did not reliably apply his theory to the data, will confuse and not help the jury, and will be extremely prejudicial to defendants.

1. **Methodology**

Defendants assert that Cohen does not have any methodology, theory, or technique to support his statement that "anyone with any familiarity with the world of abortion" would have known the CMP videos

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[130] In that case, the court explained that the "sociologist and epidemiologist" had for "the last 35 years, [] been affiliated in some manner with the Guttmacher Institute, an organization that advocates for abortion rights and access to contraception. At trial, he presented a number of studies of the effects of distance and cost on women's likelihood of obtaining an abortion and on delays in obtaining abortion. Henshaw has a bias against abortion restrictions and regulations. Nonetheless, having viewed the witness and listened to his testimony, the court found that he testified credibly and helpfully about the nature of the various studies and their strengths and limitations." *Planned Parenthood S.E., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1395 (M.D. Ala. 2014).

could lead to violence and did. Defendants contend that his methodology, or lack thereof, cannot be tested, was not peer reviewed, and cannot be assessed for known rates of error or under accepted standards, making it excludable under *Daubert*.

More specifically, defendants point out that during his deposition Cohen could not define "world of abortion" and argue that his foreseeability arguments – that release of the videos would encourage third parties to acts of violence and threats – would encompass subsequent reports on the HCP videos by the *New York Times* as well as Cohen's own articles covering the CMP videos. Defendants argue, under Cohen's own logic, that anyone discussing or republishing the HCP videos would be responsible for "foreseeable" damage caused by third parties. Defendants also contend that his assertion tying the supposed increase in violence to the HCP videos is unreliable because he fails to account for alternative explanations for violence following the release of the HCP videos – explanations including the presidential campaign, Supreme Court abortion cases, and states passing restrictive abortion laws.

As to methodology, plaintiffs point out that in Cohen's deposition he explained he did consider alternate causes of the increase in violence/threats following the release of the HCP videos (even if he did not address them in his short report) and that he provided reasons to tie the foreseeability to defendants' conduct and not subsequent reports on that conduct (which typically did not include or link to the full content of the HCP videos). Defendants' points on

methodology are, in the end, the sorts of issues that are appropriately used to discredit or undermine an expert on cross-examination. I will not exclude Cohen on this basis.

2. **Sufficient Data**

Defendants contend that Cohen's opinions do not rest on sufficient data because the data Cohen relies on is itself unreliable. Cohen's first source is his 2015 book "Living in the Crosshairs," released prior to the HCP videos. The book discussed the impact of targeted harassment on the lives of abortion providers and was based on interviews with 87 abortion providers. Defendants argue that because the interviewees were not chosen randomly or methodically and the "surveys" were not designed in accordance with any standards, the result is inadmissible self-reported data infected with self-interest bias.

However, Cohen testified in his deposition to his use of several widely-accepted methods to validate his research (comparative method, triangulation, member/respondent validation, and transparency), which are common in the field of qualitative research. He also noted that he relied on secondary sources and statistics and that his book was "peer-reviewed" by its publisher, the Oxford University Press. Considering this, defendants' criticisms of Cohen's methodology in his book is not a basis to exclude him. The cases defendants rely on are largely inapposite (for example, addressing deficient surveys in antitrust and consumer protection cases), and do not readily apply to the sort of qualitative research Cohen undertook.

Defendants also challenge Cohen's reliance on "violence" data as collected and reported by NAF and Feminist Majority Foundation, pointing out that Cohen knows very little about that data collection and that he did not test or validate that data in any way before relying on it in to draw his opinions in this case. In particular, defendants criticize Cohen for failing to analyze or address any of PPFA's own security reporting data following the release of the HCP videos. Finally, defendants argue – without citation to any apposite case law – that Cohen's reliance on reports of bad acts by third parties is the same as excludable "prior bad acts" evidence under the Federal Rules of Evidence.

Plaintiffs respond, simply, that experts like Cohen are permitted to rely on data (like the NAF and Feminist Majority Foundation data) that they have not collected or validated themselves. At most, this provides a basis for defendants to attempt to undermine Cohen on cross-examination. I agree. The failure to verify the underlying threat data is not a basis to exclude, but is a basis for cross-examination.

3. **Application of Theory to Data**

Defendants then challenge Cohen's application of theory to data, basically rehashing their prior two arguments as to Cohen's methodology and data. This argument is rejected for the same reasons.

4. **Confusing and Prejudicial**

Finally, defendants argue that Cohen's testimony should be excluded as it will be extremely confusing to the jury and prejudicial to defendants because Cohen

identifies them as extremists, his testimony is entirely unobjective, and it is tinged with bias and stereotyping. They point out that Cohen did not review any of plaintiffs' actual claims of damage in this case and argue that his testimony goes to "publication" damages which are irrelevant and protected by the First Amendment. They further contend that Cohen's opinions on foreseeability and causation are excludable legal conclusions. Finally, they assert that Cohen's testimony – at deposition and in his report – that the HCP videos caused the Colorado Springs clinic shooting is allegedly contradicted by testimony from plaintiffs PPFA and PPRM in separate lawsuits in Colorado that "no one could have foreseen" that isolated violent event.

In response, plaintiffs point to cases where experts have been allowed to provide "history" evidence regarding cults, police abuse, and historical discrimination, and assert that Cohen's testimony describing the history of violence against abortion clinics and providers over the last 40 years is no different. Plaintiffs rely on *Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998), where the Ninth Circuit held that a sociologist's opinions on "the history and general practice of deprogramming and the origin and practices of the 'anti-cult movement'" including "as to the entrepreneurial nature of deprogramming and its origins in religious intolerance" were not inappropriately admitted because those topics were beyond general knowledge of jury and were based on a "generally accepted explanatory theory." Plaintiffs characterize Cohen's testimony likewise, asserting that the history opinions will be helpful to the jury as well as relevant to "whether the increase and threats and

harassment of abortion providers was a foreseeable and natural consequence of the CMP videos." Pls. Oppo. Cohen [Dkt. No. 674] at 8.

Plaintiffs also point out that bias goes to weight, not admissibility. *U.S. v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001) ("Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury."). And as to legal conclusions, plaintiffs say first that Cohen will not testify as to "causation" but only on "Defendants' awareness of the harassment and violence that would likely result from the release of the CMP videos." Pls. Oppo. Cohen at 14. But they also say on page 8 that Cohen's testimony is relevant as to foreseeability and "natural consequences." *Id*. at 8. As to confusion and contradiction, plaintiffs explain that there is none because in the Colorado case (which was brought by victims of the Colorado Springs shooting against PPFA and PPRM), Planned Parenthood's position was simply that the *specific* event was unforeseeable at that location, not that violence or threats in general were not unforeseeable.

Both sides have good points. I will not exclude Cohen in full because of bias or prejudice. Cohen may testify as to the background and history of anti-abortion activists targeting abortion providers. He may also testify concerning his understanding of whether there was an increase in the number or types of threats to abortion providers following the release of the HCP videos. This information is relevant to whether plaintiffs' incurred damages (in the categories allowed) were reasonably incurred, or speculative or voluntary.

However, Cohen will not be allowed to testify about the causation of plaintiffs' damages *in this case*, or the intent of these defendants, or the foreseeability of acts of violence perpetrated by third parties following the release of the HCP videos. These are beyond his area of expertise, verge on legal conclusions, and his testimony would likely venture into areas in which he advised third party witnesses in this case and shut down questioning at his deposition on the basis of privilege.

Defendants' motion to exclude is, accordingly, GRANTED in part and DENIED in part.

IV. MOTION TO STRIKE

Defendants move to strike and preclude plaintiffs from relying on late-identified segments of defendants' recordings in support of plaintiffs' illegal or tortious recording claims. Defs. MTS [Dkt. No. 601]. Through an interrogatory, defendants asked plaintiffs to identify each video file that plaintiffs contended showed an illegal or tortious recording. Plaintiffs eventually identified 119 video segments in amended responses in November 2018. But on April 27, 2019, plaintiffs served amended interrogatory responses identifying 147 video segments.[131] For the 25 "newly identified" segments at issue, they contain 17 distinct conversations or interactions 11 of which were recorded at NAF conferences.

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[131] The parties agree that one amended designation was in error and one is a duplicate, so there are only 25 newly identified segments at issue. Pls. Oppo. MTS [Dkt. No. 655] at 1 n.1; Defs. Reply MTS [Dkt. No. 691] at 3 n.1.

Defendants object and move to exclude the additionally identified segments because they came almost four months after the written fact discovery cutoff (December 31, 2018) and two weeks after the full fact discovery cutoff (April 15, 2019, not including the depositions which were allowed to take place thereafter by stipulation and Order). Defendants also note that the parties entered into a stipulation providing that the parties had until January 18, 2019, to provide "amended initial disclosures, additional documents on which either party intends to rely (of which the party is currently aware)." Trissell Decl., Ex. 30.

Defendants argue that under Federal Rule of Evidence 37(c)(1) the amendments should be struck because they have been prejudiced by the late identification. They were unable to ask plaintiffs' witnesses questions about the circumstances surrounding the added recordings because the only depositions occurring after April 27, 2019 were of fact-witnesses who were not alleged to have been unlawfully recorded. The circumstances surrounding each of the recordings – whether the witness believed the conversation could be overheard, whether there was private content – is "core" evidence. That prejudice cannot be cured given the cutoff, the pending motions for summary judgment, and the approaching trial.

Plaintiffs respond that they learned of their inadvertent omission at the March 2019 PPFA deposition and promptly moved to identify the missing segments and serve the amended responses. Therefore, under Rule 26(e), which requires prompt corrections to

an incomplete or incorrect discovery response, their response was appropriate and timely.[132]

Plaintiffs also contend that if, instead, Rule 37(c)(1) applies, there is no prejudice or harm under Rule37(c)(1) because on October 22, 2018 (two months before the discovery cutoff), in response to discovery requests from defendant Daleiden, plaintiffs identified by name (or Doe identifier) all persons illegally recorded, including the event/location of the illegal recordings and the recording dates. Those responses covered 18 of the 25 segments at issue in this motion. What was missing from those responses, and only requested in Rhomberg's requests, were the video file names or start/end times. When plaintiffs served their November 2, 2018 responses to Rhomberg providing that additional information, they inadvertently omitted the file names of 18 segments where six of the individuals identified in the October 22, 2018 discovery responses were recorded.[133]

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[132] Plaintiffs also point out that the email confirming the stipulation covered only "amended initial disclosures" and documents. Plaintiffs argue that it did not cover other amended or corrected written responses, while defendants assert that it did and the confirmatory email was "poorly drafted." Defs. Reply MTS [Dkt. No. 691] at 2. If the confirmatory email was poorly drafted, defendants should have objected to it and clarified their understanding. There is no evidence they did so.

[133] Plaintiffs admit they omitted one employee DOE4001 from the October 22, 2018 responses but included some specific recording of DOE4001 in the November 2, 2018 responses. Plaintiffs just did not include all of the segments including DOE4001 in their November responses.

With respect to the other 7 segments at issue on this motion, plaintiffs admit that in neither the October 22, 2018 or November 2, 2018 responses were those 7 segments identified by file name much less by person/location. However, plaintiffs state that in response to one of Daleiden's requests, in their October 22, 2018 responses, plaintiffs identified each of the employees in those segments by name or Doe identifier as having been illegally recorded at "some point in time."

Plaintiffs assert, therefore, that they had identified each employee they considered illegally recorded and were not trying to hide the ball. Their failure to identify the specific file names for some of the recordings was inadvertent and promptly corrected. They also contend that there is no prejudice to defendants because defendants made the recordings and know all the facts regarding the circumstances of each. Defendants, according to plaintiffs, also had ample opportunity to depose both fact and corporate witnesses about the circumstances of the recordings and have not, in their motion, identified any particular "newly identified" segment that shows something materially different from the segments they did explore with plaintiffs' witnesses.

In Reply, defendants provide a new explanation for their prejudice – they contend that they in fact could not identify, even roughly, which conversations plaintiffs contend were illegally recorded because plaintiffs' court-sanctioned use of the Doe identifiers made it uniquely complex for defendants to puzzle out which specific individuals were allegedly illegally

recorded and when. Also in Reply, defendants attempt to explain the prejudice to them by discussing with specificity some of the newly added segments. Reply ISO MTS [Dkt. No. 691] at 5-6. They point out that for some of the newly added segments new Does have been identified (*e.g.*, Doe9002 who was recorded by Daleiden at PPCG's offices in Houston) but admit that other segments of the recordings had been previously identified by plaintiffs with respect to other Does and named employees.

What defendants did not do in either their Motion or the Reply is show or explain why the circumstances surrounding the newly added segments, for example of Doe9002, differed materially from the circumstances surrounding the other segments identified by plaintiffs prior to the discovery cutoff dates. Defendants did not, for example with the Doe9002 segment, identify what questions they would have asked PPGC's Rule 30(b)(6) witness that differed from the questions they asked that witness regarding the other staff recorded in the same video.

Given defendants' arguments raised in Reply and their failure to specifically show prejudice or harm from the late disclosures, in my Tentative Rulings and Procedure Order I directed the parties to file supplemental brief of ten pages or less explaining "why late identification of each of the approximately 25 late-disclosed video segments is [or is not] prejudicial, focusing on the existence of unique circumstances in each of those segments that differentiates them from the other, prior-disclosed video segments on which defendants had the opportunity depose plaintiffs'

witnesses." Dkt. No. 718. Considering those supplemental briefs, I rule on each as follows.

NAF Conference Recordings: As clarified by the supplemental briefs, the majority of the late-disclosed recordings still at issue were taken at either the NAF 2014 San Francisco conference or the 2015 NAF Baltimore conference. Prior to the late disclosure, defendants argue that only one NAF conference video had been specifically identified as actionable by plaintiffs; a recording of Doe1023 at the 2014 conference taken at the NAF exhibit table.

Plaintiffs argue that there can be no prejudice because in their October 22, 2018 corrected responses to Daleiden's Interrogatory responses, they specifically identified each name/Doe identifier of each staff member recorded at the NAF 2015 conference in Maryland, as well as its staff who were illegally recorded in California (which could have only been at the 2014 NAF conference or at the Gatter and Nucatola lunch meetings). Dkt. No. 662-7 at ECF pgs. 70-72. Plaintiffs, however, accidentally omitted these recordings (as well as the requested timestamps) from plaintiffs' November 2018 responses to Rhomberg's requests. Plaintiffs argue that defendants' reliance on plaintiffs' accidental omission – defendants contend they believed plaintiffs might have intentionally omitted those recordings – was not reasonable, plaintiffs' responses to Daleiden remained valid, and defendants' should have sought clarification from plaintiffs before assuming those prior disclosed videos were no longer at issue. Plaintiffs also argue that because Daleiden and Lopez, and now counsel, were

and are intimately familiar with the contents of the records (for the initial transcribing and production of the HCP videos as well as for submission of relevant recordings to me), it is unreasonable for defendants to claim ignorance or prejudice about which of plaintiffs' employees were recorded and the circumstances surrounding those recordings.

Turning to each video at issue:

Recordings #14-15/25-26 (taken by Merritt at NAF 2015 Baltimore conference of Doe1001 and VanDerhei (Doe1003) in the lobby area of the hotel). Defendants argue prejudice on these videos because Merritt was not on notice that any of her videos from the NAF 2015 conference were at issue and so she did not have the opportunity to question PPFA's Rule 30(b)(6) witness or VanDerhei about the confidential nature of the conversations or VanDerhei's concern that conference participants might be secretly recorded. These two individuals, however, were disclosed as having been illegally recorded *at that specific conference* in plaintiffs' October 22, 2018 responses, although time stamps were not provided. As to the VanDerhei comment about possible secret recordings, defendants obviously had notice of it as it was relied upon *by* defendants in their motions for summary judgment and defendants – had they wanted to – could have asked VanDerhei about it in her deposition. Defendants had adequate notice that recordings of these individuals were at issue. Claims related to these recordings remain.

Recording #72 (taken by Merritt at NAF 2015 Baltimore conference of Nucatola). Defendants assert

that no other recording of this conversation has been disclosed, so none of the defendants had the opportunity to ask Nucatola about the circumstances surrounding this encounter. However, defendants do not identify what "circumstances" in this particular conversation were different than other, timely disclosed conference tapings that would have altered the information sought or possibly the answers given. Nucatola, a central figure in this case, was deposed extensively and defendants had adequate opportunity to probe the circumstances surrounding the recordings of Nucatola in the various contexts where she was recorded. The claims regarding this recording remain.

Recording #69 (duplicate of #87) (taken by stationary camera at NAF 2014 San Francisco conference of Nucatola conversing with Merritt and Baxter at the exhibit table). Defendants argue that their prejudice on this recording is significant because they did not get to ask PPFA's Rule 30(b)(6) witness which defendant PPFA believes is responsible for the "stationary camera" or why this conversation was confidential. However, defendants deposed Nucatola about various NAF 2014 recordings and have identified no particular circumstances in this video that differentiate it from those Nucatola was asked about. As to which defendant was responsible for the stationary camera, that can be readily probed at trial and there is no prejudice from defendants not being able to ask that discrete question to PPFA's deposition witness. Claims related to this recording remain.

Recordings #19-21 (recordings of a panel presentation by Doe1002 at NAF 2015 Baltimore

conference). This is the only recording of a panel presentation, as opposed to individual or small group conversations, identified by plaintiffs as actionable. Doe1002 was disclosed as having been illegally recorded at this conference in plaintiffs' October 22, 2018 responses. More significantly, the circumstances surrounding this video obviously differ materially from the other timely-disclosed videos. However, defendants asked VanDerhei about a portion of *this* very recording, exploring the expectation of privacy of those involved. Defendants have not shown prejudice. Claims related to this recording remain.

Recording #24 (taken by Daleiden at NAF 2015 Baltimore conference of Doe1003). Defendants claim prejudice because this is the only recording of Doe1003 at this meeting, so no defendant had an opportunity to question PPFA about it. However, Doe1003 *was specifically* identified in plaintiffs' October 22, 2018 responses as having been illegally recorded at this conference. If this is the only video of that Doe from that conference, defendants necessarily had adequate notice. Moreover, defendants identify no circumstances regarding this particular video that set it apart from the other recorded conference conversations that were timely disclosed. Claims related to this recording remain.

Recording #71 (taken by Daleiden at NAF 2015 Baltimore conference of Nucatola). Defendants argue prejudice because this video is the only one of Nucatola from the Maryland conference identified. However, Nucatola was disclosed in plaintiffs' October 22, 2018 responses as having been illegally recorded in

Maryland; therefore, defendants were on notice of this recording. Further, defendants do not identify any specifics regarding this conference or this video that set it apart from the other recorded conference conversations that were timely disclosed. Claims related to this recording remain.

Recording #68 (duplicate of #88) (taken by Daleiden at NAF 2014 San Francisco conference of Nucatola). Defendants argue that they were not on notice to ask questions about the NAF 2014 conference with Nucatola, but plaintiffs point out that defendants asked Nucatola questions about this very recording during her deposition (as it was part of one of the HCP videos). There is no prejudice to defendants and claims related to this recording remain.

Recording #70 (taken by non-party Bettisworth at 2015 NAF Baltimore conference of Nucatola). The result here is the same with respect to prejudice because Nucatola was specifically identified as having been illegally taped at the 2015 NAF conference and defendants identify no circumstances surrounding this video that would have altered the questions asked or possible answers with respect to privacy at conferences in general. Plaintiffs, however, seem to admit they mistakenly listed this video (by non-party Bettisworth) instead of the video of the same conversation recorded on Daleiden's device. *See* Dkt. No. 730 at 5. Assuming that there are no circumstances surrounding Daleiden's recording that differentiate it from the one taken by Bettisworth, the recording taken by Daleiden may be late-identified and claims related to it may presented at trial.

PPFA Conference. Recordings #27-28 (taken by Daleiden at the PPFA Washington, DC conference of VanDerhei (Doe1003)). Defendants argue that they were prejudiced because no other recordings of VanDerhei in this jurisdiction or setting were disclosed, and defendants did not question her about her expectation of privacy at this conference in this "one-party consent" jurisdiction. Plaintiffs respond that there can be no prejudice because this very recording was used in the HCP videos, so defendants clearly knew about it. In addition, defendants do not identify any particular circumstances from *this* recording that differed from the other timely-disclosed Washington DC conference recordings that were identified. That VanDerhei was not asked about her particular expectations is not significantly prejudicial. Defendants had ample opportunities to question others about their expectations at this conference. Claims related to these recordings remain.

PPCG Facility. Recording #3 (taken by Daleiden at PPCG's Houston offices of Doe9002). Defendants acknowledge that similar recordings of other PPCG staff were timely disclosed, and admit that there is no prejudice if PPCG seeks only one statutory damage award for taping of all staff. But if plaintiffs seek statutory damages for each person recorded during the visit, defendants object because they were prejudiced by not being able to specific questions PPCG's Rule 30(b)(6) witness about (1) PPCG's standing, because Doe9002 is neither a PPCG or PPCFC employee, and (2) the confidential nature of the conversation where the only thing Doe9002 said was "OK." However, Doe9002 was specifically identified as

having been illegally recorded in PPGC's responses and identified as a PPCFC employee in PPCG's November 2, 2018 amended responses, and plaintiffs simply used an incorrect filename for the video itself. Sterk Decl. [Dkt. No. 730-1], Ex. 1 at 5. That error was corrected in the amended Rhomberg responses. Defendants have not shown prejudice. The claims over recording #3 remain.

For the foregoing reasons, defendants' motion to strike is DENIED.

V. MOTIONS TO SEAL

There are numerous administrative motions to file under seal pending. The ruling on those motions is deferred. Within twenty (20) days of the date of this Order, the parties shall file one, consolidated chart identifying:

Each document (by ECF docket number and sub-docket number) containing information a party contends should remain under seal, and identifying the information they wish to keep sealed by paragraph or page/line number.

For each such document or part of a document identified, the party seeking to keep the information under seal shall provide:

- a description of the information they seek to keep under seal;
- justification for sealing, with a citation to a declaration from a party representative establishing a compelling justification and/or

> a citation to a prior Court order allowing that exact information to remain under seal under the compelling justification standard.

For each document that is conditionally sealed in the Court's docket that the parties agree may be unsealed, the parties shall identify them by ECF docket number, including each sub-docket number.

When submitting the joint chart, the parties should not e-file revised redacted versions of documents, assuming the parties agree during this process that some currently sealed information may be unsealed. After I rule on the sealing motions, I will instruct the parties at that juncture to e-file revised redacted versions, redacting only the information I allow them to continue to seal.

In compiling the joint chart, the parties shall consider the following: this case is approaching trial and I will not seal information that is highly material to the issues to be resolved at trial, the discussion of which would not justify closure of the courtroom during trial. I will not seal information that has already been discussed in open court or in my prior Orders.

With respect to the continued use of Doe identifiers, the parties shall meet and confer on a proposal (or competing proposals) as to how persons currently identified as Does should be treated at trial and submit the proposal(s) prior to the pretrial conference.

CONCLUSION

Motions for Summary Judgment

Count 1: RICO

Partial summary judgment is GRANTED to plaintiffs on the interstate commerce nexus for the false identification predicate acts. Motions are otherwise DENIED.

Count 2: Federal Wiretapping

Defendants' motions for summary judgment are DENIED.

Count 3: Civil Conspiracy

Defendants' motions for summary judgment are DENIED.

Count 4: Breach of PPFA Contracts

Partial summary judgment is GRANTED to plaintiffs on Daleiden and BioMax's breach of the PPFA EAs. Summary judgment is GRANTED to Merritt and Lopez, and the Court clarifies that Rhomberg and Newman cannot be liable for this claim directly or indirectly (through Count 3). The motions for summary judgment are otherwise DENIED.

Count 5: Breach of NAF Contracts

Defendants' motions for summary judgment are DENIED.

Count 6: Trespass

Plaintiffs' motion for partial summary judgment against BioMax, Daleiden, and Lopez is GRANTED as to the PPFA conferences in Florida and Washington, DC. Plaintiffs' motion for partial summary judgment against as to BioMax, Daleiden, and Merritt for the trespasses to PPGC/PPCFC and PPRM is GRANTED. The only issues for trial on those trespass claims are whether CMP is directly liable and actual damages. Whether PPRM is entitled to injunctive relief for its claim will be determined post-trial.

Summary judgment is GRANTED to Merritt with respect to the PPFA conferences, but not otherwise. The Court clarifies that Rhomberg and Newman may not be held directly liable for this claim, but may be liable under Count 3 (Conspiracy). Defendants' motions are otherwise DENIED.

Count 7: California UCL

The motions for summary judgment are DENIED.

Count 8: Fraudulent Misrepresentation

The motions for summary judgment are DENIED.

Counts 9 & 10: California Penal Code Recording Claims

Summary judgment is GRANTED to defendants as to claims dropped by PPPSW, PPGC, PPRM, PPOSBC, and PPMM. Defendants' motions are otherwise DENIED.

Plaintiffs' motion for partial summary judgment on the Penal Code section 633.5 defense is DENIED.

Count 11: Florida Recording Claim

Summary judgment is GRANTED as to Merritt for direct liability. Summary judgement is GRANTED to defendants as to claims dropped by PPNorCal, PPMM, and PPLA. Defendants' motions for summary judgment are otherwise DENIED.

Count 12: Maryland Recording Claim

Summary judgment is GRANTED as to claims dropped by PPNorCal, PPPSW, PPMM, and PPOSBC. Defendants' motions for summary judgment are otherwise DENIED.

Count 13: Invasion of Privacy: Intrusion Upon A Private Place

Summary judgment as to the intrusion claims of PPRM and PPGC/PPCFC is GRANTED to defendants and GRANTED to defendants as to the claims based on intrusions at conferences, but DENIED as to the claims based on the Nucatola and Gatter lunch meetings under California law.

Count 14: Invasion of Privacy: California Constitution Art. I § I

Summary judgment as to the intrusion claims is GRANTED to defendants as to all plaintiffs *except* PPPSGV and PPFA based on the Nucatola and Gatter lunch meetings. As to those limited claims, defendants' motions are DENIED.

Count 15: Breach of Non-Disclosure and Confidentiality Agreement by PPGC/PPCFC

Summary judgment is GRANTED as to Merritt and as to PPCFC's lack of standing. The motions are otherwise DENIED.

Public Policy Defense

Plaintiffs' motion for summary judgment is GRANTED. The public policy defense is not applicable as a matter of law.

Unclean Hands

Plaintiffs' motion for summary judgment is GRANTED. The unclean hands defense is not applicable as a matter of law.

Other Motions

The special motion to strike under the anti-SLAPP law is DENIED. The motion to exclude Cohen is GRANTED in part and DENIED in part. The motion to strike late-disclosed recordings is DENIED. The administrative motions to seal are DEFERRED for meet and confer and submission of a joint chart.

IT IS SO ORDERED.

Dated: August 23, 2019

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

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-00236-WHO

[Filed September 30, 2016]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,
Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,
Defendants.

ORDER ON MOTIONS TO DISMISS AND STRIKE

Re: Dkt. Nos. 78, 79, 81, 86, 87

Plaintiffs' First Amended Complaint alleges that defendants created a complex criminal enterprise involving fake companies, fake identifications, and large-scale illegal taping of reproductive health care conferences and private meetings in order to advance their goal of interfering with women's access to legal abortion. FAC (Dkt. No. 59) ¶ 1.[1] Defendants move to

[1] Plaintiffs are Planned Parenthood Federation Of America, Inc. (PPFA), Planned Parenthood: Shasta-Diablo, Inc., Dba Planned

dismiss the FAC, arguing that plaintiffs failed to adequately allege facts supporting their fifteen claims for relief as well as facts supporting their standing.[2] Defendants separately move to strike the claims in the FAC under California's anti-SLAPP statute arguing, similarly, that plaintiffs fail to allege facts to support their state law claims and their standing. For the reasons discussed below, while defendants have raised serious arguments with respect to some of the claims in the FAC, as a matter of pleading plaintiffs have alleged sufficient plausible facts to state their claims. The motions to dismiss and strike are DENIED.

Parenthood Northern California (Planned Parenthood Northern California or PPNC), Planned Parenthood Mar Monte, Inc. (PPMM), Planned Parenthood of the Pacific Southwest (PPPSW), Planned Parenthood Los Angeles (PPLA), Planned Parenthood/Orange and San Bernardino Counties, Inc. (PPOSBC), Planned Parenthood Of Santa Barbara, Ventura & San Luis Obispo Counties, Inc. (PPSBVSLO), Planned Parenthood Pasadena and San Gabriel Valley, Inc. (PPPSGV), Planned Parenthood of the Rocky Mountains (PPRM), Planned Parenthood Gulf Coast (PPGC) and Planned Parenthood Center For Choice (PPCFC). Defendants are the Center for Medical Progress (CMP), BioMax Procurement Services LLC (BioMax), David Daleiden (aka "Robert Sarkis") (Daleiden), Troy Newman (Newman), Albin Rhomberg (Rhomberg), Phillip S. Cronin (Cronin), Sandra Susan Merritt (aka "Susan Tennenbaum") (Merritt), and Gerardo Adrian Lopez (Lopez).

[2] Defendant Sandra Merritt moved separately and filed her own motion to dismiss and motion to strike. Dkt. Nos. 78, 81. The other defendants joined in filing one motion to dismiss and one motion to strike. Dkt. Nos. 79, 87.

BACKGROUND

Plaintiffs allege that defendants formed a conspiracy in 2012 to secretly embed defendant David Daleiden and others within the reproductive health community in order to "expose" what defendants believed were violations of law but what Planned Parenthood contends were legal facilitations of fetal tissue donation. FAC ¶¶ 5, 56. As part of the alleged conspiracy, defendants set up a fake company called BioMax Procurement Services, LLC ("BioMax"), which "dishonestly" held itself out as a legitimate fetal tissue procurement company. *Id*. ¶¶ 5, 57-58, 61.[3] The individual defendants pretended to be officers and employees of BioMax, creating pseudonyms, manufacturing fake identification, and using a credit card with a fake name. *Id*. ¶¶ 5, 61-62, 85-86. Defendants allegedly used these fake corporate and personal identities to gain access to private conferences held by Planned Parenthood and the National Abortion Federation ("NAF"). *Id*. ¶¶ 5, 64-65, 68-69, 80-89, 98-104, 105-108, 118-123.[4] Plaintiffs allege that

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[3] Plaintiffs also allege that defendants set up and incorporated CMP as a non-profit under California law, and falsely represented that CMP would be nonpartisan and not engage in any legislative advocacy. *Id*. ¶ 59.

[4] The meetings allegedly accessed by defendants are: the 2014 NAF Conference in San Francisco, California (FAC ¶¶ 64-74); the PPFA North American Forum on Family Planning in Miami, FL in October 2014 (*id*. ¶¶ 81-89); the PPFA Medical Directors' Council Conference in Orlando, Florida in February-March 2015 (*id*. ¶¶ 98-103); the PPFA National Conference in Washington, DC in March 2015 (*id*. ¶¶ 105- 108); and the NAF 2015 Conference in Baltimore, Maryland (*id*. ¶¶ 118-123).

defendants signed binding confidentiality agreements in order to gain admission into these conferences, making promises that they had no intention of keeping; defendants planned to wear and did wear hidden video cameras, secretly taping hundreds of hours of conversations with plaintiffs' staff. *Id.* ¶¶ 5, 67-68, 70-71, 82-83, 99-101, 105-107, 114, 120-121.

Plaintiffs allege that defendants then leveraged the "professional" relationships they made at the conferences to seek access to individual Planned Parenthood doctors and affiliates in private meetings, some of them in secure Planned Parenthood offices and clinical spaces in Colorado and Texas. *Id.* ¶¶ 6, 69-70, 75-76, 109-110, 111, 115. Defendants then repeatedly requested additional meetings with Planned Parenthood staff, "lying at every step about who they were and what they were doing." *Id.* ¶ 5. As a result, Planned Parenthood senior medical staff and other staff members made time to meet with defendants -- the staff were completely unaware that they were being secretly taped and that they would later be featured in "malicious videos." *Id.* ¶¶ 5, 75-76, 95-97.[5]

Plaintiffs contend that defendants went public with an online video campaign as part of their "Human Capital Project" by releasing a series of YouTube videos purporting to show that Planned Parenthood violated federal law related to fetal tissue. *Id.* ¶¶ 7, 124-127. According to plaintiffs, the videos were heavily

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[5] The senior medical staff who met with defendants include Dr. Deborah Nucatola in California (FAC ¶¶ 75-76) and Dr. Mary Gatter in California (*id.* ¶¶ 95-97).

manipulated, with critical content deliberately deleted and disconnected portions sewn together to create a misleading impression. *Id.* ¶¶ 5,126-127, 128-128, 133-134, 137, 139, 141. Those misleading videos led people to believe that Planned Parenthood had violated the law and acted improperly. As a result, after the release of defendants' videos there was a dramatic increase in threats, harassment, and criminal activities targeting abortion providers and their supporters and, in particular, Planned Parenthood health centers. *Id.* ¶¶ 8, 130. The doctors and staff targeted in the videos have been the subject of online attacks, harassment at their homes and in their neighborhoods, and death threats. *Id.* ¶¶ 5, 135, 138, 140.

As a result of defendants' "false statements, breaches of contractual agreements, illegal recordings and the video smear campaign," plaintiffs have incurred millions of dollars in costs and put the safety and security of Planned Parenthood's personnel and patients at serious risk, as "witnessed most horrifically" in the shootings at a Planned Parenthood health center in Colorado Springs on November 27, 2015. *Id.* ¶¶ 9, 142-147.

Based on these allegations, plaintiffs assert fifteen claims for relief: (1) Violation Of Racketeer Influenced And Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1962(c) and 1962(d)) by all plaintiffs against all defendants; (2) Violation of 18 U.S.C. § 2511 by all plaintiffs against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (3) Civil Conspiracy by all plaintiffs against all defendants; (4) Breach Of Contract by PPFA Against Daleiden,

Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (5) Breach Of Contract by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, and PPCFC against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (6) Trespass by PPFA, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (7) Violations of Calif. Bus. & Profs. Code § 17200, *et seq*. for Unlawful, Unfair, and Fraudulent Acts by all plaintiffs against all defendants; (8) Fraudulent Misrepresentation by PPFA, PPGC, PPCFC, and PPRM Against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (9) Violation Of California Penal Code § 632 by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Coconspirators; (10) Violation Of California Penal Code § 634 by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Coconspirators; (11) Violation of Section 934 Title XLVII of the Florida Criminal Procedure Law by all plaintiffs against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (12) Violation of § 10-402 of the Courts And Judicial Proceedings Article of the Maryland Annotated Code by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, And Unknown Coconspirators (13) Invasion of Privacy: Intrusion Upon A Private Place by All Plaintiffs Against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; (14) Invasion of Privacy: California Constitution Art. I § I by PPFA, PPNC, PPPSW, PPMM, and PPOSB against Daleiden,

Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators; and (15) Breach of Non-Disclosure and Confidentiality Agreement by PPGC and PPCFC against BioMax, Daleiden, and Merritt.

DISCUSSION

I. MOTIONS TO DISMISS

Defendants, and separately Merritt, move to dismiss the claims asserted by plaintiffs for failure to plead adequate and plausible facts to support their claims, as well as facts to establish standing. Defendants also move to strike the state law claims in the FAC under California's anti-SLAPP statute arguing (similar to their motions to dismiss) that plaintiffs have failed to allege sufficient facts to support their claims and their standing to assert them. Each argument is addressed below.

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff 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, 556 (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 plaintiff must

allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court accepts the plaintiff's 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). However, 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).

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. Violation of RICO Act, 18 U.S.C. §§ 1962(c) and 1962(d), by all plaintiffs against all defendants

The elements of a RICO claim are: (i) the conduct of (ii) an enterprise that affects interstate commerce (iii) through a pattern (iv) of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c); *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). In addition, the conduct must be the proximate cause of harm to the victim. Under § 1964(c), plaintiffs must also allege that they have been injured in their "property or business" by reason of the alleged racketeering activities.

1. Injury to "property or business"

Defendants argue that plaintiffs' RICO claim fails because plaintiffs have not alleged injury in "business or property" to satisfy RICO, and point out that reputational harm does not constitute an injury to a business or property interest sufficient to support RICO standing. *See, e.g., Hamm v. Rhone-Poulenc Rorer Pharms.*, 187 F.3d 941, 954 (8th Cir. 1999) ("Damage to reputation is generally considered personal injury and thus is not an injury to 'business or property' within the meaning of 18 U.S.C. § 1964(c)."); *see also Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1086-87 (9th Cir. 2002) ("To demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest."); *cf. Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992) (where plaintiff had to invest in a home security system and missed several days of work due to hostile conduct of former lover, alleged injuries were personal and not injuries to a business or property interest).

Plaintiffs respond that they have alleged injury to their business and property interests as a result of defendants' enterprise because: (i) their ability to serve their clients has been impaired, FAC ¶¶ 142, 151, 161; (ii) they incurred increased operational costs to ensure safety of patients and staff, *id.* ¶¶ 142-43; (iii) PPFA's website was hacked by individuals who referenced defendants' videos and campaigns, resulting in additional costs to PPFA, *id.* ¶¶ 144; and (iv) business relations with vendors have been interrupted or terminated as a result of defendants' video and press

campaign. *Id.* ¶ 145. Plaintiffs rely on *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994) and *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1382 (D. Or. 1996) as recognizing that disruption of services confers RICO standing on plaintiffs. *See, e.g., Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (allegations that defendants conspired to use force to induce clinic staff to quit and patients to seek care elsewhere sufficient at pleading stage to support standing); *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1382 (D. Or. 1996) (allegations that defendants' racketeering activities decreased the volume of business of plaintiffs or increased their cost of doing business and were calculated to induce clinic personnel to give up their jobs and doctors to forego their economic right to practice medicine sufficient to confer standing at pleading stage). Plaintiffs also rely on *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005), where the Ninth Circuit concluded that interference with business relations was sufficient to allege injury to a business or property interest.

Defendants reply that *Scheidler* has been limited by a subsequent Ninth Circuit case – *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 700 (9th Cir. 2001) – such that the portion of *Scheidler* relied on by plaintiffs here is only relevant to Article III standing and can no longer be relied on to establish RICO statutory standing. Defs. MTD Reply at 1-2.[6]

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[6] Defendants' *Scheidler* argument, if accepted, would likewise limit the reach of *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1382 (D. Or. 1996) (following *Scheidler*).

However, the *Philip Morris* case and the other authorities defendants rely on in their attempt to limit *Scheidler* addressed a different question; proximate cause and the "directness" of plaintiffs' injuries. Those cases do not address whether the type of injuries alleged in *Scheidler* and the similar allegations here are sufficient to establish statutory standing under RICO's "business or property" prong.

In Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 700 (9th Cir. 2001), hospital districts sued tobacco companies under RICO alleging that the tobacco companies "conspired to misrepresent and to conceal the addictive nature of nicotine and the health risks associated with tobacco use" and damaged the health care districts who sought to recover their increased costs for treating their patients' tobacco-related illnesses. *Id.* at 700. The Ninth Circuit, consistent with the decisions of other circuits and decisions regarding union trust funds that had attempted to sue under similar theories, concluded that the hospital districts lacked standing because their injuries lacked proximate cause and were entirely derivative of the injuries to the smokers themselves. *Id.* at 702-704. The court did not address what direct injuries satisfied the "business or property" prong.[7] *See*

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[7] I recognize that the Ninth Circuit rejected plaintiffs' arguments that standing requirements should be relaxed for health care providers, and in doing so described *Scheidler* in a footnote as a case concerning "constitutional standing, not RICO or antitrust standing." *Id.* at 704 n.4. But the Ninth Circuit did not address or otherwise limit the Supreme Court's determination that plaintiffs in *Scheidler* had adequately alleged injury to "business or property" under the RICO statute.

also Perry v. Am. Tobacco Co., 324 F.3d 845, 850 (6th Cir. 2003) ("*Scheidler* is inapposite, however, since the Supreme Court did not address the direct injury requirement that is at issue in the present case.").

Defendants also argue that because the harms at issue here resulted from defendants' speech – the publishing of the videos and related Human Capital Project press – the injuries caused to defendants must be reputational, and any financial injuries flowing therefrom cannot confer standing. Defs. MTD at 2-3; Defs. MTD Reply at 2. There is no support for defendants' leap in logic, and their reliance on *Doe v. Roe*, 958 F.2d 763, does not help them. There the plaintiff's injuries (costs for installing a security system and lost wages from plaintiff's missed work) were derivative of her *personal* injuries and not injuries to her business or property. Here plaintiffs are not attempting to recover damages that arise out of a personal injury. *But see Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556, 564-565 (6th Cir. 2013) (distinguishing cases holding that individuals personally harmed by actions of RICO enterprise could not state a RICO claim). The injuries plaintiffs plead here are directly tied to their business interests. They confer standing under RICO.[8]

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[8] Defendants' reliance on *Rylewicz v. Beaton Services, Ltd.*, 698 F. Supp. 1391, 1395 (N.D. Ill. 1988) does not help them either. There, the court concluded that "effort and time" the plaintiffs spent on an investigation into defendants' alleged campaign to intimidate them were "personal injuries or political damages" not damages to "business or property" as required by § 1964(c). Here the damages are to PFFA and its affiliates *as businesses*.

2. Predicate Acts

Defendants argue that plaintiffs have not sufficiently alleged predicate acts supporting their RICO claim. In opposition, plaintiffs rely on their wire and mail fraud allegations, FAC ¶¶ 157-158 (September 15, 2013, wire transmission of registration; September 16, 2014, wire transmission of registration; October 17, 2014, email from BioMax; and March 6, 2015, introductory letter) and their allegations under the federal Identity Theft Statute, 18 U.S.C. § 1028.

a. Wire/Mail Fraud

Claims of wire fraud and mail fraud under 18 U.S.C. §§ 1341 and 1343 require three elements: (i) the formation of a scheme to defraud, (ii) the use of the mails or wires in furtherance of that scheme, and (iii) the specific intent to defraud. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014).

The parties' initial dispute is whether there must be allegations that property or money was intended to be acquired or actually acquired through the fraud to state a claim for wire or mail fraud. Defs. MTD at 5; Defs. MTD Oppo. at 6. Plaintiffs contend that all that is required is that "a plaintiff was wronged in his or her property rights." Defs. MTD Oppo. at 6. However, defendants' reliance on more recent cases is persuasive; allegations regarding an attempt to *acquire* money or property through fraud are required. *See, e.g., United States v. Ali*, 620 F.3d 1062, 1070 (9th Cir. 2010) ("*Cleveland* requires that the property taken be property 'in the hands of the victim,' . . . suggesting

that at least some level of convergence between the fraud and the loss is required. Second, we held in *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989), that, for mail fraud, 'the intent must be to obtain money or property from the one who is deceived.'"); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) ("While it is true that after *McNally* the elements of mail fraud remain unchanged except that the intent of the scheme must be to obtain money or property, the Court made it clear that the intent must be to obtain money or property from the one who is deceived").

To meet this element, plaintiffs rely first on their allegations about defendants' attempts to interfere with their operations, arguing that the right to carry on one's business is a property right. Oppo. at 6. As support, plaintiffs rely on two RICO cases where the predicate act was a violation of extortion under the Hobbs Act. *See Ne. Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980). As defendants point out, the Supreme Court in *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003), *rejected* an attempt to satisfy the Hobbs Act's requirement of "obtaining of property from" based on an argument that "the right to control the use and disposition of an asset is property [and] petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property." *Id.* at 401.

Plaintiffs also rely on defendants' attempted and actual acquisition of plaintiffs' confidential information to satisfy this element. Defs. MTD Oppo. at 7. Plaintiffs

rely exclusively on *Carpenter v. United States*, 484 U.S. 19 (1987), where the Supreme Court held that "confidential business information" – there the Wall Street Journal's publication schedule and content of a column – was property protected by the mail and wire fraud statutes. *Id*. at 25. While *Carpenter* concluded that "confidential business information" could be property fraudulently acquired under those statutes, recent cases explain that whether information actually constitutes "property" must be determined by reference to applicable state laws. *See, e.g., United States v. Shotts*, 145 F.3d 1289, 1294 (11th Cir. 1998) ("state law appears to control the definition of property under Section 1341"); *Borre v. United States*, 940 F.2d 215, 220 (7th Cir. 1991) ("It is logical, therefore, for this court to look to state law in determining whether a cable television franchise constitutes 'property' for purposes of the mail fraud statute.").

Defendants argue that confidential information can only constitute "property" under the state laws at issue[9] *if* the information meets the definition of a trade secret under the Uniform Trade Secrets Act, as adopted by those states. They rely heavily on *SunPower Corp. v. SolarCity Corp*., No. 12-CV-00694-LHK, 2012 WL 6160472, at *5 (N.D. Cal. Dec. 11, 2012), where the court concluded that the only cause of action that could be stated for misappropriation of confidential business information under California law was a claim under CUTSA for misappropriation of trade secret information. In essence, if confidential information did not qualify as trade secret under CUTSA, then there

[9] California, Colorado, Maryland, and Texas.

was no common law claim protecting against its misappropriation. The court recognized that absent status as trade secret, plaintiff needed to (but could not) identify a separate "property interest" in its confidential business information. *Id*. at *9-12; *see also Silvaco Data Sys. v. Intel Corp*., 184 Cal. App. 4th 210, 239 (2010), *as modified on denial of reh'g* (May 27, 2010) disapproved of on other grounds by *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011) ("Information that does not fit this definition, and is not otherwise made property by some provision of positive law, belongs to no one, and cannot be converted or stolen.").[10]

According to defendants, because plaintiffs have failed to allege facts identifying trade secrets that were allegedly acquired through wire or mail fraud, plaintiffs have failed to plead these predicate acts. I agree. Plaintiffs have not pleaded that the information defendants' attempted to or did acquire qualifies as trade secret under the USTA-adopting states at issue. At oral argument, plaintiffs did not make any argument that they could plead (or should be given leave to plead) that the information at issue constitutes a trade secret.

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[10] Plaintiffs rely also on *United States v. Mahaffy*, 693 F.3d 113, 135 (2d Cir. 2012) a securities fraud case which held, without analysis, that "[i]formation may qualify as confidential under *Carpenter* even if it does not constitute a trade secret." That may be correct as a matter of securities law or in a state that has not adopted UTSA, but that position was explicitly rejected under California law in *SunPower*.

Plaintiffs, therefore, cannot rest their RICO claim on their mail or wire fraud allegations.

b. Federal Identity Theft

Plaintiffs also allege as a predicate act that defendants violated the federal identity theft statute by producing or transferring false identification documents and by possessing and using, without authority, the name of a real person. FAC ¶ 160.[11] The FAC contains references to defendants' use of two specific fake identifications to gain access to plaintiffs' conferences and meetings. FAC ¶¶ 85-86. While defendants point out that mere possession of false identification is not covered by the statute, the plaintiffs allege not just possession but use. *See, e.g., United States v. Rohn*, 964 F.2d 310, 313 (4th Cir. 1992) (mere possession not criminalized, instead "government is required to establish two things: first, the uses to which appellant intended to put the false identifications; and, second, that those intended uses would violate one or more federal, state, or local laws."). However, to the extent plaintiffs are

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[11] 18 U.S.C. § 1028(a)(1)-(2) makes it unlawful to "(1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document" and "(2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority." § 1028(a)(7) makes it unlawful to "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law."

attempting to state a claim under § 1028(a)(3) for possession and intended use, they fail to do so because that provision requires knowing possession with intent to use unlawfully or transfer unlawfully five or more identification documents. Plaintiffs have not alleged that any defendant possessed five or more identification documents.[12]

However, plaintiffs also rely on §§ 1028(a)(1) and (a)(2) – knowing production or transfer of fake identification – and argue that their allegations "are sufficient at the pleading stage for the court to infer that Defendants played an active role in obtaining the fake IDs they used." Defs. MTD Oppo. at 8.[13] I recognize that the allegations regarding production and transfer are bare: "[o]n information and belief, Defendants produced these false photo identifications." FAC ¶ 160. However, we are at the pleading stage and any more detailed information regarding the fake IDs is within the sole possession of defendants. Plaintiffs' allegations are plausible and sufficient with respect to production or transfer.

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[12] Plaintiffs disclaim any reliance on (a)(3) in their Opposition at 10 n.7.

[13] "Production" includes "alter, authenticate, or assemble." 18 U.S.C. § 1028(a)(9*); see also United States v. Jaensch*, 665 F.3d 83, 95 (4th Cir. 2011) ("Because Jaensch's ID contained Jaensch's signature, jurors could reasonably infer that Jaensch both signed and laminated his ID after it was shipped to his home address—acts of "production" under the statutory definition."); *but see United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir. 2003) (conviction upheld under § 1028(a)(1) where defendant did not produce but simply procured false identification *in significant part* under an aiding and abetting theory).

Defendants also argue that plaintiffs have failed to plead facts that any of the alleged fake ID conduct was "in or affecting" interstate commerce as required by § 1028(c)(3)(A).[14] Plaintiffs respond that this is not an issue of pleading, but simply one of proof at trial. I agree.[15]

With respect to the alleged violation of § 1028(a)(7), plaintiffs base that claim on defendants' use of the name of an unnamed co-conspirator, Brianna Allen, to pose as a representative of BioMax, and allege that Brianna Allen was a former classmate of Daleiden. FAC ¶¶ 38, 68, 178. These allegations, according to plaintiffs, "plausibly allege Defendants used the name of a specific person without her authorization." Defs. MTD Oppo. at 9. Defendants respond that the FAC does not allege a specific use of "identification" but only the use of the name "Allen" and the absence of any additional facts make this claim implausible. More persuasively, defendants also argue that under (a)(7), the "means of identification" must be used in connection with unlawful activity that constitutes a

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[14] *See, e.g., United States v. Villarreal*, 253 F.3d 831, 835 (5th Cir. 2001) ("with respect to [the] jurisdictional element, we do not focus on whether the identification document actually traveled in interstate or foreign commerce or whether the transfer actually affected interstate or foreign commerce. Rather, we focus on whether the identification document would have traveled in interstate or foreign commerce or whether the transfer would have affected interstate or foreign commerce if Villarreal had successfully accomplished his intended goals.").

[15] The cases defendants rely on regarding use in commerce are post-trial cases reviewing the sufficiency of the evidence supporting those claims. *See* Defs. MTD at 9.

violation of Federal law, or that constitutes a felony under any applicable State or local law. Because plaintiffs do not allege any other violation of federal law (except wire and mail fraud which as discussed above are insufficiently pleaded), and plaintiffs have failed to allege any *felony* conduct under state law, plaintiffs cannot rest their RICO claim on a predicate act under § 1028(a)(7).

Finally, while defendants argue plaintiffs have failed to allege that the predicate acts create a "pattern" of RICO activity, I disagree. Plaintiffs have adequately alleged that defendants repeatedly (and continuously) used their fake IDs (produced or procured in violation of federal law) as key steps in defendants' ongoing RICO enterprise.

3. Proximate Cause

Finally, defendants argue that the FAC fails to allege facts showing that the RICO predicate acts, as opposed to other actions and the actions of others who may have been influenced by the Human Capital Project videos and press, proximately caused plaintiffs' injuries. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) ("The proper referent of the proximate-cause analysis is" is predicate acts alleged). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 461. Defendants contend that because the acts complained of (the mail/wire fraud and false identification) did not directly cause the harms plaintiffs complain of (disrupted and delayed services, expending additional resources on physical and cyber

security, increase in threats, harassment, and vandalism, loss of vendors, and time and expense in responding to legislative inquiries, FAC ¶¶ 142- 147), proximate cause has not been alleged. Instead, defendants contend that the harms suffered by plaintiffs were caused by a complex causal chain of events resulting in the acts of third-parties and legislative bodies beyond the control of defendants.

Defendants describe plaintiffs' causal chain as follows: "(1) Defendants allegedly used fake identifications and communicated by email (the only alleged predicate acts); (2) which induced Plaintiffs and others to admit Defendants to conferences; (3) which led to site visits and business meetings; (4) at which Defendants recorded various conversations; (5) Defendants later published those recordings; (6) thereby harming Plaintiffs' reputation; (7) causing unrelated third parties to harass or physically attack Plaintiffs, governmental entities to investigate Plaintiffs, and third parties to fear associating with Plaintiffs; (8) which in turn caused economic harms to Plaintiffs." Defs. MTD Reply at 8-9. Plaintiffs, at oral argument, countered that the chain consists of only two elements: (1) defendants used the fake identifications and communications to access the meetings and record plaintiffs' staff, and (2) plaintiffs were harmed by that breach of their security protocols.

Defendants rely on a series of cases where the Supreme Court and other courts have concluded that plaintiffs who were only *indirectly* injured by the alleged RICO enterprise could not sue where others were more directly injured. For example in *Holmes v.*

Sec. Inv'r Prot. Corp., 503 U.S. 258 (1992), the Court concluded that indirectly injured plaintiffs (non-purchasing customers) could not sue because there were too many intervening causation and damage apportionment questions. *Id* at 272-273; *id.* at 268 (there is a "demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover."); *see also Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) ("The direct harm in this case runs to the prime contractors. It was the intervening inability of the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries. Under *Holmes*, the MWBE plaintiffs are missing the direct relationship needed to show Kiewit proximately caused their injuries."). Here, however, the issue is not damage to third-parties for which plaintiffs are trying to recover (and the related difficulties apportioning damages), but damage to plaintiffs directly. This line of cases is inapposite.

Defendants also argue that because the injuries here were the results of the publication of the Human Capital Project videos and press, and not the predicate acts of wire/mail fraud and use of fake IDs, plaintiffs cannot allege a RICO claim. *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) ("The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."); *see also Hemi Grp., LLC v. City of New York, N.Y.*, 559

U.S. 1, 11 (2010) ("the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file [cigarette sales report with the state]. Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.").

Relatedly, defendants rely on cases concluding that RICO claims cannot be pursued where the causal nexus between the defendants' conduct and the harm alleged to plaintiff is too distant. In *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), the Ninth Circuit concluded that the county plaintiff "cannot, as a matter of law, show an adequate causal nexus between the four defendant companies' employment of undocumented workers and the financial harm the County claims to have suffered" in providing health care and criminal justice services to the undocumented immigrants. *Id.* at 980; *see also Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990) (employee who was fired after reporting racketeering activities to employer lacked RICO standing because he was not harmed by the racketeering activity itself). Defendants also rely on cases refusing to extend the causal nexus to situations where the complained of harms were most-directly caused by third parties. *See, e.g., Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 2-3 (2010) ("the City's theory of liability rests not just on separate actions, but separate actions carried out by separate parties."); *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1027 (C.D. Cal. 2011) ("Mattel cannot rest its theory of liability on 'the independent actions of third and even fourth parties' to its counter-

claim"); *see also Wodka v. Causeway Capital Mgmt. LLC*, 433 F. App'x 563, 564 (9th Cir. 2011) (rejecting as "too attenuated" allegations of harms that were directly caused by a series of intervening third-party actions).

The only case relied on by plaintiffs is *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008). There, the Court addressed a scheme where property lien auction bidders made fraudulent representations to the county, thereby securing a disproportionate amount of liens at auction and reducing the pool of liens available for plaintiffs. The Court concluded that plaintiffs were injured as "the direct result of petitioners' fraud," because there were fewer liens available to them to bid on. *Id.* at 658. The Court characterized plaintiffs' harm as "a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens." *Id.* But whether foreseeability can still be considered is questionable in light of *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1 (2010), which rejected the idea that proximate cause under RICO could "turn on foreseeability, rather than on the existence of a sufficiently 'direct relationship' between the fraud and the harm." *Id.* at 12. In the specific context of RICO, "[o]ur precedents make clear that [] the focus is on the directness of the relationship between the conduct and the harm. Indeed, *Anza* and *Holmes* never even mention the concept of foreseeability." *Id.*

Having thoroughly reviewed the cases cited by both sides and the extensive allegations in the FAC, I conclude that at this juncture plaintiffs have

adequately alleged proximate cause for damages caused directly by defendants' actions. I agree that plaintiffs may not be able to recover for damages that were not *directly* caused by the actions of defendants, but caused instead by intervening actions of *third parties* who were motivated by the videos and press released by the Human Capital Project. For example, the damages plaintiffs incurred because their website was hacked by a third-party[16] would appear to be too distant, too far down the causal chain, for plaintiffs to seek them under RICO. But other damages alleged – including the increase in security costs at conferences, meetings, and clinics that plaintiff incurred when *they learned* about defendants' infiltration of their conferences, meetings, and clinics – are much more directly tied to defendants' conduct and do not raise the problem of intervening actions of third-parties.[17]

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[16] There are no allegations that defendants were directly responsible for hacking plaintiffs' website.

[17] Defendant Merritt raises a slightly different proximate cause argument, saying that the damages identified by plaintiffs are simply costs of engaging in their chosen business and were not incurred as the result of Merritt's attending the conferences and meetings alleged. Merritt MTD at 3-4. Those arguments are without merit as (i) plaintiffs pleaded they incurred *additional* security costs as a result of defendants' fraud; and (ii) plaintiffs need not tie Merritt's specific actions to specific damages, but rather tie the predicate acts committed as part of the RICO enterprise to proximately caused damages. Relatedly, defendants' characterization of plaintiffs' decision to incur additional security costs as a "voluntary" act in light of defendants' infiltrations is not dispositive at this juncture. Whether plaintiffs' costs were necessarily incurred is a matter to be explored in discovery.

How far the actual causal link stretches for each category of damages plaintiffs' allege is something that will need to be developed in discovery and tested on summary judgment. But for purposes of the motions to dismiss, they are sufficiently alleged.

For the foregoing reasons, plaintiffs have adequately alleged their RICO claim based on the predicate acts of using false identification under Federal law.

C. Violation of the Federal Wiretap Act by all plaintiffs against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators

Plaintiffs allege that defendants violated the federal Wiretap Act by intercepting plaintiffs' and their staffs' communications without their consent in order to further their RICO conspiracy and to invade the privacy of plaintiffs' staff. 18 U.S.C. § 2511(1), (2)(d); FAC ¶¶ 164-165, 169(a)(b). Because defendants were participants in those conversations, the recordings can only violate the Act if they were intercepted for the purpose of committing criminal or tortious acts. 18 U.S.C. § 2511(2)(d); *see Sussman v. American Broadcasting Cos*., 186 F.3d 1200, 1202 (9th Cir.1999) ("the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception – its intended use – was criminal or tortious." (internal quotations and citation omitted)). Defendants contend that because they have shown that plaintiffs cannot state a RICO claim (*supra*) nor invasion of privacy claims (*infra*), these crimes and torts cannot support this claim. However, as discussed

above, the RICO claim is plausibly alleged at this juncture.

Defendants also challenge whether plaintiffs can plead that the intercepted communications were made for the purpose of committing the RICO act, given the fact that all of the RICO predicate acts predated the interception of the communications at issue. However, the RICO enterprise allegations, by their nature and as expressly pled in the FAC, encompass actions that occurred after the interceptions at issue. Defendants also argue that plaintiffs cannot rely on invasion of privacy to support this claim because plaintiffs fail to allege facts showing that at the time defendants intercepted the communications, defendants intended to commit a *further* invasion of privacy tort against plaintiffs or their staff. However, defendants' subsequent disclosure of the contents of the intercepted conversations for the alleged purpose of *further* invading the privacy of plaintiffs' staff satisfies that element. *See, e.g., In re Google Inc.*, 806 F.3d 125, 145 (3d Cir. 2015) (plaintiffs must plead "'sufficient facts to support an inference that the offender intercepted the communication for the purpose of a tortious or criminal act that is *independent* of the intentional act of recording.'" (quoting *Caro v. Weintraub*, 618 F.3d 94, 100 (2d Cir. 2010)). Whereas the court in *In re Google Inc.*, 806 F.3d at 145, dismissed the § 2511 claim because plaintiff pled "no tortious or criminal use" of the intercepted information, here the public release of the videos (the fruits of the interception), including allegedly misleading summary videos, could constitute the further tortious act.

Finally, in their Motion and Reply, defendants attempt to draw a distinction between the privacy interest the plaintiff organizations have in the intercepted conversations and the privacy interests of their staff in the same. Defs. MTD at 16; Defs. MTD Reply at 10 (relying on *Smoot v. United Transp. Union*, 246 F.3d 633 (6th Cir. 2001)). But for purposes of the federal Wiretap Act claim, plaintiffs have sufficiently alleged that the intercepted conversations concerned their organizational activity (even if the conversations may also implicate the privacy interests of the staff) and, therefore, the plaintiff organizations have a cognizable interest in the privacy of those conversations under the Act. *See id.* at 639.

D. Civil Conspiracy by all plaintiffs against all defendants

Both sides agree that conspiracy is not "is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). Defendants challenge plaintiffs' conspiracy claim on two grounds: (1) plaintiffs fail to tie specific actions of each defendant to each of the underlying tort claims; and (2) because plaintiffs allege that all defendants are agents of corporate entities BioMax or CMP (and allege that BioMax and CMP are not distinct legal entities), the conspiracy claim fails because a corporate entity cannot conspire with itself nor can corporate employees acting within the scope of their employment, conspire

with the corporate entity. *See, e.g., Black v. Bank of Am.*, 30 Cal. App. 4th 1, 6 (1994) (discussing "single-entity" rule).

Reviewing the FAC, I find that the allegations adequately identify and link each defendant, including Merritt, to the underlying tort they are alleged to either have committed directly or conspired to commit. FAC ¶¶ 56-58, 62, 173(a) – (f); *but see* Merritt MTD at 7. With respect to the impact of plaintiffs' alter ego allegations – that BioMax and CMP are alter egos of the individual defendants and each other, FAC ¶ 41 – at this stage of the litigation, those allegations will not preclude the assertion of a conspiracy claim. *See, e.g., AccuImage Diagnostics Corp v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 947 (N.D. Cal. 2003) (recognizing the single-entity rule does not apply in cases where directors and officers of a corporation directly order, authorize, or participate in the tortious conduct).[18] As discovery progresses, the roles of the individual defendants in connection with BioMax or CMP may be

[18] Merritt argues in Reply that the alter ego allegations are facially deficient as well. Merritt MTD Reply at 6-7. Plaintiffs have adequately alleged that BioMax was set up as a fake company through the *direct participation* of Merritt and that Merritt consistently held herself out as the CEO of BioMax and distributed BioMax advertising materials. *See, e.g.,* FAC ¶¶ 5, 35, 41, 61, 87. The alter ego cases discussed by Merritt (addressing the more common ownership, beneficial interest, and co-mingled fund allegations typically presented in alter ego cases) are inapposite considering the factual allegations in this case. Plaintiffs' very specific factual allegations are sufficient at this juncture to support plaintiffs' alter ego assertions.

explored, as well as whether BioMax or CMP adhered to the corporate form.

Defendants' motion to dismiss the conspiracy claim is DENIED.

E. Breach of Contract by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, and PPCFC against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators

1. Breach of PPFA Agreements

Plaintiffs' fourth claim alleges breach of contract by PPFA against Daleiden, Merritt, Lopez, CMP, and BioMax with respect to defendants' conduct on September 16, 2014, February 6, 2015, and on February 17, 2015, when defendants allegedly entered into Exhibitor Agreements and registrations for the PPFA conferences in Miami, Orlando, and Washington, DC. FAC ¶¶ 177-181. Plaintiffs contend that the defendants falsely represented BioMax as a legitimate specimen procurement organization and "defendants agreed that their contribution to the conferences would be useful to attendees and beneficial to the interests of their clients and patients and that they would comply with all applicable laws related to fraud, abuse, privacy, and confidentiality." *Id.* ¶ 178.

Defendants argue that the FAC fails to allege facts supporting the alleged breaches or that any breach proximately caused damage to PPFA. With respect to the PPFA agreements, plaintiffs allege that defendants breached two sections: (i) a requirement that exhibits be "educational and informative," and (ii) a provision

requiring exhibits to be "beneficial to attendees" and requiring exhibits to "comply with all applicable laws, particularly those related to fraud, privacy and confidentiality." FAC ¶¶ 82, 99, 105, 178; FAC Exs. B & D, "Sponsor, Exhibitor/Advertisement Package Terms and Conditions" at ¶ 1 "PURPOSE AND USE OF SPONSORSHIP SUPPORT" ("The exhibits and sponsored meetings must be educational and informative, emphasizing information about products and services useful to the registrants' practice and beneficial to the interests of their clients and patients."); LEGAL AND COMPLIANCE MATTERS ¶ 3 ("Exhibitor and PPFA each agree that they shall comply with all applicable federal, state and local laws and regulations in performance of its respective obligations pursuant to this Agreement, including, without limitation, laws related to fraud, abuse, privacy, discrimination, disabilities, samples, confidentiality, false claims and prohibition of kickbacks.").

With respect to the first provision, while defendants argue that it binds only sponsors, the language at issue specifically applies to "[t]he exhibits and sponsored meetings." While the paragraph heading is "PURPOSE AND USE OF SPONSORSHIP SUPPORT," the language of that portion of the agreements appears to apply by its terms to *both* exhibitors and sponsors.

Defendants also argue that the requirements of this provision (requiring exhibits to be "educational," "useful," and "beneficial" to participants) are too vague to support a claim of breach. *See, e.g.*, *Tauber v. Quan*, 938 A.2d 724, 730 (D.C. 2007) (applying concept of

"reasonable definiteness in the essential terms of a purported contract" so that a court may determine "whether a breach has occurred"); *Soderlun v. Pub. Serv. Co. of Colorado*, 944 P.2d 616, 620 (Colo. App. 1997) (collecting cases recognizing that contract must have "such certainty and definiteness as to be capable of enforcement"); *see also Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 793 (2013) (recognizing the unenforceability of contracts that are so uncertain and indefinite that the intent of the parties cannot be ascertained, but requiring courts nonetheless interpret contracts to "carry into effect the reasonable intentions of the parties" if possible).[19] But given the structure and overall content of the agreements at issue, I conclude that the specific portion alleged to have been breached – "The exhibits and sponsored meetings must be educational and informative, emphasizing information about products and services useful to the registrants' practice and beneficial to the interests of their clients and patients" – is sufficiently definite to be enforceable.

With respect to the second provision, defendants argue that a contractual provision requiring parties to follow the law has no legal effect. *See, e.g.*, Rest., Contracts, § 578 ("A bargain, the sole consideration of which is refraining or promising to refrain from

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[19] I recognize that the laws of the states of Colorado, Florida, District of Columbia, Maryland and Texas apply to the contacts at issue. *See* Oppo. at 15 n.11. Neither side contends that the specific law of any of these jurisdictions differs in any significant respect with respect to the analysis of the breach of contract claims. The California cases cited in this Order were relied on by the parties.

committing a crime or tort, or from deceiving or wrongfully injuring the promisee or a third person, is illegal."); *see also Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 715 (N.D. Cal. 2014) ("In California, a promise to refrain from unlawful conduct is unlawful consideration."). However, as plaintiffs point out, the agreement to refrain from breaking the law was not the sole consideration for the contracts at issue. *See also* Rest., Contracts, § 578, comment ("but a bargain with sufficient legal consideration is not rendered illegal by the addition of a promise to refrain from misconduct, unless that promise was used as a means of exacting greater compensation.").

Defendants also contend that plaintiffs' allegations as to which laws defendants violated – allegedly breaching this provision – are likewise vague and conclusory. Not so. Reading the FAC as a whole, plaintiffs have adequately identified which laws they believe defendants violated. *See, e.g.*, FAC ¶¶ 148-62 (RICO), ¶¶ 163-71 (Federal Wiretap Act), ¶¶ 179, 211-17 (Cal. Penal Code § 632), ¶¶ 218-25 (Cal. Penal Code § 634), ¶¶ 226-31 (Florida Wiretap Act), ¶¶ 232-37 (Maryland Wiretap Act).

Finally, defendants argue that plaintiffs have not alleged sufficient facts to show that their damages were "reasonably foreseeable damages proximately caused" by defendants' conduct. The damages identified by plaintiffs as a result of defendants' alleged breach of contract include: being forced to expend additional extensive resources on security and IT services; property damage; and responding to multiple state and

federal investigations and inquiries. FAC ¶¶ 181,188, 253.

Damages as a result of a breach of contract are recoverable only to the extent those damages were "foreseeable as the probable result of the breach." *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 360 (Colo. App. 2016); *see also id.* at 360-361 (foreseeable damages include those: "that have usually existed in similar cases within that person's experience"; the "injury actually suffered must be one of a kind that the defendant had reason to foresee"; the "loss must have been a foreseeable, though not a necessary or certain, result of the breach"; and "[f]oreseeability is judged by what was foreseeable when the contract was entered into.") (internal citations omitted); *Mnemonics, Inc. v. Max Davis Associates, Inc.*, 808 So. 2d 1278, 1281 (Fla. Dist. Ct. App. 2002) ("It is not necessary to prove that the parties contemplated the precise injuries that occurred so long as the actual consequences could have reasonably been expected to flow from the breach."); *see also Civic Ctr. Drive Apartments Ltd. P'ship v. Sw. Bell Video Servs.*, 295 F. Supp. 2d 1091, 1107 (N.D. Cal. 2003) (under California law, "[w]hether damages arising from a breach of contract were reasonably foreseeable is a question of fact."). Given the allegations here – including defendants' past history and alleged intentions for the Human Capital Project – the facts alleged support an inference that the damages pleaded by plaintiffs were foreseeable and exactly the ones intended by defendants. *See, e.g.*, FAC ¶¶ 53-55, 56, 125, 132, 141.

Defendant Merritt raises an additional argument; that because none of the PPFA agreements attached to the FAC show that Merritt/Tennenbaum was a signatory to those agreements or was registered for the Washington, DC or Florida meetings, these breach claims cannot be asserted against her. Merritt MTD at 7-8. In response, plaintiffs rest on their alter ego theory, asserting that Merritt is liable because she is an alter ego of BioMax and BioMax entered the agreement at issue. FAC ¶ 41; *see also id.* ¶ 35. The alter ego allegations, as well as the allegation regarding BioMax's representations and contractual agreement with respect to the PPFA meetings, are sufficiently pleaded and Merritt's motion to dismiss is DENIED on this ground. Merritt can challenge the merit of those allegations on summary judgment and trial.

2. Breach of PPCG Agreement

Plaintiffs' fifteenth claim alleges breach of non-disclosure and confidentiality agreements by PPGC and PPCFC against BioMax, Daleiden, and Merritt based on Merritt's (posing as BioMax CEO) signing in April 2015 of a "Non-Disclosure And Confidentiality Agreement" ("NDA") with PPGC. FAC ¶¶ 250-253. As above, defendants argue that the FAC fails to adequately allege facts supporting the alleged breaches and that any breach proximately caused damage to PPGC.

As to the adequacy of facts supporting breach, in order to gain access to the PPCG clinic, Merritt on behalf of BioMax signed a NDA that prohibited visitors from disclosing any confidential information, defined as

"all oral information of the Disclosing Party, which in either case is identified at the time of disclosure as being of a confidential or proprietary nature or is reasonably understood by the Recipient to be confidential under the circumstances of the disclosure." FAC ¶ 114, Ex. M at ¶ 1. Plaintiffs allege that despite signing the NDA, defendants Daleiden and Merritt surreptitiously filmed their entire private meeting at PPCG and published that recording on the internet. FAC ¶ 139. Defendants argue that plaintiffs have failed to identify the specific contents of the PPGC meeting that plaintiffs contend are confidential, or that the necessity for confidentiality was "reasonably understood" by Merritt or Daleiden. But considering the allegations of the FAC, including the security protocols implemented by PPGC and circumstances surrounding the private meetings (in private spaces off limits to the public), sufficient facts have been alleged that Merritt and Daleiden would have reasonably understood that the information they received was considered confidential. FAC ¶¶ 112, 115-116, 124. Those allegations may not withstand scrutiny once admissible evidence has been developed, but plausible inferences can be drawn at this juncture from the facts alleged.[20]

3. Breach of NAF Agreements

Plaintiffs' fifth claim alleges breach of contract by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, and PPCFC against Daleiden, Merritt, Lopez, CMP, and

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[20] The adequacy of the allegations regarding PPCG's damages is satisfied for the reasons discussed above.

BioMax, when defendants agreed in February 2014, April 2014, March 2015, and April 2015 to NAF's Exhibitor Agreements and non-disclosure agreements in connection with exhibiting and attending NAF's 2014 and 2015 annual conference. FAC ¶¶ 182-188.

Defendants argue first that because the NAF policy was that all "people" attending its meeting sign the NDA agreement, corporate entities like plaintiffs are not "people" and therefore are not intended third-party beneficiaries of the confidentiality agreements. *See* FAC ¶ 66 (NAF Conference attendees "include clinicians, facility administrators, counselors, researchers, educators, and thought leaders in the pro-choice field, who have longstanding commitments to health care, women's rights, and reproductive choice. Staff from PPFA and Planned Parenthood affiliates regularly attend the NAF annual conferences.").

Given the language of the agreements at issue, their alleged purpose, and the alleged circumstances under which they were entered, plaintiffs have alleged plausible facts showing the *intent* to consider plaintiffs as third-party beneficiaries of the NAF confidentiality agreements. As alleged, the explicit purpose of the NAF confidentiality agreements was to provide confidentiality and ensure security for the attendees, and the language of the agreements considered in full bears out that intent. FAC ¶ 185. Even though plaintiffs were not specifically identified in the agreements, they are included within the class of "people" who were required to sign and abide by, and as a result receive protection from, the NAF confidentiality agreements. *See, e.g., Spinks v. Equity*

Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1023 (2009) ("Ultimately, the determination turns on the manifestation of intent to confer a benefit on the third party."); *see also Northstar Fin. Advisors, Inc. v. Schwab Investments*, 781 F. Supp. 2d 926, 942 (N.D. Cal. 2011) ("Under California law, a contract must be clear in its *intention* to benefit a third party in order for that party to establish beneficiary status." (emphasis in original)); *Jones v. Aetna Cas. & Sur. Co.*, 26 Cal. App. 4th 1717, 1725 (1994) ("Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered."). The intent of NAF to benefit plaintiffs is plausibly pleaded and supported facially by the agreements at issue.

Defendants also argue that plaintiffs fail to adequately allege breach of the NAF agreements. I disagree. The allegations in the FAC are sufficient. FAC ¶¶ 67, 185, 186.[21]

For the foregoing reasons, plaintiffs have adequately alleged their breach of contract claims and defendants' motion to dismiss these claims is DENIED.

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[21] For the reasons discussed above, plaintiffs have adequately alleged damages proximately caused by the breach of the NAF agreements.

F. Trespass by PPFA, PPGC, PPCFC, and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators

Defendants challenge the adequacy of plaintiffs' allegations of trespass under Florida, District of Columbia, Colorado and Texas law.

1. Possessory Interest Under Florida and District of Columbia Law

Defendants argue that the claims of trespass under Florida and District of Columbia law fail as a matter of law because plaintiffs did not and cannot plead a "possessory interest" in the property onto which defendants allegedly trespassed. *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) (tort of trespass requires an "unauthorized" entry onto property that "results in interference with the property owner's possessory interest therein," and "possessory interest" is the ability "to control and exclude others from using those areas"); *Winselmann v. Reynolds*, 690 So. 2d 1325, 1327 (Fla. Dist. Ct. App. 1997) ("To obtain a recovery for a trespass to real property then, it is clear that the aggrieved party must have had an ownership or possessory interest in the property at the time of the trespass.").

Defendants assert the FAC is devoid of any facts establishing that plaintiffs have a possessory interest in the hotel conference rooms where the meetings took place in Florida and the District of Columbia. However, PPFA *has* alleged that "PPFA possesses a right to exclusive use of the real property it leases for Planned

Parenthood meetings." FAC ¶ 190; *see also* ¶¶ 81, 98, 100, 107 & Exs. B, D, F (requiring registration, identification, and badges for access and reserving right to exclude exhibitors). At this juncture, the clear allegation that PFFA leased the property at issue (as opposed to simply being a guest) and that PPFA had the right to exclusive use are sufficient. The facts alleged here distinguish this case from those relied on by defendants, where the plaintiff did not have exclusive control or the right to exclude, or where the plaintiff simply rented a hotel room for one night. *But see Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) ("Greenpeace cannot demonstrate "exclusive" control of the trash and recycling areas because it concedes that those areas were for all tenants' common use."); *Young v. Harrison*, 284 F.3d 863, 868 (8th Cir. 2002) (distinguishing between a right afforded under unlawful detainer statute between a tenant and a hotel guest, in part because "the guest acquires no estate and has mere use without the actual or exclusive possession."); *Winselmann v. Reynolds*, 690 So. 2d 1325, 1327 (Fla. Dist. Ct. App. 1997) ("where it is clear from the allegations of the amended complaint that Winselmann allegedly had only an easement or a right to the use of the subject property, the trial court properly determined that a trespass action could not lie.").

The evidence may or may not support PPFA's lease and exclusive use allegations, but at this juncture the express factual assertions are sufficient.[22]

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[22] Defendants complain that plaintiffs should be required to state more facts – as to the location of the conferences and the terms of

2. Authorized Access under Colorado, District of Columbia, Florida, and Texas Law

Defendants also argue that because they had consent to access the meetings – by signing the Exhibitor and NDA agreements and by paying the necessary fees – the claims for trespass fail under Colorado, District of Columbia, Florida and Texas law. *See, e.g.*, *Daniel v. Morris*, 181 So. 3d 1195, 1199 (Fla. Dist. Ct. App. 2015), *reh'g denied* (Jan. 19, 2016) ("Trespass to real property is the unauthorized entry onto another's real property."); *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) ("The tort of trespass is defined as 'an unauthorized entry onto property'"); *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 389 (Colo. 2001) ("physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that real estate."). Plaintiffs claim, however, that defendants either vitiated the consent by obtaining it by misrepresentation or exceeded the scope of the consent when they secretly filmed the proceedings. FAC ¶¶ 192, 193.

Defendants cite a number of cases that have rejected trespass claims where defendants misrepresented their identities in order to conduct surreptitious filming on business properties. Defs. MTD at 25. In each of those cases, however, the

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the lease agreements – but those facts will come out in discovery and are not necessary at this juncture for defendants to be able to defend against the trespass claim.

trespass claim failed because the defendants recorded in *publicly* accessible places. *See, e.g., Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) ("The test patients entered offices that were open to *anyone*" (emphasis in original); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 239 Mich. App. 695, 708-09 (2000) ("Stern entered only those areas of plaintiffs' shop that were open to anyone seeking transmission repair services and videotaped plaintiffs' employee engaging in a professional discussion with her."). Other cases conclude that a claim for trespass can be made where defendants fraudulently gained access to places not open to the public. *See, e.g., Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1367 (S.D. Fla. 2005) (denying summary judgment where defendant "was able to access areas of plaintiff's business not open to the public"); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1222 (M.D.N.C. 1996) ("the misrepresentations which allowed Litt and Barnett to enter the restricted parts of Food Lion's stores could negate the consent which they were given.").

Defendants also rely on *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756-57 (N.D. Cal. 1993). But in that case, the court dismissed the trespass claim because plaintiff had expressly allowed the film crew onto her property and consented to the filming. *Id.* 767. The defendants exceeded the scope of consent *later* by, contrary to plaintiff's direction, broadcasting the footage. That the subsequent broadcast might have exceeded the scope of consent could not support the trespass claim. *Id.* at 756-757.

The alleged facts of this case are starkly different:plaintiffs were never aware of the intent of or actual recording by defendants. That recording, on its own, is alleged to have exceeded the explicit scope of consent from the start. *See also Berger v. Cable News Network Inc.*, No. CV 94-46-BLG-JDS, 1996 WL 390528, at *5 (D. Mont. Feb. 26, 1996) (film crew accompanying FBI executing a search warrant had consent of government which had "temporary control and possession of the property" and although plaintiff acknowledged film crew was present, did not ask them to leave).[23]

3. Damages Barred by the First Amendment

Finally, defendants argue that the trespass claims fail because the damages plaintiffs seek from the alleged trespasses are barred by the First Amendment as they flow exclusively from the publication of the Human Capital Project recordings, and plaintiffs do not seek nominal damages or any other damages that do not stem from the publication of the recordings. Although not *expressly* pleaded, plaintiffs confirmed at

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[23] Defendants also argue – specifically with respect to Colorado and Texas – that the FAC itself establishes that consent was given to defendants to access the clinics in those states. Defs. MTD at 26. However, plaintiffs have adequately alleged plausible facts supporting their contentions that consent was impermissibly obtained by misrepresentation or exceeded by defendants. What plaintiffs can prove as to these arguments under the requirements of Colorado and Texas law is more appropriately addressed on summary judgment.

oral argument that nominal damages are sought and are at issue in this case.

Numerous courts acknowledge that nominal damages support a trespass claim, even where other damages are not sought or not available. *See, e.g.*, *Daniel v. Morris*, 181 So. 3d 1195, 1199 (Fla. Dist. Ct. App. 2015), *reh'g denied* (Jan. 19, 2016) ("Even if no actual damages are proven, the plaintiff is still entitled to nominal damages and costs." (internal citations omitted)); *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1365 (S.D. Fla. 2005) ("Florida courts have allowed the recovery of nominal damages in civil trespass actions. The courts have found that when trespass occurs and no actual damages are proven, the plaintiff is entitled to a judgment for nominal damages and costs."); *see also Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 820 (9th Cir. 2002) (upholding summary judgment on trespass claim under Arizona law where plaintiff did not request nominal damages and failed to show it suffered any damage from broadcast of 52 seconds of tape secured by trespass, as opposed to damages flowing from other segments of broadcast). It is not necessary to plead them separately.

Defendants' motion to dismiss plaintiffs' trespass claims, therefore, is DENIED.[24] I address the question

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[24] Merritt argues that she cannot be liable for trespass at the PPFA meetings in Florida or the District of Columbia because she did not attend those meetings. The PPFA trespass claim, however, is also based on Merritt's alleged trespass at the PPFA Texas and Colorado clinics. Therefore the claim for trespass against Merritt will not be dismissed at this juncture.

of whether all or some of plaintiffs' compensatory damages claims are barred by the First Amendment later in connection with the fraudulent misrepresentation claim.

G. Violations of Calif. Bus. & Profs. Code § 17200, et seq. for Unlawful, Unfair, and Fraudulent Acts by all plaintiffs against all defendants

California's Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Each prong of the UCL – unlawful, unfair, or fraudulent – creates a separate and distinct basis for liability. *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1129-30 (9th Cir. 2014).[25]

1. Unlawful

In prohibiting "any unlawful" practice, section 17200 "borrows" violations of other laws and "treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (internal quotations omitted).

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[25] Merritt contends that because her conversations at the conferences, clinics, and restaurants cannot be considered "business practices," the UCL claim must fail. Merritt MTD at 12-13. However, the FAC adequately alleges that Merritt's conduct was necessarily part of her efforts on behalf of BioMax (albeit a fake business) and intended to injure the business of plaintiffs and injure consumers. FAC ¶¶ 35, 61, 64, 68, 69, 80, 87, 88, 95, 109, 115. These allegations are sufficient to state a claim under the UCL at this juncture.

Plaintiffs identify each of their other claims as supporting their unlawful prong claim. As discussed above and below, because I conclude that plaintiffs have adequately alleged violations of other federal and state laws, plaintiffs have adequately pleaded the basis for an unlawful UCL claim.

2. Unfair

There are two standards for determining what "unfair competition" is under the UCL. The first standard, advocated by defendants and applicable to claims between competitors, is whether the conduct complained of threatens "an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel–Tech*, 20 Cal.4th at 187. The second standard, advocated by plaintiffs and applicable to claims brought by a consumer, "involves balancing the harm to the consumer against the utility of the defendant's practice." *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007).[26] While plaintiffs have alleged economic harm to their business interests, that does not mean the consumer protection balancing test would not apply. *Cf. Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th Cir. 2014) (where "crux of the business owners' complaint is that Yelp's conduct unfairly injures their economic interests to the benefit" of their

[26] As the *Lorzano* Court noted, whether or not the *Cel-Tech* test is also applicable to consumer claims is an open issue in the California courts. *Id.* at 736.

competitors, first standard applied). Plaintiffs persuasively argue that they are in no way "competitors" with defendants and do not allege that defendants' action benefitted plaintiffs' competitors. Instead, plaintiffs posit that they were potential "consumers" of the fake services defendants purported to offer. Applying the balancing test, plaintiffs have alleged sufficient facts to state an unfairness claim; defendants' practices were aimed at reducing the availability of plaintiffs' services and injured plaintiffs' as potential customers of fetal tissue procurement companies as well as plaintiffs' ultimate customers.

However, even if I apply the first standard, plaintiffs still adequately allege an unfair claim at this juncture. The FAC alleges that defendants' goal was to put plaintiffs – one of the largest provider of reproductive health services in the country – out of business. FAC ¶¶ 1,2. That goal threatens the type of harm the antitrust and federal consumer protection laws aim to prevent.

3. Fraudulent

The "fraudulent" prong of the UCL "requires a showing [that] members of the public are likely to be deceived." *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002). "[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Plaintiffs allege that defendants defrauded the plaintiffs and the public when defendants held themselves out to be representatives of a legitimate

tissue procurement company. FAC ¶¶ 30, 31, 35-36, 61-62.

Defendants argue that the fraud prong claim fails because plaintiffs are not entitled to any form of restitution or injunctive relief available under the statute. Plaintiffs admit that they do not and cannot seek restitution from defendants, and instead seek only injunctive relief. Defs. MTD Oppo. at 26 n.18. As to injunctive relief, plaintiffs have adequately alleged facts plausibly showing that defendants will engage in similar conduct in the future if they are not enjoined. FAC ¶ 54 ("Planned Parenthood has been the main target of DALEIDEN's covert video-taping operations over the years"), ¶ 132 (defendant Newman disclosing to the media the techniques used to infiltrate and that "this is just the beginning, we have moles and spies deep inside the abortion cartel".), ¶ 202 ("Defendants' unlawful, unfair, and fraudulent conduct is ongoing. They have publicly stated that they 'have moles and spies deep inside the abortion cartel,' an explicit threat that they intend to continue to engage in unlawful and fraudulent acts meant to harm Plaintiffs through further wrongful invasions and malicious lies.").

These allegations suffice to support injunctive relief under the UCL because they establish the specific threat of ongoing conduct and are not simply based on past wrongs. *But see Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (recognizing that past wrongs are evidence of wrongs are "evidence bearing on whether there is a real and immediate threat of repeated injury" but not sufficient by themselves to

make out a case for a "real and immediate threat of repeated injury") (internal quotations omitted)).[27]

Defendants' motion to dismiss plaintiffs' UCL claim is DENIED.

H. Fraudulent Misrepresentation by PPFA, PPGC, PPCFC, and PPRM Against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Co-Conspirators

Defendants challenge plaintiffs' claim for fraudulent misrepresentation because plaintiffs fail to plead that their damages were proximately caused by defendants' conduct and because any damages are barred by the First Amendment.[28] Plaintiffs' alleged damages are:

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[27] Defendants reliance on *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1015 (N.D. Cal. 2014) is misplaced. There, the court concluded a claim for injunctive relief under the UCL based on misrepresentations about the functionalities and battery life of a fitness tracker could not be alleged because the plaintiff already knew the falsity of those claims and could not plausibly allege he would be deceived by them in the future. Here, while plaintiffs may reasonably expect defendants to continue their attempts to infiltrate meetings and clinics, the individuals who might attempt to do so at defendants' direction or the exact methods to be used are not so obviously known as to render injunctive relief unnecessary.

[28] Merritt also argues that plaintiffs fail to adequately allege detrimental reliance by plaintiffs on any of Merritt's specific misrepresentations. Merritt MTD at 16-18. However, plaintiffs specifically identify the misrepresentations by Merritt and BioMax in their applications, agreements, advertising materials, and verbal statements and that plaintiffs relied on in giving Merritt and BioMax access. FAC ¶¶ 81, 84, 87-89, 98, 102, 105-106, 108, 109-110, 113-115. The fact that plaintiffs have not identified *the*

> As a result of Defendants' wrongful acts, PPFA, PPGC, PPCFC, and PPRM have suffered and/or will suffer economic harm and irreparable harm caused by the improper acquisition, use, and disclosure of Plaintiffs' confidential information, including harm to the safety, security, and privacy of Plaintiffs and their staff, and harm caused by being forced to expend additional, extensive resources on security and IT services, property damage, and responding to multiple state and federal investigations and inquiries. If Defendants are allowed to continue their wrongful acts, PPFA, PPGC, PPCFC, and PPRM will suffer further irreparable injury and loss

FAC ¶ 209.

1. Proximate Cause

"Under California law, '[a] complete causal relationship between the fraud or deceit and the plaintiff's damages is required.'" *See, e.g., City Sols., Inc. v. Clear Channel Commc'ns*, 365 F.3d 835, 840 (9th Cir. 2004) (quoting *Small v. Fritz Cos.*, 30 Cal.4th 167, 202 (2003)). Defendants argue that the "complete causal" nexus for proximate cause cannot be satisfied here because each of the harms complained of stems not from the fraud but from the subsequent publication of the recordings that were surreptitiously made.

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employees of plaintiffs who received these misrepresentations, given the context of this case and the specificity as to the content and timing of the representations, does make the allegations deficient.

Defendants rely on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999). In that case, employees of ABC went undercover to secure footage of improper food handling at plaintiff's store and ABC's *Prime Time Live* broadcast it. Plaintiff sought to recover damages for lost profits resulting from that broadcast. Reviewing the jury's verdict post-trial, the court recognized that the doctrine of "independent cause" applied under South Carolina law and "provides that an event occurring after the tortious conduct of the plaintiff may intervene to break the causal chain and cut off plaintiff's liability for the ultimate harm." *Id.* at 961. As applied to the facts of that case, the court concluded that while:

> tortious activities may have enabled access to store areas in which the public was not allowed and the consequent opportunity to film people, equipment and events from a perspective not available to the ordinary shopper, but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence. Those practices were not the probable consequence of Defendants' fraud and trespass and it cannot be argued under the evidence in this case that the filming of those practices by the Prime Time Live producers set any of those activities in motion.

Id. at 963.

Defendants contend that, similar to *Food Lion*, all of the alleged damages here arise from the publication

of the recordings, not from any purported misrepresentations that occurred prior to the recordings. *See also Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, I*nc., 30 F. Supp. 2d 1182, 1199 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) (where undercover reporters misrepresented their identification in gathering information about a lab that conducted faulty test, court conclude that "[b]ecause any negative portrayal of Plaintiffs during the broadcast was not proximately caused by Defendants' misrepresentation of their identities at the March 18, 1994 meeting, Defendants are entitled to summary judgment on this portion of the fraud claim."); *Frome v. Renner*, No. 97 CIV 5641, 1997 WL 33308718, at *2 (C.D. Cal. Oct. 1, 1997) ("'48 Hours'" merely served as a forum through which the public could learn about Plaintiff's medical practices. Profits lost subsequent to the broadcast could not have been proximately caused by Renner's misrepresentation.").

Plaintiffs distinguish their damages from the ones precluded in defendants' cases, arguing that they have alleged that they suffered damage as the "direct" result of defendants' fraud in securing access to plaintiffs' private conferences and clinics, including incurring increased security costs for the protection of their staff, their clinics, their conferences, and their websites and IT systems. MTD Oppo. at 27 (relying on FAC ¶ 143).[29]

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[29] In addition to attempting to distinguish *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 30 F. Supp. 2d 1182 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002), plaintiffs also rely on it, noting that the court denied summary judgment on the aspect of the fraud claim where plaintiff claimed emotional

I agree with defendants in part. The allegations of damages currently included in plaintiffs' FAC do not clearly differentiate between damages that were *directly* caused by the breaches of plaintiffs' security measures themselves as opposed to damages that were caused by the *publication* of the videos and related Human Capital Project press which resulted – through the acts of third-parties – in increased security threats, harassment, and acts of violence. However, as noted above, plaintiffs may have implemented security measures simply upon discovering defendants' breaches before the full extent of the publications was known and the backlash from them occurred. While the proximate cause standard may at summary judgment or trial prevent plaintiffs from recovering on some categories of damages, for purposes of pleading I conclude that plaintiffs have adequately alleged proximately-caused damages.

2. First Amendment

Relatedly, defendants argue that because plaintiffs seek damages resulting from the publication of the recordings, plaintiffs must satisfy the First Amendment requirements for defamation claims. Defendants rely on a line of Supreme Court cases and other precedent applying First Amendment defamation standards to tort and statutory claims where the damages sought from publishers stemmed from the act

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distress damages for the deception – the fraudulent access by plaintiffs to a meeting with defendant – separate from any emotional distress damages stemming from the publication. *Id*. at 1200-1201.

of publication. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 55-56 (1988) (requiring public figure to satisfy First Amendment requirements under defamation law for claim of intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) ("We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."); *see also Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986) (recognizing in context of intentional interference with economic advantage claim "[a]lthough the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement.").[30]

As the Fourth Circuit Court of Appeals explained in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999), plaintiff could not "avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational

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[30] *See also Hornberger v. Am. Broad. Companies, Inc.*, 351 N.J. Super. 577, 630 (App. Div. 2002) (plaintiff police officers filmed conducting traffic stops of African-American males sued for the broadcast on Prime Time Live and sought emotional distress and reputational damages, the court concluded that "plaintiffs are not entitled to these reputational and emotional distress damages, resulting from a publication, without showing that the publication contained a false statement of fact that was made with actual malice.").

tort claims, while holding to the normal state law proof standards for these torts. This is precluded by *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)." Under the First Amendment standard, defendants contend that plaintiffs fail to specifically identify any false statements of fact made with the requisite level of malice in order to plausibly plead a claim for the damages they seek.

In response, plaintiffs argue that defendants' line of cases is limited to precluding recovery of reputational or state of mind damages that flow from an expressive act and note that *Hustler, Blatty,* and *Hornberger* dealt with emotional distress claims or claims whose gravamen is an injurious falsehood. Plaintiffs *also* rely on *Food Lion, Inc.*

Helpful to defendants, in *Food Lion* the Fourth Circuit affirmed the district court's refusal to allow plaintiff to use its non-reputational tort claims (breach of duty of loyalty, trespass, etc.) to recover compensatory damages for ABC's broadcast of the *PrimeTime Live* program that targeted Food Lion. The court concluded that because the loss of good will and lost sales were related to Food Lion's reputation, they were "publication damages" that resulted from diminished consumer confidence related to the disclosed food-handling practices (as opposed to damages stemming from the *method* by which the recordings were made or published). *Id.*, 194 F.3d at 522. To allow Food Lion to seek those publication damages without meeting the heightened First Amendment standard would be the prohibited run-around prohibited by *Hustler*. *Id.*

However, helpful to plaintiffs, the court rejected the application of heightened First Amendment scrutiny to the breach of duty of loyalty and trespass claims, where the jury found in favor of plaintiffs but only awarded nominal damages, because those laws did not "single out the press or have more than an incidental effect upon its work." *Id.* at 522. Similarly, in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) a source was allowed to sue a publication after the newspaper identified Cohen (contrary to the paper's express promise) as its source and Cohen was fired from his job. The Supreme Court refused to apply heightened scrutiny, concluding that application of the doctrine of promissory estoppel had "no more than [an] incidental" effect on the press's ability to gather or report news. *Id.* at 671–72.

Whether First Amendment scrutiny applies, therefore, does not turn on the label of the cause of action but on whether the "challenged conduct" is to some form of expression and relatedly whether the damages sought stemmed from that form of expression. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (viewing "the challenged conduct in *Cowles* to be the breach of promise and not some form of expression."). Here, the First Amendment does not impose heightened standards on plaintiffs' tort claims as long as plaintiffs *do not seek* reputational damages (lost profits, lost vendors) stemming from the publication conduct of defendants. As with proximate cause, discovery will shed light on the nature of the damages for which plaintiffs seek recovery. Resolution of this issue is more appropriately addressed at summary judgment or trial.

I. Violations of California Penal Code §§ 632 & 634 by PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC and PPRM against Daleiden, Merritt, Lopez, CMP, BioMax, and Unknown Coconspirators

1. Recordings under Section 632

Defendants argue that plaintiffs fail to allege claims for unlawful recording under California Penal Code section 632 because the FAC does not include facts plausibly suggesting that the conversations at issue – unspecified conversations at conferences and clinics and the lunch meetings with Drs. Nucatola and Gatter – were made with a reasonable expectation of privacy. Defendants also argue that the plaintiff organizations do not have standing to assert this claim.

Under Section 632, "a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan v. Flanagan*, 27 Cal. 4th 766 (2002). 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 made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Penal Code § 632(c).

A "communication is not confidential when the parties may reasonably expect other persons to overhear it." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003). As the California Court of Appeal explained in *Lieberman,* "[t]he concept of privacy is relative. Whether a person's expectation of privacy is reasonable may depend on the identity of the person who has been able to observe or hear the subject interaction." *Id*. Importantly for determination of this motion, the "presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve." *Id*.

Here, plaintiffs allege that Daleiden and his co-conspirators "intentionally recorded confidential communications made during the NAF 2014 annual meeting in San Francisco," which staff representatives from PPFA, PPPSW, PPMM, PPOSBC, PPNC, PPGC, PPCFC and PPRM attended. FAC ¶ 212. Daleiden and his co-conspirators also "intentionally recorded confidential communications made during private meetings with PPFA and Planned Parenthood affiliate staff members in which PPFA and Planned Parenthood affiliate staff members had a reasonable expectation of privacy." *Id*. ¶ 213. Plaintiffs assert that the staff who were recorded at NAF 2014 meeting had a reasonable expectation of privacy on the recorded conversations because "(1) all attendees at the meeting, including Defendants, were required to sign nondisclosure agreements with confidentiality provisions prior to entering the meeting and all attendees received and were required to wear badges demonstrating that they had signed such agreements; (2) NAF had in place a

Security Program to ensure that communications concerning and made during the annual meeting would be confidential and restricted to NAF members and trusted others; and (3) the nature and subject matter of the conferences were highly sensitive." *Id.* ¶ 214.

a. Staff Conversations at NAF 2014 Annual Meeting

Defendants argue that these allegations do not plausibly suggest a reasonable expectation of privacy because no specific conversations at the NAF Annual 2014 meeting have been identified, much less facts about where and when those alleged conversations occurred, that could overcome the admission that the conversations were recorded at a conferences attended by hundreds of individuals. Defs. MTD at 34; Defs. MTD Reply. at 18. However, given the particular circumstances of this case – where defendants have publicly acknowledged that they recorded hours and hours of conversations at the NAF Conference, but the actual contents of those recordings only came into the possession of plaintiffs after the inception of this lawsuit – I conclude that the allegations regarding conversations at the 2014 NAF Annual meeting are sufficient for present purposes.[31] At summary

[31] Defendants' reliance on *Turnbull v. Am. Broad. Companies*, No. CV 03-3554 SJO(FMOX), 2005 WL 6054964, at *6 (C.D. Cal. Mar. 7, 2005), does not help them on this motion to dismiss. There, the court affirmed the jury verdict where plaintiffs conceded they "were talking openly" and were aware that others were in the room. Those circumstances supported the jury's conclusion that a reasonable person would have expected that the conversations may be overheard.

judgment, plaintiffs will be required to prove through admissible evidence which members of their staff were recorded and what circumstances surrounding those particular recordings support their Section 632 claim.[32]

b. Lunch Meetings with Drs. Nucatola and Gatter and Laurel Felczer

Defendants argue first that the FAC does not allege facts to plausibly support that Dr. Nucatola was acting in her capacity as an employee of PPFA. They rely on allegations in the FAC that Nucatola was an employee of PPFA but then point to allegations they contend are "contrary," namely that Daleiden sought a meeting with Nucatola to discuss the operations of PPPSGV (not PPFA). FAC ¶¶ 69, 95. I conclude that plaintiffs have stated sufficient facts, in particular that defendants sought a meeting with Dr. Nucatola in her capacity as an employee of PPFA *or* PPSGV to discuss

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[32] Defendants argue that the NAF NDA agreements are irrelevant to the question of a reasonable expectation of privacy in light of the *Flanagan* court's clarification that a violation of Section 632 turns more on expectations regarding "simultaneous dissemination" of conversations rather than "secondhand repetition," which would be prohibited by the NDA. 27 Cal. 4th at 775. However, the NDAs are not irrelevant concerning whether there has been an "intentional eavesdropping or recording" prohibited by Section 632. *Id*. at 776. In *Flanagan*, the California Supreme Court adopted a standard that gave *greater* protection to privacy interests in private conversations. *Id*. Similarly, defendants' arguments that NAF's efforts to limit and screen participants at the meeting and that plaintiffs' characterizations of the contents of the recorded conversations as "sensitive" are irrelevant under *Flanagan* are also without merit.

tissue procurement. *See also* FAC ¶¶ 75-76. The allegations are not inherently contradictory and nothing further is required at this juncture.

Defendants also argue that there are no allegations that Dr. Gatter and Laurel Felczer were acting in their capacities as employees of specific plaintiff organizations when they were recorded and that plaintiffs fail to identify which plaintiff organizations those individuals were employees of at the time of the recording. However, plaintiffs have plausibly pleaded that defendants sought out private meetings and recorded those meetings with PPFA and affiliate staff members. FAC ¶¶ 69-70, 75-76, 95-97, 213. That is sufficient at this juncture.

With respect to the meeting with Dr. Nucatola, defendants challenge the adequacy of the allegations regarding the "confidentiality" of the communications as that meeting was held in a restaurant. FAC ¶ 76. However, the facts as alleged – that Dr. Nucatola believed the communications were confidential, she arranged for the meeting to be held in a private booth, she "sat with her back to the corner wall of the restaurant, a position that enabled her to be able to observe the presence of others," and the "music and ambient noise in the restaurant were very loud," FAC ¶ 76 – are sufficient for pleading purposes. FAC ¶ 76; *see also Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003) (presence of others creates at most a question of fact for jury as to objective reasonableness).

c. Standing

Finally, with respect to standing, defendants argue that any claim under Section 632 brought by plaintiffs may only cover the confidential communications of *those entities* and not the confidential conversations of staff or meeting attendees. Defendants complain that there are no allegations in the FAC to support the inference that *all* of plaintiffs' staff were attending on behalf of their employer, so as to confer standing on the employer to bring the Section 632 claim. Defs. MTD at 36. The only case they rely on is *Ion Equip. Corp. v. Nelson*, 110 Cal. App. 3d 868, 880 (Cal. Ct. App. 1980), where the court simply held that a corporation is a person who may not only be liable under Section 632, but also may also prosecute an action under that section.

Plaintiffs point to allegations that defendants intended to and did engage plaintiffs' staff at the 2014 NAF meeting about developing business relationships to demonstrate that those employees, and the subsequent recordings, related to the staff members' employment with plaintiffs. FAC ¶¶ 69-71, 75-76, 95-97. I agree. The facts alleged are sufficient to establish plaintiffs' standing under Section 632.[33]

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[33] Defendants challenge the adequacy of the allegations regarding defendant Lopez, who is not named as attending the 2014 NAF meeting or participating in the Nucatola or Gatter meetings. In Opposition, plaintiffs argue that Lopez is included with the "DALEIDEN and his co-conspirators" allegations in paragraph 212 with respect to the 2014 NAF meeting. I conclude that at this juncture, prior to discovery, it is not appropriate to dismiss Lopez from the Section 632 claim.

2. Trespass under Section 634

Defendants argue that plaintiffs fail to allege a claim for criminal trespass under California Penal Code section 634 at NAF's 2014 Annual Meeting because the trespass (if any) was against NAF, not plaintiffs. California Penal Code section 634 makes it illegal to trespass for purpose of committing a violation of Section 632. Plaintiffs clarify that they are not seeking to assert a claim for trespass to the NAF conference under Section 634 itself, but instead bring their claim under Section 637.2, which provides a cause of action for anyone injured under Section 634 to bring an action against the person who committed the violation. FAC ¶ 225.

Defendants also argue that plaintiffs fail to allege the necessary facts to state this claim, because plaintiffs fail to plead "aggravating factors" to establish "criminal trespass" under Section 634 and that plaintiffs fail to allege that NAF had possessory interest in the conference rooms used during the 2014 NAF meeting. I have already concluded that plaintiffs adequately pleaded their possessory interest to state a claim for trespass at the 2014 NAF meeting. In the absence of any case law to support defendants' argument, I find no need for plaintiffs to plead aggravating factors that would be required for criminal trespass when plaintiffs seek to use Section 634 as a basis for a civil action under Section 637.2.

The motions to dismiss the California Penal Code sections 632 and 634 claims are DENIED.

J. Violation of Florida and Maryland Wiretapping

Defendants challenge the adequacy of the allegations regarding defendants' violation of Florida's Wiretapping Statute, Section 934 of Title XLVII of the Florida Criminal Procedure Law based on recording made at the 2015 PPFA Medical Directors Council Conference in Orlando, Florida, and the 2014 PPFA North American Forum on Family Planning Conference in Miami, Florida. "[F]or an oral conversation to be protected under section 934.03 the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable." *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994). Florida case law "establishes that the following factors are considered in determining whether, under the totality of the circumstances, the expectation of privacy is one which society recognizes as reasonable" including "(1) the location where the communication took place; (2) the manner in which the communication was made; (3) the nature of the communication; (4) the intent of the speaker asserting Chapter 934 protection at the time the communication was made; (5) the purpose of the communication; (6) the conduct of the speaker; (7) the number of people present; and (8) the contents of the communication." *Brevard Extraditions, Inc. v. Fleetmatics, USA, LLC*, No. 8:12-CV-2079-T-17MAP, 2013 WL 5437117, at *5 (M.D. Fla. Sept. 27, 2013). Given the highly fact-intensive "totality of the circumstances" test under Florida law, absent factually similar case law to the contrary, I cannot conclude at

this juncture that plaintiffs' current allegations preclude a claim under Florida's statute.[34]

Defendants also challenge the adequacy of the allegations under Maryland's Wiretapping Statute, § 10-402 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code. Under Maryland law, a plaintiff must have both a "subjectively and objectively reasonable expectancy of privacy" in the conversation. *Hawes v. Carberry*, 103 Md. App. 214, 220 (1995), abrogated on other grounds by *Deibler v. State*, 365 Md. 185 (2001); *see also Benford v. Am. Broad. Companies, Inc.*, 554 F. Supp. 145, 154 (D. Md. 1982) ("A person's 'reasonable expectation of privacy' is a matter to be considered on a case-by-case basis, taking into consideration its unique facts and circumstances."). Defendants argue that given the facts alleged – conversations during a conference with hundreds of participants – individuals recorded could not have had a subjectively and objectively reasonable

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[34] While defendants point to case law rejecting the idea that there can be a privacy interest in a conference call held to conduct the business of a company by participants acting on behalf of the company, *Cohen Bros., LLC v. ME Corp., S.A.*, 872 So. 2d 321, 325 (Fla. Dist. Ct. App. 2004), that case does not support defendants' argument that there can be no privacy interest in "closed business meetings," even if the Florida conferences could be analogized to closed business meetings. *See also Morningstar v. State*, 428 So. 2d 220, 221 (Fla. 1982) (rejecting constitutional challenge to wiretapping statute as applied to "expectation of privacy in" a "private office"); *Jatar v. Lamaletto*, 758 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 2000), cause dismissed, 786 So. 2d 1186 (Fla. 2001) (rejecting right to privacy because "[s]ociety is not prepared to recognize as reasonable an expectation of privacy" in a conversation in someone else's business office seeking extortion).

expectation of privacy. Given the highly fact-intensive question at issue, and in absence of any case from Maryland on similar facts, I cannot conclude at this juncture that plaintiffs' current allegations preclude a claim under Maryland's statute.[35]

Finally, as to both the Florida and Maryland claims – and as with the claim under California law – defendants complain that the FAC lacks necessary facts to support the reasonableness of the expectation of privacy, including which exact conversations were recorded, the specific circumstances for each of those conversations, and why the expectation of confidentiality was reasonable given that there were hundreds of employees attending a multi-day conference. Defs. MTD at 42. However, given the allegations in this case – the surreptitious recording of

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[35] The cases defendants contend are factually analogous are not. *Matter of John Doe Trader No. One*, 894 F.2d 240, 245 (7th Cir. 1990) ("The environment of the trading floor, the presence of the [government] agent and other traders all indicate that a reasonable expectation of privacy did not exist."); *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 818 (9th Cir. 2002) (defendants covert videotaping of "external" semi-public workplace communications by "strangers" who could have been potential partners or competitors could not support objectively reasonable expectation of privacy); *Kemp v. Block*, 607 F. Supp. 1262, 1264 (D. Nev. 1985) (no reasonable expectation of privacy where argument conducted in "loud voices," defendant and the other coworkers who overheard the argument were in a place they had a right to be (therefore plaintiff may be deemed to have knowingly exposed the discussion to them), relatively small size of the instrument shop and its lack of interior walls further indicated that an expectation of privacy within it would not be objectively reasonable, and plaintiff had no right to exclude other persons from entering the shop while the argument ensued).

many hours at the conference of conversations with dozens of individuals that were only turned over to plaintiffs after the inception of this lawsuit – plaintiffs are not in a position to provide more specifics at this juncture. Those specifics will be tested at summary judgment.[36]

Defendants' motions to dismiss the wiretapping claims under Florida and Maryland law are DENIED.

K. Invasion of Privacy: Intrusion Upon A Private Place by All Plaintiffs Against Daleiden, Merritt, Lopez, CMP, and BioMax and Invasion of Privacy: California Constitution Art. I § I by PPFA, PPNC, PPPSW, PPMM, and PPOSB against Daleiden, Merritt, Lopez, CMP, and BioMax

Plaintiffs' thirteenth and fourteen claims allege invasions of privacy; specifically that Daleiden, Merritt, Lopez, CMP, BioMax intruded on a private place and violated the rights of all plaintiffs; and that Daleiden, Merritt, Lopez, CMP, BioMax invaded the rights of privacy of PPFA, PPNC, PPPSW, PPMM, and PPOSB under the California Constitution.

Defendants argue that plaintiffs lack "associational" standing to bring these claims on behalf of their

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[36] Merritt argues the wiretapping claim under Florida law should be dismissed as to her because she did not attend the Florida meetings. Merritt MTD at 20. Plaintiffs, again, rely on their alter ego allegations. That claim will not be dismissed as to Merritt at this juncture.

employees because: (i) the claims at issue require the participation of the individual members in the lawsuit; and (ii) associational standing does not allow corporations to assert the interests of their employees. Defendants also challenge the adequacy of the facts alleged to support the substantive privacy claims.

1. Individual Participation

Defendants assert that if plaintiffs are attempting to plead "associational standing," the Ninth Circuit has held that an association lacks standing where "the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir.1998).[37] Defendants note that "'the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded.'" *Ass'n for Los Angeles Deputy Sheriffs v. Los Angeles Times Comm"ns LLC*, 239 Cal. App. 4th 808, 821 (2015), *review denied* (Nov. 18, 2015) (emphasis in original) (quoting *Hendrickson v. California Newspapers, Inc.*, 48 Cal.App.3d 59, 62 (1975)).

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[37] To establish associational standing, a plaintiff must demonstrate: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir.1998) (citation omitted).

"A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). Similarly, the elements of the California constitutional claim for invasion of privacy are: (i) the identification of a specific, legally protected privacy interest; (ii) a "reasonable expectation of privacy on plaintiff's part"; and (iii) a sufficiently serious invasion. *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35-37. (1994).

Defendants contend that whether any particular employee actually possessed a statutory or constitutional expectation of privacy in a particular conversation with defendants – when those employees were recorded at different times, in different settings, and disclosed different information – would differ from employee to employee and, therefore, require the participation of each employee/member whose privacy was allegedly violated. *See also Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1293 (9th Cir. 2014), *cert. denied sub nom. United Healthcare of Arizona v. Spinedex Physical Therapy USA, Inc.*, 136 S. Ct. 317 (2015) (distinguishing between claims that depend on whether payments for services were withheld from association members and the individual situations of its members versus cases alleging "systematic policy violations" that make extensive individual participation unnecessary). This need for individual participation, defendants

argue, runs to plaintiffs' request for injunctive relief and is also heightened by the plaintiffs' request for money damages because "[t]he courts that have addressed this issue have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990).

In their Opposition, plaintiffs clarify that they only seek injunctive and declaratory relief for the invasion of privacy claims, not damages. FAC Prayer for Relief ¶ 2. As to individual participation, plaintiffs rely on cases challenging "systematic policy violations" that would make individual participation unnecessary. For example, in *Pennsylvania Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002), plaintiffs challenged "systemic policy violations," namely the methods defendants employ for authorizing or denying mental health services, credentialing physicians, and reimbursement that plaintiff contended could be "established with sample testimony, which may not involve specific, factually intensive, individual medical care determinations." *Id.* at 286. While the appellate court questioned whether plaintiffs could, in fact, make that showing utilizing only limited individual participation, it allowed the claim to proceed past the motion to dismiss stage. *Id.* Plaintiffs assert that this case is more akin to *Pennsylvania Psychiatric Soc* than *United Healthcare of Arizona* because plaintiffs allege a consistent course of defendants' conduct (surreptitious recording) and the same injury

to its employees (invasion of privacy) and will be able to establish that defendants' conduct was highly offensive to all employees by representative testimony given defendants' history of violence, harassment, and targeting abortion providers. Similarly, the intrusion alleged here – all recordings – may be shown to be offensive to a "reasonable person" that would cover all staff given defendants' past history.

As in *Pennsylvania Psychiatric Soc.*, as this case continues and discovery progresses, the evidence may support defendants' argument that individual participation is necessary. Given the broad but plausible allegations in the FAC, I should not make that determination at this juncture.

2. Standing to Assert Claims on Behalf of Employees

As to the second standing challenge, defendants rely on *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993), which concluded that the "associational standing test articulated in [*Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)] is properly reserved for voluntary membership organizations—like trade associations or environmental groups—and has no application to a corporation's standing to assert the interests of its employees." *Id.* at 810, n.15.

Plaintiffs argue that the footnote comment in *Region 8* is not binding nor persuasive in the Ninth Circuit, and instead rely on cases finding associational standing appropriate in similar circumstances. For example, in *Planned Parenthood Arizona, Inc. v.*

Brnovich, No. CV-15-01022-PHX-SPL, 2016 WL 1158890 (D. Ariz. Mar. 23, 2016), the court concluded that the Planned Parenthood affiliate could represent its employees in challenging a statute that allegedly infringed on its doctors' First Amendment rights. *Id.* *8. The court noted that Planned Parenthood's interest in challenging the statute was "in every practical sense identical" to the physicians it employs, that its physicians would otherwise have standing to sue in their own right, the interests they sought to protect were germane to their purpose of providing reproductive health care services, and because the parties were seeking injunctive and declaratory relief, individual participation of the physicians was unnecessary. *Id.*; *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (concluding that an association could represent its members challenging the demolition of a historic club house where "the individual members' interests are largely identical to the organization's goals of maintaining the Clubhouse for the members' use in a manner suitable for the social and athletic activities surrounding the game of golf."); *but see Fleck & Associates, Inc. v. Phoenix, City of, an Arizona Mun. Corp.*, 471 F.3d 1100, 1106 (9th Cir. 2006) (rejecting associational standing to challenge ordinance prohibiting live sex acts by an association who ran that type of business because plaintiff had customers and not members and suit to allegedly vindicate "putative privacy interests of its customers" was not germane to plaintiff's purpose).

As above, given the breadth of plaintiffs' plausible allegations, standing by plaintiffs has been sufficiently

alleged. It may be challenged upon a fuller evidentiary record at summary judgment or trial.

3. Adequacy of Allegations

Defendants challenge the factual allegations regarding the plaintiffs' employees' reasonable expectations of privacy and whether the intrusions suffered would be highly objectionable to all staff. These arguments largely track the ones raised against plaintiffs' claims under the wiretapping statutes discussed above. In short, as to the privacy claims under California law and for purposes of ruling on these motions to dismiss, I conclude that plaintiffs have alleged facts plausibly supporting their employees' reasonable expectations of privacy and the objectionable nature of defendants' intrusions.

The unique question here is whether the newsworthiness of defendants' disclosures – a position asserted by defendants – turns what might otherwise be considered an "offensive" intrusion into a justified intrusion. Defs. MTD at 50. Whether defendants' disclosures were newsworthy and whether public interest can diminish the offensiveness of the intrusions are not appropriately determined on a motion to dismiss. *See,e.g., Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 236 (1998), *as modified on denial of reh'g* (July 29, 1998) (recognizing, in reviewing lower court's summary judgment opinion, that "the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may-as a matter of tort law-justify an intrusion that would otherwise be considered offensive.").

For the foregoing reasons, defendants' motions to dismiss are DENIED. At this early stage of the case and given the plausibly alleged allegations, the claims may proceed.

II. ANTI-SLAPP MOTIONS TO STRIKE

As relevant to this set of motions, the parties submit evidence through declarations and requests for judicial notice.[38] Defendants rely on the declaration of David Daleiden. Dkt. No. 87-1. He declares that he is an investigative journalist and founder of CMP. *Id.* ¶ 2. He explains that CMP is a California not-for-profit, 501(c)(3) corporation founded for the purpose of monitoring and reporting on medical ethics, with a focus on abortion and the use and disposal of aborted fetal tissue. *Id.* ¶¶ 203. He asserts that CMP carries out its mission through investigatory journalism that complies with all applicable laws. *Id.* His aim has been to gather information about illegal activities, including for-profit sale of fetal tissue, altering of abortion procedures to obtain fetal tissue for research, and the commission of partial-birth abortions, and in that process also gather information about the difficulties of disposing of fetal tissue, the practical difficulties of fetal tissue procurement, the stigma abortion providers feel is attached to their work, and the toll their work

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[38] This evidence is relevant only to the determination of the anti-SLAPP motions and irrelevant to the determination of the motions to dismiss. In ruling on an anti-SLAPP motion, the court considers, "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (quoting Cal. Civ. Proc. Code § 425.16(b)(2)).

takes on them. *Id*. ¶ 4. As part of his research, Daleiden gathered information from medical journals, legislative hearing and websites, spoke with researchers, scientists, abortion providers, current and former tissue procurement specialists, and attended seven scientific and industry conferences under the assumed name of Robert Sarkis. *Id*. ¶ 5.

On July 14, 2015, CMP released two videos of Daleiden's lunch meeting with Dr. Nucatola, one a summary version and the other showing the full meeting. *Id*. ¶ 6. A week later, CMP released two videos of his lunch meeting with Dr. Gatter, one a summary version and the other showing the full meeting. *Id*. ¶ 7. Nine days after that, CMP released two additional videos of recorded conversations with Dr. Ginde of PPRM, one a summary and the other the full version. *Id*. ¶ 8. After four more days, CMP released a short highlight video of Daleiden's meeting with Melissa Farrell of PPGC (because of technical difficulties the fuller video was not released until August 6, 2015). *Id*. ¶ 9.

Defendant Merritt also submits a declaration in support of her separate anti-SLAPP motion. Dkt. No. 78-1. Merritt declares that that she is an "investigative journalist" of the abortion industry, but does not provide any explanation of her educational background, credentials, work experience, or names of outlets that have published any of her work other than CMP. Merritt Decl. ¶ 3.[39] She explains that she

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[39] Plaintiffs rely on Merritt's deposition testimony in *StemExpress, LLC, et al v. The Center For Medical Progress, et al*, Case

performed investigative work for CMP's Human Capital Campaign from 2013 through 2015, using the name Susan Tennenbaum to portray herself as CEO of BioMax. *Id.* ¶ 4-5. She admits that she used that alias to attend the 2014 and 2015 NAF Annual meetings in San Francisco and Baltimore, but did not attend any other PPFA conferences or meetings identified in the FAC. *Id.* ¶ 6. She admits that she met with Planned Parenthood representatives (along with Daleiden who was using the name Sarkis) at clinics in Colorado and Texas to discuss fetal tissue transactions between BioMax and those clinics in order to further "her research." *Id.* ¶ 7. She also admits she and Daleiden met with Dr. Nucatola in Southern California to discuss BioMax purchasing fetal tissue specimens from Planned Parenthood to further "her research." *Id.* ¶ 8. She admits that she and an unnamed colleague met with Dr. Gatter in Southern California to discuss BioMax purchasing fetal tissue specimens from Planned Parenthood to further "her research." *Id.* ¶ 9. She declares that she participated in and recorded during those meetings in order to gain evidence of illegal conduct in the abortion industry. *Id.* ¶¶ 10-11.

Both sets of defendants rely on the Declaration of Charles S. Limandri (Dkt. No. 85-2). That declaration attaches various documents to show that CMP's

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No. BC 589145, pending in Los Angeles County Superior Court, in which Merritt admits she has never published any articles. Declaration of Amy L. Bomse (Dkt. No. 94), Ex. A, Depo. Trans. of Sandra Susan Merritt at 27:20-21. A full copy of that deposition transcript is filed in support of Merritt's reply on her motion to strike. Dkt. No. 102.

Human Capital Project videos generated a tremendous amount of public and media interest and spurred several state and federal investigations into the conduct of Planned Parenthood and its affiliates. Limandri Decl. ¶¶ 2-3. Finally, both sets of defendants also request Judicial Notice of: (i) a ruling by a judge of the Superior Court of the State of California, County of Los Angeles in *StemExpress, LLC, et al v. The Center For Medical Progress, et al*, Case No. BC 589145 (Los Angeles County Superior Court) finding that defendants' secret videotaping of representatives of StemExpress LLC and subsequent publication of videos containing that footage met the first prong of California's anti-SLAPP statute (that defendants' complained-of actions were taken in furtherance of their rights to petition and speech) and (ii) an amicus brief submitted to the Ninth Circuit in support of the appeal of the granting of a preliminary injunction in related case *Center for Medical Progress, et al. v. National Abortion Federation et al.*, Case No. 16-15360.[40]

In response to Merritt's motion, plaintiffs submit declarations from Dr. Nucatola and Dr. Gatter describing their initial communications and interactions with Daleiden and BioMax, their lunch meetings with Daleiden and Merritt, their expectations that the information they shared with Daleiden and Merritt would be treated confidentially, and their

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[40] I grant the request for Judicial Notice, but only as to the existence of this opinion and pleadings, and not for purposes of noticing the truth of the facts or arguments made therein. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

expectations of privacy in the conversations at those lunch meetings. Dkts. Nos. 95, 96.

A. Legal Standard

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. Civ. Proc. Code § 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. Civ. Proc. Code § 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. Civ. Proc. Code § 425.16(b)(2)).

"[T]he anti-SLAPP statute cannot be used to strike federal causes of action." *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

B. Protected Activity

Defendants assert that they were acting in furtherance of their rights of petition or free speech as shown in part by their publication of the fruits of their surreptitious recordings and also by the significant public reaction to those videos. Plaintiffs counter that defendants' acts do not fall within the protection of California's anti-SLAPP statute because defendants waived any First Amendment rights by signing the NAF confidentiality agreements discussed above and because defendants engaged in illegal conduct in order to secure their recordings.

I need not reach this issue in order to resolve the motions to strike. Instead, I assume for the purpose of deciding these motions that defendants have made a prima facie showing that the plaintiffs' suit arises from acts in furtherance of defendants' rights of petition or free speech. However, as discussed below, plaintiffs have shown a probability of prevailing on the merits sufficient to defeat the motions to strike.

C. Probability of Success

1. Defendants' Joint Motion to Strike

As to plaintiffs' probability of success on the merits, defendants repeat the *identical* arguments they made on their motions to dismiss. Other than the declaration from Daleiden – asserting that he was acting as an investigative journalist in his work for CMP and on the Human Capital Project, which goes solely to the first prong of the anti-SLAPP statute – defendants present no evidentiary-based argument to undermine plaintiffs' probability of success on the state causes of action discussed above.

Defendants correctly argue that once a defendant meets the burden on the first prong, the burden shifts to plaintiff to substantiate a legally sufficient claim. *See, e.g., Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010). However, this does not mean that plaintiffs were required to come forward with evidence to prove up the merits of their claims when defendants' *attacks* on those claims were based solely on *pleading* deficiencies. Defendants' initial motion set out the parameters of defendants' anti-SLAPP motion to strike. Defendants argued that they were entitled to

"judgment as a matter of law" on the state law claims in the FAC. Defendants' challenges were not *evidentiary* (or even allegations that plaintiffs would be unable to produce adequate evidence in support of their claims), but targeted to the allegedly deficient pleadings. *See, e.g.*, Defs. MTS (Dkt. No. 87) at 5 ("As Defendants described in detail in their Motion to Dismiss, the Complaint fails to plausibly allege any state-law claims against Defendants. *See* Doc. 79. Defendants incorporate by reference the arguments in their Motion to Dismiss, as summarized and expanded upon below.").

Defendants, therefore, expressly limited their challenge in the MTS to the sufficiency arguments made in their MTD as "summarized and expanded." They did not expressly challenge plaintiffs' ability to prove with evidence the substance of any of plaintiffs' state law claims. In their Reply in support of their motion to strike, defendants fail to identify any instances of "expanded" arguments (as opposed to arguments repeated from their motion to dismiss) or instances where defendants expressly argued that defendants would be unable to come forth with *evidence* to support a specific claim.

The limitation of defendants' motion to strike is confirmed, in part, by the evidence they offer in support. That evidence consists, as noted above, of the declarations of Daleiden and Limandri (and the exhibits to Limandri's declaration). Daleiden's declaration discusses only Daleiden's purported work as an investigative journalist, the work of CMP, and the release of the Human Capital Project videos in July

and August 2015. Dkt. No. 87-1. Limandri's declaration basically authenticates documents regarding government investigations into the operations of Planned Parenthood following the release of the Human Capital Project videos to substantiate defendants' claim that the disclosures created significant public and government interest. Dkt. No. 85-2.[41] There is no evidentiary-based challenge to plaintiffs' probability of success.

While defendants are correct that they did not need to present evidence in support of their opening motion to strike, that does not mean they were *not required* to raise explicit arguments that plaintiffs would not be able to prove (as opposed to plead) specific claims. Defendants cannot make those evidentiary-based arguments for the first time in their reply.

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[41] In their Reply, defendants refer to "evidence" regarding the PPCG meeting and cite to a specific portion of a video. Defs. MTS Reply at 9. Daleiden's declaration provided a link to the whole video, but the specific contents of that video were *not discussed* in it or in defendants' moving papers. If I were to consider this "evidence" and the argument improperly raised for the first time in Reply, it would not result in my granting the motion to strike the breach of contract claim with respect to the PPCG meeting. It would only support an argument that *some portion* of the taping or subsequent disclosure may not have breached the PPCG contract, an issue appropriate for resolution on summary judgment or trial. The second piece of evidence discussed, again for the first time in Reply, is the video of the Dr. Nucatola lunch that defendants contend shows that Dr. Nucatola "clearly viewed" the lunch as an opportunity to provide information to defendants and not a business meeting on behalf of PPFA. Defs. MTS Reply at 13 & n2. Again, if I were to consider that evidence, it at most raises a question of fact that cannot be resolved on a motion to strike under the anti-SLAPP statute.

Confining my analysis to the arguments actually raised in defendants' motion to strike, and for the reasons discussed with respect to their motion to dismiss, the motion to strike is DENIED.

2. Merritt's Motion to Strike

Merritt's motion to strike (Dkt. No. 78) similarly argues that plaintiffs failed to "allege sufficient facts" and, like the other defendants' motion, largely copies the arguments made in her motion to dismiss. *See, e.g.*, Merritt MTS at 9 ("Since Plaintiffs are unable to allege sufficient facts"), 15 ("Since Plaintiffs cannot allege sufficient facts or meet the standing requirements"); 19 ("Plaintiffs have not alleged sufficient facts to state claims for fraud, invasion of privacy or trespass against Ms. Merritt"). Merritt, however, asserts two discrete evidentiary-based arguments that require separate analysis.

First, Merritt appears to argue that the circumstances surrounding the lunch meetings with Drs. Nucatola and Gatter preclude a finding that any of the communications during those meetings were "confidential." Merritt MTS at 3. In her declaration, Merritt does not provide *any facts* regarding the circumstances of or occurrences in those meetings except that they occurred in restaurants. Merritt Decl. ¶¶ 8, 9. In their opposition, plaintiffs submit declarations from Drs. Nucatola and Gatter, explaining further why they believed those conversations were confidential. Dkt. Nos. 95-96. In reply, Merritt does not counter that evidence. Reviewing the allegations and evidence submitted, I conclude that, at most, a question of fact has been raised regarding the reasonable

expectation of privacy in the conversations that occurred during those lunch meetings.

Second, Merritt argues that she cannot be liable for violations of California Penal Code section 632 and trespass to effect an illegal recording under Section 634 because she is exempt from liability under Section 633.5. California Penal Code section 633.5 provides that nothing in Section 632 "prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person." Merritt argues that because she attended the meetings and conference in her capacity as an investigative journalist gathering evidence of what she "reasonably believed" were plaintiffs' commissions of crimes of violence against unborn children, she is exempt as a matter of law under Section 633.5 Merritt MTS at 14-15; Merritt Decl. (Dkt. No. 78-1) ¶ 11.

Section 633.5 is an affirmative defense to liability under Section 632, and "[a]lthough the anti-SLAPP statute 'places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016) (*quoting Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal.App.4th 658 (2005)). Moreover, whether a belief is "reasonable" is typically resolved by the finder of fact.

Kuschner v. Nationwide Credit, Inc., 256 F.R.D. 684, 689 (E.D. Cal. 2009) ("Although plaintiff has submitted a declaration stating his actual belief [under § 633.5], resolution of this issue plainly cannot be done on the pleadings. It requires the types of credibility determinations and weighing of evidence quintessentially performed by a fact-finder.").

In her declaration submitted in support of her motion to strike, Merritt declares that her

> research revealed that abortion providers were doing business with fetal tissue procurement companies, and as part of those business dealings abortion providers such as Planned Parenthood would alter abortion procedures so as to obtain an intact baby from which organs could be harvested for sale to procurement companies. My research further revealed that in order to obtain intact fetuses, abortion providers would perform what is known as "partial birth abortions" or would use techniques that would result in a live fetus being removed from the mother and then killed and dissected.

Merritt Decl. ¶ 3. She also states that she "recorded these meetings because I believed that the communications would reveal evidence related to Planned Parenthood's commission of violent felonies against unborn, partially born, and born children whose bodies were dissected and sold piecemeal." *Id.* ¶ 11.

In support of their positions on Merritt's motion to strike, both plaintiffs and Merritt rely on portions of

Merritt's deposition in the *StemExpress* case pending in Los Angeles County Superior Court. Plaintiffs contend that this deposition testimony undermines Merritt's current assertion that her belief was reasonable (Merritt MTS Oppo. at 15 & n.9) and Merritt (supplying the full deposition transcript in Reply) relies on it to demonstrate that her belief had a reasonable basis. Merritt MTS Reply at 14-15. These portions of the Merritt deposition transcript *demonstrate* that that this issue cannot be decided on this motion to strike, but instead, presents a question of fact as to the reasonableness of Merritt's belief.[42]

Merritt does not raise any other evidentiary or new arguments in her motion to strike. For the reasons discussed above and with respect to her motion to dismiss, the motion to strike is DENIED.

CONCLUSION

Defendants have raised a number of arguments that may cause the claims in this case to be narrowed after discovery on summary judgment. However, plaintiffs

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[42] This is not an "uncontroverted" record, unlike in the case relied on by Merritt. *People v. Parra*, 165 Cal. App. 3d 874, 879 (Cal. Ct. App. 1985) (affirming admission of evidence because recording fell within § 633.5, where "recording was clearly for the purpose of obtaining evidence of appellant's intent to carry out her prior written threats of physical violence"). Where there is controverted evidence, the issue is for the jury. *See Moore v. Telfon Commc'ns Corp.*, 589 F.2d 959, 965 (9th Cir. 1978) (the "jury alternatively found either that Moore impliedly consented, the communication was not confidential, or Anderson recorded the conversation for the purpose of obtaining evidence reasonably believed to relate to the crime of extortion.").

have alleged sufficient facts to plausibly state their claims at this juncture. For the foregoing reasons, the motions to dismiss and motions to strike are DENIED.

IT IS SO ORDERED.

Dated: September 30, 2016

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

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 1, 2023]

No. 20-16068
D.C. No. 3:16-cv-00236-WHO
Northern District of California,
San Francisco

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

TROY NEWMAN,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16070
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants-Appellants,

and

TROY NEWMAN; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16773
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

ALBIN RHOMBERG,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

No. 20-16820
D.C. No. 3:16-cv-00236-WHO

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al.,
Plaintiffs-Appellees,

v.

SANDRA SUSAN MERRITT, AKA Susan Tennenbaum,
Defendant-Appellant,

and

CENTER FOR MEDICAL PROGRESS; et al.,
Defendants,

NATIONAL ABORTION FEDERATION,
Intervenor.

ORDER

Before: MURGUIA, Chief Judge, GOULD, Circuit Judge, and FREUDENTHAL,[*] District Judge.

The panel has unanimously voted to deny Appellants' petitions for panel rehearing (ECF Nos. 153, 154, 157). Chief Judge Murguia and Judge Gould voted to deny Appellants' petitions for rehearing en banc (ECF Nos. 153, 154, 156, 157), and Judge Freudenthal has so recommended.

The petitions for en banc rehearing have been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petitions for panel rehearing and petitions for rehearing en banc are DENIED.

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[*] The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

APPENDIX I

18 U.S.C. § 1028 - Fraud and related activity in connection with identification documents, authentication features, and information

(a) Whoever, in a circumstance described in subsection (c) of this section—

(1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document;

(2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority;

(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents;

(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States;

(5) knowingly produces, transfers, or possesses a document-making implement or authentication feature with the intent such document-making

implement or authentication feature will be used in the production of a false identification document or another document-making implement or authentication feature which will be so used;

(6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority;

(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or

(8) knowingly traffics in false or actual authentication features for use in false identification documents, document-making implements, or means of identification;

shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under subsection (a) of this section is—

(1) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 15 years, or both, if the offense is—

(A) the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be—

(i) an identification document or authentication feature issued by or under the authority of the United States; or

(ii) a birth certificate, or a driver's license or personal identification card;

(B) the production or transfer of more than five identification documents, authentication features, or false identification documents;

(C) an offense under paragraph (5) of such subsection; or

(D) an offense under paragraph (7) of such subsection that involves the transfer, possession, or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating $1,000 or more during any 1-year period;

(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 5 years, or both, if the offense is—

(A) any other production, transfer, or use of a means of identification, an identification

document, authentication feature, or a false identification document; or

(B) an offense under paragraph (3) or (7) of such subsection;

(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed—

(A) to facilitate a drug trafficking crime (as defined in section 929(a)(2));

(B) in connection with a crime of violence (as defined in section 924(c)(3)); or

(C) after a prior conviction under this section becomes final;

(4) a fine under this title or imprisonment for not more than 30 years, or both, if the offense is committed to facilitate an act of domestic terrorism (as defined under section 2331(5) of this title) or an act of international terrorism (as defined in section 2331(1) of this title);

(5) in the case of any offense under subsection (a), forfeiture to the United States of any personal property used or intended to be used to commit the offense; and

(6) a fine under this title or imprisonment for not more than one year, or both, in any other case.

(c) The circumstance referred to in subsection (a) of this section is that—

(1) the identification document, authentication feature, or false identification document is or appears to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance or the document-making implement is designed or suited for making such an identification document, authentication feature, or false identification document;

(2) the offense is an offense under subsection (a)(4) of this section; or

(3) either—

(A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce, including the transfer of a document by electronic means; or

(B) the means of identification, identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section.

(d) In this section and section 1028A—

(1) the term "authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of

identification to determine if the document is counterfeit, altered, or otherwise falsified;

(2) the term "document-making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement;

(3) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(4) the term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that—

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;

(5) the term "false authentication feature" means an authentication feature that—

(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

(C) appears to be genuine, but is not;

(6) the term "issuing authority"—

(A) means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization;

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

(8) the term "personal identification card" means an identification document issued by a State or local government solely for the purpose of identification;

(9) the term "produce" includes alter, authenticate, or assemble;

(10) the term "transfer" includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others;

(11) the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States; and

(12) the term "traffic" means—

(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

(e) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of this title.

(f) Attempt and Conspiracy.—

Any person who attempts or conspires to commit any offense under this section shall be subject to the same

penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(g) Forfeiture Procedures.—

The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(h) Forfeiture; Disposition.—

In the circumstance in which any person is convicted of a violation of subsection (a), the court shall order, in addition to the penalty prescribed, the forfeiture and destruction or other disposition of all illicit authentication features, identification documents, document-making implements, or means of identification.

(i) Rule of Construction.—

For purpose of subsection (a)(7), a single identification document or false identification document that contains 1 or more means of identification shall be construed to be 1 means of identification.

18 U.S.C. § 1961 - Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 932 (relating to straw purchasing), section 933 (relating to trafficking in firearms), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship

papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons), sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor

vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in

and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business

of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962 - Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the

activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964 - Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of

limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.