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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

THE CENTER FOR MEDICAL PROGRESS, *et al.*,

Defendants.

Case No. 3:16-CV-00236 (WHO)

Judge William H. Orrick, III

DEFENDANTS ALBIN RHOMBERG AND TROY NEWMAN'S JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing Date: July 17, 2019
Time: 9:00 a.m.
Courtroom 2, 17th floor

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Defendants Albin Rhomberg and Troy Newman hereby submit this Opposition to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

For over three years, Defendants have attempted to keep track of Plaintiffs' shifting theories of liability, causation, and damages and wondered where they would finally end up. It was clear from the outset that Plaintiffs were bringing a defamation case disguised as RICO, fraud, trespass, and breach of contract claims. *See, e.g.*, First Amended Complaint (FAC), ¶ 12 ("This action is brought to . . . recover damages . . . emanating from the video smear campaign."). But what exactly was allegedly false, and how Plaintiffs intended to prove it, was always in flux.

The latest iteration of Plaintiffs' theory is that Plaintiffs don't intend to prove falsity at all, but rather a malicious attempt to "smear" with the apparent *truth*. By the simple expedient of labeling the CMP videos as "smear videos" and part of a "smear campaign," Plaintiffs hope to completely sidestep proving anything about the content of CMP's publications, as evidenced by the fact that Plaintiffs *did not put a single video or press release* featuring a Planned Parenthood employee or discussing their practices into evidence to support their motion. The lack of any evidence of a "smear campaign" waged by Defendants is made even more glaring by the fact that Plaintiffs allege, *on the first page of their motion*, that they incurred millions of dollars in damages "[a]s a result of [Defendants' smear] campaign." Pls. Br. at 1:23-26.

Plaintiffs' goal is to win summary judgment on liability alone for at least one of their tort or contract claims and then hope that a San Francisco jury will take Defendants to the cleaners on damages because of the "malice" shown to Planned Parenthood in their publications. The Achilles' heel of Plaintiffs' plan (besides the absence of proof of a smear campaign) is that, *even for liability*, Plaintiffs must prove the fact, if not the amount, of damages – proximately caused, constitutionally allowable damages – on each of their claims. Plaintiffs have failed to meet their burden to prove the existence of recoverable damages proximately caused by the conduct that allegedly gave rise to any cause of action against any of the Defendants, and particularly not Newman and Rhomberg.

Additionally, although Plaintiffs bore the burden of proof with respect to their attempt to have Rhomberg and Newman held liable on various claims (despite their minimal involvement in

the course of events giving rise to this lawsuit), Plaintiffs have failed to prove any basis for liability for Rhomberg or Newman on any cause of action. Plaintiffs' belated attempt to assert non-existent, new causes of action against them at this late point in the litigation should also be rejected.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

Throughout their motion, and particularly in their "Facts" section, Plaintiffs repeatedly overstate, exaggerate, and outright fabricate facts, fail to provide any citations to evidence for critical factual assertions, and portray controverted facts as if they are not in dispute. Defendants here point out some of the worst offenses against the record.

A. Plaintiffs Misrepresent the Strength of their Vetting Process

Plaintiffs repeatedly misstate and exaggerate their paltry conference vetting process in an attempt to persuade this Court that everything said at the conferences was confidential and that the Defendants who attended conferences were only allowed in because of false identification documents. However, given the lack of citations to actual facts in the record, this Court must either reject Plaintiffs' presentation of the facts or at least concede that there are many disputed, material facts going to the elements of the underlying causes of action that must be decided by a jury.

For instance, Plaintiffs tell the Court that "[w]here an exhibitor is not known, PPFA staff checks whether partner organizations, such as NAF, have knowledge of them." Graziani Decl., ¶ 4 (Sterk Decl., Ex. 7). What Plaintiffs fail to explain, though, is that "known" is a shockingly low threshold for an exhibitor to meet. Daleiden's First Interrogatories to PPFA asked it to "[i]dentify all steps PPFA took to ensure that the attendance at any Planned Parenthood conference was limited to health care providers and other professionals committed to providing high quality reproductive health care, as alleged in . . . the First Amended Complaint." Supp. Millen Decl., Ex. 125 (Pls. Resp. to Daleiden's Interrogatories Propounded to PPFA) at 6. PPFA responded, "If an exhibitor did not have a preexisting relationship with PPFA, PPFA required a reference from a Planned Parenthood affiliate, a like-minded organization, and/or the Society for Family Planning for the exhibitor to be invited to the conferences. Individuals without a preexisting relationship with PPFA needed to provide references before they were permitted to attend the North American Forum." *Id.* at 6-7.

Rhomberg then asked PPFA to "[d]escribe any 'pre-existing relationship' that BioMax . . . had with any entity on the basis of which it (BioMax) was invited to attend the [Forum]." Supp. Millen Decl., Ex. 126 (PPFA's Resp. to Rhomberg's Interrogatories (Set One)) at 7. Plaintiffs responded, "BioMax was invited to the [Forum] based on the fact that BioMax was known to Dr. Deborah Nucatola," who had met them at the 2014 NAF meeting. *Id.* Plaintiffs also admitted that they had not required any references for BioMax because they were "known to Dr. Deborah Nucatola." *Id.* at 8. However, Dr. Nucatola admitted to the paucity of her actual knowledge of BioMax; Nucatola stated, "They were at the NAF conference, and they exhibited at PPFA conferences. . . . I asked them if they would be interested in exhibiting. . . . I believe I spoke with them at their table and learned a little bit about them before I asked them to exhibit, yes. I may have looked up for a website or Googled them. . . . I can't recall [if it was before or after inviting them to exhibit]." Supp. Millen Decl., Ex. 127 (Nucatola Depo.) at 175:9-176:23. Her invitation was premised on "the fact that they were exhibiting at the NAF conference." *Id.* In sum, Plaintiffs' claim that PPFA staff check on exhibitors who are "not known" is true only if they mean "not known, even in a minimal way, to any individual at PPFA." A single employee, such as Dr. Nucatola, "knowing" the exhibitor is enough to get that exhibitor admitted without further scrutiny.

Furthermore, Plaintiffs stated that "PPFA staff also checks all attendee and exhibitor names against an extensive list of known anti-abortion groups and individuals." Pls. Br. at 4:7-8. The sole support for this statement is the deposition testimony of one PPFA staffer, Brandon Minow. Sterk Decl., Ex. 78 (Minow Depo.) at 295-297, 300-301, 336-338. This assertion is notably absent from the declaration of Vikki Graziani, whose declaration states she assisted in organizing and planning all the relevant conferences and is "familiar with the steps PPFA took in 2014 and in early 2015 to vet conference attendees and exhibitors." Sterk Decl., Ex. 7 (Graziani Decl.), ¶ 2. While she mentions checking names "against staff lists for PPFA-only conferences or against membership lists for conferences held in conjunction with other groups," she never states that names were checked against lists of known anti-abortion activists—only that their names would be checked against their IDs at registration. *Id.*, ¶¶ 3-4. Similarly, this security measure was not listed by PPFA in response to the interrogatory asking PPFA to list "all steps PPFA took to ensure that the

attendance at any Planned Parenthood conference was limited to health care providers and other professionals committed to providing high quality reproductive health care." Supp. Millen Decl., Ex. 125 (Daleiden's First Interrogs.) at 6-7. Nor is this step mentioned in Mr. Minow's Declaration in support of Plaintiffs' Motion. Sterk Decl., Ex. 6 (Minow Decl.). Plaintiffs' failure to put the list into evidence, along with its absence from PPFA's response to the all-encompassing "list all steps" interrogatory, estops PPFA from claiming that such a list was used.

Additionally, Plaintiffs' description of the actual process by which certain Defendants "infiltrated" the Forum is as follows: Graziani received an email from an unknown person at a company she had never heard of; this stranger stated that Dr. Nucatola had invited them to attend; and, since that sounded like something Dr. Nucatola would do, Graziani gave the unknown company information it needed to register for and attend the conference. Graziani Decl., ¶¶ 7-8 (Sterk Decl., Ex. 7). Graziani explained that *if* BioMax had not dropped Dr. Nucatola's name, she "would have taken further steps to evaluate BioMax before [she] provided information to permit BioMax to register as an exhibitor . . . ." *Id.* According to Graziani's testimony, simply mentioning Nucatola's name was good enough for her to give away the—supposedly—"secret" information about the conference to a company that she knew nothing about.

In short, contrary to Plaintiffs' representations in their brief, the evidence shows that there are many disputed facts regarding the strength or feebleness of Plaintiffs' efforts to keep their conferences private and confidential.

B. Plaintiffs Attempt to Conjure Evidence of Rhomberg and Newman's Involvement in CMP's Activities Out of Thin Air

Plaintiffs' case against Newman and Rhomberg for conspiracy, far from being undisputed, is practically non-existent. Plaintiffs misstate witness testimony and ignore ample evidence contradicting their unsupported assertions about Rhomberg's and Newman's involvement in their brief.

1. "Evidence" of Rhomberg's Involvement with CMP

Plaintiffs claim that "Rhomberg assisted Daleiden in fundraising and strategized with consultants to ensure the secretly recorded videos had 'maximum impact.'" Pls. Br. at 6:12-13.

However, the cited pages actually paint a far different picture:

> Q. You helped with fundraising for CMP?
> A. Minimally.
> Q. What did you do to help with fundraising? . . .
> THE WITNESS: I think I only suggested a couple of names of people that might be interested. . . .
> Q. You didn't provide them [the suggested donors] any information at all about CMP?
> A. I don't remember that I did anything more than suggest to David Daleiden that they might be persons who might be interested.

Sterk Decl., Ex. 14 (Rhomberg Depo.) at 128:24-129:23. That is the entirety of the evidence Plaintiffs adduce to "prove" that Rhomberg fundraised for CMP and strategized with consultants.

Plaintiffs next claim that Rhomberg "advised on CMP's undercover activities." Pls. Br. at 6:14. Most of the citations provided no information whatsoever about Rhomberg's involvement with CMP. Only one citation refers to an e-mail in which Rhomberg provided some general tips about gathering video footage of the surroundings to provide adequate context for the videos that would eventually be published. Sterk Decl., Ex. 14 (Rhomberg Depo.) at 226:7 – 227:11.

Finally, Plaintiffs devote an entire section of their Statement of Facts to describing various activities of the "ringmaster" David Daleiden, and conclude with the statement that "Defendants Rhomberg and Newman were fully cognizant of these lies." Pls. Br. at 6:13–7:23. Their only citation for this assertion is four pages of Rhomberg's deposition in which, far from claiming omniscience over all CMP's activities, Rhomberg testified only that Daleiden's "undercover work" was briefly discussed "[i]n some vague sense" at infrequent board meetings. Supp. Millen Decl., Ex. 128 (Rhomberg Depo.) at 341:11-345:11.[1] Plaintiffs' assertion that Rhomberg was "fully cognizant of these lies" is directly refuted by Rhomberg's deposition testimony that he had no knowledge of, for example, the NAF confidentiality agreement or its terms, *id.* at 225:21-229:14, or of the production of identification documents, *id*. at 175:5-12.

2. "Evidence" of Newman's involvement with CMP

Virtually all of the "evidence" offered against Newman amounts to an (unstated) request to

[1] Curiously, Plaintiffs failed to include the transcript pages. Defendants include them in this filing.

draw negative inferences based on his assertion of the privilege against self-incrimination. Pls. Br. at 6:8-11. Under applicable precedent, however, in order to receive the inference from the Court, Plaintiffs were obligated to provide two things: 1) independent evidence with respect to each particular factual issue to which they are requesting the inference, and 2) an explanation of why Plaintiffs could not obtain the requested information from another source. Plaintiffs failed to do either of these things and, as such, drawing an adverse inference based upon Newman's invocation of the privilege is unwarranted, and would violate his constitutional rights.

In the leading Ninth Circuit case on this issue — *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000) — the court held that the district court "properly prevented an adverse inference regarding Elroy's exercise of his constitutionally guaranteed right against self-incrimination [in response to deposition questioning] from reaching the jury." *Id.* at 1267. The Ninth Circuit held that an adverse inference may only be drawn when the party requesting the inference produces independent corroborating evidence of the fact at issue, and also emphasized that

> "[b]ecause the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." . . . In that light, no negative inference can be drawn . . . unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information.

Id. at 1264-65 (citation omitted); *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 912 (9th Cir. 2008) (same).[2]

The Ninth Circuit explained that "[t]he Fifth Amendment's protections against self-incrimination would be undermined if, absent an affirmative duty of candor or other corroborating evidence, a party was penalized for exercising a constitutionally guaranteed right in the way that Elroy did." *Glanzer*, 232 F.3d at 1267. The court held that drawing a negative inference in that case would be improper because the party requesting the inference failed to offer independent proof

[2] The decisions cited by Plaintiffs similarly recognized that a negative inference may only be drawn when there is independent evidence of the fact(s) at issue. *SEC v. Fujinaga*, 698 F. App'x 865, 867 (9th Cir. 2017) (unpublished); *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998).

concerning the specific fact to which the question related. *Id.* at 1266. The court emphasized that, even when a party requesting the inference actually provides "evidence to the specific fact being questioned," any inference drawn must be limited to the specific question at issue; drawing any broader inference would be impermissibly "constructing an inference on another inference."[3]

Plaintiffs have failed to meet their burden to establish a basis for drawing an adverse inference. Plaintiffs did not even ***attempt*** to prove, through independent evidence, the specific facts relating to the deposition questions at issue.[4] Under the cases discussed previously, however, the invocation of the privilege is not "evidence" establishing the underlying factual assertion. Plaintiffs needed to provide specific evidence establishing, for example, that Newman actually provided advice about the procurement of novelty ID's, but they failed to do so.

Additionally, Plaintiffs presented no evidence demonstrating that they were unable to obtain information through other means concerning ***any*** factual issue concerning which Newman declined to answer a question. The deposition questions at issue relate to Newman's involvement (or lack thereof) in various aspects of CMP and BioMax's operations, and his interactions (or lack thereof) with Daleiden, Rhomberg, and others associated with CMP or BioMax. Plaintiffs had ample opportunity to obtain written discovery and deposition testimony from Defendants and numerous non-parties, and Plaintiffs ultimately received many thousands of pages of documents and conducted numerous lengthy depositions of Defendants and non-parties. Plaintiffs could have asked (and, in many cases, ***did*** ask) others what they knew about Newman's activities.[5] Newman's

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[3] *Id.* at 1266, n.2; *Perez*, 2014 U.S. Dist. LEXIS 84600, at *15-19 (declining to allow an adverse inference where the party requesting it failed to provide independent evidence of the fact at issue); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 907-08 (N.D. Cal. 2009) ("[A]ny adverse inferences are limited to what the independent evidence actually corroborates.").

[4] *See, e.g.*, Sterk Decl., Ex. 13 (Newman Depo.) at 73 ("Did Mr. Daleiden ask you for help in raising funds in order to pay for the project to secretly videotape Planned Parenthood doctors?"); *id.* at 120 ("Mr. Daleiden repeatedly reached out to you for advice on the project, correct?"); *id.* at 176 ("Did you advise Mr. Daleiden on the use of the fake name Sarkis?").

[5] Contrast this with the cases cited by the Plaintiffs, where the individuals invoking the Fifth Amendment were the ***only*** individuals who could provide the requested information, plus the SEC also provided independent evidence of the facts about which it was seeking an inference. ***Fujinaga***, 698 F.App'x at 867 ("Fujinaga was the only person in possession of the information. . . .

invocation of the privilege did not prejudice Plaintiffs in any way and does not excuse Plaintiffs from having to actually prove their case. Plaintiffs have thus failed to prove that an adverse inference would be warranted or constitutionally permissible in this case.

Finally, for both Rhomberg and Newman, the declaration of David Daleiden filed with his Motion for Summary Judgment contradicts each and every contention Plaintiffs make about these Defendants' allegedly deep and knowledgeable involvement with CMP. Daleiden Decl. (Dkt. 609-1), ¶¶ 121-126.

C. Plaintiffs Claim—Without Evidence—To Have Been "Smeared"

Plaintiffs repeatedly characterize Defendants' videos—both Daleiden's while at Live Action as well as the videos at issue in this case—as "smears." Pls. Br. at 3:13, 5:5-6, 5:20-22, 6:2-5, 13:18-19. They also claim that the video of Dr. Nucatola was taken out of context. *Id.* at 13:20-25. Plaintiffs, however, offered no evidence whatsoever in support of these factual allegations, so they must be disregarded.

D. Plaintiffs' Claims of Harms and Damages Are Unsupported

In their unsourced Introduction, Plaintiffs provide a catalog of harms allegedly flowing from the release of the CMP videos, including that doctors and staff were threatened and targeted at their homes and "incidents of protests, vandalism, harassing calls, and other security incidents surged." They further claim that "Plaintiffs incurred millions of dollars in additional expenses to protect their staff and patients." Pls. Br. at 1:23-26. Incredibly, Plaintiffs make no attempt to cite evidence regarding most of these alleged consequences of the CMP video releases. Apparently they were included in the Introduction merely for atmosphere, rather than as factual assertions.

Plaintiffs' actual effort to document threats and harms fares little better. Plaintiffs state, "Within hours of the release, Dr. Nucatola began receiving threats on her voicemail and on Twitter

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Additionally, there was independent evidence of June's receipt of illicit funds."); *Colello*, 139 F.3d at 678 (there was independent proof that Colello received the funds at issue, and he was the only source of the requested information).

and Facebook," and drop a footnote with a link to a screenshot from someone's Twitter feed, which, while unpleasant, contains neither the imminence nor the intention necessary for a threat. *Id.* at 13:23-24 and n. 10. More importantly, there is no evidence as to whether this tweet was ever sent to or received by Dr. Nucatola, whether and when she or anyone at PPFA even became aware of it, or any indication of its provenance. *See* Sterk Decl., ¶ 59 ("Attached hereto as Exhibit 57 to this declaration is a true and correct copy of Twitter screenshot (printed on May 22, 2019)."") Yet this tweet, dated August 3, 2015, is the sole "evidence" Plaintiffs cite to support their contention that Nucatola received threats, and that she received them shortly after the first videos were released. The same is true for the screenshot (printed May 22, 2019) appearing as Exhibit 58 to the Declaration of Diana Sterk: it is dropped in a footnote with no indication of where it came from, whether Drs. Nucatola or Ginde ever saw it, much less whether it was the impetus for their respective employers to spend money on security.[6] Finally Plaintiffs' claim that PPFA hired a 24-hour security guard for Nucatola has no supporting evidence or detail.

As to establishing harms and damage to PPGC, Plaintiffs rely primarily on the deposition testimony of Melissa Farrell. As discussed in more detail (*infra*, at p. 13), Ms. Farrell did not know who paid for her security, how it was decided she would have security, or whether it was paid for at all. Farrell Depo. at 213-215, 218-219, 243 (Sterk Decl., Ex. 52). She also had no recollection of having received any threats that would have necessitated personal security for her. *Id.* at 214:3-5; Supp. Millen Decl., Ex. 130 (Farrell Depo.) at 243:15–244:10. The cited testimony of PPGC's corporate designee indicates simply that "post videos" and "certainly . . . post Colorado," PPGC did a security assessment and decided to make upgrades because, *e.g.*, "an individual could simply just leap over the window and be in a secured area." (Palmer Depo.) at 289:6-20 (Sterk Decl., Ex. 53). These voluntary security upgrades have nothing to do with securing the facility against infiltration by invited guests, which is what this case is about.

For their finale, Plaintiffs claim:

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[6] PPRM is not seeking damages in this case.

> Defendants understood precisely the impact their videos would have as they spread on the internet, noting that it was important to keep the videos short to ensure that the maximum number of viewers became "angry/upset" and "stigmatiz[ed] the [abortion] industry." [citation omitted]. On November 28, one of those potentially angry/upset people, Robert Dear, drove to the PPRM clinic run by Dr. Ginde, and shot eight people, killing three, including a police officer and Planned Parenthood volunteers.

Pls. Br. at 14:17-23. Plaintiffs do not cite any evidentiary support for the second sentence. As such, this Court should not consider it.[7]

RESPONSE TO PLAINTIFFS' LEGAL ARGUMENTS

I. Plaintiffs Are Not Entitled to Summary Judgment Against Rhomberg or Newman On Any Claim Because Plaintiffs Cannot Show Any Proximately Caused Damages.

The very first page of Plaintiffs' motion for summary judgment demonstrates why it should be denied in its entirety. Plaintiffs admit that *none* of the pre-publication conduct that Plaintiffs complain of caused any Plaintiff any damages. To the contrary, Plaintiffs summarize the numerous causal steps that would be required to connect the alleged misrepresentations made to Plaintiffs with the expenses that Plaintiffs voluntarily undertook (many months or even years later) *in response to CMP's publications* as follows:

1. Misrepresentations: Daleiden created CMP and then BioMax, registered BioMax and its representatives using assumed names for various conferences, agreed to various contracts he did not intend to comply with, and procured/created fake driver's licenses, which he and others presented to NAF and certain Plaintiffs. Pls. Br. at 1:4-9.

2. Infiltration: "Relying on these misrepresentations and the phony documents," certain Plaintiffs or individuals employed by them met with Daleiden and other BioMax representatives or

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[7] Additionally, in its Minute Order following the hearing on Rhomberg's earlier Motion for Summary Judgment, this Court admonished Plaintiffs that in any future opposition, they "must address the causal chain for each category of damages for each plaintiff, *instead of lumping categories of damages and plaintiffs together*." Dkt. 432 at 1 (emphasis added). In Plaintiffs' Motion for Partial Summary Judgment, however, they do not even raise, much less put on evidence of, any damages for any Plaintiff other than PPFA, PPGC/PPCFC, and PPRM (which is not seeking damages). The remaining eight Plaintiffs cannot seriously expect to be granted summary judgment on the RICO claim (or any other claim) without presenting any evidence of damages.

admitted them into various conferences and meetings. *Id.* at 1:10-16.

3. Recording: "Through infiltrating the conferences and health centers," certain Defendants recorded individuals associated with some of the Plaintiffs. *Id.* at 1:17-20.

4. "Smear" Campaign: Defendants edited the recordings and then published videos on the Internet asserting (among other things) that Planned Parenthood made money from the sale of aborted fetal tissue and organs. *Id.* at 1:20-22.

5. Public Reaction: As a result of the "smear campaign," the subjects of the video were allegedly "harassed, threatened, and targeted" at their homes by non-parties, while incidents of lawful and unlawful anti-abortion activity (protests, vandalism, calls, etc.) "surged." *Id.* at 1:23-25.

6. Alleged "Damages": Plaintiffs decided to spend millions of dollars on security upgrades and other security-related expenses. *Id.* at 1:23-26.[8]

In sum, by Plaintiffs' own admission, *none* of the broad categories of expenses that they assert as "damages" were caused by the alleged misrepresentations to Plaintiffs, by certain Defendants' attendance at various conferences or meetings, or by the act of secretly recording videos. Rather, as Plaintiffs admit, it was the "smear campaign," and third parties' reaction to it, that prompted Plaintiffs to expend money. *See id.* at 1:23-26, 21:6-12. In fact, the very purpose of this lawsuit was "to recover damages for the ongoing harm to Planned Parenthood *emanating from the video smear campaign*." FAC, ¶ 12 (emphasis added). As such, all of Plaintiffs' claims fail due to (among other things) a lack of any damages that were caused by the "misrepresentations" (related to fake driver's licenses, BioMax's promotional materials, contracts signed in order to attend conferences, etc.) or the act of recording.

Additionally, a "smear campaign" is, by definition, "a planned attempt to harm the reputation of a person or company *by telling lies* about them." Cambridge Business English

[8] *See also id.* at 21:6-12 (recapping the lengthy chain of events by stating that "[a]fter Defendants fraudulently misrepresented themselves to Plaintiffs, they released selectively edited videos," which triggered public reaction that included third party threats to some of Plaintiffs' employees, which prompted Plaintiffs to spend money to improve security, including for security at future conferences).

Dictionary, https://dictionary.cambridge.org/us/dictionary/english/smear-campaign. Given that Plaintiffs do not contest the truthfulness of the video campaign, there is no basis to characterize the videos as being a "smear." More importantly, given Plaintiffs' admission that their "damages" all "emanat[ed] from" Defendants' public statements, their case is founded upon alleged harms to their reputation. *See* Pls. Br. at 1:23-26, 21:6-12; FAC, ¶ 12. Plaintiffs cannot recover any publication damages, however, so they have no cognizable damages with respect to any cause of action. *See, e.g.*, Order, Dkt. 124, at 16, 33, 36 (noting that Plaintiffs are not entitled to reputational or publication damages); Order, Dkt. 442, at 14-16, 23 ("Plaintiffs do not seek reputational or publication damages.").

Even if Plaintiffs were to execute a volte-face and admit that they are seeking publication damages based on the alleged "smear" videos, and even if this were a legally viable and constitutionally permissible theory of recovery, they would face two more obstacles in their motion: the complete lack of evidence of a smear, and the complete lack of evidence of damages.

Although Plaintiffs assert in their Introduction and in their headings that they are the victims of a "smear" campaign, based both on videos and on accompanying press releases, Pls. Br. at 1:20-22, they have not put a single example of a "smear" video or statement into evidence in their motion. Much less, therefore, have they pointed to any specific language or accusations in the videos or press releases that they contend are untrue, accompanied by undisputed evidence of their falsity. *See, e.g., id.* at 13:20-23. Without any such evidence or any specificity, Plaintiffs' chain of causation suffers another blow, as they are seeking to recover publication damages from unspecified publications for which they do not adduce evidence of falsity. As this Court has already recognized, the First Amendment demands that recovery for damages stemming from publication be based on a showing of falsity and malice. Order on Motions to Dismiss and Strike, Dkt. 124 at 34-36. Plaintiffs did not even attempt to show falsity in their motion or supporting evidence, and in fact have waived their right to do so.

Moreover, there is no evidence with respect to the end of Plaintiffs' causation chain. Plaintiffs' motion includes no proof that *any* of the Plaintiffs seeking damages incurred a dime, much less millions of dollars, in "additional expenses to protect their staff and patients." The only

invoices included in Plaintiffs' motion are from PPRM, which is only seeking injunctive relief. Millen Decl. [Dkt. 595-1], Ex. 101 (Damages Chart), at 10, n. 2 (waiving PPRM's damages claim); Pls. Opposition to Rhomberg's Mot. for Summary Judgment [Dkt. 389] at 6, n. 2.

While Plaintiffs assert that "PPFA hired a 24-hour armed guard" for Deborah Nucatola (Pls. Br. at 13:25), they provide no admissible evidence to support that assertion, whether in the form of authenticated invoices or testimony.[9]

PPGC relies on excerpts from the deposition testimony of Melissa Farrell to support its claim that it expended money, *id.* at 14:9-10, but Ms. Farrell's cited testimony makes clear that she did not know who paid for her security, how it was decided she would have security, or whether it was paid for at all. Sterk Decl., Ex. 52 (Farrell Depo.) at 213-215, 218-219, 243. She also had no recollection of having received any threats that would have necessitated personal security for her.[10] *Id.* at 214:3-5 ("[W]hat threats actually did you review yourself that you recall?" A. "I don't remember."); Supp. Millen Decl., Ex. 130 (Farrell Depo.) at 243:15–244:10 ("[A]s the calls were coming in, I was just forwarding those, and didn't listen to them. . . [I]t was someone else's responsibility to . . . listen to the voicemails and correspond with the people in the call center to ascertain [if] a threat had been made that warranted me leaving.").

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[9] In the section of the brief on the Fourth Claim (for breach of the PPFA exhibitor agreements), PPFA cites the testimony of Rule 30(b)(6) corporate designee Brandon Minow to support its claim that the organization suffered "significant harm." Pls. Br. at 26:15-16. PPFA's reliance on Minow's testimony is ironic, given that PPFA's counsel repeatedly objected during that deposition that Mr. Minow was not designated or prepared to discuss PPFA's damages. Supp. Millen Decl., Ex. 131 (Minow Depo.) at 304:8–307:21 ("He's not designated for anything related to our damages . . . . [H]e cannot speak to . . . whether or not they're included on our damages calculation. . . . He can say that vetting has been increased, but not to what numbers are on the damages chart."); 354:2–13 ("He can speak to what was done, but he can't speak to the numbers we're claiming damages for.") *See also* Dkt. 561.

[10] Plaintiffs append to the Declaration of Diana Sterk an unauthenticated e-mail concerning an alleged threat (classed by PPGC's head of security as "a howler") received in a voicemail. Farrell is not copied on the e-mail, and she had no recollection of receiving any such voicemail. Supp. Millen Decl., Ex. 130 (Farrell Depo.) at 247:8-23. Moreover, the e-mail indicates that the voicemail was retained by PPGC in a recording. Defendants object to the admission of the e-mail as (1) lacking foundation and hearsay that "Farrell's relocation occurred after a voicemail threat . . was received" (Pls. Br. at 14, n. 12), and (2) not the best evidence of the content of the alleged communication (FRE 1002).

PPPSGV (which did not bring the Eighth Claim and therefore cannot seek fraud damages at all) provides no evidence, or even any unsupported argument, concerning any safety threats or any damages. Thus, even if PPPSGV were allowed to join in the Eighth Claim at this late date, and even if it had a viable legal theory for seeking damages, it has completely failed to establish that it suffered any damages.

In sum, Plaintiffs have offered no evidence that any Plaintiff incurred any damages as a result of the pre-publication conduct of Defendants that is the subject of Plaintiffs' causes of action. Plaintiffs cannot bypass their burden to prove that Defendants' complained-of conduct actually caused Plaintiffs recoverable damages—which is an element of each cause of action—by simply stating that they intend to prove the *amount* of damages at trial. Their motion for summary judgment should be denied with respect to each claim for relief that was raised in the motion.

II. Plaintiffs Have Failed to Establish a Basis for Alter Ego, Agency, or Conspiracy Liability Against Rhomberg or Newman on any Cause of Action.

In one footnote, Plaintiffs present the *entirety* of their argument that Rhomberg and Newman should be held liable for various causes of action on the basis of alter ego, agency, or conspiracy liability. Pls. Br. at 16, n.15. Based on their argument, Plaintiffs have failed to establish any basis for holding Rhomberg or Newman liable on any cause of action and, as such, their motion should be denied with respect to both Rhomberg and Newman.

A. Alter ego

There is "a general presumption in favor of respecting the corporate entity" that may only be disregarded in "exceptional" circumstances, *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995). Disregarding the corporate form through the imposition of alter ego liability "is an extreme remedy, sparingly used." *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 539 (2000); *Pac. Mar. Freight, Inc. v. Foster*, 2010 U.S. Dist. LEXIS 87205, at *16 (S.D. Cal. 2010). Plaintiffs have failed to meet their "burden to overcome the presumption of the separate existence of the corporate entity," *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212 (1992), as they have failed to prove, with respect to either Rhomberg or Newman, that (1) "there is unity of interest and ownership such that the separate personalities of the corporation and the

individual no longer exist" (*e.g.*, commingling of personal and corporate funds), and (2) "if the acts are treated as those of the corporation alone, an inequitable result will follow." *See NAF v. CMP*, No. 15-cv-03522-WHO, 2018 U.S. Dist. LEXIS 190887, at *41 & n.19 (N.D. Cal. 2018) (citations omitted); *Sonora Diamond Corp.*, 83 Cal. App. 4th at 538.

Plaintiffs completely ignore the first element of their burden of proof, which requires that "[b]efore a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of such person and corporation has ceased. . . ." *Associated Vendors Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837 (1962) (citation omitted). Plaintiffs' failure to meet their burden of proof with respect to the first element is illustrated by their reliance upon *Riddle v. Leuschner*, 51 Cal. 2d 574 (1959). In *Riddle*, two individuals were held liable as alter egos of two corporations in light of an extensive record of financial transactions with the corporations for their own individual benefit. *Id.* at 577-81. By contrast, Plaintiffs have offered no evidence that would establish that either Rhomberg or Newman exclusively controlled and directed BioMax's or CMP's affairs, comingled corporate funds with their own, etc. to the point that any separateness between that individual and BioMax or CMP ceased to exist.

Plaintiff's failure to cite such evidence is particularly surprising given this court's rejection of the alter ego theory in the related *NAF v. CMP* case. In *NAF*, the Court concluded that, *even accepting all of NAF's factual allegations as true*, there was no basis for alter ego liability on any claim against Newman since he was not a corporate director or officer of BioMax, and neither he nor CMP signed any of the contracts at issue. 2018 U.S. Dist. LEXIS 190887, at *41-43. Similarly, here, neither Rhomberg nor Newman were corporate directors or officers of BioMax, and neither individual entered into a contract with any Plaintiff or made any representations to any Plaintiff. The complete absence of "unity of interest and ownership" between Rhomberg/Newman and BioMax is further indicated by Plaintiffs' statement that "Daleiden was the ringmaster" concerning BioMax's operations. Pls. Br. at 6:17. If Daleiden was indeed running the show, there is no legal basis to hold Rhomberg or Newman liable under the alter ego doctrine. As in *NAF*, alter ego

principles are simply inapposite here.

Alter ego liability was the only cited basis for holding Rhomberg and Newman liable for breach of contract (although they were not named in those causes of action). Pls. Br. at 25, n.24. Even if such a claim had timely been brought against them, however, it would have failed; courts have rejected breach of contract claims brought against directors or agents of a corporate entity based upon a contract that the plaintiff entered into with the corporation itself, even when the individual actually signed the contract or made false representations to the plaintiff.[11]

B. Agency

Plaintiffs have failed to prove that Rhomberg or Newman are personally liable on any cause of action through an agency theory for two reasons: 1) Plaintiffs have not proven that Rhomberg and Newman, as individuals, were principals in any agency relationship with any person or entity; and 2) Plaintiffs have not proven that either Rhomberg or Newman specifically directed any agent(s) to engage in tortious conduct, specifically authorized any agent(s) to engage in tortious conduct, or personally participated in tortious conduct. *See, e.g., Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 508-09 (1986).

1. Plaintiffs failed to prove that Rhomberg or Newman were principals in any agency relationship.

Although Plaintiffs assert that Rhomberg and Newman should be held personally liable under an agency theory for various actions taken by other individuals or entities, Plaintiffs ignore the fact that it is ***their burden*** to prove that any agency relationship(s) in which Rhomberg and Newman were principals actually existed. "Agency" is "the fiduciary relationship resulting from the manifestation of consent by one person to another that the other will act on his or her behalf and

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[11] *See, e.g., United Computer Sys. v. AT&T Info. Sys.*, 298 F.3d 756, 761 (9th Cir. 2002); *Chan v. Empire Fire & Marine Ins. Co.*, 2011 U.S. Dist. LEXIS 83327, at *12-13 (N.D. Cal. 2011); *Banks.com, Inc. v. Keery*, 2010 U.S. Dist. LEXIS 17850, at *14-15 (N.D. Cal. 2010); *Pedraza v. Alameda Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 131461, at *13 (N.D. Cal. 2009); *Frances T.*, 42 Cal. 3d at 507-08, 512 & n.20; *U.S. Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 594-95 (1970); *Fleet v. Bank of Am. N.A.*, 229 Cal. App. 4th 1403, 1410, n.8 (2014).

subject to his or her control and consent by the other so to act." 3 Am. Jur. 2d Agency § 1. Further:

> To establish an actual agency relationship, *the plaintiff must show*: (1) acknowledgment by the principal that the agent will act for him or her, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent. *The party claiming agency must prove* that the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task. . . . [T]he essential feature of agency is the right of control, which right includes the right to dictate the means and details of the agent's performance.

Id. § 2 (emphasis added); *id.* § 14 ("[T]here must be a meeting of the minds in establishing the agency, and the consent of both the principal and the agent is necessary to create an agency relationship.").

Plaintiffs' agency-related allegations are vague, jumbled, evidence-free, and inconsistent, so each conceivable principal-agency relationship will be addressed separately for the sake of clarity:

(a) Rhomberg and Newman, as individual CMP board members, were not principals in an agency relationship with CMP.

Plaintiffs assert that Rhomberg and Newman are liable on certain claims "because they were officers and board members of CMP and in their roles were aware of, advised on and approved of CMP's scheme and undercover tactics." Pls. Br. at 16, n.15. In other words, Plaintiffs posit that Rhomberg and Newman were principals, with CMP acting as their agent, and, in turn, CMP was a principal over BioMax, Daleiden, and other individuals involved with BioMax. However, "[d]irectors are agents of a corporation," 18B Am. Jur. 2d Corporations § 1264, not the other way around. *See also Altobelli v. Hartmann*, 499 Mich. 284, 296-97 (2016) (same); *Settlers' Hous. Serv. v. Bank of Schaumburg*, 520 B.R. 253, 261 (N.D. Ill. Bankr. 2014) (same).

Plaintiffs' evidence indicates that Daleiden, and not Rhomberg or Newman, directed and managed CMP's day-to-day affairs. After researching the idea for a few years, Daleiden created, founded, and incorporated CMP in order to pursue journalistic projects. Sterk Decl., Ex. 8 (Daleiden Depo. I) at 180:5-181:4. Rhomberg and Newman's CMP-related duties were minimal, estimated in advance to take a handful of hours of time per week. Sterk Decl., Ex. 15 (CMP Non-Profit Application IRS form) at NAF0001804-05. Rhomberg was to be "responsible for reviewing the finances of the organization, advising the development of educational projects, and

participating in fundraising," *id.*, but in actuality did not perform the first function, and had minimal involvement with the other two functions. Supp. Millen Decl., Ex. 128 (Rhomberg Depo.) at 129:4-23; 340-46. Newman was to be "responsible for keeping the organization's Board Meeting minutes, advising the development of educational projects, and assisting in research for educational projects," Pls. Ex. 15, at NAF0001805, but in actuality had only infrequent conversations with Daleiden over the course of the project. Daleiden Decl. [Dkt. 609-1], ¶¶ 123-24.

Conversely, Daleiden anticipated spending 50 hours per week on CMP business, as he was responsible for "directing the research, planning, and production of The Center for Medical Progress' educational projects" as well as "overseeing employees or contractors working on educational projects," Sterk Decl., Ex. 15 (CMP Non-Profit Application IRS form) at NAF0001805, and in fact, was the only person responsible for recruiting, training, and all the day-to-day operations of CMP. Daleiden Decl., ¶ 121; Pls. Br. at 7:13 (stating that "Daleiden coached *his* 'actors'") (emphasis added). Daleiden described one document as "my road map for my release called the Human Capital Project." Sterk Decl., Ex. 8 (Daleiden Depo. I) at 220:2-13; Sterk Decl., Ex. 79 (each page of the project proposal has a header stating "**© 2013 David Daleiden**").

Plaintiffs have not adduced *any* evidence, much less proven, that CMP was subject to Rhomberg's *personal* control, and that Rhomberg had "both the right to assign [CMP's] task[s] and the right to control the means and details by which [CMP] will accomplish the task[s]." 3 Am. Jur. 2d Agency §§ 1, 2. Nor have Plaintiffs made such a showing with respect to Newman. *See supra* § B.2. To the contrary, the evidence indicates that Daleiden ran CMP's day-to-day operations, giving Rhomberg and Newman occasional, brief, general updates. Sterk Decl., Ex. 14 (Rhomberg Depo.) at 340-44. In sum, Plaintiffs have failed to demonstrate that CMP was an agent of either Rhomberg or Newman, and have also failed to prove that Rhomberg and Newman were "undisclosed principals" of CMP for purposes of any contract (CMP did not enter any contracts).

(b) Rhomberg and Newman were not principals in an agency relationship with BioMax.

Plaintiffs asserted that Daleiden "was the ringmaster" concerning all aspects of BioMax's operations. Pls. Br. at 6:17. It is unsurprising that Rhomberg and Newman are barely mentioned in Plaintiffs' seven-page description of numerous actions taken to set up BioMax, create BioMax promotional materials, procure novelty IDs, and attend and record conversations at conferences and meetings given their complete non-involvement with BioMax. *Id.* at 6:15-13:17. That Rhomberg and Newman received occasional, brief, general updates about some of BioMax's activities, Sterk. Decl., Ex. 14 (Rhomberg Depo.) at 340-44, does not make either one of them principals in an agency relationship with BioMax. Neither Rhomberg nor Newman personally controlled BioMax.

(c) Rhomberg and Newman were not principals in an agency relationship with Daleiden or other individuals associated with BioMax (Merritt, Lopez, "Wagner," and "Allen").

"[I]n the absence of special circumstances it is *the corporation, not its owner or officer*, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents. . . . A corporate employee typically acts on behalf of the corporation, not its owner or officer." *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (emphasis added); *cf. Holley v. Crank*, 386 F.3d 1248, 1252 (9th Cir. 2004) ("[A] corporate employee acts on behalf of the corporation, not its owner or officer; as a result, liability in the typical employment relationship runs between the corporation and the salesperson and between the corporation and the supervisor, but not between the salesperson and the supervisor.") (citing *Meyer*, 537 U.S. at 286). Plaintiffs have not shown, or even attempted to show, that this is a "special circumstance" in which Rhomberg and/or Newman were principals in an agency relationship with any (or all) of the individuals who had some role in the undercover investigation.

Plaintiffs have offered no evidence to prove that Rhomberg and/or Newman were principals in an agency relationship with Daleiden; in fact, Plaintiffs' assertion that Daleiden "was the ringmaster" who personally conducted and/or directed all facets of the undercover investigation conclusively defeats that suggestion. Pls. Br. at 6:15-13:17; *see also* FAC, ¶¶ 156(e), 173(b), 220 (asserting that Daleiden acted as an agent of *CMP and/or BioMax*). Plaintiffs have clearly failed to

present evidence suggesting, much less proving, that Daleiden consented to act on Rhomberg's behalf and subject to Rhomberg's control, and that Rhomberg had the right to "dictate the means and details of [Daleiden's] performance." *See* 3 Am. Jur. 2d Agency §§ 1, 2. Similarly, there is no evidence that Newman and Daleiden were in a principal-agency relationship.

Furthermore, the Complaint asserted that other individuals associated with BioMax (Merritt, Lopez, "Wagner," and "Allen") acted as agents of *CMP and/or BioMax*, FAC, ¶¶ 156(e), 173(b), 220, not agents of Rhomberg and Newman. Plaintiffs have not proven that Rhomberg and/or Newman directly or indirectly communicated with, or even met, any of these individuals, *see* Pls. Br. at 6:15-13:17, let alone that any of those individuals agreed to act as agents on behalf of Rhomberg and/or Newman. There is simply no basis for concluding that Plaintiffs have proven the existence of any agency relationship in which Rhomberg and/or Newman were principals.

> *2. Plaintiffs failed to prove that Rhomberg or Newman specifically authorized, specifically directed, or personally participated in any tortious conduct, let alone all of the conduct alleged to be tortious.*

Plaintiffs assert that Rhomberg and Newman are liable on certain claims "because they were officers and board members of CMP and in their roles were aware of, advised on and approved of CMP's scheme and undercover tactics." Pls. Br. at 16, n.15. Under applicable precedent, however, the question is not whether Rhomberg and Newman helped to create CMP or advised on or approved of some aspects of CMP's overall operations. Rather, Plaintiffs are required to — but have failed to — provide evidence sufficient to satisfy a two-part test in order to extend liability to Rhomberg and Newman for allegedly *tortious actions* taken by CMP:

> To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director *specifically* authorized, directed or participated in *the allegedly tortious conduct*. . . . The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.

Frances T., 42 Cal. 3d at 508-09 (emphasis added); *see also* 18B *Am. Jur. 2d Corporations* § 1613 ("One seeking to impose liability for fraud upon an agent, officer, or employee of a corporation as an individual . . . must both allege and prove facts sufficient to impose liability upon him or her as an individual defendant.").

Plaintiffs' motion sets forth numerous factual allegations about Daleiden's involvement in

BioMax's formation, the creation of BioMax's website and promotional materials, the recruitment and training of individuals to work as BioMax representatives, and the procurement of novelty IDs for himself and two other people. Pls. Br. at 6:15-7:22. Plaintiffs then assert that Rhomberg and Newman "were fully cognizant" of *each and every specific action* set forth at pages 6:15-7:22 simply because they "participated in Board meetings or calls with Daleiden every few months to discuss and receive updates on the progress of the project," Pls. Br. at 7:23-25 (citing Sterk Decl., Ex. 14 (Rhomberg Depo.) at 342-45). This sweeping assertion is unsupported by the evidence.

The deposition cited by Plaintiffs indicates that there were "occasional," "infrequent[]" phone calls between Daleiden, Rhomberg, and Newman throughout the course of the investigation, which "frequently were rather brief." Sterk Decl., Ex. 14 (Rhomberg Depo.) at 340-41. Topics discussed at some point during these brief calls included "the minimal formalities of things," "some general ideas about the fundraising," "some general ideas . . . very general, about the progress of . . . the overall project," and "toward the end, there was some discussion about . . . obtaining videotape and video materials which would be useful for the goals of the project." *Id.* at 343-44. However, "the undercover work that . . . Daleiden was coordinating" was only discussed "[i]n some vague sense" and, "as far as the people who were actually doing the project, that was, generally speaking, not discussed." *Id.* This testimony does not establish, or even *imply*, that Rhomberg and Newman were aware of, or expressly approved of, the specific acts of Daleiden or others that Plaintiffs' allege were tortious or illegal. *See also* Daleiden Decl., ¶¶ 121-24.

Plaintiffs also rely on an email that Daleiden sent separately to Rhomberg and Newman as evidence that they were aware of "the goals and activities of CMP," Pls. Br. at 7:23-8:2 (citing Sterk Decl., Ex. 25 and 26), but these emails were sent in May of 2015 as the undercover investigation was almost completed. Additionally, the attached document merely indicated that CMP was preparing to publish evidence documenting illegal activities involving the sale of fetal tissue, which would potentially lead to Congressional investigations and criminal prosecutions of the wrongdoers; the document did not discuss or detail any potentially tortious or illegal activities allegedly committed by CMP, BioMax, or their agents, nor did it indicate Rhomberg or Newman's personal knowledge or approval of any such (hypothetical) activities. Sterk Decl., Exs. 25 and 26.

Additionally, the evidence indicates that Rhomberg had "very little" involvement with CMP and had "not very much" responsibility for oversight of CMP's activities, as that "just wasn't part of what was going on." Sterk Decl., Ex. 14 (Rhomberg Depo.) at 340, 346. Rhomberg "minimally" helped with fundraising by suggesting a couple of names of people who might be interested in donating to CMP. *Id.* at 129:4-23; Supp. Millen Decl., Ex. 128 (Rhomberg Depo.) at 340. Other examples of this minimal involvement were that Rhomberg: (a) once gave general advice to Daleiden about the importance of getting "context" video and also recommended that he pick up copies of available literature at a NAF conference, Sterk Decl., Ex. 14 (Rhomberg Depo.) at 226-27; (b) said "Delicious!" upon learning that Daleiden had secured several admissions of potential illegal activities from an abortion provider, Sterk Decl., Ex. 38; and (c) had a "kind of general" knowledge that Daleiden was coordinating undercover recordings but "didn't take part in basically any of the undercover things in any direct way." Supp. Millen Decl., Ex. 128 (Rhomberg Depo.) at 340, 344-45. Overall, Rhomberg's understanding was that the goal of CMP's investigative project was to investigate and "seek out the truth" concerning illegal activities regarding fetal tissue, which was supported by three prior years' worth of research. Sterk Decl., Ex. 14 (Rhomberg Depo.) at 21-22, 89; Sterk Decl., Ex. 79.

Similarly, the evidence indicates that Newman's role in CMP's activities was minimal.[12] Prior to the creation of CMP, Daleiden met Newman in Kansas to discuss Daleiden's proposal to conduct an undercover investigation that would "document fetal trafficking and associated crimes," which was based on three years' worth of research into such activities that had already taken place. Sterk Decl., Ex. 8 (Daleiden Depo. I) at 114:10-16; Sterk Decl., Ex. 12. Daleiden's project proposal neither stated nor implied that any torts or illegal acts would be committed during the course of the

[12] As discussed previously, Plaintiffs have not established a basis for an adverse inference based upon Newman's invocation of the Fifth Amendment. As such, Plaintiffs' claim that Newman "assisted Daleiden and CMP with fundraising, and advised on project goals, undercover activities, use of fake names and IDs, and other actions of CMP 'throughout the three-year undercover investigation'"— citing only Newman's invocation of the privilege in support—is unsupported by evidence and should be disregarded. Pls. Br. at 6:8-11 (citing Sterk Decl., Ex. 13 at 73-74, 118-129, 176).

investigation. *Id.* As noted previously, during the two and a half years that the undercover investigation took place, the evidence shows Newman had "occasional," "infrequent[]," "brief" phone calls with Daleiden and Rhomberg in which the undercover work was only discussed in a "very general," "vague sense," but "the people who were actually doing the project . . . [were] generally speaking, not discussed." Supp. Millen Decl., Ex. 128 (Rhomberg Depo.) at 340-44. There is simply no evidence establishing that Newman knew of, let alone approved of, the specific acts of others that Plaintiffs' allege were tortious or illegal.[13]

C. Conspiracy

"[C]onspiracy '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.'" Order, Dkt. 124, at 18 (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994)).[14] "[F]or conspiracy liability, the conspiring defendants must have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose. . . ." *Navarrete v. Meyer*, 237 Cal. App. 4th 1276, 1292 (2015). Conspiracy liability may only arise against a defendant to the extent that he or she actually owes a duty to each person(s) alleging a conspiracy; "[t]he conspiracy is to have a co-conspirator do the act that breaches everyone's respective duties." *Singh*, 457 B.R. at 805 (citing *Applied Equip. Corp.*, 7 Cal. 4th at 512-14). For this reason, conspiracy is not a basis for extending

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[13] Plaintiffs have also failed to prove, under the second part of the *Frances T.* test, "that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances." *Frances T.*, 42 Cal. 3d at 508-09. This part of the test is not limited to failure to act cases, but has also been applied in cases alleging that a corporate director directed or participated in, *e.g.*, fraud, trade secret misappropriation, and trademark infringement claims. *See, e.g., GeoData Sys. Mgmt. v. Am. Pac. Plastic Fabricators, Inc.*, No. 15-04125VAP (JEMx), 2016 U.S. Dist. LEXIS 195422, at *15-18 (C.D. Cal. Apr. 21, 2016); *Viewsonic Corp. v. Electrograph Sys.*, No. CV 09-04093 SJO (JCx), 2010 U.S. Dist. LEXIS 152299, at *24, 28 (C.D. Cal. July 8, 2010); *Mad Sci. Grp., Inc. v. Aquawood, LLC*, NO. CV 15-1022-R, 2016 U.S. Dist. LEXIS 185255, at *2-3 (C.D. Cal. Feb. 24, 2016); *Banks.com, Inc. v. Keery*, No. C 09-06039 WHA, 2010 U.S. Dist. LEXIS 17850, at *15-17 (N.D. Cal. Mar. 1, 2010).

[14] *See also Sprewell v. Golden State Warriors*, No. 99-15602, 2001 U.S. App. LEXIS 20434, at *23 (9th Cir. Dec. 28, 2001); *Singh v. U.S. Bank (In re Singh)*, 457 B.R. 790, 804 (E.D. Cal. 2011); *Kenne v. Stennis*, 230 Cal. App. 4th 953, 968-69 (2014).

contract-based liability to individuals who were not parties to a contract; "a person who is not a party to a contract cannot be bootstrapped into a conspiracy tort" that arises from contractual promises or duties. *Id.*[15] This, then, eliminates the possibility of any conspiracy liability against Rhomberg or Newman for the Fourth, Fifth, and Fifteenth Claims.

Thus, the civil conspiracy "claim" here boils down to an argument that Rhomberg and Newman should be held liable as joint tortfeasors on Plaintiffs' Sixth and Eighth Claims for trespass and fraudulent misrepresentation, brought by Plaintiffs PPFA, PPRM, and PPGC/CFC *only* against the other Defendants. *See* FAC ¶¶ 189-96, 204-10. However, one does not "have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose," *Navarrete*, 237 Cal. App. 4th at 1292, by merely agreeing to have some involvement with an undercover investigation for the purpose of exposing wrongful conduct. It is well-established that the kind of misrepresentations that are a necessary part of undercover journalism do not constitute "fraud," nor is an agreement to conduct an undercover investigation of illegal or unethical activities a tortious "conspiracy."[16]

Putting it another way, conducting an undercover investigation is not an inherently tortious or nefarious act—to the contrary, it is a constitutionally-protected act that is beneficial to society, *see Wasden*, 878 F.3d at 1189-90—so the mere agreement to have some (minimal) role in an investigation is not a tortious conspiracy. In fact, numerous decisions have held that an agreement to work together in a journalistic venture *does not* give rise to conspiracy liability, even if a tort is

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[15] *See also Gen. Am. Life Ins. Co. v. Rana*, 769 F. Supp. 1121, 1125 (N.D. Cal. 1991); *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 508-11 (1980); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 576 (1973).

[16] *See, e.g., Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1193-99 (9th Cir. 2018) (noting that there is a critical difference between (1) misrepresenting one's identity in order to gain access to property *for the purpose of material gain* (*i.e.*, actual "fraud"), and (2) the misrepresentations of undercover journalists made to gain access to property, which "quite simply do not inflict any material or legal harm on the deceived party"); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (no fraud liability for misrepresentations made by journalists to obtain employment in order to secretly videotape practices for later publication); *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1362-64 (S.D. Fla. 2005) (same); *cf. Desnick v. ABC*, 44 F.3d 1345, 1353-54 (7th Cir. 1995)

committed by one or more individuals during the course of the venture, absent some other unlawful purpose for the venture.[17] As such, although Plaintiffs posit that Rhomberg and Newman should be held liable as co-conspirators because they "were aware of, advised on and approved of CMP's *scheme and undercover tactics*," Pls. Br. at 16, n.15 (emphasis added), Plaintiffs' burden of proof is much higher and more specific than that: Plaintiffs must prove that both Rhomberg and Newman "ha[d] *actual knowledge* that *a tort* [was] planned and concur[red] in the scheme *with knowledge of its unlawful purpose. . . .*" *Navarrete*, 237 Cal. App. 4th at 1292 (emphasis added); *see also Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1582 (1995) ("The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.") (citation omitted); *People ex rel. Kennedy v. Beaumont Investment, Ltd.*, 111 Cal. App. 4th 102, 137 (2003) ("[P]articipants in a conspiracy also must know that their conduct is wrongful.").[18]

As discussed in detail previously, Plaintiffs have not proven that either Rhomberg or Newman had any involvement in any tortious activities, nor have they shown that either Rhomberg or Newman knew that the undercover investigation would entail the commission of torts and yet agreed to help aid the investigation anyway. At most, the evidence offered by Plaintiffs suggests that Rhomberg and Newman were tangentially involved in CMP's operations, and were not involved at all in BioMax's activities or the conduct of the undercover investigation. There is no

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[17] *See, e.g., Downey v. Coalition Against Rape & Abuse, Inc.*, Civ. No. 99-3370 (JBS), 2005 U.S. Dist. LEXIS 7340, at *25-26 (D.N.J. 2005), *aff'd by* 2005 U.S. App. LEXIS 18866 (3d Cir. 2005); *Kisser v. Coalition for Religious Freedom*, No. 92 C 4508, 1997 U.S. Dist. LEXIS 1744, at *7-8 (N.D. Ill. Feb. 18, 1997); *Robertson v. McCloskey*, 666 F. Supp. 241, 253, n.5 (D.D.C. 1987); *Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998); *Dowd v. Calabrese*, 589 F. Supp. 1206, 1213-14 (D.D.C. 1984).

[18] Defendants do *not* argue here that undercover journalists are immune from tort liability no matter what they do; rather, the point is that a plaintiff cannot simply point to the existence of an undercover investigation, label it as "fraud," and label anyone having any connection to the investigation as co-conspirators in a fraudulent, tortious scheme—but that is just what Plaintiffs have done here. There must be proof that the individual defendant knew that *a tort* was planned (not just that an undercover investigation was planned) and yet still agreed to further the tortious plan.

evidence that Rhomberg or Newman knew about, or approved the commission of, any torts.

Additionally, Plaintiffs distort the evidence and grasp at straws in an attempt to manufacture a non-existent goal of inciting violence in response to CMP's videos. The evidence offered by Plaintiffs clearly indicates that the purpose of the undercover investigation was to "seek out the truth" and "uncover information and truth" about illegal activities within the fetal tissue procurement and abortion industries, and to publicly "[l]everage the evidence" of those illegal acts so that law enforcement agencies and legislators—compelled to take action by the public's outrage at the revelations—would investigate and prosecute the wrongdoers.[19] Similarly, Plaintiffs attempt to inaccurately paint Newman as a supporter of violence against abortion providers, Pls. Brief at 5:10-17, but they offer no evidence that supports that accusation.[20]

Schwartz v. Pillsbury, Inc., 969 F.2d 840, 843-44 (9th Cir. 1992), the only case cited in support of Plaintiffs' conspiracy argument, does not help Plaintiffs. *See* Pls. Br. at 16, n.15. In *Schwartz*, the court concluded that there was a genuine issue of material fact as to the extent of the individual defendant's participation in the distribution of allegedly false information because *she had personally sworn to the truth of statements*, but the court noted that the mere fact that she was the President and "was involved in the day-to-day operation of the Haagen Dazs business" was

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[19] *See, e.g.*, Sterk Decl., Ex. 8 (Daleiden Depo. I) at 206-208 (objecting to Plaintiffs' counsel's attempts to mischaracterize CMP documents as if they endorsed violence, and reiterating that "[t]he whole point was to create public outrage . . . as part of a campaign to expose criminality within the abortion industry . . . and *see that justice was done under the law*"); Sterk Decl., Ex. 80 ("[T]his project aims to ignite public outrage" and "prompt defunding and criminal prosecutions."); Sterk Decl. Ex. 14, at 21-22, 89, 125-27 157-58; Sterk Decl., Ex. 16; Sterk Decl., Ex. 18; Sterk Decl., Ex. 55; Sterk Decl., Ex. 79.

[20] Sterk Decl., Ex. 14 (Rhomberg Depo.) at 358:2-359-14 ("Newman was very explicit about avoiding violence."); Sterk Decl., Ex. 11 (an Operation Rescue website states "[w]e wish only that the truth be told" and provides records concerning "health code violations, abortion injuries, malpractice claims, disciplinary action, and criminal conduct"). Plaintiffs' claim that "Newman has described the murder of an abortion doctor as 'justifiable defensive action'" is patently false. The cited Operation Rescue press release (Sterk Decl., Ex. 10) states that a criminal defendant was unjustly denied due process by not being given "the opportunity to defend himself with the defense of his choosing in a court of law," and advocating for a criminal defendant's right to present whatever defenses he deems appropriate, *as a matter of due process*, is a far cry from expressing one's own personal agreement with the validity of such defenses.

insufficient to "tie her to the alleged misrepresentations and omissions." 969 F.2d at 843-44. Here, by contrast, there is no evidence that Rhomberg or Newman personally took actions that were allegedly tortious, or personally approved of such actions, and neither Rhomberg or Newman were "involved in the day-to-day operation" of CMP, BioMax, or the undercover investigation.[21] Plaintiffs' conspiracy theory is without merit and, as such, Plaintiffs cannot establish conspiracy-based liability against Rhomberg or Newman on any cause of action.

III. Plaintiffs Cannot Seek or Obtain Summary Judgment Against Rhomberg or Newman on Claims That Were Not Brought Against Them.

FRCP 56(a) allows a party to move for summary judgment on a "claim or defense." Plaintiffs' motion for summary judgment improperly attempts to assert—and obtain summary judgment on—*non-existent* claims that are not asserted in the FAC. These non-existent claims include purporting to add Rhomberg and Newman to numerous claims that the FAC *expressly excluded them from* (the Fourth and Fifteenth Claims, for breach of contracts, and the Sixth Claim, for trespass) as well as purporting to add Plaintiff PPPSGV to the Eighth Claim (fraudulent misrepresentation), which was previously only asserted by PPFA, PPGC, PPCFC, and PPRM. Rhomberg and Newman are entitled to summary judgment concerning these non-existent claims.

The original complaint asserted five causes of action against all Defendants—RICO (count 1), 18 U.S.C. § 2511 (count 2), civil conspiracy (count 3), Cal. Bus. & Profs. Code § 17200 (count 7), and fraudulent misrepresentation (count 8)—while the other nine claims were expressly asserted against five Defendants other than Rhomberg and Newman. Complaint, Dkt. 1. When Plaintiffs

[21] Conspiracy liability is also inapposite where, as here, the plaintiffs allege that corporate directors conspired among themselves. *See, e.g., Koch Foods, Inc. v. Pate Dawson Co.*, No. 3:16-CV-355-DCB-MTP, 2018 U.S. Dist. LEXIS 74837, at *6-7 (S.D. Miss. May 3, 2018) ("The directors of a corporation, in their capacity as agents of the corporation, cannot conspire with themselves. . . . [T]o the extent Koch seeks to recover against the Defendants for conspiring among themselves, Koch's conspiracy claim is deficient as a matter of law."); *Reynolds v. Bement*, 36 Cal. 4th 1075, 1090 (2005) ("Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.") (citation omitted).

amended their complaint, they ***removed*** Rhomberg and Newman from the Second Claim (18 U.S.C. § 2511) and the Eighth Claim (fraudulent misrepresentation brought by PPFA, PPGC, PPCFC, and PPRM), leaving RICO, civil conspiracy, and Cal. Bus. & Profs. Code § 17200 as the only three counts against them. FAC, Dkt. 59 (filed March 24, 2016). Plaintiffs also added the Fifteenth Claim (breach of PPGC contract) against three Defendants other than Rhomberg and Newman. *Id.*

As such, for over three years, Defendants have been on notice that four Plaintiffs, ***but no other Plaintiffs***, were asserting the Eighth Claim. Rhomberg and Newman were also led to believe by Plaintiffs that only the state claim sounding in fraud (the Eighth Claim) was being asserted against them via the Third Claim for civil conspiracy. ***See, e.g.***, FAC, ¶ 175 ("Defendants' ongoing conspiracy to defraud, as described above . . ."); Supp. Millen Decl., Ex. 129 (Plaintiffs' Second Amended Initial Disclosures) at 11 (damages for Third Claim identified as "all damages by all Plaintiffs claiming fraud"). Rhomberg expressed this understanding in the motion for summary judgment that he filed six months ago. Dkt. 354, at 1:1-18 (seeking summary judgment on "each and every cause of action of each and every plaintiff against" him—specifically the RICO, § 17200, civil conspiracy, and fraudulent misrepresentation claims—and stating that the civil conspiracy claim "is essentially the Eighth Claim, for fraudulent misrepresentation"). Plaintiffs said nothing in response to the motion to indicate that this understanding was incorrect. Indeed, the fact that Plaintiffs felt it necessary to inform the Court—and Defendants—of these attempted changes to their claims via footnotes to their motion for summary judgment indicates their awareness that these claims had heretofore not been asserted against Rhomberg or Newman.

Plaintiffs' attempt to obtain summary judgment on unpled causes of action violates not only the Federal Rules of Civil Procedure but also traditional notions of fair play. A fundamental purpose of the filing of a complaint is to give each defendant fair notice of what claim(s) are being asserted against him. "A plaintiff suing multiple defendants 'must allege the basis of his claim *against each defendant* to satisfy Federal Rule of Civil Procedure 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them.'" *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) (quoting *Gauvin*

v. Trombatore, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988)) (emphasis added); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007); FRCP 8(b)(1) (requiring a defendant to state its defenses "to each claim asserted against it"). The complaint, of course, is critical in conducting discovery because it delineates who is suing whom about what. *Cf.* FRCP 26(b)(1) (discovery must be relevant to an existing claim or defense). Allowing plaintiffs to belatedly tack on new causes of action against defendants ***sub silentio*** after the close of discovery works havoc on a defendant's due process rights to prepare for summary judgment and/or trial.

A plaintiff cannot prevail against a defendant on a claim that was not pled against that defendant in the operative complaint. In *Strong v. Wisconsin*, 544 F. Supp. 2d 748 (W.D. Wis. 2008), the court granted defendant Dorn and Marshall's motions for summary judgment with respect to a cause of action that specifically identified some defendants, but not Dorn or Marshall. *Id.* at 753, 768. The court stated that, "by specifically identifying in his complaint some defendants on his failure to intervene claim and not others, plaintiff communicated to the defendants not included in the list that they were off the hook." *Id.* at 768. Similarly, in the FAC, Plaintiffs communicated to Rhomberg and Newman that "they were off the hook" with respect to the numerous claims that Plaintiffs excluded them from. As such, Rhomberg and Newman are entitled to judgment in their favor on all claims that were not pled against them, including (but not limited to) the Fourth, Sixth, and Fifteenth claims asserted in Plaintiffs' motion for summary judgment.[22]

Furthermore, Plaintiff PPPSGV gave Defendants no notice that it would be belatedly asserting a fraudulent misrepresentation claim against any or all of them. Thus, even if PPPSGV had evidentiary support for its claim, which it does not, its motion for summary judgment on the Eighth Claim would fail because it did not properly assert the claim in a timely manner.

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[22] Rhomberg and Newman moved for summary judgment on the only three claims asserted against them in the Complaint, Dkt. 595, not knowing that Plaintiffs would subsequently act as if they were actually named in four additional counts. Given Plaintiffs' actions, Rhomberg and Newman have no way of knowing whether Plaintiffs will attempt a similarly improper maneuver at trial with respect to the numerous claims that were not asserted against them.

IV. Plaintiffs Are Not Entitled to Summary Judgment Against Rhomberg or Newman on their Claim Under California Unfair Competition Law (Bus. & Prof. C. § 17200).

Plaintiffs assert that the "undisputed evidence demonstrates that Defendants' actions were clearly unlawful and fraudulent," thus entitling them to summary judgment on their Seventh Claim. Pls. Br. at 21:18-19. Not only is the evidence at issue very much disputed, but Plaintiffs have overlooked several other elements that would need to be demonstrated for Plaintiffs to be entitled to summary judgment on this claim.

A. No Plaintiff Has Met the "Unlawful" Prong of the UCL.

Plaintiffs' claim that the Defendants' actions were "unlawful" for purposes of the California unfair competition law ("UCL") has shrunk from the original allegations of the complaint of multitudinous illegal activities down to three assignments of unlawful conduct: 1) setting up a "fake business," 2) lying to the IRS and the California Secretary of State to do so, and 3) creating and using falsified driver's licenses in violation of state and federal law. Pls. Br. at 21:6-26.

As a preliminary matter, the act of setting up a business would not appear to be a "business practice" for purposes of the UCL. Plaintiffs cite no authority that filing papers with the IRS or the Secretary of State constitutes a "business practice" under any law.

More importantly, Plaintiffs cite no authority in support of the bald assertion that Defendants did in fact violate any law in setting up BioMax or CMP. As to the former, Plaintiffs simply cite to California Penal Code § 470, but make no attempt to explain how any of Defendants' actions violated any part of that statute. As to the latter, Plaintiffs cite no evidence, no statute, and no case law concerning their allegation that Defendants "lied to the IRS."

Additionally, Plaintiffs cite to California Penal Code § 118 to support their contention that Defendants violated California law with regard to the creation, procurement, or use of falsified driver's licenses. However, that section defines and criminalizes perjury; it has nothing to do with falsified drivers' licenses. As to the purported violation of the federal identity theft law (18 U.S.C. § 1028), Plaintiffs have failed to present evidence on the interstate commerce element of the offense of producing false identification documents. *See* CMP Motion for Summary Judgment (Dkt. 605) at 9-11. Moreover, even if Plaintiffs had provided such evidence to satisfy all the

elements of § 1028, they (much less each of them) have not shown how they "lost money or property as a result of the unfair competition," a prerequisite for standing under the UCL. Cal. Bus. & Prof. Code § 17204; *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 853, 856-57 (2008). To rest their summary judgment motion under the UCL claim on the "unlawful" production of drivers' licenses, each Plaintiff would have to show how it was actually injured by Defendants' production of the identification documents. All Plaintiffs have failed to do so, or even attempt to do so; to the contrary, as noted previously, Plaintiffs have expressly attributed their alleged damages to *Defendants' publications*, not the production of any identification documents.

Finally, even if a Plaintiff was able to make such a showing, the only injunctive relief it would be entitled to would be an injunction against the *particular unlawful conduct underlying the claim*, not any other practice that they find distasteful or inconvenient. *See Feldman v. Glaze*, No. C-87-20723-WAI, 1989 WL 81076, at *2 (N.D. Cal. Apr. 14, 1989) (granting motion to dismiss request for injunctive relief because "plaintiff's prayer for injunctive relief is addressed toward preserving MAI's assets, not enjoining an unfair trade practice.") Plaintiffs have not sought injunctive relief against producing identification documents, nor have they made any argument that such injunctive relief is necessary, as to Rhomberg, Newman, or any other defendant, because of an imminent threat of repetition.

B. No Plaintiff Has Met the "Fraudulent" Prong of the UCL.

Plaintiffs' attempt to show "undisputed evidence" demonstrating a violation of the "fraudulent" prong of the UCL fares no better. Again, Plaintiffs begin by citing various steps taken to set up BioMax and CMP, labeling these steps as "phony" and "false." However, these interactions with governmental agencies were not "business practices," nor did they inflict any injury on the Plaintiffs. Plaintiffs do not contend that any of them ever viewed, let alone relied on, any document that Defendants filed with the state of California or the federal government.

Plaintiffs' claim of "fraud" boils down to Defendants' use of assumed identities in their dealings with some of the Plaintiffs "for the purposes of obtaining access to Plaintiffs' facilities." Pls. Br. at 2-5. However, the Ninth Circuit has explicitly held that this type of speech, *i.e.*, "a false statement made in order to access a [commercial] facility," cannot on its face be characterized as

fraud. *Wasden*, 878 F.3d at 1194; *see also Desnick*, 44 F.3d at 1355 ("The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme."); *Food Lion*, 194 F.3d at 520 ("[T]he deception -- the misrepresentations in Dale's application -- did not harm the consuming public. Presumably, ABC intended to benefit the consuming public by letting it know about Food Lion's food handling practices.").

Moreover, with one exception, Plaintiffs make no attempt to distinguish which of the allegedly "fraudulent" business practices took place in California.[23] The record is clear that none of Plaintiffs' conferences or clinics that were accessed by Defendants were in California, and it is equally clear that the UCL does not apply outside of California. As set out in Rhomberg and Newman's Motion for Summary Judgment, no plaintiff has shown that it "lost money or property" because of "fraudulent" activity in California.

Finally, as set out in Rhomberg and Newman's Motion for Summary Judgment, Plaintiffs, and each of them, lack standing to seek injunctive relief, the only remedy available, and for this reason their claim fails. Dkt. 595 at 32-34. It is particularly telling that Plaintiffs offered no evidence whatsoever concerning Rhomberg or Newman's alleged likelihood of violating the UCL in California in the future. Pls. Br. at 22:11-18.

In sum, Plaintiffs have a laundry list of complaints about Defendants' conduct, but they have not presented undisputed evidence that Rhomberg or Newman, or any of the other Defendants, is liable to any Plaintiff under California's unfair competition law.

V. Plaintiffs Are Not Entitled to Judgment as a Matter of Law on the Predicate Offense Element of RICO.

A. Plaintiffs Have Failed to Present Any Evidence Establishing the Interstate Commerce Element of 18 U.S.C. 1028.

Subsections (a)(1) and (2) of § 1028, prohibiting "production" and "transfer" of false

[23] The single exception is the allegation that "Defendants . . . signed contracts in California under fake names." Even if this allegation were true (with respect to individuals other than Rhomberg or Newman, who signed no contracts), Plaintiffs presented no evidence that any Plaintiff relied on the representations in these unidentified contracts, or that these representations on unidentified contracts caused them to "lose money or property" in consequence.

identifications, are limited by section (c), which requires that "(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.*" 18 U.S.C. § 1028(c) (emphasis added). A connection with interstate commerce or use of the mail is a jurisdictional element, without which § 1028 cannot be applied to Defendants' actions. *See, e.g.*, *United States v. Klopf*, 423 F.3d 1228, 1237 (11th Cir. 2005) (noting that the Supreme Court has found there must be a minimal connection to interstate commerce for jurisdiction under the Commerce Clause in both *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)).

Courts have interpreted the language of § 1028(c)(3)(A) to require that plaintiffs must show that it is specifically the "production [or] transfer prohibited by this section [rather than possession or later use]" that "is in or affects interstate commerce." 18 U.S.C. § 1028(c)(3)(A). As the court in *United States v. Della Rose*, 278 F. Supp. 2d 928 (N.D. Ill. 2003), noted:

> [I]n this case, the only conduct Defendant was charged with that was 'prohibited by this section' was *production* of false identification documents. Thus, under the plain language of the statute, it is the *production* that must be in or affect interstate commerce.

Id. at 933 n.2 (emphasis added).

Plaintiffs have presented no evidence that the production or transfer of the identification documents was "in or affecting interstate commerce." Indeed, the undisputed factual record establishes that there was no such nexus with interstate commerce. *See* CMP Motion for Summary Judgment (Dkt. 605) at 10:13-21. Therefore, Plaintiffs are not entitled to judgment as a matter of law as to any predicate RICO violations of 18 U.S.C. 1028.

B. Plaintiffs Have Not Established Mail and/or Wire Fraud.

Plaintiffs improperly attempt to resurrect their previously dismissed mail/wire fraud predicate as a basis for RICO liability by arguing an (admittedly) new theory, namely, that Defendants were engaged in a "scheme to deprive Plaintiffs of their fundamental property right to exclude others from their conferences and offices." Pls. Br. at 27:26-27. Even if the Court were to consider this previously unpled theory of trespass-as-fraud as a theoretical basis for Plaintiffs' RICO claim, the theory fails.

First, even if certain efendants' indisputably invited entry on Plaintiffs PPFA, PPGC/PPCFC and PPRM's property constituted a trespass, trespass does not "deprive" the property owner of any rights. Indeed, it is only if a property owner holds those rights that it has standing to bring a claim for trespass, as Plaintiffs here assert in their Sixth Claim. Trespass is an *invasion* of a property right, not the deprivation of a property right. *See. e.g.*, *Watson v. Jones*, 160 Fla. 819, 821 (1948) ("It must not be forgotten that recovery in trespass is always based upon a wrongful invasion of the plaintiff's rights. . . .") (citation omitted); *Mallon Oil Co. v. Bowen/Edwards Assocs.*, 940 P.2d 1055, 1061 (Colo. App. 1996) ("An unauthorized invasion of the lands renders the invader a trespasser who could be liable for damages resulting to the owner of the property right."); *Shell Petroleum Corp. v. Liberty Gravel & Sand Co.*, 128 S.W.2d 471, 474 (Tex. Civ. App. 1939) ("'Every invasion of private property, be it ever so minute, is a trespass.' Webb's Pollock on Torts, p. 10.").

Second, a violation of 18 U.S.C. §§ 1341 or 1343 requires more than that a plaintiff be "deprived" of some property right. Rather, as this Court has already held, "an attempt to *acquire* money or property through fraud [is] required." Dkt. 124 at 9 (original emphasis). Plaintiffs have failed to argue, much less present facts establishing, that Defendants acquired or attempted to acquire the "right to exclude others" that they allege certain Plaintiffs were deprived of. On the contrary, the record is clear that the Defendants who attended conferences (along with hundreds of other people) and visited affiliate clinics for a few hours (while not displacing anyone) neither acquired nor attempted to acquire any such right to exclude others.

Plaintiffs are not entitled to judgment as a matter of law as to any RICO predicate acts.

C. Plaintiffs Are Not Entitled to Judgment as a Matter of Law on Any RICO Predicate Acts as to Rhomberg and Newman.

Plaintiffs "seek a ruling by this Court that the Defendants committed predicate offenses of Plaintiffs' RICO claim." Pls. Br. at 26:21-22. Even if Plaintiffs were entitled to judgment as a matter of law that one or more Defendants had committed a RICO predicate offense, they are not entitled to any such judgment as to Rhomberg or Newman. Plaintiffs have not adduced any evidence, much less undisputed evidence, that Rhomberg or Newman violated or conspired to violate 18 U.S.C. § 1028 or 18 U.S.C. §§ 1341, 1343. *See.*, Millen Decl., (Dkt. 595-1), Ex. 124 (Rhomberg Depo.) at 175:5-12; Daleiden Decl. (Dkt. 609-1), ¶ 126; Response to Facts (B), and Section II, *supra*.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied in full with respect to Defendants Rhomberg and Newman.

Respectfully submitted on June 19, 2019.

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