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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 REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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

INTRODUCTION

In its Order following the hearing on Rhomberg's earlier Motion for Summary Judgment, this Court gave the Plaintiffs explicit instructions: "if and when this issue is raised again (after the completion of discovery), in their opposition plaintiffs *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.[1] Plaintiffs have disregarded this Court's instructions, as well as the barest requirements for defeating Defendants' motions for summary judgment as to the RICO and fraud claims. They have neither explained nor presented evidence to support the crucial element of proximately caused damages for the RICO claim or of reasonably foreseeable damages for the fraud claim *as to each Plaintiff*. Opposing a motion for summary judgment requires evidence, not mere allegations. Plaintiffs failed to offer evidence to establish any genuine issue of material fact that would prevent the entry of summary judgment in Defendants' favor.

I. THERE IS NO EVIDENCE THAT RHOMBERG OR NEWMAN AGREED TO A PLAN THAT CALLED FOR THE COMMISSION OF ACTS OF RACKETEERING AND, AS SUCH, THERE IS NO BASIS FOR RICO CONSPIRACY LIABILITY.

"To establish a violation of section 1962(d), Plaintiffs must allege 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). Since Plaintiffs do not contend that Rhomberg or Newman personally participated in any RICO predicate acts, or were part of an agreement that itself substantively violated RICO, they must prove that Rhomberg and Newman "agreed to commit . . . a violation of two predicate offenses" in order to establish RICO conspiracy liability. Plaintiffs have offered no evidence to establish that a

[1] Rhomberg and Newman adopt by reference the arguments, authorities, and related evidence in their co-Defendants' motions and replies submitted in this action, as well as their own Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 652).

genuine issue of material fact exists concerning this issue—to the contrary, there is a lack of any evidence that would support RICO conspiracy liability for Rhomberg and Newman—so Rhomberg and Newman are entitled to summary judgment on the RICO claim.

In *Salinas v. United States*, 522 U.S. 52 (1997)—the leading case on RICO conspiracy—the Supreme Court repeatedly emphasized the requirement to prove that *each* alleged co-conspirator *specifically intended* that a crime be committed through a plan calling for illegal action. The Court noted that "'the purpose of the agreement . . . [must be] to facilitate commission of a crime,'" and the defendant must "'agree[] with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime,'" and must also "intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Id.* at 64-65 (citations omitted). Other decisions have reiterated that a RICO conspiracy claim requires the plaintiff to prove that the defendant actually agreed to further the commission of a crime; evidence that the defendant agreed to the pursuit of a goal that could potentially be achieved without the commission of RICO predicate acts is insufficient.[2]

Here, Plaintiffs have offered no evidence that Rhomberg and/or Newman "agreed to commit . . . a violation of two predicate offenses," *Howard*, 208 F.3d at 751, agreed to a "plan which calls for some conspirators to perpetrate [a] crime," *Salinas*, 522 U.S. at 63-64, or had "specific intent" that a co-conspirator would commit multiple RICO predicate offenses, *Ocasio*, 136 S. Ct. at 1429-30. As explained in Rhomberg/Newman moving papers, the evidence merely indicates that Rhomberg and Newman agreed to the goal of investigating and reporting about illegal and unethical activities within the fetal tissue procurement and abortion fields, which is not an illegal goal, and *no evidence* proves, or even suggests, that they agreed to, or were even aware

[2] *See, e.g., Ocasio v. United States*, 136 S. Ct. 1423, 1429-30 (2016) (citing *Salinas*, 522 U.S. at 63-64) (conspiracy liability requires the pursuit by all co-conspirators of "the same criminal objective" and "specific intent" on behalf of the defendant at issue "that the underlying crime be committed" by a co-conspirator); *Smith v. United States*, 568 U.S. 106, 110 (2013) (establishing that an individual was a RICO co-conspirator requires proof that "the defendant knowingly and willfully participated in" an agreement to commit at least two crimes covered by the statute).

of, the commission of any predicate acts of racketeering. Def. MSJ (Dkt. 595) at 13:22-25.

Plaintiffs place heavy reliance on drafts of project proposals written by Daleiden in 2013 and sent to Newman and Rhomberg. Pls.' Opp. at 8:12-21, 10:14-16, 11:15-20, 12:21-24 (citing Sterk Decl., Ex. 12; Mayo Decl., Ex. 31). Although Plaintiffs hypothesize that these proposals entailed "a plan that by necessity would require use of fake identifications and acts of mail fraud,"[3] in reality, the proposals merely stated that CMP would conduct undercover investigations within the fetal tissue procurement and abortion industries using trained actors. It would be absurd to suggest that any collective effort to conduct an undercover investigation (by citizen journalists, news organizations, or otherwise) is, by definition, a RICO enterprise that entails the commission of numerous crimes, and Plaintiffs provide no authority to support that proposition.

Additionally, Plaintiffs do not cite any particular language in the proposals that indicates the alleged "necessity" of obtaining fake IDs. The proposals do not refer to assumed identities, much less to producing or obtaining fake IDs, and they do not state or imply that any RICO predicate acts (or other illegal acts or torts) would be committed during the course of the investigation. Further, even a (hypothetical) reference to using fake IDs would not have converted the proposals into a RICO scheme to violate the federal identify theft law; that statute includes other elements such as the requirement that the production of the IDs be in or affect interstate commerce, 18 U.S.C. §1028(c), and Plaintiffs would also still have to come up with evidence that Rhomberg and Newman agreed to a plan to engage in a *pattern* of unlawfully producing or transferring fake IDs. Plaintiffs' assertion that Rhomberg and Newman "*should have known, if they did not actually*

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[3] Plaintiffs "cannot rest their RICO claim on their mail or wire fraud allegations." Order, Dkt. 124 at 8:18-10:5; Doc. 652 at 34; *cf.* Doc. 91 at 5:14-7:2-7 (Plaintiffs argued that Defendants committed wire fraud by interfering with "[t]he right to carry on one's business" and by obtaining Plaintiffs' "confidential business information"). As to Plaintiffs' newly minted, unpled theory of trespass-as-wire fraud, which would improperly convert most run-of-the-mill state trespass claims involving multiple defendants into RICO and wire fraud claims, one does not "obtain" money or property by committing a trespass. *Cf. Sommers v. Okamoto*, No. 16-00558 JMS-KJM, 2017 U.S. Dist. LEXIS 38235, at *7 (D. Haw. Mar. 16, 2017) (trespass is not a RICO predicate act); *Pyke v. Laughing*, No. 92-CV-555, 1996 U.S. Dist. LEXIS 6518, at *31-33 (N.D.N.Y. May 8, 1996) (same).

know, that the conspiracy required the use of fake IDs," Pls.' Opp. at 17:12-13 (emphasis added), amounts to an admission that they lack evidence that Rhomberg or Newman had any involvement in, or knowledge of, any person's production, use, or transfer of false IDs. "Should have known" is not the standard for conspiracy liability (under RICO or otherwise).

Simply put, Plaintiffs would have this Court rule that *every* undercover investigation "necessarily requires" a pattern of multiple violations of the federal identity theft law, and thus a "reasonable jury could find" that anyone involved with an undercover investigation in any way is liable under RICO. This is not the law. Plaintiffs' insinuations are not evidence creating a triable issue of fact on whether Rhomberg and Newman conspired to commit any RICO predicate acts.[4]

II. NO PLAINTIFF INCURRED ANY DAMAGES PROXIMATELY CAUSED BY THE ALLEGED RICO PREDICATE ACTS.

A. All Plaintiff-Affiliates Failed to Adduce Evidence, Or Even Argue, That They Incurred Any Damages Proximately Caused by the Alleged RICO Predicate Acts.

In responding to Rhomberg and Newman's argument that the Plaintiffs suffered no proximately caused damages from the alleged RICO predicate acts, Plaintiffs argue that a jury "could find that several categories of Plaintiffs' damages are 'first step' damages directly caused by "the use of fake identities to infiltrate Plaintiffs' conventions." Pls' Opp. at 14:25–15:1. Citing this Court's Order on Defendants' Motion to Dismiss, they assert that "discovery has confirmed that Plaintiffs suffered damages directly caused by Defendants' infiltration of Plaintiffs' . . . conferences and health centers . . . through their use of fake IDs." They then proceed to discuss only the damages claimed *by PPFA*. Plaintiffs make no effort to establish damages for any of the

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[4] Plaintiffs also attempt to make hay with their contention that "Rhomberg . . . repeatedly refused to explain his role in the conspiracy under oath" because of First Amendment objections. Pls' Opp. at 12:14-18. Plaintiffs fail to mention that they successfully moved to compel Rhomberg to answer these questions and were granted (and used) extra deposition time to do so. Dkt. 536 at 2. Plaintiffs cannot pretend that there is more damning information about Rhomberg's involvement with CMP that they were prevented from getting. Further, Plaintiffs' contention that Rhomberg "initially refused to testify about his involvement with the fake IDs" (Pls' Opp. at 7:22-23) is false. Rhomberg was shown and asked about the Sarkis ID in the initial deposition, and he promptly answered that he knew nothing about it. Millen Decl., Ex. 124 (Rhomberg Depo.) at 175:5-12.

Plaintiff-affiliates. *Id.* at 14-16. For this reason, all Defendants' summary judgment motions as to the First Claim, under RICO, must be granted against Plaintiffs PPNorCal, PPMM, PPPSW, PPLA, PPOSBC, PPCCC (formerly PPSBVSLO), PPPSGV, PPGC, PPCFC, and PPRM.[5]

B. PPFA Failed to Show Damages Proximately Caused by the Alleged RICO Predicate Acts of Producing or Transferring False Identification Documents.

PPFA describes the proximate causation at issue as if the predicate acts were the "use of fake identities to infiltrate Plaintiffs' conventions" or the "use of fake IDs." Pls.' Opp. at 14:26–15:1; 15:9-10. Yet, the sole remaining alleged RICO predicate act is the *production or transfer* of false identification documents in violation of 18 U.S.C. § 1028(a)(1) and (2). The subsequent *use* of the documents is not a predicate act, but rather one of the many steps in the chain of causation (along with PPFA making the decision to undertake various measures to prevent future infiltrations). Thus, even the cost of security consulting that PPFA seeks to recover in this action is well beyond the "first step" of proximate causation from the alleged RICO predicate acts.

As to the particular measures themselves, PPFA lists the use of airport style devices, "increased physical security, photo and scanning technology, and data collection policies." *Id.* at 15:17-19. However, none of these items appears as costs on PPFA's itemization of its damages, nor does that itemization categorize any damages as specifically being related to preventing future infiltrations. Millen Decl., Ex. 101 (Damages Chart) at 16-19. And, as to PPFA more generally "implement[ing] enhanced security measures," "chang[ing] their practices to more fully vet those who do business with PPFA, and creat[ing] mandatory threat response and encounter training for all staff," *PPFA presented no evidence* that it spent money to implement any of these measures.

Finally, PPFA asserts that these security measures (for which there is no evidence of any *cost* to PPFA) were not voluntary but necessary modifications for which Defendants are liable. This contention is unsupported by law, logic, or evidence. PPFA's only evidence for that statement

[5] PPRM seeks only injunctive relief; therefore, summary judgment for defendants on PPRM's RICO claim was already required and should be granted.

is the declaration of Melvin Galloway, who was hired by PPFA just three months before the first CMP video release. He asserts that "staff and providers would not come to the offices and health centers or attend any Planned Parenthood meeting at which they felt either that there was a threat to their well-being or that their conversation would be overheard by those opposed to abortion."[6] However, PPFA presented no evidence that it expended money to prevent infiltrations at any offices or health centers. Even if it had, the idea that staff and providers would not go to health centers if they thought their conversations there might be overhead by those opposed to abortion is facially absurd; any patient or patient companion who comes in the facility door might be opposed to abortion and overhear conversations. PPFA does not even suggest any security measures would prevent that from happening.

Moreover, under PPFA's theory, not just it but any abortion rights organization, such as the ARHP or National Coalition of Abortion Providers, could sue these Defendants and recover the costs of voluntary security enhancements, simply by claiming the enhancements were "necessary" to get people to keep coming to their conferences in the wake of the infiltrations and videos. Conversely, if BioMax had infiltrated only the 2014 NAF meeting and had the lunch meeting with Deborah Nucatola, PPFA, under its theory, could nonetheless recover the costs of security enhancements by making the same claim it makes now: the enhancements would be necessary because "staff and providers would not attend any meeting" that they thought might be infiltrated. Under PPFA's theory, the fact that BioMax infiltrated one particular abortion rights organization's meeting as opposed to a different one plays no role in PPFA's causation argument: the infiltration of somebody's meeting "led directly" to the security expenditures, and therefore Defendants are liable for those costs. This *reductio ad absurdum* is merely illustrative, however, as PPFA failed to provide admissible evidence of any expenditures "necessitated" by the alleged predicate acts.

C. Plaintiffs' Attempt to Bootstrap Foreseeability and Intentionality into Proximate

[6] Defendants object to the Declaration of Melvin Galloway in their Joint Evidentiary Objections to Plaintiffs' Opposition Evidence.

Causation Analysis for the Purpose of Establishing RICO Damages is Unavailing.

In their Supplemental Brief, Plaintiffs argue that the Court "should deny Defendants' motion for summary judgment on proximate causation under RICO." Pls.' Supp. Opp. at 5. However, Defendants did not move for summary judgment solely on the issue of proximate causation; they moved for summary judgment on the RICO claim in its entirety on various grounds, including that Plaintiffs had not suffered any damages proximately caused by the alleged RICO predicate acts. *See, e.g.*, Dkt. 595 at 14-19. Thus, it was Plaintiffs' burden to show, by admissible evidence, that they had incurred such damages. As noted previously, this Court's Order directed Plaintiffs how they were to do so: "[P]laintiffs' counsel are advised that if and when this issue is raised again (after the completion of discovery), *in their opposition* plaintiffs *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). Plaintiffs have entirely failed to explain, must less adduce evidence to support, the causal chain between the alleged RICO predicate acts and any specific damage or category of damages to any Plaintiff.

Instead, Plaintiffs spend five pages disputing one sentence in Rhomberg and Newman's moving papers, concerning the relevance of foreseeability and intent to the proximate cause analysis, as well as discoursing on "first step" causation, direct v. indirect victims, and intervening third-party actors. Not surprisingly, none of Plaintiffs' cases contradict the fundamental RICO case law requiring a plaintiff to prove damages proximately caused by *the RICO predicate acts* and holding that foreseeability alone is not enough to make that showing, *e.g.*:

> [A]t most, Plaintiffs-Appellants' cases indicate that courts in a circuit other than ours have considered foreseeability *and* directness when evaluating showings of proximate cause in cases brought under the ATA. These cases do not trump *Holmes* and its Supreme Court progeny, and they do not establish that directness is unnecessary, or that a showing of foreseeability is sufficient on its own to demonstrate proximate causation.

Fields v. Twitter, Inc., 881 F.3d 739, 747 (9th Cir. 2018).

> [T]hese are two quite distinct questions. Here, the harm to Kaiser plainly was foreseeable, and foreseeability is needed for, but does not end the inquiry as to, proximate causation.

In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 34 (1st Cir. 2013).

> The concepts of direct relationship and foreseeability are of course two of the "many shapes [proximate cause] took at common law," *Holmes*, 503 U.S., at 268. . . . Our precedents

> make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm.

Hemi Group, LLC v. City of New York, 559 U.S. 1, 12 (2010).

However, Plaintiffs have a bigger problem than unhelpful case law. Even assuming *arguendo*, contrary to Supreme Court and Ninth Circuit precedent, that proximate causation could be established by foreseeability and intent alone, Plaintiffs failed to explain how, much less present evidence that, they actually suffered any foreseeable or intended damages. Thus, while Plaintiffs indirectly claim that "Defendants intentionally caused[] hacking, vandalism, and acts of violence" (Pls.' Supp. Opp. at 4:7-8), they fail to argue or elucidate the legally actionable nexus between the production or transfer of false IDs and their claimed damages.[7] Even more astonishing is the fact that Plaintiffs did not present any evidence that they actually suffered any particular instance of damage.

In other words, Plaintiffs have presented no actual evidence of a hack, vandalism, acts of violence, or any other harm. In fact, Plaintiffs' papers do not answer any of the basic "who/what/when/where/how" questions about any of these damage elements: What was hacked? When and how? Did the hack actually cause any direct damage to whatever was hacked, or only indirect? What was vandalized? When? Why do Plaintiffs attribute it to the Defendants?[8] How is any of this related to the money spent by one affiliate for a grief/stress hotline, or another for lighting, or another for key fobs, or another for monitoring social media, or another for extra security guards during lawful free speech demonstrations? Nor is there testimony that the affiliates in fact spent money in those ways.

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[7] *See, e.g.*, *Higgins v. Kentucky Sports Radio, LLC*, Case No. 5:18-cv-043-JMH, 2019 U.S. Dist. LEXIS 45535, at *43, 45, 50 (E.D. Ky. Mar. 20, 2019) (holding that, although the plaintiffs (a referee and his business) may have "valid tort claims against the third-parties who directly contacted, harassed, and made false comments about them," all claims against the defendants (radio hosts), whose continuing negative commentary likely fed the campaign of harassing phone calls and sparked FBI investigation, had to be dismissed; the defendants "did not make anyone contact the Plaintiffs directly or encourage viewers to make death threats toward the Plaintiffs").

[8] Millen Decl., Ex. 101 (Damages Chart) p. 76 and Ex. 115 (PPCCC/Tosh) at 139:20–140:11; 186:22–188:2; 241:6-242:23 (vandalism caused by ex-boyfriend of clinic employee chargeable to Defendants).

Plaintiffs' main opposition brief (Dkt. 662) does not shed any further light. As noted above, none of the Plaintiff-affiliates even suggested that they are entitled to damages under RICO. Instead, in the discussion of the *fraud* claim -- a claim brought solely by PPFA, PPGC/PPCFC, and PPRM (which is not seeking damages) -- Plaintiffs state that their damages include:

> (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; (4) lost revenue due to lost opportunity to treat patients due to the unavailability of the Planned Parenthood online appointment scheduling system because of a hack; and (5) other costs related to Defendants' wrongful conduct, such as staff time responding to the videos, security training for health center staff, and legal and other vendor fees.

Pls.' Opp. at 51:12-18. None of the Plaintiffs, including the ones actually bringing the fraud claim, offered a single declaration substantiating that a single expenditure was related to a single instance of the "foreseeable and intended" harms from Defendants' actions. Under any theory of proximate causation, no Plaintiff has established the existence of damages proximately caused by the alleged RICO predicate acts. Summary judgment should be granted against all Plaintiffs on Claim One.

III. PLAINTIFFS HAVE FAILED TO CREATE A TRIABLE ISSUE OF FACT THAT RHOMBERG OR NEWMAN CONSPIRED TO COMMIT TORTIOUS ACTS.

Plaintiffs have acknowledged that, to establish conspiracy liability for Rhomberg or Newman, they would need to prove Rhomberg and Newman's *personal participation in, or knowledge of*, tortious acts as well as evidence of their *consent to or approval of* those tortious acts. Pls.' Opp. at 16:22-23, 17:14-19. The evidence does not support Plaintiffs' assertion that "Rhomberg and Newman knew about, approved of, and participated in" any fraudulent misrepresentations supposedly made by CMP or BioMax. *Id.* at 17:19-21.[9] To the contrary, the evidence indicates that Daleiden was "the ringmaster" who managed the day-to-day affairs of CMP and BioMax and was the only person responsible for recruiting and training "his" actors, Dkt. 606, at 6:17, 7:13; Daleiden Decl. (Dkt. 609-1), ¶ 121, whereas Rhomberg and Newman had no personal

[9] It must be reiterated that Rhomberg and Newman are not named in the trespass claim, and Plaintiffs have acknowledged that their conspiracy claim only encompasses the fraudulent misrepresentation claim. Pls.' Opp. at 17:25-28 (citing Rhomberg/Newman MSJ at 24).

involvement with BioMax, and their minimal CMP-related activities did not entail specifically directing any agent(s) to engage in torts, specifically authorizing any agent(s) to engage in torts, or personally participating in tortious conduct. *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 508-09 (1986).[10]

Plaintiffs' opposition brief makes numerous misleading claims by stating that "*Defendants*" made false statements about BioMax to the State of California, procured and used falsified drivers' licenses, signed contracts, attended events with disguised identities, and recorded Plaintiffs without their consent, even though it is undisputed that Rhomberg and Newman did *none* of these things. Pls.' Opp. at 1:2-7, 1:15-16, 4:17-19, 15:13-16, 20:10-13, 23:20-22, 30:21-22, 35:2-7, 40:21-41:4, 41:15-18, 44:13-14. Additionally, although Plaintiffs assert that Daleiden asked Rhomberg and Newman to serve as CMP board members for the specific purpose of *using their "expertise"* in undercover "methodology," *id.* at 8:8-11, 8:22-9:5, 11:6-12, 11:20-22, the cited deposition testimony actually indicates that Daleiden asked them to serve as CMP board members because they were trustworthy since they understood the importance of keeping the existence of an investigation private (*i.e.*, they would "appreciate[] the methodology") given their backgrounds. Mayo Decl., Ex. 1 (Daleiden Dep. I) at 110:2-111:23.

Further, the meager evidence cited for the claim that Daleiden "kept Rhomberg updated in real time on his acts of deceit," Pls.' Opp. at 11:28-12:8, 12:25-26, consists of three emails sent over the course of 21 months, which provided little to no detail about the specifics of how the investigation was being carried out. *See, e.g.,* Mayo Decl., Ex. 33 (limited details in email simply note that "site visits" were successful and Plaintiffs PPRM and PPGC "both agreed to alter procedures and to sell individual specimens to maximize profit margins").

Much of the "evidence" that Plaintiffs offer against Newman amounts to an (unstated)

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[10] Plaintiffs' conspiracy theory also fails because they have offered no evidence to prove, as required by 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; *see* Doc. 652 at 23, n.13 (and cited cases).

request to draw negative inferences based on his assertion of the privilege against self-incrimination. Pls.' Opp. at 7:20-22, 10:8-13, 41:5-9, 42:12-14; *cf. id. at* 2:16-17 & n.4.[11] However, Plaintiffs did not even attempt to meet their burden to prove that an adverse inference would be constitutionally permissible in this case, as they failed to provide independent evidence with respect to each factual issue to which they are requesting the inference, and they did not demonstrate that they could not obtain the requested information from another source. *See* Dkt. 652 at 5:24-8:3; *Doe v. Glanzer*, 232 F.3d 1258, 1264-67 (9th Cir. 2000).[12] Moreover, a few statements attributed to Newman indicating that he had "advised" Daleiden, Pls.' Opp. at 9:6-22, do not show that Newman knew of, or was involved in, any illegal or tortious acts. To the contrary, one email cited by Plaintiffs expressly states: "We always abide by all local and federal laws." Mayo Decl., Ex. 24. Also, when read in context, the few references by Newman to CMP's work being "my project" or "one of my plans" were intended to indicate that, unlike "a lot of people [who] are participating in speaking on the subject," Newman (and Operation Rescue) were actually involved with CMP's work, among various other projects. Mayo Decl., Ex. 17, 25.[13]

Additionally, Plaintiffs mischaracterize evidence in an attempt to paint Newman (and non-party Operation Rescue) as supporters of violence against abortion providers. Pls.' Opp. at 8:3-7,

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[11] The only cite provided for the 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'" is Newman's invocation of his Fifth Amendment privilege during his deposition. Pls.' Opp. at 17:5-8 (citing Sterk Decl., Ex. 13).

[12] Plaintiffs' assertion that Newman's invocation of the privilege is an admission "that explaining his role would incriminate him," Pls.' Opp. at 10:19-21, is wrong; the privilege encompasses information that "itself is not inculpatory" where the individual believes that requested information "could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner." *United States v. Hubbell*, 530 U.S. 27, 38 (2000); *Glanzer*, 232 F.3d at 1263.

[13] Plaintiffs also mischaracterize the evidence in an attempt to claim that there was some sort of secretive pact between CMP's board members to not create a paper trail. Pls.' Opp. at 9:23-10:7, 10:19, 12:9-13, 12:26-27. The email discussion relied on by Plaintiffs (Mayo Decl., Ex. 28) occurred *over two years after CMP's work began*, and merely amounts to a suggestion that one particular complex subject (strategic considerations relating to the upcoming *publication* of CMP's videos) should be discussed by phone, not an "instruction" to hide incriminating evidence.

47:9-15. The documents relied upon by Plaintiffs expressly *disprove* that claim. Sterk Declaration Exhibit 11, a printout from an Operation Rescue website, includes a link to a Disclaimer that states: "This site . . . is in no way meant to encourage or incite violence of any kind against abortion clinics, abortionists, or their staff. *We denounce acts of violence against abortion clinics and providers in the strongest terms*."[14] Tellingly, Plaintiffs failed to mention this Disclaimer even though a link to it clearly appears at the end of the second paragraph of Sterk Declaration Exhibit 11.[15] Moreover, other evidence cited by Plaintiffs indicates that "Newman was very explicit about avoiding violence," Sterk Decl., Ex. 14 (Rhomberg Depo.) at 358:2-359:14, and Plaintiffs' claim that "Newman has described the murder of an abortion doctor as 'justifiable defensive action'" is patently false. *See* Dkt. 652 at 26, n.20.[16]

Finally, Daleiden, Newman, and Rhomberg's expressed hope that the exposure of Planned Parenthood's illegal and unethical acts would lead to investigation, criminal prosecution, and public defunding is not an *unlawful* purpose. Presumably, animal rights activists who conduct undercover investigations that expose horrific acts of animal abuse hope that those responsible for such acts face similar consequences; hoping that criminals receive punishment under the law is not an improper purpose. Also, the fact that Rhomberg and Newman oppose abortion on religious or moral grounds[17] is certainly not evidence of any nefarious or unlawful purpose; as Justice

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14 Def. Rhomberg/Newman Request for Jud. Notice, Ex. 132 (http://abortiondocs.org/disclaimer/)

15 Additionally, although Plaintiffs offered into evidence one page of a Christian theological study co-authored by Newman, they omitted other pages that *unequivocally state* that individuals lack the authority to take the law into their own hands. Def. Rhomberg/Newman Request for Jud. Notice, Ex. 133 at pp. 49-50, 88.

16 Plaintiffs similarly distort the evidence in an attempt to manufacture a non-existent goal of Rhomberg, Daleiden, and/or CMP to incite violence in response to CMP's videos. Numerous documents *offered by Plaintiffs* demonstrate a purpose to "seek out the truth" about, and publicly expose, illegal activities within the fetal tissue procurement and abortion industries in order to prompt *investigations and criminal prosecutions*. *See, e.g.*, Dkt. 652 at 26:2-8 & n.19. None mentions violence or criminal activity of any kind.

17 Plaintiffs seek to "convict" Rhomberg and Newman of having a long history of opposing abortion and using their knowledge about abortion practice and practitioners to gain (through lawful means) information about abortion businesses that they might wish to shield from public

O'Connor famously observed, "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (O'Connor, J.).

IV. PLAINTIFFS PPFA AND PPGC DID NOT INCUR ANY PROXIMATELY CAUSED DAMAGES FROM THE ALLEGED FRAUDULENT REPRESENTATIONS.

A. PPFA and PPGC/PPCFC Failed to Show Proximately Caused Damages.

As with their RICO claim, Plaintiffs PPFA and PPGC/PPCFC devote much effort to establishing a theory of recovery that relies not on proximate causation but on foreseeability.[18] Pls.' Opp. at 45–48. However, PPFA and PPGC/PPCFC have failed to present evidence backing up their theory or, as noted above, establishing any damages.

Plaintiffs assert that "[t]he history of the anti-abortion movement and its association with threats, harassment and violence directed at abortion providers made everything that happened after the video release 'an entirely predictable outcome.' *See* Expert Report of David S. Cohen at 5, 10 (Mayo MSJ Opp. Decl. Ex. 47)." *Id*. at 47:2-5. However, in his deposition, Cohen was unable to provide any specifics about the alleged association of the anti-abortion movement with threats, harassment, and violence, instead relying almost entirely on bare numbers published by NAF. He knew virtually nothing about how NAF gathered those numbers, and Plaintiffs have made no attempt to supplement his "expert" knowledge with actual evidence. *Cf.* Second Supp. Millen Decl. In Support of MSJ, Ex. 134 (Cohen Depo.) at 156:11-162:21.[19]

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scrutiny. These activities are not evidence of liability on any cause of action.

[18] Plaintiffs seem to have forgotten that the Eighth Claim, for fraudulent misrepresentation, was brought by PPFA, PPGC/PPCFC, and PPRM only. FAC, ¶¶ 204-210. PPRM seeks only injunctive relief. Millen Decl., Ex. 101 (Damages Chart), at 10, note 2. Thus, only PPFA's and PPGC/PPCFC's damages claims are relevant to the fraudulent misrepresentation claim.

[19] Plaintiffs' reliance on an expert witness to prove that the Defendants had to have known what random third parties would do (though not saying what they actually did) apparently replaces their prior plan to show "connections between Defendants and third party actors who sponsored or encouraged protest activity aimed at Planned Parenthood." Request for Deferral of Ruling on MSJ (Dkt. 394), at 3:19-22. Plaintiffs' inability to produce evidence of any such connections speaks volumes.

But the lack of evidence of a "historical backdrop of violence and harassment aimed at Planned Parenthood and other abortion providers," Pls.' Opp. at 48:18-20, is not the most significant failure of PPFA's and PPGC/PPCFC's damages theory. Rather, the most significant failure is the lack of evidence about "everything that happened after the video release" that they assert was "entirely predictable." What happened after the release? Plaintiffs don't say, much less provide any evidence of, what this "entirely predictable outcome" was. Was it letters to the editor? Congressional investigations finding that multiple Plaintiffs likely violated the law? Boycotts? Defunding (or efforts to defund)? #PlannedParenthoodSellsBabyParts? Legislation? Lawful, peaceful demonstrations at clinics? People holding signs over freeway overpasses? While Plaintiffs contend that "Defendants knew or should have known that the release of their fraudulently obtained videos would cause an increase in criminal activity directed at Planned Parenthood," *id.* at 48:19-20, they did not put a scintilla of evidence into the record showing any criminal activity, much less an *increase* in criminal activity, following the CMP video releases. Without such evidence, there is nothing to which any particular expenditure or category of damages can be tied in the causal chain, even if PPFA and/or PPGC/PPCFC had offered evidence establishing such expenditures.

Plaintiffs did not create a triable issue of fact as to whether any damages were proximately caused by the alleged fraud.[20] Summary judgment should be granted on Claims Three and Eight.

B. Plaintiffs Cannot Collect Reputational Damages.

Summary judgment on Claims Three and Eight is appropriate for a second reason: reputational damages were disclaimed by Plaintiffs and are barred by the First Amendment. Plaintiffs concede that they *are* seeking "economic" damages arising from third-party reaction to the publication of the CMP videos, yet they try to argue that they are not seeking *reputational* damages that arose from those reactions. Pls.' Opp. at 48-51. No knife can slice so thinly.

PPFA and PPGC/PPCFC cite several cases for the proposition that, even without showing actual malice or incitement to harm, they may still recover damages caused by third parties' actions

[20] PPFA's failure to show proximately caused damages from infiltration is discussed previously.

"taken in response to defendant's publication," thus permitting them to claim their five categories of publication damages. *Id.* at 50-51. They claim that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), is "dispositive" because the Court awarded the plaintiff damages for his lost job and lowered earning potential after a publication contained his name. *Id.* at 50 (citing *Cohen*, 501 U.S. 663). *Cohen* is readily distinguishable: Cohen did *not* lose his job because his reputation had been injured, but rather because publication of his name as the source of the story revealed to his employer that he had violated the terms of his employment. *Cohen*, 501 U.S. at 666. Thus, damages were allowed against the journalist who breached the oral agreement not to reveal Cohen's name; obviously, if Cohen's claim was that his co-worker became outraged at the revelation and beat him senseless at work, the case would have had a different outcome. So too here, every item of PPFA and PPGC/PPCFC's claimed damages relies on the "outraged" reaction of third parties to CMP's publications about them. *See* CMP MSJ at 6; Rhomberg/Newman MSJ at 8-10.

Next, PPFA and PPGC/PPCFC rely on *Smithfield v. United Food and Commercial Workers Int'l Union*, 585 F. Supp. 2d 815 (E.D. Va. 2008), but that case substantially undermines their argument. The plaintiffs in *Smithfield* sought recovery for various damages, including "the 'direct' expenses realized by Smithfield as a result of the campaign," lost profits, loss of an opportunity to advertise on Oprah for free, and abnormally low stock returns. *Id.* at 817. The court noted that, although plaintiffs did not make "a claim for defamation," that "is not dispositive." *Id.* at 818. It then analyzed the content of the pleadings to determine whether the damages sought were "'reputational,'" thus requiring proof of malice. *Id.* at 821-22 (quoting *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 523 (4th Cir. 1999)). The court found numerous examples in the complaint where plaintiffs framed the issue as reputational in nature, such as claiming that their "brand name has been significantly tarnished" due to allegations that it is "a disreputable company that operates an unsafe workplace, mistreats its workers and regularly violated the law," which "have painted a revolting and visceral picture of Smithfield's business . . . ." *Id.* at 822-23.

> The *Smithfield* court concluded that the complaint's language,
> which remains binding on Smithfield, demonstrates rather clearly that Smithfield is seeking damages, inter alia, on the basis of harm to its corporate reputation. And, that language refutes Smithfield's more recent contention that none of its asserted losses represent

> "reputational damages." See Pltfs' Reply at 3. Therefore, it is clear that, at least with respect to certain portions of its damage claims, Smithfield must prove both falsity and actual malice to recover.

Id. at 823. The court, finding no evidence of malice, dismissed four out of five of Smithfield's claims for recovery, including the so-called direct expenses from the campaign. The only category of damages allowed was for the value of an appearance on Oprah, which was lost, not due to misrepresentations (as PPFA and PPGC/PPCFC assert in their brief) but due to defendants' "active interference and is not based on any harm to Smithfield's reputation." *Id.* at 824.

Although Plaintiffs' Opposition Brief alleges that their reputational injury is irrelevant to their claims, this assertion is belied by multiple allegations in the Complaint.[21] As the court in *Smithfield* noted, "if a party seeks damages caused to its reputation by the publication of speech, the party must prove that the speech was false and made with actual malice." 585 F. Supp. 2d at 822. Despite the repeated references to falsity in the Complaint, and despite their repeated references to a "smear" campaign in their Motion for Summary Judgment (at 3:13, 5:5-6, 5:20-22, 6:2-5, 13:18-19), Plaintiffs have introduced no evidence whatsoever to show that the videos were false. As a result, Plaintiffs cannot recover for any alleged damages that resulted from the publication of the videos—that is, all of them. CMP Br. at 6 (citing to depositions of every Plaintiff admitting all damages arose from the publication of the videos); Rhomberg/Newman Br. at 8-10.

Plaintiffs' reliance on *Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000), allowing the plaintiff to recover damages for "loss of . . . customers flowing from the misrepresentation[]," Pls.' Opp. at 50-51, flies in the face of Plaintiffs' assurances and this Court's orders (as quoted in Plaintiffs' own brief) which stated that Plaintiffs were not seeking "reputation" damages such as "lost business" or "loss of revenue." *Id.* at 50 (citing Doc. 466 at 2; Doc. 420 at 1). Furthermore, the

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[21] *See, e.g.,* Doc. 59, at ¶ 1 ("aim . . . was to demonize"); ¶ 7 ("misleading impression"); ¶ 8 ("manipulated videos and inflammatory accusations"); ¶ 10 ("false statements . . . and the video smear campaign constitute a conspiracy to demonize"); ¶ 12 ("This action is brought to further expose the falsity and illegality of Defendants' methods and to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign.").

misrepresentation referred to by the district court in Plaintiffs' quoted passage was a broken promise to not allow members of an anti-trucking group to appear in the program. The First Circuit limited recovery further than this, allowing recovery only if the plaintiff could "prove pecuniary losses specifically resulting from the inclusion of [the anti-trucking group] PATT in the program." *Veilleux*, 206 F.3d at 129.[22] Perhaps even more relevant, the *Veilleux* court found that the misrepresentation about who would be in the broadcast was far different from mere misrepresentations about the undercover reporter's identity, and noted that, had the misrepresentation been about mere identity, its decision would have been far different. *Id.* at 125-26 (referencing *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997), *rev'd on other grounds*, 194 F.3d 505 (4th Cir. 1999)). Plaintiffs' claim that all of their categories of damages would pass muster under *Veilleux*, Pls.' Opp. at 51, is incorrect because Plaintiffs seek to "recover generally for all harm flowing from" the publication of the CMP videos, *id.*; *cf. Veilleux*, 206 F.3d at 125.

PPFA and PPGC/PPCFC's reliance on *Steele v. Isikoff*, 130 F. Supp. 2d 23 (D.D.C. 2000), is equally misplaced. There, the court acknowledged that it was constrained to "accept the plaintiff's version of events" *at the motion to dismiss stage* but noted that, "[q]uite possibly, following discovery[,] Defendants could demonstrate that the damages Steele seeks are all for harm to her reputation." *Id.* at 29. Thus, although the plaintiff alleged "occupational harm" which was "non-reputational," the court reasoned that this allegation might not stand up to additional testing during discovery. *Id.* The instant case has progressed far beyond the pleading stage. Plaintiffs cannot survive summary judgment by conclusory assertions that they are not seeking reputational damages when *the testimony of their own witnesses* establishes that *all* of the claimed expenses (none of which are supported by evidence in the record) are related to perceived or actual damage to their reputation because of the CMP publications. Rhomberg/Newman Motion at 6-9.

[22] *Id.* at 105, 123-26 ("[W]e limit Ray's recovery to those damages specifically and directly caused by the program's inclusion of PATT; he may not recover generally for all harm flowing from the entire broadcast.").

V. PLAINTIFFS HAVE NOT SHOWN THE ELEMENTS OF A CLAIM FOR RELIEF UNDER BUS. & PROF. CODE § 17200 AS TO RHOMBERG AND NEWMAN.

A. Plaintiffs Have Failed to Show That They Lost Money or Property From Any Unlawful, Fraudulent, or Unfair Business Practices in California.

As in their Motion for Summary Judgment, Plaintiffs rely on allegations about how BioMax and CMP were formed in order to support the "unlawful" prong of their § 17200 claim, but they again failed to provide any legal support for their contention that steps taken to set up a business are "business practices," nor did they provide a shred of evidence establishing the supposed illegality of those steps. *See* Rhomberg/Newman Opp. at 30. As discussed previously, there is no evidence that Rhomberg or Newman conspired to commit any illegal act.

Plaintiffs refuse to recognize the Ninth Circuit's holding in *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018), that the use of false identities to enter property is not *per se* fraudulent, but rather is constitutionally protected: "Idaho's criminalization of misrepresentations to enter a production facility . . . cover[s] protected speech under the First Amendment. . . ." Plaintiffs try to make fraud out of what the Ninth Circuit clearly said was not fraud ("a false statement made to access a . . . facility," *id.* at 1194) by claiming that the fact that CMP raised money to underwrite its investigations creates the "material gain" necessary to turn a misrepresentation into fraud. Pls' Opp. at 36:11-21. However, Plaintiffs offer no evidence that anyone who donated to CMP did so because of any misrepresentation made to the donor and, in any event, the existence of commercial sponsors of a television broadcast about an undercover investigation would not turn constitutionally protected journalism into actionable fraud.

Plaintiffs also argue two bases for their standing as parties who have "lost money or property" as a result of allegedly unlawful or fraudulent business practices. First, Plaintiffs claim a deprivation of the "right to exclude others." *Id.* at 42:27-43:1. Even if this were a valid assertion of a "loss" of property for purposes of the UCL,[23] none of these alleged "deprivations" took place in

[23] The "right to exclude others" may be part of the "bundle of property rights," yet it does not follow that every stick in the property rights bundle is an "economic" one under the UCL. PPFA can show no *economic* damages from merely having lost the ability to prevent Defendants from entering their conferences as invited, paid attendees. The only other infiltrated Plaintiffs—PPRM in

California. Also, no non-infiltrated Plaintiff can even pretend to argue that they lost this property right since no Defendant ever entered their property (in California or elsewhere).

Second, Plaintiffs point to the costs incurred to "upgrade the security of their conferences." *Id.* at 43:4-6. Since PPFA is the only Plaintiff that hosts conferences, Plaintiffs are effectively conceding that *no other Plaintiff* has standing to pursue the UCL claim.[24] Moreover, even as to PPFA, Plaintiffs' cases explaining why PPFA—a New York corporation—could have standing due to its security upgrades all miss the point. Plaintiffs here would only be paying to protect that which should have been protected all along, unlike the plaintiffs in *Witriol* whose credit information was not previously at risk and therefore was not protected. *Witriol v. LexisNexis Grp.*, 2006 U.S. Dist. LEXIS 26670, 2006 WL 4725713, at *18-19 (N.D. Cal. Feb. 10, 2006). Also, the members of the plaintiff class in *Witriol* were located in California, whereas neither PPFA nor its conferences are located in California. *Id.* at 16-17. In any event, whether called security upgrades or "diversion of resources," PPFA has failed to adduce admissible evidence that either occurred.

Finally, Plaintiffs argue that Rhomberg and Newman should be held personally liable under the UCL. Even if liability were established, Plaintiffs' logic is that 1) BioMax violated the UCL; 2) therefore Daleiden (and possibly others) violated the UCL; 3) "CMP is the parent company of BioMax"; 4) this Court should pierce the corporate veil and find that CMP is "liable as [BioMax's] alter ego"; and 5) this Court should pierce the corporate veil of CMP and find that officers of CMP are personally liable for all actions of BioMax. Pls.' Opp. at 43. Plaintiffs have provided no evidence that the corporate veil should be pierced twice, or that liability should flow to CMP's officers. *See* Rhomberg/Newman's Opp. at 14-16.

Colorado and PPGC/PPCFC in Texas—similarly cannot show any actual monetary loss from having not ejected Defendants, and PPRM is not even *seeking* recovery in this action.

[24] Plaintiffs also ignore that PPFA does not provide abortion or medical services and thus could not have been injured as a consumer or competitor under the UCL. Rhomberg/Newman Br. at 30-31.

B. Plaintiffs failed to show an imminent threat of harm from future violations by Rhomberg or Newman justifying injunctive relief against them.

Plaintiffs have claimed that "*Defendants* intend to attend Plaintiffs' conferences in the future," Pls.' Opp. at 5:28-6:02 (emphasis added), but there is no evidence that either Rhomberg or Newman intend to attend Plaintiffs' conferences in future. The cited interrogatory response of *CMP and BioMax* indicated that they were not responding on behalf of any individual Defendants, and stated that, should *CMP or BioMax* seek to attend or enter any of Plaintiffs' or NAF's future conferences, meetings, or facilities, *they* "would do so for the purpose of journalism." Sterk Decl., Ex. 64, CMP/BioMax Objection #7 and Resp. to PPFA Interrog. #22. Plaintiffs' speculation that other Defendants may, at some point, attempt to investigate one or more Plaintiffs' activities in the future is not "evidence" of any intent by Rhomberg or Newman, former CMP board members (Daleiden Decl., ¶ 125), to commit any future violation of the UCL (or any other law). Plaintiffs' description of an "open-ended" conspiracy to investigate Planned Parenthood lacks any specificity as to timing, methods, or personnel conveying the "real and immediate threat of repeated injury" (*Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)) through conduct covered by § 17200 necessary to confer standing to seek injunctive relief under that statute.

CONCLUSION

Rhomberg and Newman are both entitled to summary judgment on all causes of action brought against them: RICO, Civil Conspiracy (related to fraud) and the UCL (§ 17200 *et seq.*).[25]

Respectfully submitted on July 3, 2019.

[25] Plaintiffs are belatedly attempting to expand their breach of contract and trespass claims to cover Rhomberg and Newman who were not listed as defendants on those claims in the Amended Complaint. *See* Rhomberg/Newman MSJ Oppo (Dkt. 652) at 27-29. Similarly, Plaintiff PPPSGV did not bring a cause of action for fraud against anyone. Plaintiffs are foreclosed from seeking to hold Rhomberg and Newman liable on unpled, non-existent causes of action.

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