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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiffs, vs. CENTER FOR MEDICAL PROGRESS, et al., .	Case No. 16-cv-00236 (WHO) Judge William H. Orrick, III Defendants' Reply in Support of their Motion to Dismiss Pursuant to Rule 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure

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INTRODUCTION

Plaintiffs' Opposition exposes major weaknesses in their claims. First, Plaintiffs fail to grasp that elements of RICO such as injury to business, pattern, and causation must be alleged and proven in relation to the RICO predicate acts, not merely to some nebulous "scheme." Second, Plaintiffs assert claims of unlawful recording of corporate speech, while simultaneously asserting that same incidents of recording constitute personal privacy torts against their employees. Third, Plaintiffs attempt to back away from their repeated and unambiguous allegations that "[t]his action is brought . . . to recover damages for the ongoing harm to Planned Parenthood *emanating from the video smear campaign*," Doc. 59, ¶ 12, *i.e.*, publication damages barred by the First Amendment.

I. Plaintiffs Have Failed to State a Claim Under RICO.

A. Plaintiffs fail to allege an injury to "business or property."

Plaintiffs' arguments that they have "RICO standing" because they have been injured in "business or property" are entirely meritless. *See* Doc. 79, 1-4. First, Plaintiffs claim that "[a]llegations of RICO conduct leading to interruption of services or increased cost of doing business is sufficient to confer RICO standing." Doc. 91, at 4. As support for this contention, Plaintiffs cite *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255-56 (1994), and *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1383 (D. Or. 1996) ("*PPCW*"). Plaintiffs' reliance on these cases reflects an erroneous conflation of RICO statutory standing with Article III constitutional standing. "RICO standing is a more rigorous matter than standing under Article III." *Zazzali v. Eide Bailly LLP*, No. 1:12-cv-349, 2013 WL 6045978, at *28 n.24 (D. Idaho Nov. 14, 2013). As the Ninth Circuit has explained, *Scheidler* "concern[s] constitutional standing, not RICO or antitrust standing." *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 704 n.4 (9th Cir. 2001) (refusing to apply *Scheidler* in analysis of RICO standing). Thus, when analyzing a plaintiff's RICO standing, *Scheidler* is "inapposite." *Id.*; *see also Perry v. Am. Tobacco Co.*, 324 F.3d 845, 849-50 (6th Cir. 2003) (refusing to apply *Scheidler* in RICO-standing analysis). The district court's RICO-standing analysis in *PPCW* relied entirely on the erroneous position that *Scheidler* addressed RICO standing.

See 945 F. Supp. at 1383. Subsequent Ninth Circuit case law squarely rejects that analysis. *See Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 704 n.4.

Second, economic injuries that result from non-RICO personal or reputational injuries do not support RICO standing. Certain forms of interference with business relations can constitute an injury to "business or property" under RICO. But if the harm to a plaintiff's business or property derives from an injury that itself does not support RICO standing, then the plaintiff lacks RICO standing. *See, e.g.*, *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 565 (6th Cir. 2013) (en banc) (RICO does not permit recovery for "damages arising directly out" of non-RICO injuries, even though such "injuries often lead to monetary damages that would be sufficient to establish standing if the plaintiff alleged a non-personal injury"); *see also Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 668 (S.D. Cal. 1994) ("[T]he courts have been clear that even the economic consequences of personal injuries are not compensable under RICO."); *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992) (economic injuries that "are plainly derivatives" of non-RICO injuries "are not compensable under RICO"). "These losses are not recoverable because of the origin of the underlying injury." *Jackson*, 731 F.3d at 565.

Here, while Plaintiffs claim to have sustained economic losses such as reduced clinic visits and vendor contacts, those alleged losses all derive directly from non-RICO injuries. Plaintiffs allege that their alleged injuries "all stem[] from Defendants' campaign of lies," *i.e.*, from Defendants' public speech. Doc. 59, ¶ 161. Any injuries that result from Defendants' public speech are either reputational injuries, or harm caused by third parties allegedly provoked by Defendants' public speech, such as violence or "harassment." *See id.* All of these injuries are not recoverable under RICO. *See, e.g.*, *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (holding that personal and emotional injuries do not support RICO standing); *In re Teledyne Def. Contracting Derivative Litig.*, 849 F. Supp. 1369, 1372 n. 1 (C.D. Cal. 1993) (noting that injuries to "business reputation" are not cognizable under RICO). Because those underlying alleged injuries do not support RICO standing, neither do economic injuries that originate in and derive from such non-RICO injuries. *See Jackson*, 731 F.3d at 565-66; *Doe*, 958 F.2d at 770.

B. Plaintiffs have failed to allege facts giving rise to a reasonable inference that Defendants committed any RICO predicate acts.

1. The Complaint fails to allege that Defendants committed wire fraud.

Plaintiffs' Complaint fails to allege plausibly that Defendants violated the federal wire-fraud statute. *See* Doc. 79, 5-8. Plaintiffs principally rely on the remarkable contention that violations of the federal wire-fraud statute do not require that a defendant intend to acquire money or property from the victim. *See* Doc. 91, at 6. No authority supports this proposition. The wire-fraud statute "explicitly require[s] an intent to obtain money or property from the one who is deceived by means of false or fraudulent pretenses, representations, or promises." *Monterey Plaza Hotel v. Local 483*, 215 F.3d 923, 926 (9th Cir. 2000) (quotation and brackets omitted); *see also, e.g., United States v. Ali*, 620 F.3d 1062, 1070 (9th Cir. 2010) ("[T]he intent must be to obtain money or property from the one who is deceived."). Plaintiffs simply ignore this black-letter law.

Plaintiffs' arguments that Defendants *did* intend to obtain money or property from them also fail. First, Plaintiffs contend that "Defendants' scheme was carried out with the clear intention of shutting down (or at least significantly interrupting) Plaintiffs' business." Doc. 91, at 6. The Supreme Court rejected precisely this argument in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003). In *Scheidler*, the RICO plaintiffs claimed that pro-life protesters had deprived them of "property" rights consisting of "the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear." *Id.* at 400-01. The Supreme Court held that defendants' interference with such interests simply cannot be characterized as obtaining property. *Id.* at 402.[1] Here too, even assuming that Plaintiffs have correctly characterized Defendants' intent, *Scheidler* definitively holds that such an intent cannot constitute an intent to obtain property from Plaintiffs. *See id.* Thus, Defendants did not commit wire fraud. *Monterey Plaza*, 215 F.3d at 926.

Second, Plaintiffs contend that Defendants obtained "confidential information" from them, and that this information constitutes property within the meaning of the wire-fraud statute. Doc. 91,

[1] To the extent that Plaintiffs rely on two pre-*Scheidler* cases to the contrary, *see* Doc. 91 at 6, *Scheidler* plainly overruled the relevant holdings of those cases.

at 7. An interest constitutes "property" sufficient to support a violation of the federal wire-fraud statute only if that interest constitutes "property" under applicable state law. *See*, *e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1293-94 (11th Cir. 1998); *Borre v. United States*, 940 F.2d 215, 219-20 (7th Cir. 1991); *see also Maloney Gaming Mgmt., LLC v. St. Tammany Parish*, 456 F. App'x 336, 342 (5th Cir. 2011). California law provides that "[i]nformation is not property unless some 'positive law' makes it so." *SunPower Corp. v. SolarCity Corp.*, No. 12-cv-00694-LHK, 2012 WL 6160472, at *5 (N.D. Cal. Dec. 11, 2012). Under the California Uniform Trade Secrets Act ("CUTSA"), if information does not qualify as a "trade secret," then the information does not constitute property under California law. *Id.*; *Silvaco Data Sys. v. Intel Corp.*, 184 Cal.App.4th 210, 239 n. 22 (2010), *overruled in part on other grounds by Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011) ("Information that does not fit [the CUTSA's] definition [of a trade secret], and is not otherwise made property by some provision of positive law, belongs to no one, and cannot be converted or stolen."). As described in Defendants' Motion to Dismiss, the purportedly confidential information at issue here plainly does not constitute a trade secret under the CUTSA. Doc. 79, 5-6. Plaintiffs do not contest this point. Thus, even an intent to obtain that purportedly confidential information cannot support a wire-fraud violation.[2]

Plaintiffs' reliance on *Carpenter v. United States*, 484 U.S. 19 (1987), is misplaced. To be sure, *Carpenter* held that certain forms of confidential information can constitute "property" within the meaning of the wire-fraud statute. But, as numerous cases since *Carpenter* have recognized, intangible interests like confidential information constitute "property" within the meaning of the wire-fraud statute only if those interests constitute "property" under applicable state law. *Shotts*, 145 F.3d at 1293-94; *Borre*, 940 F.2d at 219-20; *see also Maloney Gaming*, 456 F. App'x at 342

[2] Plaintiffs accuse Defendants of seeking to use state law to "preempt a federal statutory claim." Doc. 91, at 7. Plaintiffs misunderstand the relationship between state and federal law in this context. The CUTSA provides that, under California state law, no interest in purportedly confidential information constitutes "property" unless it qualifies as a trade secret under the CUTSA. *See SunPower*, 2012 WL 6160472, at *5. If information does not constitute "property" under California law, then an intent to obtain that information does not violate the federal wire-fraud statute. *See Shotts*, 145 F.3d at 1293-94.

(discussing in detail the Supreme Court's wire-fraud analysis in *Cleveland v. United States*, 531 U.S. 12 (2000)). In *Carpenter*, the soon-to-be-published newspaper column misappropriated from the Wall Street Journal constituted property under New York law. *See Carpenter*, 484 U.S. at 27-28 (relying on *Diamond v. Oreamuno*, 24 N.Y.2d 494 (1969)). Thus, *Carpenter* is inapposite.

Plaintiffs' reliance on *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), is similarly misplaced. *Mahaffy* involved the misappropriation of information regarding investors' requests to purchase securities, and the relevant conduct occurred in New York. *See id.* at 120. Without any analysis, the court asserted that "[i]nformation may qualify as confidential under *Carpenter* even if it does not constitute a trade secret." *Id.* at 135. Critically, however, New York has not adopted the Uniform Trade Secrets Act—unlike California. *See* Uniform Law Commission, Trade Secrets Act, http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act. *Mahaffy* thus does not address what information qualifies as property under California law.

Finally, even if the information at issue were actually wire-fraud "property," Plaintiffs fail to rebut the cases cited in Defendants' Motion to Dismiss, Doc. 79, at 4, 6-7, establishing that Plaintiffs' fraudulent-inducement theory cannot support a RICO or wire fraud claim.

2. The Complaint fails to allege plausible violations of 18 U.S.C. § 1028.

Plaintiffs claim that Defendants violated § 1028(a) in three different ways: (a) by producing false identification documents, (b) by transferring false identification documents, and/or (c) by possessing and using, without authority, a means of identification of another person with the intent to commit a crime. *See* 18 U.S.C. § 1028(a)(1), (2), (7); Doc. 91, at 8. These claims have no merit.

The Complaint does not allege facts that, if true, would show that Defendants violated § 1028(a)(1) or (a)(2). Section 1028(a)(1) prohibits "knowingly and without lawful authority produc[ing] . . . a false identification document," and § 1028(a)(2) prohibits "knowingly transfer[ring] . . . a false identification document knowing that such document . . . was . . . produced without lawful authority." 18 U.S.C. § 1028(a). Plaintiffs argue that the allegations in Paragraphs 56, 60, 62, and 84-86 support this claim. Doc. 91, at 8. But, other than Paragraphs 85 and 86, the allegations in those paragraphs do not even address false identifications at all.

Paragraph 85 merely alleges that Defendant Daleiden "presented a fake California drivers' license" at a PPFA conference. Doc. 59, ¶ 85. The mere possession or use of a false identification does not violate § 1028(a)(1). *See United States v. Rohn*, 964 F.2d 310, 312 (4th Cir. 1992) ("Congress could have criminalized mere possession of false identifications. It did not, however, write the statute in this way."). Paragraph 85 provides no facts regarding the production or transfer of the allegedly false identification. Paragraph 86 states that "Defendants produced or caused to be produced this phony identification document and other similarly phony identification documents used by their co-conspirators." *Id.*, ¶ 86. This conclusory assertion, unsupported by any other facts, amounts to nothing more than a threadbare recital of the statutory requirement that the Defendants have "produce[d] . . . a false identification document." 18 U.S.C. § 1028(a)(1). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs cite two cases for the proposition that a person can violate § 1028(a)(1) by actively participating in the production of false identifications, even if the person does not personally produce the identifications. *See United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir. 2003) (defendant violated § 1028(a)(1) "by providing false information to the DMV with the specific intent that the agency would then produce a false identification document for him"); *United States v. Jaensch*, 678 F. Supp.2d 421, 428 (E.D. Va. 2010) (false identification was produced by a third party "pursuant to a purchase order containing defendant's name and address in the shipping and billing columns"). Here, by contrast, the Complaint does not include any allegations regarding the role Defendants played in producing the false identifications, much less that such production itself was "in or affecting" interstate commerce, as required under § 1028.

The Complaint also does not allege facts that, if true, would show that Defendants violated § 1028(a)(7). The bare allegation that Daleiden was at high school at the same time as someone named "Brianna Allen," coupled with the allegation that "Brianna Allen" was, to some unspecified degree, the assumed name of one of the investigators, does not plead facts sufficient to show that Defendants used the common name "Brianna Allen" as a means of identifying the specific Brianna

Allen who went to school with Daleiden – in other words, that the unnamed investigator was impersonating Daleiden's schoolmate. That is a speculative leap unsupported by any allegations even hinting that Defendants attempted to capitalize on this other Brianna Allen's identity.

Moreover, § 1028(a)(7) requires "the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7). Plaintiffs concede, as they must, that they do not rely on violations of state law to support a violation of § 1028(a)(7). *See* Doc. 91, at 10 n.7. Plaintiffs have also failed to allege facts showing an intent to violate any provision of federal law. For the reasons stated above and below, Defendants did not commit wire fraud or violations of the federal Wiretap Act, and thus Defendants could not have used Brianna Allen's name in connection with those violations. In addition, Plaintiffs cannot rely on purported RICO violations to establish a violation of § 1028(a)(7), because such an argument would be entirely circular. A defendant violates RICO only if she engages in a pattern of committing at least two RICO predicate offenses. *See* 18 U.S.C. §§ 1961(5), 1962. But Defendants would commit a § 1028(a)(7) predicate violation only if they used identification materials for the purpose of violating RICO. Plaintiffs cannot bootstrap a RICO claim in this manner.

Finally, allegations that "the criminal enterprise is ongoing," Doc. 91, at 10, and Defendants "continue to threaten the release of more such videotapes," Doc. 59, ¶ 152, are insufficient to allege an ongoing pattern of *RICO predicate acts*. The RICO claim should be dismissed.

C. Plaintiffs allege that various actions of numerous people, not the alleged RICO predicate acts, proximately caused Plaintiffs' alleged injuries.

To state a civil RICO claim, a plaintiff must show "that *a RICO predicate offense* not only was a 'but for' cause of his injury, but was the proximate cause as well." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010) (emphasis added). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led *directly* to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added). As Defendants explained, the allegations in the Complaint demonstrate that any injury sustained by Plaintiffs did not result directly from any *RICO predicate offenses* committed by Defendants but, at

most, from a complex causal chain that involved both additional conduct by Defendants and the intervention of many third parties unrelated to Defendants. *See* Doc. 79, 11-13.

In response, Plaintiffs contend that they have satisfied RICO's proximate-causation requirement, because "all Plaintiffs suffered damages to their businesses as a foreseeable and natural consequence of Defendants' scheme." Doc. 91, at 11. In *Hemi Group*, the Supreme Court "explicitly rejected foreseeability as a standard for determining proximate causation." *Couch v. Cate*, 379 F. App'x 560, 565 (9th Cir. 2010). "*Hemi Group* definitively foreclosed RICO liability for consequences that are only foreseeable without some direct relationship." *Id.* at 566 (rejecting the argument that plaintiffs had satisfied RICO's proximate-causation requirement merely because their "injuries were a foreseeable result of the defendants' predicate acts"); *see also Mattel, Inc. v. MGA Entmt., Inc.*, 782 F. Supp.2d 911, 1023-24 (C.D. Cal. 2011) ("[A] civil RICO plaintiff may not obtain recovery on the sole basis that its injuries were foreseeable, or even intended, consequence of a violation of substantive RICO."). Thus, not only is "Defendants' scheme" not synonymous with the alleged RICO predicate acts, but the claim that Plaintiffs' injuries were a "foreseeable and natural consequence" of "Defendants' scheme" does not establish RICO causation. Doc. 91, at 11.

Plaintiffs also insist that there was a "direct" causal relationship between Defendants' alleged wire-fraud and identity-theft predicate violations and the alleged injuries to Plaintiffs' purported business or property interests. *See* Doc. 91, 10-11. In support of this contention, Plaintiffs cite *sixty* paragraphs of the Complaint that refer to a host of actions allegedly taken by numerous individuals over the course of several years, the vast majority of which do not purport to be RICO predicate acts. *Id.* Critically, to establish RICO causation, the injuries must directly result from the *alleged predicate acts*, not from the RICO scheme as a whole. *Hemi Group*, 559 U.S. at 11. Plaintiffs' causal theory requires that (1) Defendants allegedly used fake identifications and communicated by email (the only alleged predicate acts); (2) which induced Plaintiffs and others to admit Defendants to conferences; (3) which led to site visits and business meetings; (4) at which Defendants recorded various conversations; (5) Defendants later published those recordings; (6)

thereby harming Plaintiffs' reputation; (7) causing unrelated third parties to harass or physically attack Plaintiffs, governmental entities to investigate Plaintiffs, and third parties to fear associating with Plaintiffs; (8) which in turn caused economic harms to Plaintiffs.

Clearly, this causal chain does not reflect a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Plaintiffs' purported losses required the intervention (or anticipated intervention) of numerous third parties unaffiliated with Defendants, including governmental actors. *See Wodka v. Causeway Capital Mgmt. LLC*, 433 F. App'x 563, 564 (9th Cir. 2011) (affirming dismissal of RICO claim based on failure to allege proximate causation, where plaintiff's injuries "were directly caused by a series of intervening actions undertaken by independent, third party actors," including governmental actors). Moreover, Defendants' alleged predicate offenses could not have caused any injury unless Defendants had engaged in subsequent public speech, which plainly does not constitute a RICO violation. Thus, by Plaintiffs' own admission, their alleged injuries clearly resulted from "a set of actions . . . entirely distinct from the alleged RICO violation[s]." *Anza*, 547 U.S. at 458; *see also* Doc. 91, at 11 (alleging that numerous non-RICO predicates caused injuries).

Plaintiffs assert that *Anza* and *Hemi Group* are distinguishable, because "the Court rejected RICO claims on the basis that defendants realized their fraudulent scheme and derived a benefit regardless of whether the plaintiffs were harmed." Doc. 91, at 11. This statement does not accurately reflect the holdings of *Anza* and *Hemi Group*. In both cases, the Court found that the plaintiffs had failed to establish proximate causation, because "the conduct directly causing the harm was distinct from the conduct giving rise to the fraud [*i.e.*, the predicate offense]." *Hemi Grp.*, 559 U.S. at 11. In *Anza*, the same party committed both the predicate acts and the conduct that injured the plaintiff. *Id.* Because the plaintiff's injuries did not directly result from the defendant's predicate violations, but rather from some other conduct by the defendant, RICO's proximate-causation standard was not satisfied. *Id.* In *Hemi Group*, the proximate-causation deficiency was even clearer, because the plaintiff's "theory of liability rest[ed] not just on separate *actions*, but

separate actions carried out by separate *parties*." *Id.* Neither case relied on the peculiar holding attributed to it by Plaintiffs. The RICO claim should be dismissed.

II. Plaintiffs Have Failed to State a Claim Under the Federal Wiretap Act.

Plaintiffs also have failed to state a claim under the federal Wiretap Act. The Wiretap Act permits recordings where the individual making the recording "is a party to the communication . . . unless such communication is intercepted for the purpose of committing any criminal or tortious acts in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). As Defendants explained in their Motion to Dismiss, Plaintiffs' Complaint demonstrates that Defendants were parties to all of the allegedly recorded communications at issue. *See* Doc. 79, at 14-15. Plaintiffs did not dispute this point. *See* Doc. 91, at 12-13.

Instead, Plaintiffs contend that Defendants recorded the conversations for the purpose of committing RICO predicate acts and for invading the privacy of the recorded individuals. Doc. 91, at 12-13. As explained herein and in Defendants' Motion to Dismiss, Plaintiffs have failed to adequately allege any RICO predicate acts or actionable invasions of privacy. Plaintiffs cannot rely on such purported violations to support their Wiretap Act claim.

Second, as to the alleged purpose of committing a tortious invasion of privacy, Plaintiffs may only assert a claim under the Wiretap Act if they have a "possessory interest" in the recorded speech as corporations or businesses. *Smoot v. United Transp. Union*, 246 F.3d 633, 640 (6th Cir. 2001). Such a possessory interest, however, is incompatible with the claim that the same conversations were of such a private nature that recording them constituted a common-law invasion of personal privacy. To the extent that the conversations were private and personal, Plaintiffs lack standing to bring this claim.

Third, Plaintiffs contend that "[a] simultaneous tortious violation is sufficient for Section 2511." Doc. 91, at 13. As Defendants explained in detail in their Motion to Dismiss, § 2511(2)(d) requires that the defendants intend to *use* the recordings for a criminal or tortious purpose, not merely that the recording itself is criminal or tortious. *See Sussman v. ABC, Inc.*, 186 F.3d 1200, 1202-03 (9th Cir. 1999); *Caro v. Weintraub*, 618 F.3d 94, 98 (2d Cir. 2010); *In re Google Inc.*

Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 145 (3d Cir. 2015).[3] Plaintiffs have not alleged any unlawful *use* of the recordings other than the purported uses for RICO or invasion-of-privacy purposes discussed above. Thus, the Court should dismiss Plaintiffs' Wiretap Act claim.

III. Plaintiffs Have Failed to State a Claim for Breach of Contract Based on the PPFA Agreements, the NAF Agreements, or the PPGC Agreements.

A. The Complaint fails to allege that Defendants breached the PPFA agreements.

Plaintiffs fail to allege that Defendants breached the PPFA Agreements. First, Plaintiffs contend that Defendants agreed that "[t]he exhibits and sponsored meetings must be educational and informative, emphasizing information about products and services useful to the registrants' practice and beneficial to the interests of their clients and patients." Doc. 59, ¶ 82; *see also* Doc. 59-2, at 2, ¶ 1. Plaintiffs claim that this purported covenant applies to both conference sponsors and to conference exhibitors like Defendants. Doc. 91, at 16. This contention removes the quoted sentence from its context. The quoted sentence appears in a list of provisions immediately following the sentence: "[T]he acceptance of each Sponsor's support is conditioned upon their agreement to the following Terms and Conditions." Doc. 59-2, at 2. It is indisputable that the provision on which Plaintiffs rely is a condition of PPFA's acceptance of *sponsorships*, not a covenant applicable to *exhibitors*. Plaintiffs do not dispute that Defendants were never conference sponsors. Thus, this provision did not impose any obligations on Defendants.

Second, Plaintiffs claim that Defendants breached a contractual obligation to follow all applicable laws. Doc. 59, ¶ 82. As Defendants have explained, the case law is clear that "a promise to refrain from unlawful conduct is unlawful consideration. A contract that includes such a promise as consideration is illegal." *Floor Seal Tech., Inc. v. Sinak Corp.*, 156 F. App'x 903, 904 (9th Cir.

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[3] In response to these cases, Plaintiffs cite *In re Toys R Us, Inc., Privacy Litigation*, No. 00-cv-2746, 2001 WL 34517252, at *8 (N.D. Cal. Oct. 9, 2001). *Toys R Us* does not undermine the clear rule that § 2511(2)(d) requires that the defendants intend to *use* the recordings for a criminal or tortious purpose, not merely that the recording itself is criminal or tortious. At most, it contemplates that—in the context of online data piracy—an unlawful *use* of stolen data can occur simultaneous to the transmittal of those data. *See id.* at *8. That holding does not support Plaintiffs' arguments in this case.

2005). For that reasons, courts routinely refuse to enforce contractual provisions that purportedly require a party to follow the law. *See, e.g.*, *id.* (holding that a contractual provision purporting to prevent a party from engaging in "illegal activity" was unenforceable); *Landucci v. State Farm Ins. Co.*, 65 F. Supp.3d 694, 715 (N.D. Cal. 2014) (dismissing a contract claim premised on the breach of a purported contractual duty "to comply with the anti-discrimination statutes such as the FEHA or Title VII"). Rather than addressing these authorities, Plaintiffs rely entirely on a single quotation from a comment to the First Restatement of Contracts, published in 1932. Doc. 91, at 17. Plaintiffs cannot cite a single *case* applying their desired rule, and the Restatement (Second) of Contracts evidently abandoned that rule. A purported promise to follow the law is simply unenforceable.

B. Plaintiffs are not third-party beneficiaries of the NAF agreements and thus cannot sue for any purported breaches of those contracts.

Count Five of the Complaint fails, because Plaintiffs are neither parties to the NAF agreements nor are they third-party beneficiaries to those agreements. Plaintiffs claim, with little analysis, that they constituted third-party beneficiaries of the NAF contracts. *See* Doc. 91, 17-18. No provision of the NAF contracts identifies Plaintiffs—or anyone else—as intended beneficiaries. *See* Docs. 59-7, 59-9. A non-party who is not named in a contract qualifies as a third-party beneficiary only if "the contract expressly names a class of beneficiaries, and . . . the plaintiff belongs to the class," or if the "contract discharges a separate contractual duty owed to the non-party." *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 781 F. Supp.2d 926, 942-43 (N.D. Cal. 2011). The NAF contracts do not identify any class of intended third-party beneficiaries, let alone one into which Plaintiffs fall. For this reason, *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal.App.4th 1004 (2009), is inapplicable. *See Northstar*, 781 F. Supp.2d at 943 (distinguishing *Spinks* because it involved a contract that "expressly nam[ed] a class of beneficiaries, [and] the plaintiffs alleged that they were class members"). Similarly, the NAF contracts did not discharge a separate contractual duty owed directly to Plaintiffs. Thus, Plaintiffs do not qualify as third-party beneficiaries of the NAF contracts. Count Five should be dismissed.

C. The Complaint fails to allege that Defendants breached the PPGC agreements.

Count Fifteen of the Complaint fails because Plaintiffs have failed to allege that Defendants breached the non-disclosure agreements that they allegedly executed during a visit to PPGC's facility. The contract defines oral "Confidential Information" as "all oral information of the Disclosing Party, which in either case is identified at the time of disclosure as being of a confidential or proprietary nature or is reasonably understood by the Recipient to be confidential under the circumstances of the disclosure." Doc. 59-13, ¶ 1. The Complaint fails to allege that Plaintiffs designated any information as confidential or proprietary at the time of disclosure. The Complaint also fails to allege any facts showing that, "under the circumstances of the disclosure," Defendants understood the information disclosed to be confidential.

Plaintiffs assert that "*all* communications during the private meeting between Defendants and PPGC staff were confidential . . . ." Doc. 91, at 19. No facts pled in the Complaint support this assertion.[4] Plaintiffs contend that information disclosed to strangers discussing a potential arms-length business relationship necessarily is such that "a reasonable person" would have realized that it was confidential. Doc. 91, at 18. But reasonable people typically expect that businesses ordinarily do not reveal their confidential information to strangers seeking an arms-length business relationship. Further, the contract does not establish a reasonable-person standard, but a subjective standard based on whether the information "*is* reasonably understood *by the Recipient*" to be confidential. Doc. 59-13, ¶ 1. The Complaint does not plead any facts showing that Defendants believed the information to be confidential. Rather, Plaintiffs argue that Defendants must have been aware of security protocols put in place at PPGC to protect the *physical safety* of patients and staff. Doc. 91, at 18. These allegations do not establish a subjective belief that information discussed was intended to be confidential. Count Fifteen should be dismissed.

[4] Plaintiffs cite ¶ 124 of the Complaint as the factual basis for this assertion. Doc. 91, at 19. Paragraph 124 of the Complaint does not even tangentially support this assertion.

IV. Plaintiffs Have Failed to State a Claim for Trespass.

Plaintiffs have failed to state a claim for trespass, because the First Amendment bars the recovery of any actual damages, and because Plaintiffs failed to request nominal damages in their prayer for relief. *See* Doc. 79, at 27, 31-33; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522-24 (4th Cir. 1999). Plaintiffs contend that *Food Lion* and the cases on which it relies are inapplicable here, because Plaintiffs' alleged injuries "result[ed] directly from Defendants' fraud, not just from the publication of the videos." Doc. 91, at 28-29. But Plaintiffs premised their trespass claim on the following alleged injuries: "being forced to divert resources to combat Defendants' misrepresentations in intentionally distorted videos taken while trespassing on Plaintiffs' property; and dealing with security threats, property damage, governmental investigations, harassment and intimidation, online hacking, and other harms that have been the direct result of Defendants' illegal conduct." Doc. 59, ¶ 195. Clearly, combatting purported misrepresentations in Defendants' videos in a paradigmatic publication is not considered injury within the scope of *Food Lion*. Similarly, according to the Complaint, the "security threats, property damage, governmental investigations, harassment and intimidation, online hacking, and other harms" all occurred as a direct result of Defendants' post-trespass publication of their videos. *See, e.g., id.*, ¶¶ 142 (linking "threats, harassment, and criminal activities" targeting Plaintiffs to "the release of Defendants' videos"); 143 (linking Plaintiffs' increased security costs to Defendants' videos); 144 (linking hacking-related costs to Defendants' videos); 146 (linking Plaintiffs' costs associated with governmental investigations to Defendants' videos); 147 (linking Plaintiffs' other, vaguer injuries to Defendants' videos); 161 (enumerating alleged injuries and contending that they "all stemm[ed] from Defendants' campaign of lies"). Plaintiffs took great pains in drafting the Complaint to link all of their harm to Defendants' public speech. They cannot back away from these allegations now. Thus, to recover for these alleged injuries, Plaintiffs must satisfy the First Amendment standard that applies to defamation claims. *Food Lion*, 194 F.3d at 522-24. They cannot and have not attempted to do this. Doc. 79, 32-33.

Plaintiffs also assert that the First Amendment defamation standard applies only if a plaintiff seeks compensation for "reputational or state of mind harm." Doc. 91, at 29. But

Plaintiffs' alleged injuries are clearly reputational damages within the meaning of *Food Lion*. As *Food Lion* demonstrates, damages are "reputational" in the relevant sense if they "result[ed] from" the defendant's public speech, regardless of whether they encompass intangible harms like emotional distress. *Food Lion*, 194 F.3d at 523 (holding that where a plaintiff seeks recovery of "damages resulting from speech covered by the First Amendment, the plaintiff must satisfy" the constitutional standard for defamation claims; applying First Amendment defamation standard to claims for lost business profits); *see also Blatty v. N.Y. Times Co.*, 42 Cal.3d 1033, 1037, 1042-43 (1986) (applying First Amendment defamation standard to claim for profits from lost book sales and diminished value of paperback-publication and film rights); *Hornberger v. ABC, Inc.*, 799 A.2d 566, 628-29 (N.J. Super. 2002) ("The question is whether the damages resulted from the broadcast were the same damages available for defamation.").

Plaintiffs assert that, even if the foregoing analysis is correct, the Court should decline to dismiss the trespass claims, because Plaintiffs are entitled to nominal damages. *See* Doc. 91, at 23 n.17. However, Plaintiffs did not request nominal damages, even in the alternative. Doc. 59, at pp. 65-66. The Ninth Circuit has held that where a plaintiff "did not request nominal damages" and cannot prove "any other damages as a result of the alleged trespass," the plaintiff's trespass claim necessarily fails. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 820 (9th Cir. 2002). Plaintiffs do not even attempt to distinguish *Medical Laboratory Management*. *See* Doc. 91, at 23. The trespass claim should be dismissed.

V. Plaintiffs Fail to State a Claim Under California's Unfair Competition Law.

The Complaint fails to state a claim under the UCL. First, for the reasons stated herein and in the Motion to Dismiss, Defendants have not engaged in any "unlawful" conduct.

With regard to the "unfair" prong, Plaintiffs claim that the relevant standard is the so-called "balancing test" that weighs the social utility of the defendant's alleged conduct against the resulting harm. Doc. 91, at 24. As Plaintiffs' cases demonstrate, however, the "balancing test" applies to UCL claims brought by ***consumers***. *See Backus v. Gen. Mills, Inc.*, 122 F. Supp.3d 909, 929 (N.D. Cal. 2015); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007).

This is not a consumer action. Plaintiffs argue that they were "potential consumers of Defendants' sham business services," Doc. 91, at 24, but the Complaint does not allege that Plaintiffs were "consumers" of fetal tissue at all, but potential *suppliers* and business partners of BioMax. Thus Plaintiffs must allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th Cir. 2014) (citation and quotation marks omitted).

With regard to the "fraudulent" prong, Plaintiffs now admit they are not entitled to restitution. Doc. 91, at 26 n.18. They contend, however, that they are entitled to injunctive relief. They argue that because "individual Defendants are likely to engage in similar conduct—through new sham identities or enterprises—as they have repeatedly done and threatened to do." Doc. 91, at 26. To paraphrase only slightly, Plaintiffs contend that at some unspecified time, and in some unspecified way, Defendants may make some unspecified new misrepresentations to them. This falls far short of the showing necessary to obtain injunctive relief, particularly as the "threat" allegations in the FAC refer to future publications, not new sham identities. ¶132. A party seeking injunctive relief "must establish a real and immediate threat of repeated injury. Past wrongs do not in themselves amount to a real and immediate threat of injury . . . ." *Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quotations and brackets omitted); *see also Frenzel v. AliphCom*, 76 F. Supp.3d 999, 1015 (N.D. Cal. 2014).

VI. Plaintiffs Have Failed to State a Claim for Fraudulent Misrepresentation.

Plaintiffs have failed to state a claim for fraudulent misrepresentation. For the reasons stated in Part IV above, the First Amendment bars all of the damages sought by Plaintiffs in their fraudulent-misrepresentation claim because those damages constitute publication damages and Plaintiffs have not satisfied the constitutional standard applicable to claims seeking such damages.

In addition, Plaintiffs have not pled any injuries that were proximately caused by the alleged fraud. *See* Doc. 79, at 30-31. Plaintiffs argue that they "allege that they suffered damages directly resulting from Defendants' lies: the breach of Plaintiffs' security by Defendants through

their lies and misrepresentations required increases in Plaintiffs' security and IT to prevent future breaches." Doc. 91, at 27. While Plaintiffs affix the adjective "direct" to these alleged harms, the description is plainly inapt. Plaintiffs concede that their expenditures are intended "to prevent future breaches," *id.*, ***not*** to repair or remedy anything that was damaged by Defendants' conduct. To the extent that there were any gaps or shortcomings in Plaintiffs' IT and security that needed to be fixed, those gaps or shortcomings existed before Defendants' alleged fraud. At most, Defendants' conduct indirectly brought the gaps to Plaintiffs' attention; it did not cause the gaps. The supposed causal relationship here, if any, plainly lacks the "direct relationship" required for liability. *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 773 (9th Cir. 2002). In addition, Plaintiffs cite no authority, and Defendants are aware of none, that a defendant can be held liable for the costs of a plaintiff's measures to avoid future wrongdoing. A plaintiff cannot claim as trespass damages the cost of building a fence to keep out future trespassers. Similarly, Plaintiffs cannot charge to Defendants the costs of installing fences, real or digital, to protect their property.

VII. Plaintiffs Fail to State a Claim Under California Penal Code §§ 632 and 634.

With regard to the recordings that allegedly occurred at the NAF meetings, Plaintiffs argue that Defendants identified the wrong standard for establishing a § 632 violation:

> Defendants argue that a party has a reasonable expectation of privacy only in those conversations that cannot be overheard by anyone else in the room—"[a] communication is not confidential when the parties may reasonably expect other persons to overhear it." Mot., 33 (quoting *Lieberman* [*v. KCOP Television, Inc.*], 110 Cal. App. 4th [156,] 168 [(2003)]). However, the language Defendants quote is not a holding from *Lieberman*, but rather a recitation of an argument put forward by the appellant, *which the court rejected*. *Id.* at 167-68 ("Next, *appellant contends*… Penal Code section 632 protects only confidential communications, and a communication is not confidential when the parties may reasonably expect other persons to overhear it."); *id.* at 169 (rejecting argument).

Doc. 91, at 30. This is clearly incorrect. The relevant passage from *Lieberman* reads:

> Next, appellant contends that section 632 was not violated because Lieberman had no reasonable expectation of privacy when the recordings were made. Penal Code section 632 protects only *confidential* communications, and a communication is not

> confidential when the parties may reasonably expect other persons to overhear it. (See *Sanders v. Am[.] Broad[.] Co[s.]* (1999) 20 Cal.4th 907, 924–925).

110 Cal App. at 167-68. It is obvious that the phrase "appellant contends" refers to the first sentence, and that the second sentence represents the Court's statement of the law.

Second, *Lieberman* could not have "rejected" the argument that conversations are not confidential if they can be overheard, because the text of § 632 and controlling authority from the California Supreme Court both dictate that result. *See* Cal. Penal Code § 632 (c) ("The term 'confidential communication' . . . excludes a communication made in . . . any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."); *Flanagan v. Flanagan*, 27 Cal.4th 766, 776-77 (2002) ("[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded."). *See also Kight v. CashCall, Inc.*, 200 Cal.App.4th 1377, 1396 (2011) (same)).

Plaintiffs' other arguments on the § 632 claim fare no better. Plaintiffs insist that the NAF non-disclosure agreements rendered all conversations at the NAF meetings confidential. Doc. 91, at 31. Plaintiffs ignore the fact that a conversation is not "confidential" under the statute if the participants could "reasonably expect that the communication may be overheard." Cal. Penal Code § 632 (c). The existence of the NAF non-disclosure agreements has no bearing on whether any given conversation could be overheard, and thus they are irrelevant to whether any conversations that occurred at the NAF meetings fall within the scope of § 632.

Plaintiffs argue that the content of the allegedly recorded communications supports the conclusion that those communications are "confidential" under the statute. Doc. 91, at 31-32. But the Complaint provides no detail regarding the content of the *communications* that took place at the NAF meetings, other than a single exchange (Doc. 59, ¶ 71) and the conclusory assertion that the "nature and subject matter of the *conferences* were highly confidential," *id.* ¶ 214. But the content of a communication is "irrelevant" to whether it qualifies as "confidential" under § 632. *Brown v. Defender Sec. Co.*, No. CV 12-7319, 2012 WL 5308964, at *3 (C.D. Cal. Oct. 22, 2012).

Finally, as to their conversations at the NAF conferences, Plaintiffs concede that they "do not allege that they had an expectation that their actual conversation with Defendants would not be overheard by other attendees." Doc. 91, at 31 n.21. This concession is fatal to their § 632 claim.

Plaintiffs' arguments regarding the recordings of Nucatola in an open dining area of a public restaurant similarly lack merit. Plaintiffs assert that "Defendants specifically targeted and solicited Dr. Nucatola," and that "[s]he trusted Defendants were legitimate because she had met them at the highly secure NAF conference." Doc. 91, at 33. Plaintiffs do not link these allegations to whether it was reasonable to believe that the conversation would not be *overheard*. Cal. Penal Code § 632 (c). Plaintiffs also fail to allege any facts establishing standing to assert Count Nine on behalf of Dr. Mary Gatter. Count Nine should be dismissed. And because Plaintiffs allege no trespass or violations of § 632, Count Ten should also be dismissed. Cal. Penal Code § 634.

VIII. Plaintiffs Have Failed to State a Claim for Invasion of Privacy Under the Common Law and the California Constitution.

Plaintiffs lack standing to bring invasion-of-privacy claims on behalf of their staff. First, litigating such privacy claims requires the participation of the individual staff members whose privacy was allegedly invaded. An association lacks associational standing if "the claim asserted . . . requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Where resolution of the merits involves fact-bound inquiries that differ among an organization's members, the organization lacks associational standing to bring the claims. *See Spindex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1293 (9th Cir. 2014). An invasion-of-privacy claim requires that the victim *actually* had an expectation of privacy. *See Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 286 (2009); *Hill v. NCAA*, 7 Cal. 4th 1, 35-37 (1994). Whether the employees who were recorded at different times, in different settings, and with different background information actually possessed an expectation of privacy requires individualized analysis that will differ from person to person, and that cannot be proved by "sample" or "exemplary" witnesses.

The cases on which Plaintiffs principally rely are entirely inapposite. *Planned Parenthood of Ariz., Inc. v. Brnovich*, No. CV-15-01022, 2016 WL 1158890 (D. Ariz. Mar. 23, 2016), involved a facial challenge to a statute that, like all facial challenges, did not depend on the specific facts of any given application of the statute. *See id.* at *1-4. A facial constitutional challenge to a statute does not turn on the subjective beliefs of the challengers and thus does not require extensive individual participation. *Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002), similarly involved what amounted to a facial challenge of the legality of the defendants' decision-making policies. *Id.* at 286. This challenge did not depend on the subjective beliefs of the defendants' individual patients. *See id.*; *see also Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, No. Civ. A. 99-937, 2000 WL 33365907 (W.D. Pa. Mar. 24, 2000) (describing the claims at issue). Here, in contrast, the validity of the invasion-of-privacy claims depends in large part on the recorded individuals' subjective expectation of privacy under the particular circumstances of each recording. *See Hernandez*, 47 Cal.4th at 286; *Hill*, 7 Cal.4th at 35-37; *Shulman v. Grp. W Prods., Inc.*, 18 Cal.4th 200, 230 (1998). Thus, Plaintiffs lack associational standing.

Second, Plaintiffs cannot assert associational standing on behalf of their employees. Associational standing "has no application to a corporation's standing to assert the interests of its employees." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 n.15 (11th Cir. 1993). Plaintiffs do not provide any basis for distinguishing *Region 8*, nor do they provide any substantive critique of the case. *See* Doc. 91, at 41. The Court should follow the reasoned analysis of the Eleventh Circuit (relying on Wright & Miller) rather than Plaintiffs' *ipse dixit*. Plaintiffs lack standing to bring invasion-of-privacy claims on behalf of their employees.

Finally, in an attempt to square the circle of alleging invasion of privacy for the recording of business conversations, Plaintiffs focus instead on the physical intrusion into their meetings. Doc. 91, at 44-45. However, this putative "intrusion upon seclusion" is plainly inapplicable to conferences attended by hundreds of people. The invasion-of-privacy claims should be dismissed, along with all other claims in the First Amended Complaint.

Respectfully submitted,

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ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories.

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