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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION (NAF), Plaintiff, vs. THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN (aka "ROBERT SARKIS"); and TROY NEWMAN, Defendants.	Case No. 3:15-cv-3522 (WHO) Judge William H. Orrick, III Defendant Troy Newman's Motion to Dismiss Under FRCP 12(b)(2) and (6) Hearing Date: Oct. 3, 2018, 2:00 p.m. Courtroom 2, 17th Floor

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NOTICE OF MOTION

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 3, 2018, at 2:00 PM in Courtroom 2 of the Honorable William H. Orrick III at the United States District Court for the Northern District of California, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Troy Newman will, and hereby does, move to dismiss Plaintiff National Abortion Federation ("NAF")'s remaining claims—Fraudulent Misrepresentation, Promissory Fraud, Breach of Contracts, and Civil Conspiracy—from its First Amended Complaint ("FAC"), pursuant to Federal Rules of Civil Procedure 12(b)(2) and (6). Newman respectfully requests that this Court dismiss the FAC with respect to him because (1) the FRCP 12(b) Motion to Dismiss of Defendants CMP, BioMax, and Daleiden explains why the FAC fails to properly allege subject matter jurisdiction and fails to state a claim with respect to any Defendant (Newman joins those arguments); (2) the FAC fails to properly allege personal jurisdiction over Newman; and (3) the FAC fails to state a claim against Newman with respect to any cause of action.

INTRODUCTION AND SUMMARY OF KEY FACTS

The FAC should be dismissed with respect to Defendant Newman. The FAC has minimal, sparse allegations about any actions that Newman allegedly took that relate to the specific representations and contracts that the four causes of action are premised upon. It is notable that, in the related *PPFA v. CMP* case, Newman is only named in three of the fifteen causes of action, none of which are the breach of contract or fraudulent misrepresentation claims. *See* Cmplt., 3:16-cv-00236-WHO, Dkt. #59, 4th, 5th, 8th, and 15th Causes of Action (Mar. 24, 2016).

It is important to note at the outset that, throughout the FAC, specific allegations indicate that an individual *other than* Newman took a particular action, but in other Paragraphs, the FAC makes a generic allegation that "Defendants" took that particular action (without specifying which Defendant(s) purportedly did so). For example, the FAC claims that various individuals other than Newman signed contracts with NAF and attended NAF's meetings, FAC, Dkt. #131, ¶¶ 92-112, 121-

135, and also states that NAF and abortion providers would never meet with Newman or give him access to information. *Id.* ¶ 82. However, more general paragraphs loosely state that "Defendants" came to San Francisco, signed agreements to attend NAF's meetings, attended NAF's meetings as BioMax representatives, etc. *Id.* ¶¶ 8, 26; *see also id.* ¶¶ 109, 114-18, 135 (broadly alleging that "Defendants" recorded conversations at various meetings and conferences). The FAC's practice of frequently using generalized allegations that "Defendants" did certain things, while indicating in other paragraphs that individuals *other than* Newman did those things, is contradictory and misleading; as such, the generalized allegations should be disregarded with respect to Newman.[1]

In terms of the allegations having some relation to Newman, the FAC jumbles the alleged actions of Newman together with the alleged actions of the other Defendants. The FAC states that Daleiden, Newman, and others created the Center for Medical Progress ("CMP") as an investigative journalism organization designed to expose illegal activities of abortion providers, and also asserts that Daleiden, Newman, CMP, and others created BioMax, a "fake company," in order to gain access to NAF's meetings for BioMax representatives. FAC ¶¶ 1, 17, 18, 80, 84, 85. Further, the FAC alleges that several individuals assumed fake identities as BioMax's representatives, entered NAF's meetings, signed NAF contracts, and took other actions at the "direction and behest" of Daleiden, Newman, CMP, and BioMax after being recruited and trained by Daleiden, Newman, and CMP. *Id.* ¶¶ 2, 21, 22, 87. The FAC also alleges that Newman was a CMP board member who "advised Daleiden," and asserts that Newman and Operation Rescue provided "consultation services and

[1] The vague and jumbled nature of the FAC's allegations concerning Newman's alleged conduct is compounded by the fact that the FAC is an improper "shotgun pleading"—and, as such, should be dismissed—because each cause of action improperly incorporates by reference all previous causes of action. *Id.* ¶¶ 170, 176, 186, 193; *Rashdan v. Geissberger*, 2011 U.S. Dist. LEXIS 4792, at *13, 30-31 (N.D. Cal. 2011) (shotgun pleadings deny defendants fair notice and must be dismissed for failure to state a claim); *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002).

material support" to Daleiden and others, such as by discussing techniques to set up fake identities and fake companies. *Id.* ¶¶ 13, 14, 20, 139.[2]

Importantly, the FAC does *not* allege that Newman had any communications with NAF, made any representations or promises to NAF, signed any contracts with NAF, purchased anything from NAF, attended any NAF meetings, held himself out as a BioMax representative to NAF, or made any recordings on behalf of CMP or BioMax. In fact, the FAC does not even allege that Newman, a resident of Kansas, *id.* ¶ 20, was ever physically present within the State of California (or Maryland) with respect to any of the events giving rise to this lawsuit. In sum, the FAC asserts that, although Newman provided some big picture strategy and advice and "material support" to help further CMP's mission in his capacity as a CMP board member, his involvement in the day-to-day details of how CMP, BioMax, and individuals associated with them conducted their activities was minimal. *See* FAC ¶¶ 92-135.

The FRCP 12(b) Motion to Dismiss of Defendants CMP, BioMax, and Daleiden explains why the FAC fails to properly allege subject matter jurisdiction, and also fails to state a claim with respect to any of those Defendants. Newman joins those arguments as they warrant dismissal of the FAC with respect to him, but those arguments will not be restated herein to avoid needless repetition. Rather, this motion addresses arguments exclusively or primarily relevant to Newman. The FAC should be dismissed with respect to Newman for three reasons: (1) a proper basis for exercising personal jurisdiction over Newman has not been adequately alleged; (2) none of the causes of action state a claim for direct liability against Newman; and (3) none of the causes of action state a claim for agency, alter ego, or conspiracy liability against Newman.

[2] The FAC also contains other assertions, defamatory statements, and innuendo about Newman that have nothing to do with the events giving rise to this lawsuit. *See, e.g., id.* ¶¶ 17, 20 (calling Newman "a dangerous extremist"); *id.* ¶ 2 (claiming that Newman and other Defendants have a "history of violence, harassment and oppression . . . towards NAF members over time"); *id.* ¶¶ 14, 29 (insinuating that Operation Rescue had something to do with the murder of Dr. Tiller); *id.* ¶¶ 76-79 (quoting Newman's statements about other work).

I. The Complaint Fails to Allege a Proper Basis for Personal Jurisdiction Over Newman.

NAF has not met its burden to allege sufficient facts which, if true, would establish that personal jurisdiction over Newman, a resident of Kansas, is appropriate. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001); *Calvert v. Huckins*, 875 F. Supp. 674, 676 (E.D. Cal. 1995). The law of California governs the requirements of personal jurisdiction, along with federal due process principles. *See Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006); *PLS-Pacific Laser Sys. v. TLZ Inc.*, 2007 U.S. Dist. LEXIS 53176, at *12 (N.D. Cal. 2007); Cal. Civ. Proc. Code § 410.10.

> Due process requires that a court exercise personal jurisdiction over a defendant only if the defendant has such minimum contacts with the forum state that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." . . . There is general jurisdiction over a defendant where the defendant's contacts with the forum state "are so substantial, continuous, and systematic that the defendant can be deemed to be 'present' in that forum for all purposes." Absent general jurisdiction, a forum may exercise only specific jurisdiction based on the relationship between a defendant's forum contacts and the plaintiff's claim.

PLS-Pacific Laser Sys., 2007 U.S. Dist. LEXIS 53176, at *13 (citations omitted); *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

A three-prong test applies to assertions of specific personal jurisdiction:

> (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident of the forum state, (2) the claim alleged is one that arises out of or relates to the defendant's forum contacts, and (3) the exercise of jurisdiction must comport with fair play and substantial justice. . . . The plaintiff bears the burden of establishing the first and second prongs. . . . The first prong requires purposeful availment. This prong may be satisfied by showing purposeful availment of the privilege of doing business in the forum on the part of the defendant, purposeful direction by the defendant of activities at the forum, or a combination thereof.

PLS-Pacific Laser Sys., 2007 U.S. Dist. LEXIS 53176, at *18-19 (citations omitted). "[T]he mere fact that a corporation is subject to local jurisdiction does not necessarily mean its nonresident officers, directors, agents, and employees are suable locally as well. . . . An employee's contacts 'are not to be judged according to their employer's activities there.' . . . Rather, '[*e*]*ach defendant's*

contacts with the forum State must be assessed individually.'" *Id.* at *20-21 (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)) (emphasis added).

There is no basis for the exercise of personal jurisdiction over Newman based on the allegations set forth in the FAC, which assert only minimal "contacts with the forum State" with respect to Newman. The FAC asserts that Daleiden and Newman registered CMP and BioMax as California-based entities in 2013. FAC ¶¶ 84, 85. As noted previously, although the FAC alleges that Newman had an advisory role as a CMP board member, it fails to allege that he ever set foot in California on CMP-related business, recorded any individuals in California, communicated with NAF concerning its San Francisco-based meeting, signed a contract with NAF or paid any consideration to NAF concerning that meeting, or personally oversaw or managed any day-to-day activities of CMP or BioMax occurring within California. Newman's minimal contacts with California, as alleged in the FAC, fall far short of stating a basis for personal jurisdiction over him.[3]

The lack of a basis for personal jurisdiction over Newman is illustrated by the fact that an out-of-state corporate board member's "temporary physical presence in the forum," or communications in a corporate capacity with individuals located within the forum, "simply do not qualify as purposeful activity invoking the benefits and protection of the forum state" and "do[] not suffice to confer personal jurisdiction." *PLS-Pacific Laser Sys.*, 2007 U.S. Dist. LEXIS 53176, at *19-20 (quoting *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991)). Here, no "temporary physical presence in the forum," or communications with NAF or California-based abortion providers, are alleged with respect to Newman.

Additionally, even if Newman had actually entered into a contract with NAF in his capacity as a CMP board member, that would not have given rise to personal jurisdiction over him. "The

[3] Although agency and/or alter ego relationships can, in some circumstances, give rise to personal jurisdiction over non-residents, the FAC's allegations are insufficient to state a claim for personal jurisdiction over Newman on an agency or alter ego theory. *See* Section III; *Delacruz v. Serv. Corp. Int'l*, 2018 U.S. Dist. LEXIS 84172, at *27 (E.D. Cal. 2018) (noting that "the scope of the agency theory [of personal jurisdiction] has been significantly curtailed by recent Supreme Court and Ninth Circuit case law").

existence of a contract with a resident of the forum state, without more, is insufficient to create personal jurisdiction over a nonresident. . . . [N]on-parties to a contract [may not] be subject to personal jurisdiction on the same basis as parties to the contract." *Id.* at *10-12, 22-23 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)) (a settlement agreement entered into by a California corporation, which stated that this Court retained jurisdiction to enforce its terms, did not give rise to personal jurisdiction over non-resident directors); *cf. Davis v. Metro Prods., Inc.*, 885 F.2d 515, 522 (9th Cir. 1989) (mere association with a corporation that is alleged to have caused harm is insufficient to confer personal jurisdiction).

The FAC should be dismissed with respect to Newman for lack of personal jurisdiction.

II. The Complaint Fails to State a Claim for Direct Liability Against Newman On Any Cause of Action.

The three substantive causes of action—breach of contracts, promissory fraud, and fraudulent misrepresentation—are premised upon promises and representations made to NAF that NAF alleges it relied upon to its detriment. The FAC does not allege that Newman had any communications with NAF, made any representations or promises to NAF, or signed any contracts with NAF. As such, NAF fails to state a claim for direct liability against Newman on any cause of action.[4]

A. Breach of contracts

NAF's breach of contracts claim (Sixth Cause of Action) is based upon several contracts that relate to NAF's 2014 and 2015 meetings: exhibitor agreements dated February 5, 2014, and March 25, 2015, and non-disclosure agreements signed on April 5, 2014 and April 18, 2015. FAC ¶¶ 194-95. Paragraphs 92 through 112 and 121 through 135 of the FAC contain NAF's allegations detailing the conduct of Defendants and other individuals relating to the 2014 and 2015 NAF meetings. *Id.* ¶¶ 92-112, 121-35. According to these Paragraphs, individuals *other than Newman*:

[4] The alleged bases for agency, alter ego, or conspiracy liability against Newman are addressed in Section III.

- communicated with NAF about BioMax's interest in attending the meetings as an exhibitor;
- purchased the right to set up a BioMax booth at the meetings;
- purchased various passes for BioMax representatives to attend the meetings;
- submitted a proposal for BioMax to conduct a panel discussion;
- signed exhibitor agreements on February 5, 2014 and March 25, 2015;
- attended the meetings as BioMax representatives;
- presented false identification upon entering the meetings;
- signed non-disclosure agreements on April 5, 2014 and April 18, 2015;
- were given access to confidential documents and media by NAF at the meetings;
- displayed and distributed BioMax materials and information at the meetings;
- interacted with other meeting attendees and attended panel presentations; and
- surreptitiously recorded presentations and conversations with meeting attendees and NAF staff.

Id.

The only specific mentions of Newman in Paragraphs 92 through 135—which catalogue NAF's allegations concerning the conduct of Defendants and other individuals relating to the 2014 and 2015 NAF meetings as well as various communications, meetings and conferences, and recordings occurring between the two NAF meetings—are allegations that (1) "Daleiden, 'Tennenbaum' and 'Allen' signed [non-disclosure agreements at the 2014 NAF meeting] while acting as agents not only for Biomax, but also as agents for CMP, Newman and Daleiden," *id.* ¶ 104, and (2) "Daleiden, 'Tennenbaum,' 'Wagner' and Lopez signed [non-disclosure agreements at the 2015 NAF meeting] while acting as agents not only for Biomax, but also as agents for CMP, Newman and Daleiden." *Id.* ¶ 128. Additionally, the Sixth Cause of Action's lone allegation relating to Newman is as follows: "At all relevant times, Daleiden, 'Wagner,' 'Tennenbaum,' 'Allen' and Lopez were acting as the agents for Newman, Biomax, CMP and Daleiden. The true nature of their relationship, and the status of Newman, Daleiden and CMP as principals for these agents, remained undisclosed at the time that Defendants entered into contracts with NAF." *Id.* ¶ 199.

The FAC fails to state a claim that Newman breached any of the contracts at issue. The FAC does not identify a contract that NAF purportedly entered into with Newman, nor does it specify how Newman personally breached any contractual duties that he owed to NAF. The fact that Newman was a CMP officer during the relevant timeframe does not make him a party to, or personally liable for, contracts entered into by BioMax or attendees of NAF conferences. California courts have often rejected breach of contract claims brought against directors, officers, or agents of a corporate entity (or other individuals) based upon a contract that the plaintiff entered into with the corporation itself, *even in instances where the individual defendant was the one who signed the contract*.[5] Numerous decisions of this Court have rejected breach of contract claims in accordance with these principles.[6]

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[5] *See, e.g., Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 512 & n.20 (1986) (directors of a non-profit corporation "may not be held personally liable absent allegations that they entered into a contract with plaintiff on their own behalf or purported to bind themselves personally"); *U.S. Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 594-95 (1970) ("Directors and officers are not personally liable on contracts signed by them for and on behalf of the corporation unless they purport to bind themselves individually."); *Fleet v. Bank of America N.A.*, 229 Cal. App. 4th 1403, 1410, n.8 (2014) (affirming dismissal of breach of contract claim brought against bank officers and employees even though a viable cause of action had been stated against the bank itself); *Tri-Continent Int'l Corp. v. Paris Savings & Loan Ass'n*, 12 Cal. App. 4th 1354, 1359 (1993) ("[Plaintiff] cannot assert a claim for breach of contract against one who is not a party to the contract."); *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 452 (1987) ("[The contract] was an agreement between Clemens and the Dealer. . . . Under California law, only a signatory to a contract may be liable for any breach. . . . Because AWC and Sluggett were not parties to the VSC, they could not be liable for a tortious breach or for deceit in connection with the making of said contract."); *Gold v. Gibbons*, 178 Cal. App. 2d 517, 519 (1960) ("Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations.").

[6] *See, e.g., Chan v. Empire Fire & Marine Ins. Co.*, 2011 U.S. Dist. LEXIS 83327, at *12-13 (N.D. Cal. 2011) ("As a general matter, a non-party, or nonsignatory, to a contract is not liable for a breach of that contract. . . . [T]he insurance policy . . . was between Empire Fire and Plaintiff only. Under these circumstances, Plaintiff cannot assert a valid claim against Sterling for breach of contract or bad faith because Sterling was not a party to the contract."); *Banks.com, Inc. v. Keery*, 2010 U.S. Dist. LEXIS 17850, at *14-15 (N.D. Cal. 2010) (dismissing, without leave to amend, breach of contract, breach of fiduciary, and duty of loyalty claims against individual defendant Giessman; "[s]ince defendant Giessman never entered into a contract with nor owed a duty to plaintiff, leave to amend would be futile."); *Pedraza v. Alameda Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 131461, at *13 (N.D. Cal. 2009) ("Only parties to a contract are liable for its breach. . . . [T]he individual defendants are not parties to [the contract at issue]. Accordingly, plaintiff may not state a breach of

Additionally, decisions of the Ninth Circuit and other California federal district courts have recognized these principles.[7]

Moreover, the FAC's assertions that various misrepresentations made to NAF by BioMax representatives give rise to *tort* liability does not render Newman (or other individuals) personally liable on the *contracts*. Even in instances in which a corporate officer makes false representations to the plaintiff that may give rise to tort liability, the officer will not be held liable for breach of a contract that the plaintiff entered into with the officer's corporation.[8] In sum, the FAC fails to state a claim for holding Newman directly liable for any alleged breach of contract. Alternative bases for seeking to hold Newman liable on the contract claim are without merit as explained in Section III.

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contract claim against them. . . ."); *see also PLS-Pacific Laser Sys.*, 2007 U.S. Dist. LEXIS 53176, at *10-12, 31; *Gen. Amer. Life Ins. Co. v. Castonguay*, 1989 U.S. Dist. LEXIS 17435, at *7-8. 12-16 (N.D. Cal. 1991).

[7] *See, e.g., United Computer Sys. v. AT&T Info. Sys.*, 298 F.3d 756, 761 (9th Cir. 2002) (affirming dismissal of various claims that were premised upon a contract with respect to individual and entities who did not sign the contract; "Under California law, 'only a signatory to a contract may be liable for any breach.'"); *Sessions v. Chrysler Corp.*, 517 F.2d 759, 760 (9th Cir. 1975) ("Chrysler argues that, since it was the only signatory other than appellant to the contract in question, it alone, and not the individual defendants joined in this action, may be liable to Sessions for any breach. This view is supported by California law."); *see also GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JP Morgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 142188, at *18-19 (C.D. Cal. 2010); *Money Matters Mgmt. v. Niche Mktg.*, 2007 U.S. Dist. LEXIS 77871, at *9-10 (S.D. Cal. 2007); *Aaron v. Aguirre*, 2007 U.S. Dist. LEXIS 16667, at *64-69 (S.D. Cal. 2007); 18B *Am. Jur. 2d Corporations* § 1573 ("As a general rule, an individual officer is not liable for the corporation's engagements unless the officer signs individually. Generally, a corporate officer's signature on a contract, with or without a designation as to representative capacity, does not render the officer personally liable.").

[8] *See, e.g., Croeni v. Goldstein*, 21 Cal. App. 4th 754, 758 (1994) ("Since [an officer who represented Alford Industries during sale negotiations] was not a party to the sales contract between appellants and Alford, he could not be sued for its breach or for rescission. However, as the person who allegedly made the false representations on behalf of Alford to induce appellants to sell their business, he could be liable in tort for fraud or deceit."); *Seagate Tech. v. A.J. Kogyo Co.*, 219 Cal. App. 3d 696, 704-05, n.2 (1990) (emphasizing that, even if a corporation's president made tortious misrepresentations to the plaintiff in a letter, he could not be held personally liable for breach of a contract that the corporation entered into with the plaintiff); *cf. Frances T.*, 42 Cal. 3d at 507-08.

B. Promissory fraud and fraudulent misrepresentation

Typically, a complaint asserting fraud must state, with particularity, how *each defendant* made fraudulent representations or promises. *See, e.g., Arena Rest. & Lounge LLC v. Southern Glazer's Wine & Spirits, LLC*, 2018 U.S. Dist. LEXIS 63869, at *23 (N.D. Cal. 2018); *UMG Recordings, Inc. v. Global Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092, 1109 (C.D. Cal. 2015); *Croeni*, 21 Cal. App. 4th at 758.

> One seeking to impose liability for fraud upon an agent, officer, or employee of a corporation as an individual . . . must both allege and prove facts sufficient to impose liability upon him or her as an individual defendant. This is particularly true when, for example, two or more agents are involved and the facts relating to liability are different between them with the result that one or more agents might not be individually liable for the fraud depending upon such facts.

18B *Am. Jur. 2d Corporations* § 1613.

Although "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant," *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007), merely alleging that a defendant (such as Newman) who did not make a false representation was part of a fraudulent conspiracy is insufficient. Rather, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to *differentiate their allegations* when suing more than one defendant . . . and *inform each defendant separately* of the allegations surrounding *his* alleged participation in the fraud.'" *Id.* at 764-65 (emphasis added). In *Swartz*, the Ninth Circuit concluded:

> With respect to Presidio and DB, the allegations in Swartz's original complaint patently fail to comply with Rule 9(b). The complaint is shot through with general allegations that the "defendants" engaged in fraudulent conduct but attributes specific misconduct only to KPMG and B&W. Conclusory allegations that Presidio and DB "knew that [KPMG and B&W] were making . . . false statements to clients, including Swartz, and thus were acting in concert with [KPMG and B&W]" and "were acting as agents [of KPMG and B&W]" and were "active participants in the conspiracy" without any stated factual basis are insufficient as a matter of law.

Id. at 765.

The Fourth Cause of Action, Promissory Fraud, is based upon the same contracts that are the subject of the breach of contracts claim. FAC ¶¶ 177-185. As noted previously, the FAC does not

assert that Newman signed any of these contracts or attended the 2014 or 2015 NAF meetings. *See id.* ¶¶ 92-112, 121-135. The FAC also does not assert that Newman made any promises to NAF (let alone any false promises with the intent to defraud NAF), that NAF relied on any promises made by Newman, or that Newman attended, made recordings at, or received NAF confidential information at, the 2014 or 2015 NAF meetings. The promissory fraud cause of action merely asserts that Newman's alleged role was helping to create BioMax to infiltrate the NAF meetings. *Id.* ¶ 182. This is clearly insufficient to state a cause of action for direct liability against Newman for promissory fraud. *See Swartz*, 476 F.3d at 765.

The Fifth Cause of Action, Fraudulent Misrepresentation, is premised upon the following list of alleged misrepresentations:

> As previously alleged, Defendants repeatedly represented to NAF that they were affiliated with Biomax, and that Biomax was a legitimate biological specimen procurement company. These representations were false. False representations include, but are not limited to: (1) the false representations made in signed agreements dated February 5, 2014, April 5, 2014, March 25, 2015, and April 18, 2015; (2) the false letters, false marketing materials, and false email addresses sent to NAF and its members; (3) the false web pages regarding Biomax, as well as the false profiles and false Facebook pages of individuals related to Biomax; (4) the false business cards and driver's licenses, containing false names and titles, and the false brochures and literature that Defendants handed out at NAF's annual meetings; and (5) the false oral statements that Defendants made to NAF, its staff, its members and other attendees leading up to and during the course of NAF's annual meetings.

FAC ¶ 187. This paragraph's statement that "*Defendants* repeatedly represented to NAF" various things is misleading, as the FAC does not allege that *Newman* made a single representation to NAF. *See id.* ¶¶ 92-112, 121-135; *Swartz*, 476 F.3d at 765. To the contrary, according to the FAC: (1) *Newman* did not make any representations to NAF, let alone any misrepresentations with the intent to defraud NAF; (2) NAF did not rely on (and could not have relied on) any misrepresentations made by *Newman*; and (3) *Newman* did not gain entry to, receive NAF confidential information at, or make recordings at, the 2014 or 2015 NAF meetings, based on any misrepresentations. *See* FAC ¶¶ 92-112, 121-135.

There is no basis for holding Newman directly liable for any alleged promissory fraud or fraudulent misrepresentation. Alternative bases for seeking to hold Newman liable on these two claims are without merit as explained in the next Section.

III. The Complaint Fails to State a Claim for Agency, Alter Ego, or Conspiracy Liability Against Newman On Any Cause of Action.

As discussed previously, the FAC alleges that Daleiden, Newman, and others created CMP as an investigative journalism organization, and also asserts that CMP, Daleiden, Newman, and others created BioMax in order to gain access to NAF's meetings for BioMax representatives. FAC ¶¶ 1, 17, 18, 80, 84, 85. The FAC also alleges that several individuals assumed fake identities, entered NAF's meetings, signed NAF contracts, and took other actions at the "direction and behest" of Daleiden, Newman, and CMP after being recruited and trained by Daleiden, Newman, and CMP. *Id.* ¶¶ 2, 21, 22, 87. The FAC further alleges that Newman and Operation Rescue provided "consultation services and material support" to Daleiden and others. *Id.* ¶¶ 14, 20, 139. The FAC does not allege that Newman himself had any contact with NAF, attended or made any recordings at NAF meetings, or signed any NAF contract.

In sum, the FAC asserts that Newman was not a disinterested or absentee CMP board member, but rather he provided some degree of advice, consultation, and "material support" to help further CMP's mission. Board members of a corporation who fulfil this type of generalized, big picture strategy and guidance role do not become personally liable should the corporation be subject to contract or tort liability; otherwise, the rare exception of officer personal liability would be transformed into the general rule.

A. The Complaint fails to state a claim for agency liability against Newman on any cause of action.

"It is well settled that corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own

tortious conduct, not from their status as directors or officers of the enterprise." *Frances T.*, 42 Cal. 3d at 503.

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

Id. Numerous decisions of this Court and other courts have reaffirmed and applied this two-element standard.[9]

The FAC fails to state a claim for agency liability for Newman for any cause of action. The FAC alleges that various individuals were *simultaneously* acting as the agents of *four different* principals: Daleiden, Newman, CMP, and BioMax. *See, e.g.,* FAC ¶¶ 104, 128, 199. The jumbled and inadequate nature of the FAC's agency allegations is highlighted by repeated allegations that, with respect to a particular activity, Defendant Daleiden was *both* a principal and an agent and also had a principal-agent relationship with *himself*. *See, e.g., id.* ¶ 199 ("At all relevant times, Daleiden, 'Wagner,' 'Tennenbaum,' 'Allen' and Lopez were acting as the agents for Newman, Biomax, CMP and Daleiden."); *id.* at ¶¶ 104, 128. Also, while Paragraph 87 states that "*Newman and Daleiden* recruited and trained more conspirators," it also includes a statement that "[*t*]*he Center for Medical Progress* chose very intelligent, creative, adaptable people to be able to do this work. And there was a lot of really intensive training and preparation that went into preparing them to actually go undercover." *Id.* ¶ 87 (emphasis added). The U.S. Supreme Court has observed that, "in the absence of special circumstances it is *the corporation, not its owner or officer*, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents. . . . A corporate employee typically acts on behalf of *the corporation, not its owner or officer*." *Meyer v.*

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[9] *See, e.g., Banks.com, Inc.*, 2010 U.S. Dist. LEXIS 17850, at *15-16; *Mad Sci. Grp., Inc. v. Aquawood, LLC*, 2016 U.S. Dist. LEXIS 185255, at *2 (C.D. Cal. 2016); *Steinberg Moorad & Dunn, Inc. v. Dunn*, 2002 U.S. Dist. LEXIS 26752, at *70 (C.D. Cal. 2002); *Haidinger-Hayes, Inc.*, 1 Cal. 3d at 595; *Cody F. v. Falletti*, 92 Cal. App. 4th 1232, 1245 (2001); *Self-Insurers' Sec. Fund v. Esis*, 204 Cal. App. 3d 1148, 1161-62 (1988).

Holley, 537 U.S. 280, 286 (2003) (emphasis added). Even if one assumed that an agency relationship has been adequately pled between CMP and/or BioMax as principals and various individuals as agents, the FAC fails to set forth any "special circumstances" that would justify treating those individuals as *Newman's* (or Daleiden's) own agents. *See id.*

Moreover, as noted previously, the FAC's bare assertions about Newman's CMP board member activities amount to nothing more than a generalized, big picture strategy and guidance role. The FAC does not allege that Newman personally oversaw or controlled the day-to-day activities of Daleiden, Tennenbaum, Wagner, Lopez, and Allen (his alleged agents), or personally directed any or all of those individuals to commit torts or to enter and breach contracts. Rather, the FAC merely alleges that those individuals simultaneously acted as the agents of Daleiden, Newman, CMP, and BioMax, FAC ¶¶ 104, 128, 199, while barely mentioning Newman in the dozens of paragraphs relating to the 2014 and 2015 NAF meetings and other BioMax-related activities occurring in between. *Id.* ¶¶ 92-135. As such, the FAC fails to state an agency theory of liability for Newman with respect to any of the causes of action.[10]

Finally, the FAC fails to allege, even in cursory fashion, one of the required elements for holding a corporate board member liable on an agency theory: "that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances." *See Frances T.*, 42 Cal. 3d at 503; *Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *2; *Banks.com, Inc.*, 2010 U.S. Dist. LEXIS 17850, at *15-16; *Haidinger-Hayes, Inc.*, 1

[10] *See also whiteCryption Corp. v. Arxan Techs., Inc.*, 2016 U.S. Dist. LEXIS 78106, at *2, 31-34 (N.D. Cal. 2016) (citation omitted) (agency allegations were insufficient where the counterclaims largely "mush[ed] the counter defendants' alleged actions together"; there is no agency liability where the alleged principal merely sets general policy and strategy, as opposed to taking over performance of day-to-day operations; "[a]gency requires more than 'the degree of direction and oversight normal and expected from the status of ownership'"); *Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *2-3 ("MSG alleges that Dubinsky is the 'president and member' of Aquawood and that he 'manages, controls and directs' its day-to-day activities. . . . It also alleges that Dubinsky 'is actively involved with the [Doe Defendants] in approving and conducting the infringing activities alleged.' . . . MSG's assertions are conclusory and do not plausibly allege that Dubinsky specifically authorized, directed, or participated in these actions.").

Cal. 3d at 595. The FAC alleges that Daleiden and Newman formed CMP to conduct an undercover investigation of illegal activities relating to the sale of fetal organs after abortions based on information suggesting that such activities were ongoing, FAC ¶ 80, but the FAC fails to allege that an ordinarily prudent person would not have moved forward with such an investigation based on the information that Daleiden and Newman had at that time. The FAC also fails to allege that, with respect to each individual act for which agency liability is asserted against Newman, "an ordinarily prudent person, knowing what [he] knew at that time, would not have acted similarly under the circumstances." *See Frances T.*, 42 Cal. 3d at 503. The FAC fails to adequately assert a basis for agency liability against Newman.

B. The Complaint fails to state a claim for alter ego liability against Newman on any cause of action.

Disregarding the corporate form through the imposition of alter ego liability "is an extreme remedy, sparingly used." *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 539 (2000); *Pac. Mar. Freight, Inc. v. Foster*, 2010 U.S. Dist. LEXIS 87205, at *16 (S.D. Cal. 2010). There is "a general presumption in favor of respecting the corporate entity," *Calvert*, 875 F. Supp. at 678 (citation omitted), and "[i]t is the plaintiff's burden to overcome the presumption of the separate existence of the corporate entity." *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212 (1992). Courts will only pierce the corporate veil in "exceptional," *Calvert*, 875 F. Supp. at 678, "unusual," *whiteCryption Corp.*, 2016 U.S. Dist. LEXIS 78106, at *23, "narrowly defined" circumstances. *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 301 (1985).

The "exceptional" circumstances in which alter ego liability may be appropriate are where a plaintiff can adequately allege (and later prove) two elements: "(1) 'there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist' and (2) 'there must be an inequitable result if the acts in question are treated as those of the corporation alone.'" *whiteCryption Corp.*, 2016 U.S. Dist. LEXIS 78106, at *24 (quoting *Sonora Diamond Corp.*, 83 Cal. App. 4th at 538); *Mesler*, 39 Cal. 3d at 300; *Associated Vendors Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837

(1962). Here, the FAC fails to adequately allege either of these elements. "Conclusory allegations of 'alter ego status are insufficient to state a viable claim." *Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *4; *Hokama v. E.F. Hutton & Co., Inc.*, 566 F. Supp. 636, 647 (C.D. Cal. 1983).

1. Unity of interest requirement

Concerning NAF's burden to adequately allege the first element with respect to Newman, it is important to emphasize that "[b]efore a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of such person and corporation has ceased. . . ." *Associated Vendors Inc.*, 210 Cal. App. 2d at 837 (citation omitted).

> With regard to the first prong, courts look to a number of factors including "commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees," "use of one as a mere shell or conduit for the affairs of the other," "inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers." . . . "[T]his test requires a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former" and "envisions pervasive control over the subsidiary, such as when a parent corporation dictates every facet of the subsidiary's business — from broad policy decisions to routine matters of day-to-day operation." . . . "Total ownership and shared management personnel are alone insufficient to establish the requisite level of control."

whiteCryption Corp., 2016 U.S. Dist. LEXIS 78106, at *24-25 (citations omitted). "Simply stating that someone 'manages, controls, and directs' [day-to-day activities] or signed [an] agreement on behalf of the corporation is not sufficient to plausibly allege unity of ownership and interest." *Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *5 (citing *Mid-Century Ins.*, 9 Cal. App. 4th at 1215).

In *whiteCryption Corp. v. Arxan Techs., Inc.*, 2016 U.S. Dist. LEXIS 78106 (N.D. Cal. 2016) (Orrick, J.), a party asserting alter ego liability alleged that "Intertrust and whiteCryption share the same headquarters, officers, directors, and other employees," "individuals with an Intertrust-related email address discuss[ed] whiteCryption's products" at length, and "individuals . . . who facially have no role in whiteCryption, were involved in conversations or decisions related to whiteCryption

including: changing whiteCryption's website, pricing whiteCryption's new products, identifying customers for whiteCryption to pursue, monitoring whiteCryption's transactions, approving the withholding of technical support from Arxan, and negotiating issues with Arxan in relation to the Reseller Agreement." *Id.* at *25-26. This Court held that, although the allegations "establish[ed] Intertrust's significant involvement in whiteCryption's operations," they were insufficient to state a claim for alter ego liability. *Id.* at *26. Similarly, the minimal allegations concerning Newman's involvement in the day-to-day activities of CMP and/or BioMax fall short of adequately alleging that Newman personally micromanaged the daily affairs of CMP, BioMax, and/or its alleged agents so closely that that CMP and BioMax should no longer be treated as legally distinct and separate from Newman. *See also Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *4-5 (unity of interest insufficiently pled where the complaint alleged that "Dubinsky (1) is the president and a member of Aquawood, and that he manages, controls and directs its day-to-day activities; (2) was actively involved with the Doe defendants in approving and conducting the infringing activities alleged; and (3) signed the licensing agreement on behalf of . . . Aquawood's predecessor in interest").[11]

2. Inequitable result will occur in absence of alter ego liability requirement

This Court has previously held that a claimant cannot meet its burden under the second requirement by merely alleging that an inequitable result will occur if the parties at issue are treated as separate entities, or by merely asserting that the party for whom alter ego liability is sought "engaged in or approved the alleged misconduct." *whiteCryption Corp.*, 2016 U.S. Dist. LEXIS 78106, at *28-31.[12] Not only must a complaint alleging alter ego liability set forth specific allegations

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[11] The FAC even alleges that the two individual Defendants, Daleiden and Newman, *are alter egos of each other*, a clearly preposterous proposition. FAC ¶ 23 (asserting that any individuality and separateness between the Defendants has ceased).

[12] *See also Mad Sci. Grp., Inc.*, 2016 U.S. Dist. LEXIS 185255, at *4-5 (alter ego theory inadequately pled where there were not "any allegations that there would be an inequitable result if the Court does not pierce the corporate veil and find Dubinsky liable for Aquawood's alleged infringing acts"); *Orosa v. Therakos, Inc.*, 2011 U.S. Dist. LEXIS 93694, at *19 (N.D. Cal. 2011); *cf. Hibbs-Rines v. Seagate Techs., LLC*, 2009 U.S. Dist. LEXIS 19283, at *14 (N.D. Cal. 2009)

spelling out the inequitable results that would occur if the actions at issue are treated as those of the corporation alone—which the FAC fails to do concerning Newman—it must do so with respect to *each individual claim*.[13] The FAC is devoid of any allegations whatsoever specifying how inequitable results would occur if the court does not employ the "extreme remedy" of holding Newman personally liable—on the contract claim, the promissory fraud claim, the fraudulent misrepresentation claim, and/or the conspiracy claim—as an alter ego of various other party and non-party entities and individuals. The FAC's generic assertion that failing to recognize alter ego liability "would permit an abuse of the corporate privilege and would sanction fraud and promote injustice," FAC ¶ 23, falls short of what is required. The FAC fails to sufficiently allege that Newman is the alter ego of any other Defendant or non-party.[14]

C. The Complaint fails to state a claim for civil conspiracy liability against Newman.

FRCP 9(b) imposes heightened pleading requirements for a civil conspiracy claim "where 'the object of the conspiracy is fraudulent,'" such as by requiring the plaintiff to "sufficiently detail the roles played by the defendants in the alleged conspiracy to defraud." *Swartz*, 476 F.3d at 765. The FAC's allegations concerning Newman's involvement in the alleged conspiracy, including his involvement in the various actions that were allegedly taken by "co-conspirators" concerning the 2014 NAF meeting, the 2015 NAF meeting, and various communications, lunch meetings and

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(quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) ("[A] court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'").

[13] *See, e.g., Pac. Mar. Freight, Inc.*, 2010 U.S. Dist. LEXIS 87205, at *22-23 (emphasis added) ("To hold Ms. Foster individually liable for each claim, PTS must plead an inequitable result *for each claim*. When an individual is found to be the alter ego of a corporation, this does not dissolve the corporation. . . . Rather, to serve the ends of justice, the corporate entity is disregarded only in that limited circumstance. . . . To hold otherwise would ignore the presumption of corporate separateness and the essence of alter-ego theory. . . ."); *Mesler*, 39 Cal. 3d at 301 ("[U]nder certain circumstances a hole will be drilled in the wall of limited liability erected by the corporate form; for all purposes other than that for which the hole was drilled, the wall still stands.").

[14] The Court's holding in *PPFA v. CMP* that alter ego liability was sufficiently pled concerning Defendant Merritt, 214 F. Supp. 3d 808, 829, 831, n.18 (N.D. Cal. 2016) (Orrick, J.), should not be followed here because, *inter alia*, the *PPFA* complaint merely alleged, without any specificity, that declining to recognize alter ego liability "would permit an abuse of the corporate privilege and would sanction fraud and promote injustice." Cmplt. at ¶ 41, Dkt. #59 (Mar. 24, 2016).

conferences, and recordings occurring at other locations between the two NAF meetings, are inadequately sparse. *See* FAC ¶¶ 92-135.

Additionally, "for conspiracy liability, the conspiring defendants must have actual knowledge that a tort is planned and concur in the scheme *with knowledge of its unlawful purpose*. . . ." *Navarrete v. Meyer*, 237 Cal. App. 4th 1276, 1292 (2015) (emphasis added); *see also Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 784-85 (1979). According to the FAC,

> [t]he genesis [of CMP and its work] happened three years ago in [Newman's] office in Wichita, Kansas, where we [Daleiden and Newman] discussed the fact that *we already knew that Planned Parenthood was breaking the law* in trafficking in human organs after their abortions, and so *we decided and set out to go ahead and expose that and create an investigative journalism organization* that would embed ourselves into the abortion cartel and to catch them off script.

FAC ¶ 80 (emphasis added); *see also id.* ¶¶ 14, 139, 143, 144, 153, 199 (referencing a quote from Newman stating that CMP "will release more damning evidence" of "illegal" activities uncovered by CMP's investigation). Creating an investigative journalism organization for the purpose of exposing illegal activities is far from an "unlawful purpose" giving rise to wide-ranging conspiracy liability. To the contrary, the Ninth Circuit has recently recognized that undercover journalism—including the use of misrepresentations to gain access to property in order to investigate and secretly record illegal or unethical activities—is an important, constitutionally protected activity.

In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) ("*ALDF*"), an animal rights activist went undercover to get a job at an Idaho dairy farm and secretly filmed animal abuse occurring there, and portions of the recordings were published in an exposé that gained national attention. *Id.* at 1190. An Idaho statute was enacted that, among other things, criminalized gaining entry to an agricultural production facility through the use of misrepresentations and also prohibited a person from recording a facility's operations without the owner's consent. *Id.* Among the goals of the statute was to "shield the agricultural industry from undercover investigators who expose the industry to the 'court of public opinion,' which destroys farmers' reputations, results in death threats, and causes loss of customers." *Id.* at 1191-92.

The Ninth Circuit held that the criminalization of misrepresentations to enter a production facility and the ban on secret recordings of a production facility's operations violated the First Amendment. *Id.* at 1190; *see also United States v. Alvarez*, 567 U.S. 709 (2012). The court noted that "[i]nvestigative journalism has long been a fixture in the American press," and stated that "whistleblower activity and undercover investigative reporting . . . has brought about important and widespread change. . . . We are sensitive to journalists' constitutional right to investigate and publish exposés on the agricultural industry." 878 F.3d at 1189-90 (citing Upton Sinclair, *The Jungle*). The court drew a distinction between (1) misrepresenting one's identity in order to gain access to property *for the purpose of material gain* (*i.e.*, actual "fraud"), and (2) the misrepresentations of undercover journalists made to gain access to property—or those of "a restaurant critic who goes undercover, claiming to be a repeat customer in order to get a prime table from which to review the restaurant's food, service, and ambiance"—which "quite simply do not inflict any material or legal harm on the deceived party." *Id.* at 1193-99; *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (no fraud liability for misrepresentations made by journalists to obtain employment in order to secretly videotape practices for later publication); *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1362-64 (S.D. Fla. 2005) (same). The court also held that the ban on recording a facility's operations without the owner's consent was unconstitutional, noting that "there is a 'First Amendment right to film matters of public interest.'" *Id.* at 1203-05 (citation omitted). Objections to the content or quality of the journalistic product that is eventually produced by undercover journalists do not justify retroactively treating the speech that was used to gain entry to the property as "fraudulent" or otherwise unlawful. *Id.* at 1195, 1205, n.9;[15] *see also Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901 (S.D. Iowa 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017).

[15] Two provisions of the statute were upheld, which prohibited obtaining records of a facility by misrepresentation (which often entails the exposure of trade secrets for material gain), and obtaining employment with a facility by misrepresentation, with the intent to cause the facility economic or other injury (excluding reputational and publication damages). *ALDF*, 878 F.3d at 1199-1202.

The similarities between the arguments rejected by the Ninth Circuit in *ALDF* and the allegations of the FAC with respect to the alleged "conspiracy" are striking. Contrary to *ALDF*, the FAC's civil conspiracy cause of action tries to rebrand investigative journalism as "fraudulent and malicious conduct." FAC ¶ 171. The "fraud" alleged in the FAC stems from misrepresentations designed to gain access to NAF's meetings for the purpose of recording conversations in furtherance of the undercover investigation of possible illegal activities. *See id.* ¶ 80. As *ALDF* explained, however, the fact that a target of investigative journalism alleges that it has received public backlash or threats from third parties, and alleges that the journalists published falsehoods, does not make the pre-publication misrepresentations made to the investigative target actionable "fraud" or malicious conduct. *Compare* 878 F.3d at 1193-99, 1205, n.9 *with* FAC ¶¶ 1, 3-5, 32, 50 (labeling CMP's journalism as intimidation and harassment of law-abiding groups and individuals).

Other Ninth Circuit decisions illustrate that agreeing to take part in an undercover investigative journalism project intended to shed light on improper practices is not an unlawful purpose, even if some particular actions taken by individuals involved with the project eventually give rise to tort liability. The court has repeatedly recognized that recording conversations for a newsgathering purpose does not constitute recording "for the purpose of committing any criminal or tortious act" under the federal wiretapping statute, 18 U.S.C. § 2511, *even where the means of carrying out the investigation are criminal or tortious*. *Sussman v. ABC*, 186 F.3d 1200, 1201-03 (9th Cir. 1999); *Deteresa v. ABC*, 121 F.3d 460, 466 (9th Cir. 1997); *see also Desnick v. ABC*, 44 F.3d 1345, 1353-54 (7th Cir. 1995). To the contrary, there is a key difference between (1) recordings made for a lawful purpose, such as investigative reporting, and (2) recordings made "for the purpose of committing any criminal or tortious act," such as recordings intended to further the commission of blackmail, the tortious invasion of privacy, or other crimes or torts. *See id.*; *cf. Food Lion*, 194 F.3d at 520 (rejecting unfair trade practices claim because "the deception -- the misrepresentations in Dale's application -- did not harm the consuming public. Presumably, ABC intended to benefit the consuming public by letting it know about Food Lion's food handling practices.").

The same principle applies with respect to conspiracy liability: one does not "have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose," *Navarrete*, 237 Cal. App. 4th at 1292, by agreeing to have some involvement with an undercover investigation for the purpose of exposing wrongful conduct. Plaintiff may attempt to set up (and then knock down) the straw man argument that journalists have *carte blanche* to run amok committing torts and crimes with impunity, but Newman makes no such claim. Rather, the argument here is simply that, in many areas of the law, such as conspiracy liability, *purpose matters*. An action taken for a lawful purpose may be lawful, while a similar action taken for a nefarious purpose may be illegal or tortious. Organizing and carrying out an investigative journalism project for the purpose of shedding light on possible illegal activities is, under both common sense and binding precedent, a lawful (and even laudable) purpose. Even if a court subsequently holds that one or more particular actions taken during the course of the project were tortious, that *does not* retroactively transform the *purpose* of the project, and the purpose of everyone having some degree of involvement in or association with the project, from lawful to unlawful. *See Desnick*, 44 F.3d at 1354-55 ("The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme."); *Med. Lab. Consultants v. ABC*, 931 F. Supp. 1487, 1494 (D. Ari. 1996) (plaintiff agreed to dismissal of conspiracy claims in undercover journalism case "because there is no civil cause of action for conspiracy under Arizona law").

In sum, there is simply no "unlawful purpose" alleged in the FAC that could give rise to conspiracy liability for Newman (or anyone else for that matter). As such, the FAC fails to state a claim for conspiracy liability for Newman, and that cause of action should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant Newman respectfully requests that the Court dismiss the First Amended Complaint with respect to him.

In the alternative, if the Court determines that the FAC (1) properly alleges subject matter and personal jurisdiction over Newman, and (2) adequately states one or more causes of action against Newman due to one or more particular theories of liability (*e.g.*, agency, alter ego, and/or civil conspiracy), Newman respectfully requests that the Court dismiss any particular causes of action and/or theories of liability that the Court determines have not been adequately pled with respect to Newman.

Respectfully submitted on August 15, 2018.

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