No. 20-16068
(Consolidated with Nos. 20-16070, 20-16773, and 20-16820)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, *et al.*,
Plaintiffs-Appellees,
v.
TROY NEWMAN, *et al.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Northern District of California,
No. 3:16-cv-00236-WHO, Hon. William H. Orrick

DEFENDANT-APPELLANT TROY NEWMAN'S REPLY BRIEF

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I. Defendants are not racketeers.

The alleged RICO predicate acts are the production and transfer of false identifications in, or affecting, interstate commerce under 18 U.S.C. §§ 1028(a)(1)-(2). The district court concluded that the only instances of ID "production" or "transfer" were Daleiden modifying his own driver's license and arranging for the production of two others, which he provided to two investigators. 2-ER-161-165 & n.22. The court committed reversible error, however, by relying upon circumstances other than production or transfer—such as intent, use of IDs, and various lawful activities—to find that Plaintiffs satisfied Section 1028's interstate commerce requirement and RICO's pattern requirement. 2-ER-164; 2-ER-166-167.[1]

A. Mere *use* of an identification does not constitute a *transfer*.

Plaintiffs assert that numerous *uses* of the IDs, such as briefly showing an ID while picking up a badge at a conference, were "transfers" under Section 1028(a)(1)-(2). Appellees' Brief ("PPAB"):48-55. The district court rejected this plainly incorrect interpretation, and this Court should also.[2]

[1] The court's RICO proximate causation errors are addressed at Rhomberg's AOB:26-30 & Reply at 10-15. Newman adopts the other reply briefs by reference. FRAP 28(i).

[2] The district court expressed doubts that dicta from *U.S. v. Christian*, 356 F.3d 1103, 1107 (9th Cir. 2004) (cited at PPAB:48, 55) "establishes the correct framework for determining [what a] 'transfer' is under section 1028," 2-ER-170, n.27, and it appears that no decision has relied upon this statement.

Under any reasonable construction of the term, the "transfer" of IDs does not include briefly *presenting* one. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (to "transfer" is to "dispos[e] of or part[] with property or with an interest in property."). Rather, showing an ID for the purpose of gaining access to a conference is a classic "use" of an object; to "use" is "to put into action or service; [to] avail oneself of." *Merriam-Webster.com Dictionary* (accessed Nov. 5, 2021); *State v. Bowen*, 380 P.3d 1054, 1061-62 (Or. 2016) (concluding that "transfer" does not include "use," but means giving over the "possession or control" of an ID to another *for his use*).[3]

Various provisions of Section 1028 employ both "use" and "transfer," and thus differentiate those separate actions. §§ 1028(a)(3) (prohibiting possession "with intent to use unlawfully or transfer unlawfully"), 1028(a)(7), 1028(b)(1)(D), 1028(b)(2)(A).[4] To interpret "transfer" as synonymous with mere "use" would "effectively eliminate the word[] ['transfer'] from the statute," *U.S. v. First*, 731 F.3d 998, 1004 (9th Cir. 2013), and would violate the principle that courts must "give effect, if possible, to every clause and word of a statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017).

[3] There are certain objects for which "use" means "transfer"—*e.g.*, a dollar bill, which is used by transferring it—but, by its personalized nature, a photo identification is not such an object.

[4] Other subsections confirm that making an identification available to others *for their use* is the key to a "transfer." *See* § 1028(d)(10) (stating that a transfer "includes" placing a false document "on an online location where it is available to others").

Legislative history confirms the distinction. Section 1028's prohibition on identification transfers originated in a predecessor statute, the False Identification Crime Control Act of 1982, which made it a crime to "knowingly transfer[] an identification document . . . knowing that such document was stolen or produced without lawful authority." Pub. L. No. 97–398, 96 Stat. 2009 (1982). The Act's House Report explained that "the intent to *transfer* unlawfully is the intent to sell, pledge, distribute, give, loan or otherwise transfer," whereas the "intent to *use* unlawfully is the intent to . . . *present*, *display*, certify, or otherwise give currency to." H.R. Rep. No. 97–802, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 3519, 3529 (emphasis added). In short, contrary to Plaintiffs' "use equals transfer" interpretation, "transfer" refers to passing on an ID for someone else's use, whereas "use" refers to utilizing an identification oneself.

B. *At most,* only *one* act satisfied the interstate commerce requirement, which defeats the RICO claim.

It is the conduct "prohibited by this section" that must be "in," or "affect[]," interstate commerce to establish a violation. 18 U.S.C. § 1028(c)(3)(A). Accordingly, in a Section 1028(a)(1)-(2) case, as here, the limiting phrase "prohibited by this section" narrows the universe of activities that must be "in or affecting" interstate commerce to only the purportedly unlawful production or transfer of IDs.

The district court incorrectly held that Defendants' *intent*, and *use* of the IDs in different states, supported a finding that the interstate commerce requirement had been satisfied. 2-ER-164; PPAB:49-51 (repeating this argument). Neither use nor intent to use is conduct "prohibited by this section" for purposes of Section 1028(c)(3)(A). Similarly, although Plaintiffs claim that Defendants "defrauded numerous victims operating in interstate commerce," PPAB:51, fraud is not a predicate for the RICO claim. 2-ER-355-358.

Plaintiffs' reliance upon decisions involving provisions *other than* Section 1028(a)(1) or (2) is misplaced. For instance, *U.S. v. Clayton*, 108 F.3d 1114 (9th Cir. 1997), held that establishing a violation of § 1029(a)(3), prohibiting the fraudulent possession of fifteen or more unauthorized access devices, requires proof that the conduct prohibited by the statute (the aggregate possession of all devices) collectively affected interstate commerce. *Id.* at 1117-18. *Clayton* does not stand for the proposition that conduct that *falls outside the particular statutory violation* alleged (*e.g.*, subsequent *uses* in a Section 1028(a)(1)-(2) case) can be used to establish the requisite nexus to interstate commerce.

Moreover, *U.S. v. Klopf*, 423 F.3d 1228 (11th Cir. 2005), and *U.S. v. Jackson*, 155 F.3d 942 (8th Cir. 1998), involved violations of Section 1028(a)(3), but Plaintiffs "disclaim[ed] any reliance on (a)(3)" in this case. 2-ER-358. In Section 1028(a)(3) cases, whether the intended use is in, or affects, interstate commerce is

relevant because that subsection expressly includes an "intent to use" element. By contrast, Sections 1028(a)(1)-(2) do not include an intent to use element, so intent is irrelevant to the interstate commerce inquiry.[5]

Here, there is only a single, arguable connection between production/transfer and interstate commerce: one use of the Internet to find one producer of IDs. In *U.S. v. Sutcliffe*, 505 F.3d 944, 952-53 (9th Cir. 2007)—cited at PPAB:48—the Court found a link to interstate commerce in a defendant's use of the Internet to *transmit* threats, analogizing it to the use of a telephone. Here, Daleiden's minimal Internet use was akin to reviewing the Yellow Pages: he "located a service" by finding a Craigslist listing. 1-ER-54; 10-ER-2575-2576. Merely reading information that appears on the Internet is not an act that is in, or affects, interstate commerce, and is certainly not a violation of § 1028(a)(1)-(2).[6]

C. There was no RICO pattern.

Even if Daleiden's one-time use of the Internet could be characterized as the commission of a single RICO predicate act, the requisite "'pattern of racketeering

[5] Similarly, the Fifth Circuit decision relied upon by Plaintiffs—PPAB:50-51 (citing *U.S. v. Villareal*, 253 F.3d 831, 834-35 (5th Cir. 2001))—incorrectly grafted analyses from cases interpreting *intent-based* statutory provisions onto the interstate commerce requirement for Section 1028(a)(2) transfer offenses.

[6] *U.S. v. Agarwal*, 314 Fed. App'x 473 (3rd Cir. 2008), is addressed at Newman's Opening Brief ("NOB"):11.

activity' requires *at least two acts* of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). Plaintiffs' RICO claim fails due to the lack of such a pattern.

Plaintiffs acknowledge they had the burden to prove with substantial evidence a "*continuing*" violation of RICO that "involves 'conduct that by its nature projects into the future with a threat of repetition,'" *i.e.*, that "*the racketeering predicates* . . . pose a threat of continued criminal activity." PPAB:51-52, 147-48 (emphasis added); 18 U.S.C. § 1962(c). As previously discussed (NOB:13-17), there is not substantial evidence of a threat that, in the future, Defendants will unlawfully produce or transfer false IDs. The alleged predicate acts *had a concrete endpoint several years ago*, and are not the type of conduct "that by its nature projects into the future with a threat of repetition." *H.J. Inc., v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989).

1. Decisions of this Court confirm the absence of any RICO pattern.

This Court's decisions have drawn a line between 1) cases—such as this one—in which the purported predicate offenses were connected to one particular event, or one particular goal that has been achieved, such that there was no open-ended pattern of racketeering activity, and 2) cases in which racketeering activity was an ongoing, regular practice, such that it might have continued indefinitely but for some unforeseen event. NOB:13-17.

For instance, in *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986), the predicate acts posed no threat of continuing since they related to obtaining a single shipment of goods, and the defendant had no need to commit further predicate acts after completing those acts. Conversely, in *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987)—cited at PPAB:52-53—the predicate acts posed a threat of continuing since *they were necessary to cover up other crimes*. The instant case falls within the *Schreiber* line of cases; once a few IDs were modified or procured in the early stages of the investigation, there was no need for further similar acts to occur. Plaintiffs *entirely ignored* several other decisions of this Court (cited at NOB:13-17) that similarly involved alleged predicate acts that had a definitive endpoint.

Moreover, Plaintiffs rely upon clearly distinguishable cases. For instance, two decisions held that a key inquiry is whether, if defendants "'had not been fortuitously interrupted . . . the predicate acts could have recurred indefinitely.'" *Solarcity Corp. v. Pure Solar Co.*, 2016 U.S. Dist. LEXIS 199522, at *19-20 (C.D. Cal. Dec. 27, 2016) (quoting *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995) (citation omitted)). In other cases, this Court concluded that, where the commission of predicate offenses had become the defendants' "regular way of doing business," those offenses were not tied to one particular transaction or event that had a definite

endpoint. *Allwaste*, 65 F.3d at 1528-30; *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450-51 (9th Cir. 1991); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990).

Neither of these features is present here; the alleged predicate acts were not "fortuitously interrupted," nor were they Defendants' regular, ongoing way of doing business. Rather, over a year before the investigation concluded, Daleiden *voluntarily stopped* modifying, or transferring to another Defendant, any IDs. 21-ER-5315. By publishing its videos, *CMP itself made it inevitable* that Plaintiffs would quickly discover that they had admitted individuals with false IDs to conferences and meetings. In sum, Daleiden's involvement with ID acquisition was "finite in nature" and part of a "single scheme" with a definite endpoint. *Turner v. Cook*, 362 F.3d 1219, 1229-30 (9th Cir. 2004).

2. Past or future *lawful* activities are not evidence of a threat that *predicate criminal acts* will continue.

Contrary to controlling precedent and RICO's text, Plaintiffs rely on *acts that are indisputably not RICO predicates* as purported evidence of a threat of continued predicate acts. PPAB:37, 53-54. These non-predicate acts include:

- The operation of a website that compiles publicly available information about abortion providers.
- Newman's publication of books.
- Newman once called Planned Parenthood a "death machine."

- Merritt made phone calls to Planned Parenthood facilities while working with a non-party.
- Daleiden has periodically used pseudonyms since he was in high school.[7]
- Daleiden stated that he was proud of the work that he did for CMP "[b]ecause we documented and exposed these plaintiffs trafficking in fetal body parts." 12-ER-3078:15-20.
- CMP intends to do "investigative reporting projects and other news media type projects" in the future, 10-ER-2718:2-15, "to draw public attention and bring public pressure to bear for the sort of policy changes that would address criminal fetal trafficking." 10-ER-2720:3-2721:5.

Plaintiffs also cite the district court's ruling on injunctive relief—which relied on Defendants' history of lawful anti-abortion activities and continued opposition to abortion, 1-ER-73-74—as support for their RICO pattern argument. PPAB:54, 148. As this Court noted in *Jarvis v. Regan*, 833 F.2d 149, 153 (9th Cir. 1987), however, RICO continuity must be established with respect to *predicate acts*, not defendants' overall planned course of action. Plaintiffs cannot hypothesize a threat of future RICO predicate offenses based on past or hypothetical future *lawful* activities.

[7] There was no evidence that Daleiden used these pseudonyms to "target Planned Parenthood," nor any evidence that he procured IDs in connection with these pseudonyms. 9-ER-2467:7-2468:14; 2-SER-311:5-24.

3. There is no evidentiary basis for claiming that hypothetical future investigations must involve production and transfer of false IDs.

Plaintiffs baldly assert that one or more Defendants will attempt to repeat the exact type of undercover project that gave rise to this case, and "will continue to need false identification to carry out these projects." PPAB:54. Such speculation is no substitute for substantial evidence of an actual *threat* that Defendants will unlawfully produce or transfer IDs in the future. Additionally, Plaintiffs attempt to rewrite the applicable standard by asserting that "it is entirely *possible*" for Defendants to commit future predicate acts. PPAB:56 (emphasis added). That is not the law. Under RICO, hypothetical possibilities are not *substantial evidence* of an *actual threat* of repeated predicate offenses.[8]

Plaintiffs unsuccessfully attempt to distinguish *Food Lion v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995), on the basis that the findings of the Food Lion multi-year investigation were featured "in a single television episode." PPAB:55. *Food Lion*'s key holding is that there is no RICO pattern where (as here) the alleged predicate acts were connected to *the information collection process of one particular investigation* that has concluded. 887 F. Supp. at 818-20.

[8] *See, e.g., Van Galder v. Clark*, 2018 U.S. Dist. LEXIS 31848, at *9-12 (S.D. Cal. Feb. 27, 2018). Contrary to Plaintiffs' suggestion (PPAB:204-05), the mere fact that Defendants contend that their *past* actions were lawful is not evidence of a threat of *future* predicate acts.

Additionally, that ABC planned to conduct future undercover investigations that would include the use of hidden cameras *did not* transform ABC and its staff into a racketeering enterprise because undercover reporting does not necessarily entail the commission of RICO predicate acts. *Id.* at 819. Similarly, the mere possibility that a Defendant might conduct a future investigation is not substantial evidence of a threat that they *will unlawfully produce or transfer IDs* for any such investigation.

Defendants are entitled to judgment on the RICO claim.

II. Defendants were unfairly prejudiced by improper adverse inferences based upon invocations of Fifth Amendment privilege.

Newman invoked his Fifth Amendment privilege at his deposition in response to many of the questions. *Plaintiffs never contested Newman's right to do so*; instead, they sought to exploit Newman's assertion of privilege by requesting dozens of adverse inferences.

The district court instructed the jury that they could draw fourteen adverse inferences against all Defendants from Newman's assertion of privilege, and six additional adverse inferences from two non-parties' assertion of the privilege. 14-ER-3889-3896. This conveyed to the jury that these witnesses must be hiding evidence of criminal activities. None of the inferences met the constitutional and evidentiary standards for allowing adverse inferences. Some went further, exposing

the jury to irrelevant and inflammatory matter unfairly prejudicial to all Defendants. These errors warrant reversal.[9]

A. Newman Inferences #1 and 2 were improper and unfairly prejudicial.

Newman Inference #1[10] is premised upon the 166th page of Newman's two-decade old book, "Their Blood Cries Out," which examines the Bible's relevance to American government on the issue of abortion. 1-SER-47-50; Dkt. #689-2 at ECF 5-7. The book sheds no light upon whether Newman agreed to the commission of any unlawful act, or whether CMP's investigation was the kind of egregious behavior warranting punitive damages.

Defendants *repeatedly* objected to the admission into evidence of any portion of the book, or any inferences based upon it. *See, e.g.*, 1-SER-47-50; Dkt. #754 at 6-7, 11-12. Although the district court excluded Plaintiffs' exhibit (the cover page and page 166) under FRE 403, 1-ER-113, the court nevertheless instructed the jury that they could draw the following adverse inference:

> Troy Newman co-authored the book *Their Blood Cries Out*, which reflects his beliefs that, quote: "The United States government has abrogated its responsibility to deal properly with the blood guilty." End quote. And that,

[9] Although the abuse of discretion standard *generally* applies in adverse inferences cases, PPAB:165, n.44, the relevant orders *in this case* raise several purely legal questions subject to *de novo* review: *e.g.*, whether inferences may be premised upon inadmissible evidence and non-party invocations of privilege, and whether inferences largely premised upon California claims are contrary to FRE 501 and California Evidence Code § 913.

[10] The numbered inferences are found at 1-ER-113-115.

> quote: "This responsibility rightly involves executing convicted murderers, including abortionists, for their crimes, in order to expunge blood guilt from the land and people." End quote.[11]

Both the book and the inference are irrelevant, and Plaintiffs have identified no substantial need for this information to be presented to the jury.[12] Inferences, like Newman Inference #1, that are premised upon inadmissible evidence are invalid and unfairly prejudicial: "the prejudice . . . would far outweigh the probative value of the negative inference," and the requesting party "cannot show any need, let alone a substantial one, for that information." *Glanzer*, 232 F.3d at 1267.

Similarly, Newman Inference #2 is premised upon a website that compiles *public records* about abortion providers (*e.g.*, malpractice lawsuits) and also includes *public business* contact information. 2-SER-366-368. Again, Plaintiffs offered no substantial need for the jury to know this. The website and inference should have been excluded under FRE 403. 1-SER-46-47.

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[11] 14-ER-3891. Although the book emphasizes that only the government has God-given authority to take human life after providing due process, Dkt. #689-2 at ECF 5-7, jurors were unlikely to understand theological terminology like "expung[ing] bloodguilt from the land and people." 1-SER-47-50; 14-ER-3833-3835; *Doe v. Glanzer*, 232 F.3d 1258, 1266-67 (9th Cir. 2000).

[12] Plaintiffs incorrectly claim that the inference was necessary to show that Newman's motive for working with CMP was to further an anti-abortion agenda. PPAB:166-67; 1-SER-62. Besides the fact that the book was written long before CMP's existence, there was ample evidence that the intention was to expose criminal activities and prompt government investigations and prosecutions. 2-SER-467; 26-ER-6804-6818.

Just as Defendants predicted (1-SER-48-49), Plaintiffs' closing argument referenced improperly admitted "statistics of abortion violence"[13] that "include attempted murder, criminal threat with the intent to terrorize, arson, battery, assault, bomb scares and other forms of violence," and "eight murders and 26 attempted murders of abortion providers," before asserting that "Mr. Newman advocated for that violence, according to the adverse inference that you are permitted to draw." 16-ER-4426-4427 (quoting Newman Inference #1).[14] Although this claim is demonstrably false, the inference's references to "[b]lood," "deal[ing] properly with the blood-guilty," "executing convicted murderers," and "expung[ing] bloodguilt from the land and people," 1-ER-113, were perfectly tailored to fit Plaintiffs' false narrative. As Plaintiffs' candidly acknowledged, they wanted the jury to "see[] the visceral words," rather than "kind of a sanitized version of it," so that the prejudicial impact of the inference "would [not] be lost." 14-ER-3836.

Plaintiffs also claimed that Newman Inference #2 showed a need to "stand up to Troy Newman," 16-ER-4424, and illustrated that Defendants' "strategies were"

[13] *Cf.* Rhomberg AOB:36-46.

[14] This is not a "plain error" case. PPAB:176-77; 1-SER-48-49 (objecting to admission of the book and inference because Plaintiffs would use them during their closing argument to "give jurors the [false] impression that Newman calls for acts of vigilante violence against abortion providers"). Defendants were not required to filibuster Plaintiffs' closing with *renewed* objections every time they referenced previously-objected-to inferences, evidence, or argument *that the district court had made abundantly clear it would permit.*

"to put at risk the lives of Planned Parenthood's doctors and staff." 16-ER-4429. The unfair prejudice of this inference is illustrated by the fact that the district court *rejected* Plaintiffs' theory that Defendants were responsible for the actions of third parties reacting to CMP's publications. 2-ER-140, 2-ER-159.

Plaintiffs have continued to rely upon these two inferences to present a misleading narrative *to this Court*.[15] As the district court noted, "the jury likely took adverse inferences" based on the Newman inferences, 1-ER-52, and the jury "punish[ed]" Newman in light of Newman Inferences #1 and 2. 16-ER-4420; 16-ER-4426-4427; 1-ER-46. The unfairly prejudicial impact of these improper inferences warrants reversal.

B. The other eighteen inferences were also invalid.

1. Plaintiffs essentially conceded that Newman Inference #16 is unconstitutional.

As explained at NOB:32-34, Newman Inference #16 was an improper "inference on another inference" because the deposition questions (18-ER-5049-5050) merely requested that Newman authenticate documents, and did *not* ask him what his "motive and intent in participating in CMP and the Human Capital Project" were. 14-ER-3894. Tellingly, Plaintiffs declined to address *the undeniable*

[15] PPAB:8-9, 53, 158-59, 183-84, 204; *compare* PPAB:8-9 (claiming that the website "expos[es] [abortion providers] to threats" by publicizing their "personal information") *with* 14-ER-3837-3838 (Plaintiffs' counsel stated, "we're not suggesting that it's a personal home address").

disconnect between the questions asked and the text of the inference. Whether documents corroborate an inference's substance (PPAB:171-172) is irrelevant when *no questions that could support the inference were asked*. *Glanzer*, 232 F.3d at 1265-66, n.2. It is therefore undisputed that Newman Inference #16 is unconstitutional.

Additionally, Newman Inference #16's characterization of the emails' content is inaccurate. NOB:33-34; 14-ER-3894. Where, as here, a judge instructs jurors that they may draw an inference *that does not accurately reflect* what the writings the inference is based upon stated, the inference is not corroborated by admissible evidence and is therefore improper.

2. Newman Inferences #10-12 were not corroborated by evidence.

With respect to Newman Inferences #10-12 (1-ER-114), the purportedly corroborating evidence (1-SER-80-84; PPAB:169) was *general* in nature. *See, e.g.*, 9-ER-2476-2478 (Daleiden believed that Newman appreciated the need to keep the investigation a secret, but did not provide Newman with much information concerning the investigation's progress). This evidence does not corroborate the *specific* claims made by these inferences. *See Glanzer*, 232 F.3d at 1264.[16]

[16] The parties' debate over whether corroborating evidence must actually be *admitted* in a jury trial is largely academic because—as explained herein and in the opening brief—Newman Inferences #1, 2, 6, 10-12, and 16 were supported by no *admissible* evidence.

3. Several inferences were contrary to FRE 501 and California Evidence Code § 913.

It is undisputed that the jury was not permitted to "make an adverse inference as to claims in which California law provides the rule of decision." NOB:34-35. Rather, the dispute is whether permitting the inferences at issue was improper because the purported "substantial need" for the information *was heavily, if not exclusively, tied to California claims*.

Although Plaintiffs assert that their heavy reliance upon California claims in their adverse inference briefing is irrelevant (PPAB:172-73), this begs the question: For *each* of the twenty inferences, what, exactly, was the *non-California claim*-based "substantial need" for the information? *See Laurino v. U.S.*, 2021 U.S. Dist. LEXIS 166267, at *8 (E.D. Cal. Sept. 1, 2021) (applying *Glanzer*) ("It is important to focus carefully on how [the party seeking an inference] asserts that it would use the evidence."). Plaintiffs declined to explain what the purported non-California claim-based substantial need was for each inference, and their district court briefs repeatedly asserted that inferences were needed to support Plaintiffs' *California* claims.[17] For instance, Plaintiffs repeatedly cited the California Business & Professions Code § 17200 claim, the California Penal Code § 633.5 defense, and "California recording laws" as bases for various adverse inferences. 1-SER-81-90.

[17] The district court brief cited by Plaintiffs expressly incorporated the prior district court brief cited by Defendants. 1-SER-58; 18-ER-5033-5046.

Without Plaintiffs' improper California claim-based justifications, the absence of a substantial need for the inferences is apparent. The district court's admission of adverse inferences was contrary to FRE 501 and California law.

4. Plaintiffs failed to show that, with respect to each inference, there was a substantial need for the information, and there were no less burdensome ways of obtaining the information.

This Court has emphasized that, because the privilege is a constitutional privilege, "no negative inference can be drawn . . . unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information." *Glanzer*, 232 F.3d at 1265; NOB:18-29. Plaintiffs' contention that all twenty inferences are categorically defensible *en masse* is contrary to *Glanzer*'s recognition that whether an inference would be constitutional is determined on a question-by-question, and inference-by-inference, basis. 232 F.3d at 1263-67. Simply asserting that "[e]ach of the 14 Newman inferences bears on his knowledge, intent, motive, and/or conduct," PPAB:167, is insufficient.

This *is not* a case of clear necessity, in which a witness invoking the privilege was in exclusive possession or control of key information, and no other witnesses or documents could provide that information, such that permitting inferences was necessary to preserve the right to a fair proceeding. NOB:21-22 (citing *SEC v. Fujinaga*, 698 Fed. Appx. 865, 867 (9th Cir. 2017); *SEC v. Fujinaga*, 696 Fed. Appx. 203, 206 (9th Cir. 2017)); *Guo Wengui v. Clark Hill PLC*, 2021 U.S. Dist. LEXIS

204645, at *10 (D.D.C. Oct. 25, 2021) (same). Plaintiffs' inability to identify *even one single item* of key information that Newman or the two non-party witnesses were purportedly in exclusive possession of is unsurprising given that *Daleiden* personally directed, participated in, and/or had extensive knowledge of *all aspects of the conduct underlying Plaintiffs' claims*—including the knowledge and involvement (or lack thereof) of Newman and the non-parties—and testified extensively on those matters.

Moreover, contrary to Plaintiffs' suggestion (PPAB:166-68), no inferences were necessary to get documents into evidence. Where, as here, *the authenticity of the documents has been stipulated to* (18-ER-5029-5030), there are a variety of ways to get them into evidence. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1019-20 (9th Cir. 2004) (a corporate custodian may be called to get documents produced in discovery into evidence); 1-SER-229-230 (Plaintiffs' declaration authenticating copies of website pages). Plaintiffs simply *declined* to utilize these methods in an attempt to manufacture a "need" for inferences.

Additionally, Plaintiffs' blanket assertion that *all fourteen* Newman inferences were needed to prove the "required elements" of Newman's "knowledge and intent" is incorrect. PPAB:167. For instance, Newman Inferences #1-3, 6, 9, 15, and 16 bear *no connection* to whether Newman "was aware that another Defendant or person planned to commit a wrongful act," "agreed with the other Defendant or

person, and intended that the wrongful act be committed." 16-ER-4319; 1-ER-105.[18] Furthermore, alternative sources of evidence concerning Newman's knowledge and intent negated any purported need for the inferences. NOB:22-25. Whether a witness "possessed the most direct, relevant evidence" on a topic— PPAB:165-66 (*citing no authority*)—is irrelevant. *Laurino*, 2021 U.S. Dist. LEXIS 166267, at *10-12 (applying *Glanzer*) (denying request for adverse inference because "third parties can be called to testify as to the closeness of the [witnesses'] family relationships"). Additionally, that information provided by alternative sources is harmful to the requesting party's case does not constitute a basis for a contrary adverse inference. *Lawrence v. Madison Cnty.*, 176 F. Supp. 3d 650, 666-67 (E.D. Ky. 2016) (citing *Glanzer*).

Plaintiffs also incorrectly claim that all fourteen Newman inferences were proper because there are purported conflicts between documents and Daleiden and Rhomberg's testimony. PPAB:166. The jury was free, however, to draw its own conclusions comparing the testimony with the documents without the unfairly prejudicial taint of the Fifth Amendment invocations. Plaintiffs also claim that Newman's invocation of privilege "deprived Plaintiffs of a witness through which . . . to let the jury assess his credibility." PPAB:167. But *Newman did not testify at*

[18] Newman did not "grudgingly concede" that his subjective intent was relevant. PPAB:167. He merely assumed relevance *arguendo*. NOB:29.

trial, so his credibility was never at issue.[19] Thus, *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 912 (9th Cir. 2008) (cited at PPAB:166) is distinguishable. Additionally, although *Nationwide Life* noted that "there was no danger that the [*one* adverse inference given] would be given undue weight" because the case was *not* tried to a jury, *id.* at 913, here, the *twenty* inferences were repeatedly emphasized *to the jury*, greatly multiplying the danger that they would be given undue weight.

5. The non-party inferences were unconstitutional.

The six inferences based upon two non-parties' invocation of privilege were improper for previously discussed reasons. NOB:38-39. In response, Plaintiffs assert they had a "substantial need for their testimony regarding the use of false identification and information to infiltrate conferences." PPAB:175. But Daleiden and Merritt knew of, and testified about, the third parties' use of fake identities. *See, e.g.*, 4-ER-853:16-20; 10-ER-2635:8-11. Baxter Inference #2 and Davin Inferences #3 and 4 added nothing to that testimony. *See also* 1-ER-53-54 (describing Baxter and Davin's roles referring solely to trial testimony). Further, there was no need for inferences concerning the non-parties' subjective motives, which were irrelevant to any issue in the case. The third-party inferences, cumulatively piled onto the other

[19] Similarly, Plaintiffs' "shield and a sword" argument (PPAB:166-67, n.46) stems from inapplicable cases in which an individual who invokes the privilege *later attempts to testify*.

unnecessary Newman inferences, prejudiced all Defendants. *U.S. v. Custer Battles, LLC*, 415 F. Supp. 2d 628, 634-36 (E.D. Va. 2006).

Further, the key premise of decisions cited by Plaintiffs (PPAB:174)—that a non-party's loyalty to a party suggests that the privilege was invoked to avoid giving testimony that would have harmed the party's case—is suspect.[20] One cannot assert the privilege against *self*-incrimination due to a fear that the testimony could incriminate *someone else*. *Rogers v. U.S.*, 340 U.S. 367, 371 (1951). This, coupled with the fact that innocent persons often invoke the privilege, makes speculation about what the non-party's answers would have been unreliable.

C. The improper inferences unfairly prejudiced all Defendants.

In light of "the taint that stems from the assertion of the privilege," *Custer Battles*, 415 F. Supp. 2d at 633, an adverse inference can be "too high a price to pay," and a party incurs a significant "detriment" in a jury trial when the privilege is improperly used against them. *Glanzer*, 232 F.3d at 1264-65. "'[T]oo many, even those who should be better advised, view [Fifth Amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.'" *Mitchell v. U.S.*, 526 U.S. 314, 329 (1999) (citations omitted). Even Plaintiffs' counsel (Dkt. #662 at 10:19-

[20] Additionally, some of these decisions involved a bench trial; for instance, the Second Circuit noted in *LiButti v. U.S.*, 107 F.3d 110, 124 (2d Cir. 1997), that the risk of unfair prejudice posed by adverse inferences in jury trials was not at issue.

20) and several prospective jurors in this case (NOB:20, n.15) admitted to holding this belief.

Plaintiffs' attempt to distinguish *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017), is unconvincing. PPAB:176, n.50. In *Woods*, the admission of improper adverse inferences, which were emphasized by counsel during closing argument, *was a reversible error*. *Id.* at 170-71. The Second Circuit noted that "the danger of unfair prejudice is high when a jury is told that a witness declined to answer a question by invoking the Fifth Amendment; the implication is, at best, that the witness refused to answer because she had something to hide." *Id.* at 171. The court determined that "the unfair prejudice Woods suffered substantially outweighed the minimal, if not immaterial, probative value of Woods's Fifth Amendment invocation."[21]

The unfair prejudice caused by the twenty inferences here, which furthered Plaintiffs' inflammatory narrative that Defendants called for vigilante criminal acts, was as "acute" and "harsh[]" as the harm imposed in *Woods* by inferences premised upon accusations of wrongdoing that had "little, if any, probative value." 864 F.3d at 170-71; *Rightchoice Managed Care, Inc. v. Hosp. Partners, Inc.*, 2021 U.S. Dist. LEXIS 177176, at *26 (W.D. Mo. Sept. 17, 2021) (Fifth Amendment invocations

[21] *Id.* Plaintiffs' assertion that the Second Circuit reversed "*because* the trial court . . . did not conduct a Rule 403 analysis" is incorrect. PPAB:176, n.50 (emphasis added).

"are inadmissible if they relate to irrelevant issues . . . or [are] introduced in a cumulative, irrelevant manner to simply inflame and prejudice the jury"). That jurors were instructed in both cases that they were not *required* to draw the improper inferences did not negate the danger of unfair prejudice.

Although "courts must take care not to punish valid invocations of the privilege," *U.S. v. 4003-4005 5th Ave.*, 55 F.3d 78, 80 (2d Cir. 1995), Plaintiffs sought to *maximize the prejudicial impact* by getting as many cumulative invocations of Fifth Amendment privilege before the jury as possible. 1-SER-218-283 (requesting inferences for almost 300 questions); 1-SER-146 (request to show the jury a video of nearly 200 invocations of privilege because, otherwise, it would be unfair "if the only consequence" of the invocation of the privilege "is that the jury is read a clinical list of inferences"); Dkt. #944 (request to limit Daleiden's testimony about his discussions with Newman to create a need for the inferences); 1-SER-58-59 (seeking to play the jury *a thirty-minute video compilation* of Newman repeatedly invoking his privilege, despite the district court's prior statement that it was "not inclined to allow a witness to be presented . . . with the sole purpose of eliciting a Fifth Amendment refusal to answer," Dkt. #835 at 3).

The twenty cumulative inferences permitted by the district court had their intended prejudicial impact: they "blur[red] into a single inference that the defendants have committed all the acts alleged." *Custer Battles*, 415 F. Supp. 2d at

636; *id.* ("[T]he number of requested inferences [must be reduced] to those few that relate to the heart of the alleged fraud."). Reversal of the judgment is required in light of the unfairly prejudicial impact the inferences had upon all Defendants, and particularly upon Newman. *Woods*, 864 F.3d at 170-71.

III. The judgment against Newman should be reversed.

Plaintiffs failed to prove, through substantial evidence, that Newman "was aware that another Defendant or person planned to commit a wrongful act," "agreed with the other Defendant or person, and intended that the wrongful act be committed." 16-ER-4319.[22]

A. Corporate director liability

The district court erred by holding (2-ER-247) that Plaintiffs were *not* required to "prove that an ordinarily prudent person, knowing what the [corporate] director knew at that time, would not have acted similarly under the circumstances." *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 508-09 (1986). *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368 (2000)—cited at PPAB:193, n.59—expressly affirmed that, *even in intentional tort cases*, "directors are not personally liable in tort unless their action . . . was clearly unreasonable under the circumstances known

[22] Although the adverse inferences should be disregarded, *see* § II, the evidence, even if coupled with the inferences, was insufficient to establish that Newman knew of any plan to commit tortious or illegal acts and agreed that those acts be committed.

to them at that time." *Id*. at 1380, 1386-87 (citing *Frances T.*). Here, the investigation was based upon substantial information that criminal and unethical actions were ongoing (NOB:2-3), and the district court's error permitted Plaintiffs to sidestep a significant element of their burden of proof.

B. RICO conspiracy

Plaintiffs' brief confirms the lack of any evidence that Newman knew that Daleiden planned to *produce and transfer* false IDs in or affecting interstate commerce, and agreed to that course of action. PPAB:193-95. It is undisputed that, before and during the investigation, Newman was never told that false IDs might be, would be, or had been used or acquired. 12-ER-3073-3075; 5-ER-1128-1138; 5-ER-1241-1242. The three documents relied upon by Plaintiffs *never mentioned the production, transfer, or use of false IDs*. 2-SER-375-377; 2-SER-477-479; 26-ER-6804-6818. Further, that individuals actually used fake IDs to access conferences, PPAB:195, does not establish that *Newman knew* that fake IDs would be unlawfully produced or transferred. Due to the lack of evidence, Plaintiffs withdrew their request for an adverse inference that Newman knew that Daleiden and Merritt obtained and used fake IDs. 1-SER-39-40. The judgment against Newman on the RICO claim should be reversed.

C. Unpled claims

Plaintiffs offered no authorities in defense of the district court's decision to permit the inclusion of Newman on the trespass and recording claims that he was *expressly excluded from* in the Complaint. PPAB:197.[23] As this Court has noted, a complaint must "set forth . . . which causes of action are alleged against which [d]efendants." *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1130 (9th Cir. 2008); *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (a complaint must "fully set[] forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery"). A plaintiff may not assert unpled claims or theories of liability against a defendant at summary judgment or trial. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-94 (9th Cir. 2000); *Giles v. Univ. of Toledo*, 478 F. Supp. 2d 942, 961 (N.D. Ohio 2007). As such, Newman was entitled to judgment on the trespass and recording claims.

D. False promise fraud

Plaintiffs failed to refute the California Supreme Court's holdings that non-parties to a contract may not be bootstrapped via conspiracy into a tort based on contractual promises. NOB:54-55 (citing sources).[24] Newman is entitled to judgment

[23] Notably, Plaintiffs' initial proposed verdict form did not include Newman on these unpled claims. Dkt. #973-1.

[24] Plaintiffs solely relied upon an unpublished lower court decision—PPAB:196-97 (citing *Merritt v. Wells Fargo Bank, N.A.*, 2011 Cal. App. Unpub. LEXIS 9649 (Dec.

(Footnote continues on next page)

on the subparts of Plaintiffs' fraud claim that are based solely upon a contractual promise. 18-ER-4937-4940, 1-ER-111.

E. Lack of substantial evidence

Plaintiffs do not dispute that surreptitious recording for journalistic purposes *is lawful in many circumstances*; agreeing to have some involvement with an undercover journalistic venture, *without more*, does not give rise to conspiracy liability. *See* NOB:56-57 & n.35.[25] Even when the individual(s) who make the recordings do so in a particular setting or manner that is tortious or unlawful, other individuals are not liable via conspiracy unless they *had sufficient information about the details of the recordings* that they had "actual knowledge that a tort [was] planned and concur[red] in the scheme with knowledge of its unlawful purpose." *Navarrete v. Meyer*, 237 Cal. App. 4th 1276, 1292 (2015).

Plaintiffs cite *no evidence*—whether direct or indirect[26]—that Newman had sufficient information about the circumstances in which other individuals would be recording that he knew about, and concurred with, a plan that called for the

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19, 2011))—while ignoring *Pham v. Apex Escrow, Inc.*, 2005 Cal. App. Unpub. LEXIS 9322, at *11 (Oct. 12, 2005) (no liability for false promise fraud for one who made no promise).

[25] Similarly, a suggestion that one who is going to conduct an *undercover* investigation—secret by nature—utilize "an anonymous email address" is neither noteworthy nor probative. 2-SER-369.

[26] Newman does not assert that the requisite actual knowledge can only be proven by a "smoking gun." PPAB:199.

commission of tortious or unlawful acts. *As Plaintiffs acknowledge*, the minimal knowledge that Newman had was "that Daleiden and the CMP actors would engage in undercover recording." PPAB:198. The proposal at issue (TRX 24, 26-ER-6804-6818) gave no indication that any recordings would be conducted in an unlawful manner, nor is there any evidence that Newman approved of unlawful tactics.

Additionally, a few statements that Newman made *after the investigation concluded* do not show that Newman actually knew about, and actually concurred with, the commission of any unlawful or tortious acts. 2-SER-371-374 (press release mentioning "Daleiden's Center for Medical Progress" and referring to Daleiden as the "Project leader" and "Project Manager" for the investigation); 2-SER-370 (referring to Newman's 2012 meeting with Daleiden during which initial concepts for an investigation were discussed); 2-SER-467-472 (comment that the media coverage of the publication of CMP's videos "has exceeded our expectations"); 2-SER-382-384 (suggesting that potential donors support Newman's future work). Where, as here, a plaintiff fails to prove actual knowledge of, and agreement to join, an unlawful plan, the principle that a co-conspirator is responsible for acts occurring before he agreed to join an unlawful plan (PPAB:198) is inapplicable.

Finally, Plaintiffs rely upon the red herring that "ignorance of the law is no defense to a civil conspiracy claim." PPAB:198-99 & n.61. The "ignorance" here that forecloses conspiracy liability was *ignorance of fact*, *not* a lack of knowledge

about the recording statutes. That Newman *was kept in the dark about the factual details* of past or future recordings, *see, e.g.*, 11-ER-2878-2879, illustrates that he lacked "actual knowledge that a tort [was] planned," and did not concur in any course of action "with knowledge of its unlawful purpose." *Navarrete*, 237 Cal. App. 4th at 1292; *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (conspiracy liability requires "a meeting of the minds in an unlawful arrangement" with the intent "to accomplish some unlawful objective").

F. Punitive damages and injunctive relief

Plaintiffs' punitive damages argument is heavily premised upon the invalid, and unfairly prejudicial, Newman Inferences #1 and 2. PPAB:158-59, 183-84. More generally, making a theological case for the abolition of abortion, advocating for political and legal reforms, and calling for the government to investigate and prosecute criminals is not evidence of malice that can support an award of punitive damages. Additionally, there is no basis for injunctive relief against Newman, both due to the lack of any basis for any liability against him and due to the lack of any evidence of a threat that Newman will engage in any unlawful actions in the future.

Conclusion

This Court should grant Newman the relief requested in his Opening Brief.

Respectfully submitted,

Dated: November 8, 2021

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