Catherine W. Short; [redacted]
LIFE LEGAL DEFENSE FOUNDATION
[redacted]

Thomas Brejcha, *pro hac vice*
Peter Breen, *pro hac vice*
THOMAS MORE SOCIETY
[redacted]

Attorneys for Defendant
David Daleiden

(additional counsel listed on signature page)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

NOTICE OF MOTION xi

INTRODUCTION 1

I. Plaintiffs' Civil RICO Cause of Action Fails to State a Claim and Should Be Dismissed 1

A. Plaintiffs have not alleged injury in "business or property" to satisfy RICO 1

B. Plaintiffs fail to sufficiently allege any RICO predicate acts. 4

1. The Complaint fails to sufficiently allege wire fraud. 5

2. The Complaint fails to sufficiently allege violations of 18 U.S.C. § 1028 8

C. Plaintiffs fail to allege proximate causation required by RICO. 11

D. The First Amendment bars recovery for money damages for speech. 14

II. Plaintiffs' Second Cause of Action Under the Federal Wiretap Act Fails to State a Claim for Relief Because Defendants' Recording Was Permitted Under the Act 14

III. Plaintiffs' Third Cause of Action for Civil Conspiracy Fails to State a Claim for Relief. 17

IV. Plaintiffs Failed To Allege Sufficient Facts In Support Of Their Fourth and Fifteenth Claims For Breach Of Contract. 17

A. Plaintiffs have failed to allege facts sufficient to state a claim that Defendants breached the PPFA exhibitor agreements 18

B. Plaintiffs have failed to allege facts sufficient to state a claim that Defendants breached the PPGC confidentiality agreement. 20

C. Plaintiff PPFA has failed to allege reasonably foreseeable damages proximately caused by the alleged breach. 20

V. Plaintiffs' Fifth Claim Fails To State a Claim for Breach Of The National Abortion Federation Agreements. 22

VI. Plaintiffs' Sixth Cause of Action Fails to Allege a Claim for Trespass Under Florida, District of Columbia, Colorado, or Texas Law. 23

A. Plaintiffs fail to state a claim for trespass arising from Defendants' alleged attendance at PPFA meetings in Florida and the District of Columbia. 23

B. Plaintiffs fail to state a claim for trespass at the Colorado or Texas clinics..... 26

VII. Plaintiffs' Seventh Cause of Action for Purported Violations of California Business & Professions Code § 17200, *et seq.*, Fails to State a Claim for Relief. 27

A. Plaintiffs fail to allege any "unlawful" conduct within the meaning of the UCL. 27

B. Plaintiffs fail to allege "unfair" conduct within the meaning of the UCL. 27

C. Plaintiffs fail to allege "fraud" within the meaning of the UCL..... 28

VIII. Plaintiffs' Eighth Cause of Action for Fraudulent Misrepresentation Fails Because Defendants' Conduct Did Not Proximately Cause Plaintiffs' Damages and Because Plaintiffs' Fraudulent-Misrepresentation Claim Is Barred by the First Amendment..... 29

IX. Plaintiff Has Failed To State A Claim For Violation Of California Penal Code § 632. 33

A. Plaintiffs have failed to state a claim under Penal Code § 632 as to recordings at the NAF Annual Meeting..... 33

B. Plaintiffs fail to allege a § 632 violation at the Nucatola and Gatter meetings. 36

C. Plaintiffs fail to state a § 632 claim against Lopez. 38

X. Plaintiffs' Claim for Violation of California Penal Code § 634 Fails to State a Claim.. 38

A. Plaintiffs Do Not Have Standing to Bring a Claim Under Penal Code Section 634 Because The Alleged Trespass Was Against NAF..... 39

B. Plaintiffs Do Not Plead Sufficient Facts to Allege Trespass Under the California Penal Code. 40

XI. Plaintiffs' Eleventh and Twelfth Claims for Violation of State Wiretapping Laws Fail to State a Claim for Relief. 41

XII. Plaintiffs Thirteenth and Fourteenth Causes of Action Fail to State a Claim for Invasion of Privacy Under Common Law or the California Constitution. 45

A. Plaintiffs Lack Standing To Bring This Claim on Behalf of their Staff... 45

B. Plaintiffs Have Failed to Allege Sufficient Facts Establishing The Elements of Common Law Intrusion. 47

C. Plaintiffs' allegations fail to state a claim for violation of the right to privacy under the California Constitution. 49

CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases

Accuimage Diagnostics Corp. v. Terarecon, Inc., 260 F. Supp. 2d 941 (N.D. Cal. 2003) 17

Air Transp. Ass'n of Am. v. Reno, 80 F.3d 477 (D.C. Cir. 1996) 46

Alleco Inc. v. Harry & Jeanette Weignberg Found., Inc., 665 A.2d 1038 (Md. 1995) 17

Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607 (Mich. App. 2000) 25, 27

Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015) 32

Annuziato v. eMachines, Inc., 402 F. Supp. 2d 1133 (C.D. Cal. 2005) 27

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 11

Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503 (1994) 17

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 1, 9, 40, 42

Ass'n for L.A. Deputy Sheriffs v. L.A. Times Commc'ns, LLC, 239 Cal. App. 4th 808 (2015) 45

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) 11, 45, 46, 47

Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993) 25, 26

Berger v. CNN, Inc., No. CV 94-46, 1996 WL 390528 (D. Mont. Feb. 26, 1996) 25

Black v. Bank of Am., 30 Cal. App. 4th 1 (1994) 17

Blatty v. N.Y. Times Co., 42 Cal. 3d 1033 (1986) 31

Bristol Bay Prods., LLC v. Lampack, 2013 CO 60 (2013) 29

Butler v. Yusem, 44 So.3d 102 (Fla. 2010) 30

Canyon Cnty. v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008) 2, 11, 12

Caro v. Weintraub, 618 F.3d 94 (2d Cir. 2010) 15, 16

Carpenter v. United States, 484 U.S. 19 (1987) 5

Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083 (9th Cir. 2002) 3

City of Chi. Heights v. Lobue, 914 F. Supp. 279 (N.D. Ill. 1996) 3

City Solutions, Inc. v. Clear Channel Commc'ns, 365 F.3d 835 (9th Cir. 2004) 30

Cleveland v. United States, 531 U.S. 12 (2000) 5, 6, 7

Cnty. of L.A. v. L.A. Cnty. Emp. Relations Comm'n, 56 Cal. 4th 905 (2013) 49

Cohen Bros., L.L.C. v. ME Corp., S.A., 872 So. 2d 321 (Fla. Dist. Ct. App. 2004).....43

Corder v. Folds, 292 P.3d 1177 (Colo. Ct. App. 2012).....26

Core-Mark Midcontinent Inc. v. Sonitrol Corp.,
2016 WL 611566 (Colo. App. Feb. 11, 2016).....21

Coulter v. Bank of Am., 28 Cal. App. 4th 923 (1994) 36, 38, 45

Cuviello v. Feld Ent., Inc., 304 F.R.D. 585 (N.D. Cal. 2015) 34

Daniel v. Morris, 181 So.3d 1195 (Fla. App. 2015).....23, 24

Desnick v. Am. Broad. Cos., 44 F.3d 1345 (7th Cir. 1995).....25, 27, 32

Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005).....3

Doe v. Roe, 958 F.2d 763 (7th Cir. 1992).....3

E.I. Dupont de Nemours & Co., 431 F.3d 353 (9th Cir. 2005) 2, 3

Eclectic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990 (9th Cir. 2014) 1, 5

Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414 (Tex. 2015).....26

Erlich v. Menezes, 21 Cal. 4th 543 (1999) 21

Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194 (Tex. 2011) 29

Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1 (1995).....41, 44

Fearnow v. Chesapeake & Potomac Tel. Co., 342 Md. 363 (1996) 42

Flanagan v. Flanagan, 27 Cal. 4th 766 (2002) 10, 33, 34, 35

Fleck & Assocs. v. City of Phoenix, 471 F.3d 1100 (9th Cir. 2006).....45

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) 14, 31, 32

Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997) 30

Fortune v. United States, 570 A.2d 809 (D.C. 1990) 24

Frenzel v. AliphCom, 76 F. Supp. 3d 999 (N.D. Cal. 2014).....28

Frome v. Renner, No. 97-civ-56411997, WL 33308718 (C.D. Cal. 1997).....31

Greenpeace, Inc. v. Dow Chem. Co., 97 A.3d 1053 (D.C. 2014) 23, 24

Hamm v. Rhone–Poulenc Rorer Pharms., Inc., 187 F.3d 941 (8th Cir. 1999).....2

Hawes v. Carberry, 103 Md. App. 214 (1995).....41, 42

Heinold v. Perlstein, 651 F. Supp. 1410 (E.D. Pa. 1987) 4

Hemi Grp., LLC v. City of N.Y., 559 U.S. 1 (2010) 11, 12, 13

Hendrickson v. Cal. Newspapers, Inc., 48 Cal. App. 3d 59 (1975) 45

Henning v. Narconon Fresh Start,
No. 14-cv-2379, 2015 WL 4601690 (S.D. Cal. July 28, 2015) 15

Hernandez v. Hillsides, Inc., 47 Cal. 4th 272 (2009) 47, 48

Hill v. NCAA, 7 Cal. 4th 1 (1994) 47

Hoery v. United States, 64 P.3d 214 (Colo. 2003) 26

Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258 (1992) 4, 11, 12

Hornberger v. Am. Broad. Co., Inc., 351 N.J. Super. 577 (2002) 32

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 31

Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303 (9th Cir. 1992) 12

In re Apple, 802 F. Supp. 2d 1070 (N.D. Cal. 2011) 29

In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1234 (9th Cir. 2008) 16

In re Google Inc. Cookie Placement Consumer Privacy Litig.,
806 F.3d 125(3d Cir. 2015) 15, 16

In re Intuit Privacy Litig., 138 F. Supp. 2d 1272 (C.D. Cal. 2001) 15

In re Teledyne Def. Contracting Derivative Litig.,
849 F. Supp. 1369 (C.D. Cal. 1993) 2

In re Tobacco II Cases, 46 Cal. 4th 298 (2009) 27

Indus. Indem. Co. v. Superior Ct., 209 Cal. App. 3d 1093 (6th Dist. 1989) 29

Ion Equip. Corp. v. Nelson, 110 Cal. App. 3d 868 (1980) 36, 37, 39

Jatar v. Lamaletto, 758 So. 2d 1167 (Fla. Dist. Ct. App. 2000) 43

Kasky v. Nike, 27 Cal. 4th 939 (2002) 28

Katz v. United States, 389 U.S. 347 (1967) 41

Kemp v. Block, 607 F. Supp. 1262 (D. Nev. 1985) 45

Kentucky Cent. Life Ins. Co. v. LeDuc, 814 F. Supp. 832 (N.D. Cal. 1992) 29

Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310 (2011) 29

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991) 7

Landucci v. State Farm Ins. Co., 65 F. Supp. 3d 694 (N.D. Cal. 2014) 19

Lazar v. Superior Ct., 12 Cal. 4th 631 (1996) 29, 33

Levitt v. Yelp! Inc., 765 F.3d 1123 (9th Cir. 2014) 27, 28

Levy v. State Farm Mut. Auto. Ins. Co., 150 Cal. App. 4th 1 (2007) 19, 23

Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156 (2003) 33, 38

Line v. Astro Mfg., 993 F. Supp. 1033 (E.D. Ky. 1998) 4

Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718 (9th Cir. 2007) 27

Marble Bridge Funding Grp. v. Euler Hermes Am. Credit Indem. Co., No. 5:12-cv-02729-EJD, 2015 WL 971761 (N.D. Cal. Mar. 2, 2015) 30

Marmott v. Md. Lumber Co., 807 F.2d 1180 (4th Cir. 1986) 17

Matter of John Doe Trader No. One, 894 F.2d 240 (7th Cir. 1990) 44, 49

Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) 28

McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) 4

McNally v. United States, 483 U.S. 350 (1987) 5

Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 306 F.3d 806 (9th Cir.2002) 26, 44, 48

Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 30 F. Supp. 2d 1182 (D. Ariz. 1998) 31

Moncada v. W. Coast Quartz Corp., 221 Cal. App. 4th 768 (2013) 19

Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Emps. Union, 215 F.3d 923 (9th Cir. 2000) 7

Morningstar v. State, 428 So. 2d 220 (Fla. 1982) 43

Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) 46, 47

Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811 (2011) 18

Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014). 32

Oscar v. Univ. Students Co-op Ass'n, 965 F.2d 783 (9th Cir. 1992) 2

Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278 (3d Cir. 2002) 46

People v. Buza, 231 Cal. App. 4th 1446 (2014) 50

Pettus v. Cole, 49 Cal. App. 4th 402 (1996) 50

Pitts Sales, Inc. v. King World Prods., Inc., 383 F. Supp. 2d 1354 (S.D. Fla. 2005) 14

Price v. Pinnacle Brands, Inc., 138 F.3d 602 (5th Cir. 1998) 4

Rao v. Covanys Corp., No. 06-C-5451, 2007 WL 3232492 (N.D. Ill. Nov. 1, 2007) 19

Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993) 45

Rylewicz v. Beaton Servs., Ltd., 698 F. Supp. 1391 (N.D. Ill. 1988) 3, 13

SCC Acquisitions, Inc. v. Superior Ct., 243 Cal. App. 4th 741 (2015) 45

Schauer v. Mandarin Gems of Cal., Inc., 125 Cal.App.4th 949 (2005) 22

Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) 8

Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200 (1998) 50

Smith v. Cap Concrete, 133 Cal. App. 3d 769 (1982) 39, 40

Smith v. Sch. Dist., 112 F. Supp. 2d 417 (E.D. Pa. 2000) 32

Smoot v. United Transp. Union, 246 F.3d 633 (6th Cir. 2001) 48

Soderlun v. Pub. Serv. Comm'n, 944 P.2d 616 (1997) 19

Sparling v. Hoffman Constr. Co., 864 F.2d 635 (9th Cir. 1988) 4

Spindex Physical Therapy USA, Inc. v. United Healthcare of Ariz., Inc., 770 F.3d 1282 (9th Cir. 2014) 47

State v. Smith, 641 So.2d 849 (Fla. 1994) 41, 42

Stewart v. Evans, 351 F.3d 1239 (D.C. Cir. 2003) 43

Stice v. Peterson, 355 P.2d 948 (Colo. 1960) 19

Sundberg v. TTR Realty, LLC, 109 A.3d 1123 (D.C. 2015) 29

SunPower Corp. v. SolarCity Corp., No. 12-cv-00694-LHK, 2012 WL 6160472 (N.D. Cal. Dec. 11, 2012) 6

Susan S. v. Israels, 55 Cal. App. 4th 1290 (1997) 50

Sussman v. Am. Broad. Cos., 186 F.3d 1200 (9th Cir. 1999) 14, 15

Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137 (9th Cir. 2008) 11

The Knit With v. Knitting Fever, Inc., No. 08-4221, 2012 U.S. Dist. LEXIS 100368 (E.D. Pa. 2012) 13

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993) 32

Ticor Title Ins. Co. v. Florida, 937 F.2d 447 (9th Cir. 1991) 11

Time, Inc. v. Hill, 385 U.S. 374 (1967) 31

Turnbull v. Am. Broad. Cos.,
No. cv-03-3554-SJO, 2004 WL 2924590 (C.D. Cal. Aug. 19, 2004) 34, 39

Turnbull v. Am. Broad. Cos.,
No. cv-03-3554-SJO, 2005 WL 6054964 (C.D. Ca. Mar. 7, 2005) 35

U.S. v. Della Rose, 278 F.Supp.2d 928 (N.D. Ill. 2003).....9

U.S. v. Villareal, 253 F.3d 831 (5th Cir. 2001) 9

U.S. v. Villeda,
Crim. No. B-90-44 (WWE), 1990 U.S. Dist. LEXIS 17794 (D. Conn. Nov. 20, 1990) 9

United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.,
517 U.S. 544 (1996).....46

United States v. Lew, 875 F.2d 219 (9th Cir. 1989) 5

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002) 10

United States v. Rohn, 964 F.2d 310 (4th Cir. 1992).....8

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998) 5

United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am., 919 F.2d 1398 (9th Cir. 1990).....46

Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.,
No. 12-cv-2079, 2013 WL 4027858 (S.D. Cal. Aug. 5, 2013).....6

Vanderbeek v. Vernon Corp., 50 P.3d 866 (Colo. 2002).....21

Vera v. O'Keefe, Civ. Case No. 10-cv-1422-L(MDD), 2012 WL 3263930 (S.D. Cal. Aug. 9, 2012) 35

W. Distrib. Co. v. Diodosio, 841 P.2d 1053 (Colo. 1992).....18, 20

Warth v. Seldin, 422 U.S. 490 (1975).....46

Wilkins v. Nat'l Broad. Co., 71 Cal. App. 4th 1066 (1999) 37, 48

Williams v. Gerber Prods. Co., 552 F.3d 934 (9th Cir. 2008) 28

Winselmann v. Reynolds, 690 So.2d 1325 (Fla. App. 1997) 24

WMX Techs. v. Miller, 197 F.3d 367 (9th Cir. 1999).....8

Young v. Harrison, 284 F.3d 863 (8th Cir. 2002).....24, 40

Statutes

18 U.S.C. § 102 9
18 U.S.C. § 1028 ..... 5, 8, 9, 10
18 U.S.C. § 1343 5
18 U.S.C. § 1961 ..... 4, 11
18 U.S.C. § 1962 ..... 4, 11, 27
18 U.S.C. § 1964 ..... 2, 4
18 U.S.C. § 2511 ..... 14, 15, 16, 27
28 U.S.C. § 1367 16
Cal. Bus. & Prof. Code § 17200 27
Cal. Civ. Code § 3301 21
Cal. Civ. Code § 3426 6
Cal. Const., Art. I, § 1 ..... 45, 50
Cal. Penal Code § 601 40
Cal. Penal Code § 602 40
Cal. Penal Code § 602.5 40
Cal. Penal Code § 602.8 40
Cal. Penal Code § 632 ..... 10, 27, 33, 35
Cal. Penal Code § 634 ..... 27, 40
Cal. Penal Code § 637.2 ..... 33, 39, 40
Colo. Rev. Stat. § 7-74-101 6
Fla. Stat. § 934 ..... 41, 42
Fla. Stat. § 934.02 27
Md. Code Ann., Cts. & Jud. Proc. § 10-401 41
Md. Code Ann., Cts. & Jud. Proc. § 10-402 ..... 27, 41, 42
Md. Code, Commercial Law, § 11-1201 6
Tex. Civil Practice & Remedies Code § 134A.001 6

Rules

Fed. R. Civ. P. 8(a) 9, 42

Treatises

1 Williston on Contracts § 4:18 (4th ed. 1990) 19

BLACK'S LAW DICTIONARY (8th ed. 2004) 16

James Pooley, Trade Secrets, § 2.03[6] (2009) 6

Restatement (Second) of Torts 48

Other Authorities

85 Op. Atty. Gen. Md. 225 (2000) 44

Robert C. Denicola, *The New Law of Ideas*, 28 Harv. J. L. & Tech. 195 (2014) 6

NOTICE OF MOTION

TO PLAINTIFFS AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE THAT on July 6, 2016, at 2:00 p.m. in Courtroom 2 of the Honorable William H. Orrick at the United States District Court for the Northern District of California, [redacted] the Center for Medical Progress ("CMP"), BioMax Procurement Services, LLC ("BioMax"), David Daleiden ("Daleiden"), Troy Newman, Albin Rhomberg, Phil Cronin, and Gerardo Adrian Lopez (together, "Defendants") will respectfully bring Defendants' Motion To Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). Defendants respectfully request that this Court dismiss the Complaint of Plaintiffs Planned Parenthood Federation of America ("PPFA"), Planned Parenthood: Shasta-Diablo ("PPNC"), Planned Parenthood Mar Monte ("PPMM"), Planned Parenthood of the Pacific Southwest ("PPPSW"), Planned Parenthood Los Angeles ("PPLA"), Planned Parenthood/Orange and San Bernardino Counties ("PPOSB"), Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties ("PPSBVSLO"), Planned Parenthood Pasadena and San Gabriel Valley ("PPPSGV"), Planned Parenthood of the Rocky Mountains ("PPRM"), Planned Parenthood Gulf Coast ("PPGC"), and Planned Parenthood Center for Choice ("PPCFC") (collectively "PP" or "Plaintiffs"), for the following reasons, all based solely on the adequacy of Plaintiffs' pleading: (1) Plaintiffs' two federal causes of action, alleging violations of the civil RICO statute and intercepting oral communications, fail to state a claim for relief, and Plaintiffs have failed to allege diversity jurisdiction. Accordingly, this Court lacks federal subject matter jurisdiction. (2) Plaintiffs have failed to allege facts that could justify an award of monetary damages under the First Amendment, so virtually all of Plaintiffs' claims should be dismissed. (3) Plaintiffs' two federal claims and their thirteen state-law causes of action fail to state plausible claims for relief, so the First Amended Complaint ("FAC" or "Complaint") should be dismissed. Defendants therefore request that this Court dismiss Plaintiff's FAC under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

Plaintiffs' Complaint constitutes a baseless attempt to employ RICO's punitive remedies and other civil remedies to suppress and punish Defendants' speech activities. The Complaint asserts a long series of claims against Defendants. But even though Plaintiffs' alleged injuries flow exclusively from Defendants' *publication* of information and recordings of Plaintiffs' employees, Plaintiffs never claim defamation or assert any defamation-type tort. This omission is extremely telling. Plaintiffs' Complaint constitutes a blatant attempt to bypass the restrictions imposed by the First Amendment on collecting damages for speech activities. This attempt fails.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation omitted). The complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 663. Every claim in Plaintiffs' Complaint fails to satisfy these standards.

I. Plaintiffs' Civil RICO Cause of Action Fails to State a Claim and Should Be Dismissed.

"The RICO statute sets out four elements: a defendant must participate in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c). In addition, the conduct must be (5) the proximate cause of harm to the victim." *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). The Court should dismiss Count I because Plaintiffs fail to allege injury "in business or property," fail to allege viable predicate acts, and fail to allege that the predicate acts proximately caused their putative injuries. Further, the First Amendment prohibits Plaintiffs from recovering money damages without satisfying the exacting standards of *New York Times v. Sullivan*, which Plaintiffs cannot satisfy.

A. Plaintiffs have not alleged injury in "business or property" to satisfy RICO.

Plaintiffs' RICO claim fails because they have not been "injured in [their] business or

property by reason of" any alleged racketeering activities, *see* 18 U.S.C. § 1964(c), and they therefore lack statutory RICO standing. "Financial losses, in and of themselves, are insufficient to confer standing under RICO." *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364 (9th Cir. 2005). "A civil RICO 'plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct causing the violation.'" *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985); *see also Oscar v. Univ. Students Co-op Ass'n*, 965 F.2d 783, 784 (9th Cir. 1992) (en banc) ("[P]ersonal injuries are not compensable under RICO"); 18 U.S.C. § 1964(c) (civil RICO claim requires that a person is "injured in his business or property by reason of a violation of section 1962 of this chapter"). "Without a harm to a specific business or property interest—a categorical inquiry typically determined by reference to state law—there is no injury to business or property within the meaning of RICO." *Canyon Cnty.*, 519 F.3d at 975 (quotation omitted).

All of the alleged injuries on which Plaintiffs' civil RICO claim rests constitute reputational injuries or injuries flowing exclusively from reputational injuries; these are not cognizable under RICO. *See* FAC, ¶ 161. Plaintiffs allege a number of "financial losses," *id.*, such as "costs of hiring additional security," "costs related to the hacking into PPFA's website," "costs related to responding to multiple federal and state investigations and inquiries," "costs related to loss of vendors," and "costs of vandalism, arson, and other incidents" supposedly inspired by Defendants' speech. *Id.* Without exception, every one of these alleged "financial losses" flows from the putative injuries to Plaintiffs' *reputation* supposedly inflicted by Defendants' acts of pure speech—indeed, Plaintiffs specifically allege that "all" their alleged injuries "stem[] from Defendants' campaign of lies." *Id.*

It is widely recognized that *reputational* harm does not constitute an injury to business or property sufficient to support RICO standing. *See, e.g., In re Teledyne Def. Contracting Derivative Litig.*, 849 F. Supp. 1369, 1372 n. 1 (C.D. Cal. 1993) (noting that injuries to "business reputation" are not cognizable under RICO); *Hamm v. Rhone–Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999) ("Damage to reputation is generally considered personal injury and thus is not an injury to 'business or property' within the meaning of 18 U.S.C. § 1964(c)."); *City of Chi. Heights*

v. Lobue, 914 F. Supp. 279, 285 (N.D. Ill. 1996). Such reputational harms are not "concrete financial loss[es]," but at most "injur[ies] to a valuable intangible property interest." *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002) (quotation omitted); *see also Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (holding that "loss of security and peace of mind," "harassment and intimidation of litigants," "physical injury," and "emotional distress" simply do not support RICO standing).

Plaintiffs attempt to boot-strap RICO standing from non-RICO reputational injury by alleging that they made various financial expenditures as a result of the reputational injuries. *See* FAC, ¶ 161. But "[f]inancial losses, in and of themselves, are insufficient to confer standing under RICO." *E.I. Dupont*, 431 F.3d at 364. Those financial losses must result from injury to a business or property interest, not from a reputational injury. "Without a harm to a specific business or property interest . . . there is no injury to business or property within the meaning of RICO." *Diaz*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (relying on *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992)).

In fact, *Doe v. Roe* directly rejected a similar attempt to recharacterize non-RICO injuries as injuries to business or property. 958 F.2d at 770. In *Doe*, the RICO plaintiff alleged that the defendant, her former attorney, had forced her into unwanted sexual relations through a combination of legal pressure, fraud, and numerous threats of violence. *Id.* at 766. Among other injuries, the plaintiff alleged that she had lost a sense of security and had incurred "expenses for increased personal security" and for "purchase of a security system." *Id.* at 770. The court held that these injuries did not constitute RICO injuries, because they were "derivative" of her lost sense of security and thus "reflect[ed] personal injuries which are not compensable under RICO." *Id.*; *see also, e.g., Rylewicz v. Beaton Servs., Ltd.*, 698 F. Supp. 1391, 1395-96 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (holding that RICO plaintiffs' allegation that "they suffered damage to their business and property because they were forced to expend considerable time, effort, and money investigating the defendants' conduct" failed to state a RICO injury). So also here, Plaintiffs' various alleged "financial losses" are all "plainly derivatives of" reputational injuries inflicted by Defendants' speech, and thus "are not compensable under RICO." *Doe*, 958 F.2d at 770.

Moreover, Plaintiffs' RICO standing cannot be premised on alleged harms sustained by

non-parties, such as individual meeting attendees. *See Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) ("[A] plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988) (holding that shareholders lacked RICO standing based on injury to corporation).

Finally, to the extent that Plaintiffs' alleged injuries amount to having been fraudulently induced to contract with Defendants, such injuries are not cognizable under RICO. Where, as here, a plaintiff alleges that false statements induced it to enter into a commercial contract, but the plaintiff received at least market price for what it gave, the plaintiff has not been "injured in [its] business or property by reason of" the alleged racketeering activities. 18 U.S.C. § 1964(c); *see, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228-29 (2d Cir. 2008) (explaining that "in [RICO] cases that sound in fraud in the inducement, [expectation damages] plainly are not [available]"); *Heinold v. Perlstein*, 651 F. Supp. 1410 (E.D. Pa. 1987) (rejecting a RICO plaintiff's argument "that he sustained injury because he lost the benefit of his bargain," and holding that there is no RICO standing "[w]here, as here, the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation"); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that where the plaintiffs did "not allege that the value of the [baseball] cards that they did receive [was] less than the consideration paid," the plaintiffs had failed to allege an injury supporting RICO standing); *Line v. Astro Mfg.*, 993 F. Supp. 1033, 1037 (E.D. Ky. 1998). So also here: the fact that conference organizers received the fees they charged in exchange for the right to attend their events (*see* FAC, ¶ 158) defeats any claim that Plaintiffs were injured "in business or property."

B. Plaintiffs fail to sufficiently allege any RICO predicate acts.

To establish a RICO claim, a plaintiff must show that the defendants committed two or more criminal offenses enumerated by the statute. *See* 18 U.S.C. §§ 1961(1) & (5), 1962. Plaintiffs' RICO claim relies on two sets of putative predicate violations: violations of the federal wire-fraud

statute, 18 U.S.C. § 1343, and violations of the federal identity-theft statute, 18 U.S.C. § 1028. The Complaint fails adequately to allege facts supporting any RICO predicate acts.

1. The Complaint fails to sufficiently allege wire fraud.

The three basic elements of a wire or mail fraud claim are "(A) the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud." *Eclectic Props. East*, 751 F.3d at 997. The impetus behind the federal wire and mail fraud laws "was to protect the people from schemes to deprive them of their money or property." *McNally v. United States*, 483 U.S. 350, 356 (1987), *superseded in part on other grounds by* 18 U.S.C. § 1364. The vast majority of allegedly deceptive acts do not fall within the term "defraud"; to the contrary, the term is limited to "wronging one in his property rights by dishonest methods or schemes, and usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Id.* at 358 (quotation marks omitted); *see also Cleveland v. United States*, 531 U.S. 12, 19 (2000) ("[Section] 1341 protects property rights only."). Simply put, the intent of a wire fraud scheme is to financially enrich the participants by wrongly acquiring money or property from someone through deception. *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989).

Here, the Complaint does not allege that Defendants intended to acquire, or did acquire, any "money or property" from Plaintiffs within the meaning of §§ 1341 and 1343. Plaintiffs allege that Defendants sought to obtain strictly intangible interests, consisting of "confidential and proprietary information" related to "Planned Parenthood and other reproductive health care organization meetings," "identities of Plaintiffs' members," "access to . . . meetings," and "access to Planned Parenthood clinics and offices for private meetings with Planned Parenthood." FAC, ¶ 159. Some intangible property rights, such as confidential and proprietary information, can sometimes constitute "property" under the mail and wire fraud statutes. *See Carpenter v. United States*, 484 U.S. 19, 26 (1987). But an intangible interest cannot constitute "property" under the mail and wire fraud statutes if applicable state law does not consider it property. *See, e.g., United States v. Shotts*, 145 F.3d 1289, 1293 (11th Cir. 1998). Here, the Complaint does not describe any purportedly confidential information that constitutes "property" under state law.

California, Colorado, Maryland, and Texas have all enacted the Uniform Trade Secrets Act

("UTSA"). *See* Cal. Civ. Code §§ 3426 *et seq.*; Colo. Rev. Stat. §§ 7-74-101 *et seq.*; Md. Code, Commercial Law, §§ 11-1201 *et seq.*; Tex. Civil Practice & Remedies Code § 134A.001 *et seq.* Under California law, the UTSA preempts and abrogates *all* claims for appropriation of confidential or proprietary information, regardless of whether that information satisfies the statutory definition of a trade secret. *See, e.g.*, *SunPower Corp. v. SolarCity Corp.*, No. 12-cv-00694-LHK, 2012 WL 6160472, at *5-6 (N.D. Cal. Dec. 11, 2012) (collecting numerous authorities); *see also, e.g.*, *Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.*, No. 12-cv-2079, 2013 WL 4027858, at *7 (S.D. Cal. Aug. 5, 2013). To Defendants' knowledge, the state courts of Colorado, Maryland, and Texas have not addressed this issue, but the overwhelming weight of authority from other UTSA jurisdictions similarly holds that the UTSA abrogates state-law rights in confidential or proprietary information that do not qualify as trade secrets. *See SunPower Corp.*, 2012 WL 6160472, at *5-6 (collecting cases); *see also* Robert C. Denicola, *The New Law of Ideas*, 28 Harv. J. L. & Tech. 195, 215-16 (2014); James Pooley, Trade Secrets, § 2.03[6] (2009). Thus, in states that have enacted the UTSA, if a person's informational interest does not constitute a trade secret under the UTSA, the interest does not constitute a protectable property interest under state law at all. *See SunPower Corp.*, 2012 WL 6160472, at *5-6 & sources cited therein. Here, none of the allegations in the Complaint give any reason to believe that the purportedly proprietary or confidential information that Defendants allegedly obtained constitute "trade secrets" under the UTSA. Thus, that information does not constitute property under California, Colorado, Maryland, or Texas law, and its acquisition cannot support a wire-fraud violation.

In addition, there is no wire or mail fraud where, as alleged here, parties enter into a commercial exchange in which the market price is paid for the relevant benefits or services. For example, in *Cleveland v. United States*, 531 U.S. 12 (2000), the Supreme Court held that § 1341 did not reach false statements made to the State of Louisiana in an application for a license to operate video poker machines, because the licenses were not "'property,' for purposes of § 1341, in the hands of the official licensor." *Id.* at 15. The Court stated that "[t]ellingly, . . . the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled

by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue. . . . If Cleveland defrauded the State of 'property,' the nature of that property cannot be economic." *Id.* at 22. Similarly, there is no allegation here that Defendants still owe unpaid conference registration or exhibitor fees, and therefore Defendants have not deprived Plaintiffs of any property in connection with the alleged predicate acts. *Cleveland* also rejected the State's argument that it was deprived of "property" due to the loss of its "right to control the issuance, renewal, and revocation of video poker licenses" by choosing "the persons to whom it issues video poker licenses." *Id.* at 23-24. Thus, Plaintiffs' assertion that they would not have done business with Defendants but for the masking of their identities does not constitute wire-fraud "property."

Importantly, the *Cleveland* Court rejected an expansive view of wire-fraud "property," because it "stray[ed] from traditional concepts of property," imposed a "sweeping expansion of federal criminal jurisdiction," and violated the rule of lenity. *Id.* at 24-25. In contrast to this guidance, Plaintiffs rely on a sweeping, virtually unlimited interpretation of "money or property" through the vague and intangible interests asserted in their Complaint. FAC, ¶ 159; *see also Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Emps. Union*, 215 F.3d 923, 926-27 (9th Cir. 2000) (rejecting a RICO claim based on union activity where "the Union's conduct may have been vexatious or harassing, but it was not acquisitive").

Similarly, other alleged harms to Plaintiffs – responding to government investigations, fixing a hacked website, etc. – do not entail transferring property *from Plaintiffs to Defendants*; in the Ninth Circuit's words, Defendants' payment of registration fees and emails setting up meetings were "not acquisitive." *Id.*; *see also Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 406 (9th Cir. 1991) (holding that actions that were intended to increase the defendant's share of the market at the expense of the plaintiff's market share did not constitute mail fraud, as the defendant did not seek to obtain property from the plaintiff). To the contrary, the only alleged transfers of money between the parties were payments made *from Defendants to Plaintiffs*. *See* FAC, ¶ 158. The Complaint fails to allege that Defendants received property from Plaintiffs that they did not pay market price for, which is fatal to the wire fraud predicate of the RICO claim.

Moreover, the assertion that the eventual publication of videos by Defendants harmed

Plaintiffs' reputations in the public's eyes, which then prompted some individuals to stop doing business with Plaintiffs, is exactly the kind of asserted injury rejected as insufficient in cases like *Monterey Plaza Hotel*. *See also WMX Techs. v. Miller*, 197 F.3d 367, 374-76 (9th Cir. 1999) (en banc) (holding that, for purposes of 42 U.S.C. § 1983, a business was not deprived of "property" in its customer goodwill by a defamatory government report).

In addition, deceptively gaining access to Plaintiffs' premises or conferences does not constitute obtaining "property" under §§ 1341 and 1343. A person does not obtain "property" within the meaning of the federal criminal laws by depriving another of her right to the exclusive use of her property. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404-05 (2003) (holding that defendants did not obtain "property" when they occupied abortion clinics in an attempt to "shut down" the clinics' operations). As Justice Ginsburg noted, were the law otherwise, RICO would have imposed crippling criminal and civil penalties on conduct such as civil rights era sit-ins. *Id.* at 411, n.* (Ginsburg, J., concurring). Similarly, a purported loss of control over who is allowed to purchase access to conferences and related information is not a cognizable injury for purposes of mail and wire fraud. Thus, the Complaint fails to allege any wire fraud predicate acts.

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

The other RICO predicates alleged in the Complaint are putative violations of 18 U.S.C. § 1028, the federal identity-theft statute. *See* FAC, ¶ 160. The sole factual basis for this claim is Plaintiffs' assertion that certain Defendants presented fake photo IDs to gain access to certain conferences, meetings, and offices. *Id.* at ¶¶ 85, 86, 113, 120. However, merely possessing a false identification and presenting it to gain entry into a building or meeting does not violate § 1028; otherwise, nearly every college bar across the country would be a RICO enterprise, and countless American college students would be federal felons. *See United States v. Rohn*, 964 F.2d 310, 312 (4th Cir. 1992) ("Congress could have criminalized mere possession of false identifications. It did not, however, write the statute in this way.").

Seeking to manufacture a § 1028 claim, the Complaint includes language parroting the statutory standards, alleging "on information and belief" that Defendants "produced, transferred, and possessed with the intent to use, false identification documents . . . in violation of 18 U.S.C.

§ 1028(a), and conspired to do the same in violation of 18 U.S.C. § 1028(f)." FAC, ¶ 160. Such allegations are textbook examples of what ***does not*** satisfy Fed. R. Civ. P. 8(a)(2). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Such allegations, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679.

None of the allegations in the Complaint suggests that Daleiden or anyone else involved in undercover filming actually produced any "false identification document." 18 U.S.C. § 1028(a)(1). Similarly, the allegations in the Complaint do not show that Daleiden or any other Defendant transferred any identification to another. 18 U.S.C. § 1028(a)(2). Finally, Plaintiffs have failed to allege facts showing that any Defendant possessed *five or more* identification documents with the intent to use them unlawfully. 18 U.S.C. § 1028(a)(3).

Plaintiffs have also failed to allege that the alleged production or transfer of the false identifications was "in or affecting" interstate commerce. It is insufficient to merely allege that the subsequent use of the false identifications was in or affecting interstate commerce. Section 1028(c) provides the jurisdictional basis for a violation, namely that "the production, transfer, possession, or use *prohibited by this section* is in or affects interstate or foreign commerce . . . ." (emphasis added). Thus, to state a claim for violation of §1028(a)(1), one must plead that the *production*, not the subsequent use, *prohibited by the section* was in or affecting interstate commerce. *U.S. v. Della Rose*, 278 F. Supp. 2d 928, 933 n.2 (N.D. Ill. 2003) ("[U]nder the plain language of the statute, it is the production that must be in or affect interstate commerce"). For a violation of § 1028(a)(2), one must plead that the *transfer*, not the subsequent use, *prohibited by the section*, was in or affecting interstate commerce. *U.S. v. Villareal*, 253 F.3d 831, 834 (5th Cir. 2001); *U.S. v. Villeda*, Crim. No. B-90-44 (WWE), 1990 U.S. Dist. LEXIS 17794, *3-4 (D. Conn. Nov. 20, 1990).

Plaintiffs also allege "on information and belief" that the defendants "knowingly transferred, possessed, or used, without lawful authority, a means of identification of another person – to wit, fake identification that used the name of Daleiden's high school classmate Brianna Allen – with the intent to violate federal and state law." FAC, ¶ 160. The Complaint does not allege

the use of any "means of identification" other than the mere name, "Brianna Allen." But under § 1028(d)(7), a "means of identification" is a name or number "used to identify a specific individual." Other than an allegation of a news report that one of Daleiden's classmates with whom he has had no contact for several years was named Brianna Allen, FAC, ¶ 38, the FAC alleges no facts from which a reasonable inference could be drawn that the defendants "knowingly" used an identification with this name for the purpose of identifying this alleged classmate. Allen is a very common surname, and Brianna is a particularly common name among women in their 20s.[1] The fact that an unidentified news source managed to locate someone else of the same name whose path might have crossed Daleiden's several years ago is an insufficient basis from which to infer any knowing intent to identify this individual.

Moreover, the Complaint fails to allege that any defendant used the identification with the intent to commit any federal crime. The only other federal crime alleged in the complaint is wire fraud, which fails to state a claim for the reasons stated above. And even assuming that the Complaint adequately pleaded violations of Cal. Penal Code § 632, violations of that statute do not constitute a state-law felony, as required for a violation of §1028(a)(7). *See* Cal. Penal Code § 632(a) (providing that violations of § 632 are punishable by imprisonment "not exceeding one year"); *United States v. Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) (explaining that Congress has a "long-standing practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment"); *see also Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002) ("California prohibits the recording of a telephone call without consent from all parties, but only if the call includes a 'confidential communication.' (Pen. Code, § 632, subd. (a).) Violation of the law is a misdemeanor."). Moreover, even if the alleged use of the identification were to constitute a violation of § 1028(a)(7), the Complaint does not allege that the identification of Brianna Allen was used more than once. Thus, assuming *arguendo* that the single use of the identification violated

[1] LinkedIn lists 73 profiles for users named "Brianna Allen," while Facebook has well over one hundred users with the same name.

§ 1028(a)(7), it would not support the existence of a racketeering enterprise under RICO. *See* 18 U.S.C. § 1961(5) (requiring "at least two acts of racketeering activity").

Finally, the Complaint fails to adequately allege a "pattern" of racketeering activity based on fraud or § 1028 predicate acts. 18 U.S.C. § 1962(c). To allege a "pattern" of racketeering activity, Plaintiffs must not only allege two or more predicate acts, but they must also allege that "the predicates pose a threat of continued criminal activity, such as when the illegal conduct is 'a regular way of conducting a defendant's ongoing legitimate business.'" *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450 (9th Cir. 1991) (alterations omitted) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 243 (1989)). The Complaint contains no allegation that the predicate acts "pose[] a threat of continued criminal activity," *id.*, so the RICO claim should be dismissed.

C. Plaintiffs fail to allege proximate causation required by RICO.

RICO imposes liability only if the defendant's conduct is both the but-for cause and the proximate cause of the plaintiff's asserted RICO injuries. *Holmes*, 503 U.S. at 268-69. This proximate cause requirement demands that there be a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. "The proper referent of the proximate-cause analysis" is the predicate violation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006). "[T]he compensable injury flowing from a RICO violation necessarily is the harm caused by the predicate acts." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 13 (2010) (quotation marks omitted); *see also Canyon Cnty.*, 519 F.3d at 975 (quoting *Sedima*, 473 U.S. at 496). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led *directly* to [the] plaintiff's injuries." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1149 (9th Cir. 2008) (citation omitted) (emphasis added). "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (quotation marks omitted).

Here, Plaintiffs allege a complex causal chain of events between Defendants' alleged predicate acts, numerous other intervening acts of Plaintiffs, Defendants, and non-parties, and the injuries that Plaintiffs allegedly sustained from those intervening acts: (1) Defendants used

deception to access abortion-related conferences; (2) Defendants met various abortion-related personnel at the conferences and meetings; (3) Defendants set up follow-up meetings and site visits with some such persons; (4) Defendants secretly recorded conversations at meetings, conferences, and follow-up meetings; (5) Defendants publicly released certain recordings; (6) various unrelated third parties, such as legislative bodies, internet commentators, vandals, and commercial vendors, took adverse actions toward Plaintiffs after viewing Defendants' recordings; and (7) Plaintiffs voluntarily incurred various costs to address such third-party actions, such as responding to government investigations and increasing security.

Merely to state this lengthy chain of alleged causes by various individuals and entities is to demonstrate that it does not constitute a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268; *see also Canyon Cnty.*, 519 F.3d at 980-83 (affirming dismissal of RICO claim due to lack of proximate causation where a county alleged that violations of immigration law by employers resulted in the county paying millions of dollars more for health care and criminal justice services for illegal immigrants); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) (even if the defendant's conduct deprived prime contractors of certain projects, "[i]t was the intervening inability of the prime contractors to secure the contracts that was the direct cause of [the plaintiff subcontractors'] injuries," not defendant's conduct); *Reddy v. Litton Indus.*, 912 F.2d 291 (9th Cir. 1990) (holding that an employee who was fired after reporting his discovery of racketeering activities to his employer lacked RICO standing because he was not injured by the racketeering activities themselves).

Critically, Plaintiffs' alleged theory of causation relies heavily on the actions both of unrelated third parties outside Defendants' control, and of the Plaintiffs themselves. Both of these facts are fatal to proximate causation. Where a plaintiff's injuries do not flow *directly* from a defendant's predicate violations, but rather from subsequent conduct by the same defendant, the plaintiff has failed to show proximate causation, and the plaintiff's RICO claim fails. *Anza*, 547 U.S. at 458 (rejecting RICO claim where plaintiff's injury flowed from conduct by defendant separate from the predicate violations); *see Hemi Grp.*, 559 U.S. at 11 (explaining that, in *Anza*,

there was no proximate cause even though "the same party . . . had both engaged in the harmful conduct and committed the fraudulent act").

Similarly, reliance on the intervening acts of unrelated third parties—such as state and federal investigators; unidentified vandals, hackers, and arsonists; and Plaintiffs' potential "vendors" and "clients," FAC, ¶ 161—decisively defeats proximate causation. *See Hemi Grp.*, 559 U.S. at 11 (holding that plaintiff had not established proximate causation where its "theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*"). Defendants cannot proximately cause the independent decisions of vendors, clients, criminals, and government agencies. *Rylewicz*, 888 F.2d at 1179 (citing *Sedima*, 473 U.S. at 496-97). Similarly, expenses incurred by a plaintiff investigating a defendant's conduct, or mitigating the plaintiff's damages, are not RICO injuries, nor are they proximately caused by the alleged RICO predicate acts. *The Knit With v. Knitting Fever, Inc.*, No. 08-4221, 2012 U.S. Dist. LEXIS 100368, at *13-27 (E.D. Pa. 2012); *Rylewicz*, 698 F. Supp. at 1395-96.

The untenable nature of Plaintiffs' RICO proximate causation theory is illustrated by the claim as asserted by PPSBVSLO. The sole paragraph in the Complaint concerning Plaintiff PPSBVSLO, located within the description of the parties section, simply states that it "is a not-for-profit organization and one of seven California Planned Parenthood affiliates" and also provides a description of the services that it offers. FAC, ¶ 25. The Complaint does not allege that Plaintiff PPSBVSLO received any wire communications or registration payments from any Defendant (allegedly deceptive or otherwise), was presented with any false ID by any Defendant, or even had *any interaction whatsoever with any Defendant*, and only asserts generalized injuries caused by third parties (with no listed injuries specific to Plaintiff PPSBVSLO), and yet Plaintiff PPSBVSLO claims to have incurred injuries to its business or property proximately caused by Defendants' alleged RICO predicate acts. FAC, ¶¶ 148-62. The causation theories of the other Plaintiffs are similarly attenuated, falling far short of the legal requirements for establishing proximate cause, and dictating that Count I should be dismissed in its entirety.

D. The First Amendment bars recovery for money damages for speech.

Plaintiffs' RICO claim suffers from another deficiency. As discussed in detail below, *see infra* Part VIII, the First Amendment bars an action to collect money damages for injuries attributable to speech, unless the plaintiff satisfies the exacting standards of *New York Times v. Sullivan—i.e.*, false statement(s) of fact made with actual malice. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). Plaintiffs have made no such allegation here—in fact, despite their numerous claims, they have not alleged a defamation-type tort at all. Their RICO claim, therefore, must be dismissed on this ground as well.

II. Plaintiffs' Second Cause of Action Under the Federal Wiretap Act Fails to State a Claim for Relief Because Defendants' Recording Was Permitted Under the Act.

The Wiretap Act specifically permits recordings where the individual making the recording "is a party to the communication . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). Here, the allegations in the Complaint demonstrate that any alleged recordings fall within the scope of § 2511(2)(d), and thus Plaintiffs' claim must fail.

First, the allegations in the Complaint make clear that Defendants and the other individuals who allegedly made recordings were "parties" to the recorded conversations within the meaning of § 2511(2)(d). "[A] 'party to the communication' under § 2511(2)(d) is defined as a party who is present when the oral communication is uttered and need not directly participate in the conversation." *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1361 (S.D. Fla. 2005). Where a person wears a hidden recording device on her person and records conversations that take place around her, that person is a "party" to the communications within the meaning of § 2511(2)(d). *Sussman v. Am. Broad. Cos.*, 186 F.3d 1200, 1201-02 (9th Cir. 1999) (applying § 2511(2)(d) because the person who made surreptitious recordings was a "participant" because that person "used various surveillance devices to record the activities around her"). The Complaint expressly alleges that Defendants and their alleged associates recorded conversations in which they took part. *See, e.g.*, FAC, ¶¶ 71, 76, 90, 97, 102, 108, 110, 115, 122-23.

Second, the allegations in the Complaint make clear that Defendants did not make any recordings "for the purpose of committing any criminal or tortious act" in violation of federal or state law. 18 U.S.C. § 2511(2)(d). Under this provision, it is not enough that the recording itself violates the law; the recorder must intend to use the recording for an additional, subsequent purpose that itself is tortious or criminal. *Sussman*, 186 F.3d at 1202-03 ("[W]here the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere."). It is black-letter law that "under [the Wiretap Act], a defendant must have the intent to use the illicit recording to commit a tort or crime beyond the act of recording itself." *Caro v. Weintraub*, 618 F.3d 94, 98 (2d Cir. 2010); *see also, e.g.*, *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 145 (3d Cir. 2015) [hereinafter "*Google Cookie Litig.*"] ("[A]ll of the authority of which we are aware indicates that the criminal or tortious acts contemplated by § 2511(2)(d) are acts secondary to the acquisition of the communication involving tortious or criminal use of the interception's fruits.").

Thus, "to survive a motion to dismiss, a plaintiff must plead sufficient facts to support an inference that the offender intercepted the communication for the purpose of a tortious or criminal act that is *independent* of the intentional act of recording." *Caro*, 618 F.3d at 100 (emphasis added); *see also Google Cookie Litig.*, 806 F.3d at 145. Courts will dismiss Wiretap Act claims for failure to plead a tortious or criminal purpose. *See, e.g.*, *Henning v. Narconon Fresh Start*, No. 14-cv-2379, 2015 WL 4601690, at *4 (S.D. Cal. July 28, 2015) (dismissing Wiretap Act claim on Rule 12(b)(6) motion for inadequately pleading criminal or tortious purpose); *In re Intuit Privacy Litig.*, 138 F. Supp. 2d 1272, 1278-79 (C.D. Cal. 2001) (same).

Here, Plaintiffs allege that the Defendants acted with the purpose of committing the alleged criminal and tortious acts of the alleged RICO conspiracy, and of invading the privacy of Plaintiffs' staff. FAC, ¶ 169. For the reasons discussed above and below, Plaintiffs have failed to properly allege a RICO claim or an invasion-of-privacy claim. *See supra* Part I; *infra* Part XII. Plaintiffs themselves allege what is clear throughout the Complaint, namely that Defendants' purpose in recording was to "obtain[] information relating to Planned Parenthood's operations." FAC, ¶ 166. Conversations were not recorded to gain personal information, but to obtain business information. The recording was thus not for the purpose of invading the privacy of Plaintiffs' staff.

Moreover, none of the torts or crimes alleged in the Complaint show an impermissible criminal or tortious intent under § 2511(2)(d). All of those purported torts or crimes relate to conduct that occurred *before* the recordings; they do not claim that Defendants' post-recording *use* of the recordings was tortious or criminal. As noted above, to vitiate the one-party-consent rule under § 2511(2)(d), the *use* of the recordings must have a criminal or tortious purpose. *See, e.g.*, *Caro*, 618 F.3d at 98 ("[A] defendant must have the intent *to use* the illicit recording to commit a tort or crime beyond the act of recording itself" (emphasis added)); *Google Cookie Litig.*, 806 F.3d at 145 (explaining that § 2511(2)(d) requires "tortious or criminal use of the interception's fruits").

Further, breach of contract does not qualify as "criminal or tortious" under § 2511(2)(d). It is axiomatic that a breach of contract is not a tort. *See* BLACK'S LAW DICTIONARY 1526 (8th ed. 2004) (defining "tort" as "[a] civil wrong, other than a breach of contract . . . ."). Nor is breach of contract a criminal offense. Thus, any alleged breach of contract or intent to breach a contract has no bearing on the analysis under § 2511(2)(d).

For these reasons, § 2511(2)(d) defeats Plaintiffs' Wiretap Act claim, and the Court should dismiss that claim under Rule 12(b)(6).

Moreover, because both of Plaintiffs' claims that arise under federal law fail to state a plausible claim for relief, this Court also should dismiss Plaintiffs' state-law claims for lack of federal jurisdiction. The Court does not have diversity jurisdiction over Plaintiffs' complaint under 28 U.S.C. § 1332 because there is not complete diversity among the parties. *See In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008) ("Diversity jurisdiction requires complete diversity between the parties—each defendant must be a citizen of a different state from each plaintiff."); FAC, ¶¶ 20-26 (pleading facts showing that several plaintiffs are California citizens for jurisdictional purposes), ¶¶ 29-31, 33-36 (pleading facts showing that several defendants are California citizens for jurisdictional purposes). Because the Court lacks federal-question and diversity jurisdiction over Plaintiffs' remaining state-law claims, the Court should dismiss all of Plaintiffs' state-law claims. *See* 28 U.S.C. § 1367(c).

III. Plaintiffs' Third Cause of Action for Civil Conspiracy Fails to State a Claim for Relief.

Plaintiffs' Third Claim alleges civil conspiracy. *See* FAC, ¶¶ 173-76. This civil conspiracy claim fails as a matter of law for two reasons. First, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994); *see also Alleco Inc. v. Harry & Jeanette Weignberg Found., Inc.*, 665 A.2d 1038, 1045 (Md. 1995). To hold defendants liable under a theory of conspiracy, Plaintiffs must "clearly allege specific action on the part of each defendant" and must make such allegations "within the sections of the complaint that contain plaintiff's claims for the underlying torts." *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 948 (N.D. Cal. 2003). Plaintiffs have not done so here.

Second, Plaintiffs' civil conspiracy claim is barred by the single-entity rule. "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than an individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Black v. Bank of Am.*, 30 Cal. App. 4th 1, 6 (1994) (quotation omitted); *see also Marmott v. Md. Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986) (applying Maryland law). "When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire." *Black*, 30 Cal. App. 4th at 6. Here, Plaintiffs have claimed that all of the individual defendants are agents of CMP and/or BioMax, and that CMP and BioMax are not legally distinct entities. *See, e.g.*, FAC, ¶ 41, 173. Because a corporation cannot conspire with itself or its agents, the alleged conspiracy identified by Plaintiffs does not include more than one legally distinct person and thus fails as a matter of law.

IV. Plaintiffs Failed To Allege Sufficient Facts In Support Of Their Fourth and Fifteenth Claims For Breach Of Contract.

"[T]he elements of a cause of action for breach of contract are (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821

(2011); *see also W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). The Complaint's Fourth Claim, brought by PPFA alone, lacks factual allegations that Defendants have breached an agreement with PPFA and that any alleged breach proximately caused damage to PPFA. The Complaint's Fifteenth Claim lacks factual allegations that Defendants' breached their agreement with PPGC and PPCFC and that any alleged breach proximately caused damage to these Plaintiffs.

A. Plaintiffs have failed to allege facts sufficient to state a claim that Defendants breached the PPFA exhibitor agreements.

Plaintiffs allege that certain Defendants entered into written exhibitor agreements related to registration for the PPFA conferences in Miami, Orlando, and Washington, D.C., and that in so doing the Defendants "represented that BIOMAX was a legitimate biological specimen procurement organization." FAC, ¶ 178. However, these written agreements, FAC, Exh. A-F, do not contain any representations by any of the Defendants about the nature of BioMax. Moreover, even if Defendants had so represented themselves, Plaintiffs do not point to any language in the agreements that was breached by such a representation. Thus, Defendants did not breach the agreements by allegedly misrepresenting the nature of BioMax.

Plaintiffs further allege that "Defendants agreed that their contributions to the conferences would be useful to attendees and beneficial to the interests of their clients and patients . . . ." *Id*. The language cited comes from Paragraph 1 of the agreements, however, which applies to *sponsors*, not exhibitors. *See* FAC, Ex. B, ¶ 1 (addressing the "Purpose and Use of Sponsorship Support," and describing "[t]he purpose of PPFA's sponsorship program"). Plaintiffs misstate the contents of the agreements as they pertain to *exhibitors* such as BioMax. The portion of the three exhibitor agreements that govern "Exhibit Space" states:

> Exhibit space is limited. [PPFA/MeDC] reserves the right to award exhibit space only to those Exhibitors whose exhibits will best meet the educational, scientific, or practice needs of conference attendees. [PPFA/MeDC] may exclude Exhibitors whose products or services are not consistent with PPFA policies or for any other reason [PPFA/MeDC] deems in its best interest.

FAC, Exh. B and D at 2; FAC, Exh. F at 1. Thus, in signing the agreement, BioMax merely acknowledged that PPFA or MeDC had the right to exclude it as an exhibitor if its exhibit was not found to be sufficiently educational or informative or because the featured products or services

were inconsistent with PPFA's purposes. Defendants did not breach this part of the agreement because it did not require them to do, or not do, anything.

Moreover, the purported contractual obligation to participate in the meetings in a way that "would be useful to attendees and beneficial to the interests of their clients and patients" is too indefinite and vague to be enforced, even if it applies to exhibitors rather than sponsors. A contract must state the rights and obligations of the parties with sufficient definiteness and clarity such that "the promise and performances to be rendered by each party are reasonably certain." *Stice v. Peterson*, 355 P.2d 948, 952 (Colo. 1960) (quotation omitted); *see also Soderlun v. Pub. Serv. Comm'n*, 944 P.2d 616, 620 (1997) (collecting cases); 1 Williston on Contracts § 4:18 (4th ed. 1990) ("It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning."); *Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 793 (2013). Here, the agreements do not give the Court any objective, rational way to determine whether Defendants participated in a "useful" or "beneficial" way. FAC, Ex. B, ¶ 1.

Finally, Plaintiffs allege that "Defendants violated numerous laws related to fraud, abuse, privacy, and confidentiality," in putative violation of the contractual obligation to "comply with applicable laws related to fraud, abuse, privacy, and confidentiality." FAC, ¶ 179. But it is well established that a putative contractual obligation to follow the law has no legal effect. *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 715 (N.D. Cal. 2014) ("In California, a promise to refrain from unlawful conduct is unlawful consideration . . . [A] contract cannot be premised on a promise to not break the law"); *Rao v. Covanys Corp.*, No. 06-C-5451, 2007 WL 3232492, at *4 (N.D. Ill. Nov. 1, 2007) ("A party's agreement to do or refrain from doing something that it is already legally obligated to do or refrain from doing is not consideration."). The putative contractual obligation to "comply with applicable laws" is therefore "void as illegal." *Landucci*, 65 F. Supp. 3d at 715.

Moreover, such an unspecific and conclusory allegation fails both under the federal pleading standards as well as black letter contract law: "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." *Levy v. State Farm Mut. Auto. Ins. Co.*, 150 Cal. App. 4th 1, 5 (2007). Plaintiffs have failed to specify what

"applicable federal, state, [or] local laws and regulations" Defendants allegedly violated. Plaintiffs have also failed to specify how such violations took place "*in performance of [Defendants'] obligations pursuant to this Agreement*." FAC, Ex. B-4, D-2, F-2 (emphasis added). Defendants have not identified what obligations under the agreements that Defendants were performing or not performing when they allegedly violated the unidentified laws. Moreover, to the extent that Plaintiffs seek to impliedly incorporate by reference the other allegations in their Complaint, these allegations fail to state claims for violation of such other laws, for the reasons stated elsewhere herein.

B. Plaintiffs have failed to allege facts sufficient to state a claim that Defendants breached the PPGC confidentiality agreement.

Plaintiffs allege that the Defendants violated an agreement attached as Exhibit M to the Complaint by disclosing "confidential oral communications" from Plaintiffs and using this information for a purpose other than a "research transaction" as named in the agreement. Exhibit M defines oral "Confidential Information" as "all oral information of the Disclosing Party, which in either case is identified at the time of disclosure as being of a confidential or proprietary nature or is reasonably understood by the Recipient to be confidential under the circumstances of the disclosure." FAC, Ex. M, ¶ 1. Plaintiffs have failed to allege, much less specify facts supporting such an allegation, that any oral communications from PPGC or PPCFC to the Defendants were identified at the time of disclosure as confidential or proprietary. They have also failed to allege, much less specify facts in support, that any oral communications were reasonably understood by the Defendants to be confidential under the circumstances of the disclosure. Plaintiffs have also failed to identify the particular oral communications at issue that Defendants have allegedly disclosed and misused in violation of the PPGC agreement.

C. Plaintiff PPFA has failed to allege reasonably foreseeable damages proximately caused by the alleged breach.

Damages are an essential element of pleading a claim for breach of contract. *W. Distrib.*, 841 P.2d at 1058. Plaintiffs' breach of contract claim also fails because the damages they allegedly sustained were not reasonably foreseeable. Plaintiffs allege that they were "forced to expend

additional extensive resources on security and IT services, property damage, and responding to multiple state and federal investigations and inquiries." These alleged damages are quintessential "consequential damages." *See Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, No. 14CA1575, 2016 WL 611566, at *6-7 (Colo. App. Feb. 11, 2016). In a contract action, a plaintiff can recover damages—whether "general" damages or "consequential" damages—only if the plaintiff's loss was "foreseeable as the probable result of the breach." *Id.* at *7; *see also Erlich v. Menezes*, 21 Cal. 4th 543, 550 (1999) ("Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable." (internal citations omitted)); Cal. Civ. Code § 3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."). This test is more stringent than the proximate-cause requirement applicable to tort claims. *Core-Mark*, 2016 WL 611566, at *7. Moreover, consequential damages, like those claimed by Plaintiffs here, "must be so likely that 'it can fairly be said' both parties contemplated these damages as the probable result of the wrong at the time the tort occurred." *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 870 (Colo. 2002).

Here, the damages allegedly sustained by Plaintiffs were not reasonably foreseeable at the time of contracting, and thus they are not recoverable in a breach of contract action. In particular, the damages which Plaintiffs allege to have resulted from Defendants' purported breach of contracts did not flow directly from Defendants' alleged actions, but rather from the decisions and actions of independent third parties or of Plaintiffs themselves. Such damages fail to qualify as consequential damages.

Plaintiffs allege that they have suffered property damage and damage to their website. However, they do not allege that the Defendants damaged their property or their website. They allege that they have had to expend money on security and IT resources, but these costs flow from their own decision to provide greater security to their property and website. Again, there is no allegation that the Defendants damaged their property or website, or ever threatened to do so as to necessitate increased expenditures on security. Plaintiffs do not allege, even in a conclusory fashion, much less with supporting facts, that these damages were within the contemplation of the

parties when entering into the contracts or were reasonably foreseeable by the parties.

Finally, Plaintiffs allege that they expended resources on responding to state and federal investigations. These investigations were indisputably initiated by public officials, not the Defendants. Moreover, Plaintiffs make no attempt to allege whether these public officials were motivated directly by viewing CMP's information, or were responding to calls from the public, the latter constituting yet another intervening agency between the alleged breach of contracts and the damages Plaintiffs are asserting to support this claim. The Fourth and Fifteenth Claims should be dismissed.

V. Plaintiffs' Fifth Claim Fails To State a Claim for Breach Of The National Abortion Federation Agreements.

In their Fifth Claim, Plaintiffs claim damages as third-party beneficiaries to agreements allegedly entered into by Defendants and the National Abortion Federation ("NAF"). Plaintiffs fail to allege facts sufficient to show that they are intended third-party beneficiaries of these contracts, to show specific breach, or to show damages proximately caused by the alleged breach.

To be considered an intended third-party beneficiary, a party must show that the contract was made *expressly* for his or her benefit, *i.e.*, "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly." *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.App.4th 949, 957 (2005). "[A]n intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties." *Id.* at 957-58.

Plaintiffs allege that the Defendants were aware that the purpose of the agreements was to benefit attendees of NAF meetings, and that the Plaintiffs, all corporate entities, were "attendees" at the NAF meetings. However, both the allegations in the FAC and the agreements themselves, attached as exhibits to the FAC, contradict Plaintiffs' allegation that they were corporate "attendees" of NAF meetings. Plaintiffs identify "attendees" at NAF meetings as "clinicians, facility administrators, counselors, researchers, educators, and thought leaders in the pro-choice field." FAC, ¶ 66. The NAF agreements state that "attendees" are the "people" who attend the meetings. *See id.* at Ex. H, I, J, L ("It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement."). Thus, Plaintiffs lack standing as third-party beneficiaries of the NAF agreements.

Even if Plaintiffs had such standing, the Fifth Claim would fail because Plaintiffs have failed to plead specific facts alleging the breach. *Levy*, 150 Cal. App. 4th at 5 ("Facts alleging a breach . . . must be pleaded with specificity."). Plaintiffs allege "on information and belief" that Defendants have disclosed information to unidentified third parties without NAF's consent and have not used information learned at NAF meetings in order to enhance the quality and safety of services provided by NAF members and others. FAC, ¶ 186. Such allegations fall short of the specificity necessary to state a claim for breach of contract. *Levy*, 150 Cal. App. 4th at 5. Moreover, these allegations contradict Plaintiffs' allegation that all information the Defendants obtained is subject to the temporary restraining order in *NAF v. CMP*. FAC, ¶ 74.

Finally, Plaintiffs have failed to allege any damages proximately caused by the alleged breaches. Plaintiffs assert that, as a result of Defendants' unspecified breaches of the NAF contracts, Plaintiffs have been "forced to expend additional extensive resources on security and IT services, property damage, and responding to multiple state and federal investigations and inquiries." FAC, ¶ 188. As discussed above (Section IV), these damages, far from being proximately caused by Defendants' actions, are multiple layers of causation removed from Defendants' actions and do not satisfy the damages element to sustain this claim.

VI. Plaintiffs' Sixth Cause of Action Fails to Allege a Claim for Trespass Under Florida, District of Columbia, Colorado, or Texas Law.

Plaintiffs' Sixth Cause of Action alleges trespass arising from Defendants' alleged entry into PPFA meetings in Florida and the District of Columbia, and alleged entry into PPGC, PPCFC, and PPRM facilities located in Texas and Colorado. FAC, ¶¶ 190-96. It fails to state a claim.

A. Plaintiffs fail to state a claim for trespass arising from Defendants' alleged attendance at PPFA meetings in Florida and the District of Columbia.

To claim trespass under District of Columbia law, a plaintiff must show "an unauthorized entry onto property that results in interference with the property owner's possessory interest therein." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014). Similarly, under Florida law, a plaintiff must establish that the defendant engaged in "an unauthorized entry onto another's real property." *Daniel v. Morris*, 181 So.3d 1195, 1199 (Fla. App. 2015).

First, Plaintiffs do not allege that Defendants entered any real property over which Plaintiffs had a possessory interest. Under District of Columbia law, "a recognized possessory interest is the 'key requirement' for a successful claim of trespass." *Greenpeace*, 97 A.3d at 1060. Similarly, under Florida law, "[t]o obtain a recovery for a trespass to real property then, it is clear that the aggrieved party must have had an ownership or possessory interest in the property at the time of the trespass." *Winselmann v. Reynolds*, 690 So.2d 1325, 1327 (Fla. App. 1997). Plaintiffs do not allege facts supporting an ownership or possessory interest in the venues at which the PPFA meetings occurred. Plaintiffs fail to identify the property over which they allege to have had a possessory interest, or describe the nature of their rental agreements for such space. Plaintiffs make only the conclusory allegation that they "possesse[d] a right to exclusive use of the real property [they leased] for Planned Parenthood meetings." FAC, ¶ 190. They provide no facts to support the conclusory claim that they obtained an exclusive possessory interest in their conference venues. For example, they do not make any allegations about the terms of the lease or other agreements under which they used such venues, let alone attach any such agreements to the Complaint. In fact, they do not even identify the conference locales. A person who contracts to use space in a hotel does not obtain a possessory interest in the property but rather a right to "mere use without the actual or exclusive possession." *Young v. Harrison*, 284 F.3d 863, 868 (8th Cir. 2002) (collecting cases). Where a plaintiff "had only . . . a right to the use of the subject property," that plaintiff cannot maintain a trespass action. *Winselmann*, 690 So.2d at 1327; *see also Greenpeace*, 97 A.3d at 1060 ("[T]he mere fact that a tenant may have the 'authority' to permit access into the common areas does not confer onto the tenant a legally recognized possessory interest in those areas."); *Fortune v. United States*, 570 A.2d 809, 811 (D.C. 1990) ("When dealing with real property, such an interest entails more than the right to be physically present on the property; it encompasses also a right to exclude."). Plaintiffs' conclusory allegations are insufficient.

Second, under both District of Columbia and Florida law, an entry onto land gives rise to a trespass claim only if that entry is "unauthorized." *Greenpeace*, 97 A.3d at 1060; *Daniel*, 181 So.3d at 1199. Plaintiffs admit that Defendants were authorized to attend the PPFA National Conference, because Defendants had registered for the conference, signed the agreement required for

participation, and obtained the credentials necessary to participate in the conferences. FAC, ¶¶ 105-08, 120-21. Plaintiffs contend that this consent was vitiated because Defendants allegedly misrepresented their identities and intentions in order to gain entry to the meetings. FAC, ¶ 193. Numerous courts have rejected trespass claims where the defendants misrepresented their identities or intentions in order to conduct surreptitious filming on businesses' property. *See, e.g., Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351-53 (7th Cir. 1995) (holding that undercover filming of doctor by journalists posing as patients did not give rise to a trespass claim); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (rejecting trespass claim where television film crew recorded and broadcast a domestic-violence victim in her home, even though the victim expressly stated that she did not consent to filming in her home); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607, 613-14 (Mich. App. 2000) (holding that a consumer advocate who misrepresented her identity and purpose to gain access to a business's property and surreptitiously film did not commit trespass, because she obtained consent, albeit through misrepresentations). These cases have recognized that such scenarios do not implicate "the specific interests that the tort of trespass seeks to protect." *Desnick*, 44 F.3d at 1352; *see also Berger v. CNN, Inc.*, No. CV 94-46, 1996 WL 390528, at *5 (D. Mont. Feb. 26, 1996) (granting summary judgment in favor of defendants on trespass claim because, among other things, the defendants—who were filming the execution of a search warrant—"did not invade the property interests protected by the tort of trespass").

Plaintiffs also assert that Defendants exceeded their consent at the PPFA meetings by recording attendees. FAC, ¶ 193. But Plaintiffs have not alleged that they conditioned their consent on an agreement by Defendants not to record at the meetings. Nor did the Sponsor/Exhibitor/Advertisement Package Terms and Conditions prohibit recordings. FAC, Ex. B. Thus, the Complaint does not allege facts showing that Defendants exceeded Plaintiffs' consent.

Third, Plaintiffs have failed to allege that they sustained any cognizable injuries that were proximately caused by Defendants' alleged trespass. For the reasons described in Part VIII below, the damages sought by Plaintiffs were not proximately caused by Defendants' alleged trespasses, and the First Amendment precludes Plaintiffs from recovering any damages based on those allegations. While, in principle, a trespass plaintiff can obtain nominal damages, Plaintiffs have not

requested nominal damages here. *See* FAC, pp. 65-66. Where a plaintiff "did not request nominal damages" and cannot prove "any other damages as a result of the alleged trespass," the plaintiff's trespass claim necessarily fails. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 820 (9th Cir.2002). Thus, Plaintiffs' trespass claim necessarily fails.

B. Plaintiffs fail to state a claim for trespass at the Colorado or Texas clinics.

Plaintiffs' claims for trespass premised on Defendants' alleged entry into the two Planned Parenthood clinics in Denver and Houston similarly fail. First, Defendants obtained the consent of Plaintiffs' staff members at the facilities and did not exceed the conditions of consent during the time that they were on the property. In Colorado, trespass is defined as "a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property." *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). Consent is a defense to a trespass claim even when there was a mutual mistake of fact. *Corder v. Folds*, 292 P.3d 1177, 1180 (Colo. Ct. App. 2012). Under Texas law, "it is the plaintiff's burden to prove that the entry was wrongful, and the plaintiff must do so by establishing that entry was unauthorized or without its consent." *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 425 (Tex. 2015).

Plaintiffs concede that Defendants entered the clinics with consent from clinic staff. FAC, ¶ 193. For the reasons stated in the foregoing subsection, this consent was not invalid merely because Defendants allegedly misrepresented their identities and/or intentions. Moreover, as discussed above, this consent was not somehow retroactively vitiated by Defendants' alleged post-visit disclosure of information that they allegedly agreed to keep confidential. *See id.* ("PPGC and PPRM both conditioned their consent on Defendants' promise to keep all information confidential."). As the court explained in *Baugh*, a defendant commits a trespass only if she exceeds the plaintiff's consent *while on the premises*; later conduct cannot retroactively vitiate the consent to the defendant's presence on the premises. *See Baugh*, 828 F. Supp. at 756-57 ("[T]he camera crew acted within the scope of Baugh's consent while they were on the premises. If they exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property and which cannot support a trespass claim."); *see also*

Desnick, 44 F.3d at 1351-53; *Channel 7 of Detroit*, 609 N.W.2d at 613-14. Similarly, here, if Defendants exceeded the scope of consent, they did so only by broadcasting the videos only *after* they left the property.

Moreover, for the reasons discussed further below, *infra* Part VIII, Plaintiffs cannot "recover defamation-type damages under non-reputational tort claims," such as trespass, "without satisfying the stricter (First Amendment) standards of a defamation claim. . . . [S]uch an end-run around First Amendment strictures is foreclosed by *Hustler*." *Food Lion*, 194 F.3d at 522.

VII. Plaintiffs' Seventh Cause of Action for Purported Violations of California Business & Professions Code § 17200, *et seq.*, Fails to State a Claim for Relief.

Plaintiffs' Seventh Cause of Action raises a claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.* "The UCL defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice,'" and establishes three distinct theories of liability. *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009) (quoting Cal. Bus. & Prof. Code § 17200); *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). The purpose of the UCL "is the protection of consumers." *Annuziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). Here, the Complaint fails to allege that Defendants engaged in any unlawful, unfair, or fraudulent conduct within the meaning of the UCL.

A. Plaintiffs fail to allege any "unlawful" conduct within the meaning of the UCL.

To claim that Defendants have engaged in "unlawful conduct," Plaintiffs assert that Defendants have violated 18 U.S.C. §§ 1962(c) and 2511, California Penal Code §§ 632 and 634, § 10-402 of the Courts and Judicial Proceedings Article of the Annotated Maryland Code, and Section 934 Title XLVII of the Florida Criminal Procedure Law. FAC, ¶ 198. As described in this Motion, Plaintiffs fail to state claims for relief under these laws, and thus Plaintiffs cannot satisfy this prong of the UCL. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th Cir. 2014).

B. Plaintiffs fail to allege "unfair" conduct within the meaning of the UCL.

Plaintiffs also cannot satisfy the "unfair" prong of the UCL. Plaintiffs' UCL claim relies on alleged harms to their economic interests. FAC, ¶ 201. Where a non-consumer plaintiff invokes the

"unfair" prong against conduct that has harmed its economic interests, it generally must show "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Levitt*, 765 F.3d at 1136 (citation and quotation marks omitted) (holding that where business sued non-competitor for economic losses, plaintiff needed to show "violations of antitrust principles"). Here, no allegation suggests that Defendants' conduct implicated the anti-cartelization and anti-monopolization policies of antitrust law.

C. Plaintiffs fail to allege "fraud" within the meaning of the UCL.

Plaintiffs premise their fraud-prong UCL claim on both Defendants' statements to the public via already-released or anticipated videos, as well as on Defendants' statements to Planned Parenthood personnel. *See* FAC, ¶ 199. Neither set of statements supports a UCL fraud claim.

To recover for statements made to the public, a plaintiff must show that a "reasonable consumer" is likely to be deceived by the statement. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kasky v. Nike*, 27 Cal. 4th 939, 949 (2002). CMP's videos have nothing to do with commercial activity and make no appeal to "consumers" at all. This prong of Plaintiffs' claim falls outside the scope of the UCL.

To the extent that Plaintiffs' UCL fraud claim relies on misrepresentations made to Plaintiffs, the claim fails as a matter of law because Plaintiffs cannot obtain any relief under the statute. The only forms of relief available under the UCL are restitution and injunctive relief against repetition of the allegedly unlawful or fraudulent conduct. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012). Plaintiffs cannot obtain injunctive relief because they have not alleged that Defendants will make any similarly false, reliance-inducing representations to them in the future. *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1015 (N.D. Cal. 2014) (holding that a plaintiff could not obtain injunctive relief under the UCL because he could not "plausibly allege that he is likely to be fraudulently induced by the same representations he now claims he knows are false").

Nor are Plaintiffs entitled to restitution for violation of § 1703 of the UCL. Restitution requires both that money was lost by the plaintiff and that that money was obtained by the defendant. *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 336 (2011); *see also In re Apple*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011). Courts have carefully distinguished requests for restitution from requests for damages – finding the UCL permits the former, but prohibits the latter. *Kentucky Cent. Life Ins. Co. v. LeDuc*, 814 F. Supp. 832, 841-42 (N.D. Cal. 1992); *Bank of the West v. Superior Ct.*, 2 Cal. 4th 1254 (1992); ("[D]amages are not available under section 17203. The only nonpunitive monetary relief available . . . is the disgorgement of money that has been wrongfully obtained or, in the language of the statute, an order 'restor[ing] . . . money . . . which may have been acquired by means of . . . unfair competition.'" (internal citations omitted)); *Indus. Indem. Co. v. Superior Ct.*, 209 Cal. App. 3d 1093, 1095-96 (6th Dist. 1989) ("[A] private litigant is allowed only injunctive relief and not damages under the unfair competition laws.").

Although Plaintiffs frame their Request For Relief as one for "restitution," the monies sought are clearly damages and not restitution. *See* FAC, ¶ 201. Plaintiffs seek money for "damages" such as having to increase their security and to repair property damage caused by non-parties. *Id.* They do not seek to get back from Defendants money that should not have been given to Defendants, because Defendants have not been unjustly enriched. Plaintiffs' UCL claim thus fails.

VIII. Plaintiffs' Eighth Cause of Action for Fraudulent Misrepresentation Fails Because Defendants' Conduct Did Not Proximately Cause Plaintiffs' Damages and Because Plaintiffs' Fraudulent-Misrepresentation Claim Is Barred by the First Amendment.

Plaintiffs' Eighth Cause of Action raises a claim for fraudulent misrepresentation. FAC, ¶¶ 204-10. A claim for fraudulent misrepresentation requires: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638 (1996) (quotation omitted); *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015) (identical elements under D.C. law); *Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶ 26 (2013) (identical elements under Colorado law); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011) (identical elements under Texas law);

Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010) (identical elements under Florida law).

Moreover, Plaintiffs must allege a "complete causal relationship between the fraud or deceit and the plaintiff's damages." *City Solutions, Inc. v. Clear Channel Commc'ns*, 365 F.3d 835, 840 (9th Cir. 2004). "Even at the pleading stage, the complaint must show a cause and effect relationship between the fraud and damages sought; otherwise no cause of action is stated." *Marble Bridge Funding Grp. v. Euler Hermes Am. Credit Indem. Co.*, No. 5:12-cv-02729-EJD, 2015 WL 971761, at *5 (N.D. Cal. Mar. 2, 2015) (internal citation omitted).

Plaintiffs allege that "[a]s a result of Defendants' wrongful acts, PPFA, PPGC, PPCFC and PPRM have suffered and/or will suffer economic harm and irreparable harm caused by the improper acquisition, use, and disclosure of Plaintiffs' confidential information, including harm to the safety, security, and privacy of Plaintiffs and their staff, and harm caused by being forced to expend additional, extensive resources on security and IT services, property damages, and responding to multiple state and federal investigations and inquiries." FAC, ¶ 209. These facts are insufficient to allege proximate causation of injury.

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the district court rejected a fraud theory nearly identical to that on which Plaintiffs here rely. 964 F. Supp. 956, 963 (M.D.N.C. 1997), *aff'd in pertinent part on other grounds*, 194 F.3d at 522. In *Food Lion*, the district court held that the plaintiff could not recover damages for lost profits resulting from ABC's broadcast of undercover filming that depicted the plaintiff's food-handling practices in a negative light. *Id.* As the court explained, the plaintiff's "lost sales and profits were the direct result of diminished consumer confidence in the store. While these losses occurred after the *Prime Time Live* broadcast, the broadcast merely provided a forum for the public to learn of activities which had taken place in Food Lion stores." *Id.* "[T]ortious activities may have enabled" ABC to capture plaintiff's practices on camera, "but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence." *Id.* Thus, ABC's misrepresentations to obtain access to the plaintiff's facilities did not cause the plaintiff's lost profits and other publication injuries. Similarly, here, all of Plaintiff's damages flow from Defendants' *publication* of recordings, not from any purported misrepresentations that occurred

before the recordings, so there is no proximate causation of the alleged damages. *See also Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 30 F. Supp. 2d 1182, 1189 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002); *Frome v. Renner*, No. 97-civ-56411997, WL 33308718, at *2 (C.D. Cal. 1997).

In addition, the First Amendment bars Plaintiffs' fraudulent-misrepresentation claim. Where a plaintiff seeks damages resulting from a publication, he must satisfy the First Amendment requirements that govern defamation claims, regardless of the cause of action raised. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (holding that a claim for intentional infliction of emotional distress premised on publication must satisfy First Amendment defamation standard); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding that a statutory claim for invasion of privacy premised on publication must satisfy First Amendment defamation standard); *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1042-43, 1044-46 (1986) (holding that claim for intentional interference with prospective economic advantage must satisfy First Amendment defamation standard). As the Court of Appeals held in the *Food Lion* case, a plaintiff cannot "recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. . . . [S]uch an end-run around First Amendment strictures is foreclosed by *Hustler*." *Food Lion*, 194 F.3d at 522. In *Food Lion*, the ABC program *Prime Time Live* sent two undercover reporters to infiltrate and secretly film Food Lion's meat-handling practices. The reporters obtained jobs at Food Lion under false pretenses, using fake identifications and making false representations, and then secretly filmed Food Lion employees handling meat; the films were broadcast on Prime Time Live. *See id.* at 510-11. In bringing claims against ABC, "Food Lion did not sue for defamation, but focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." *Id.* at 510.

The Fourth Circuit held that, because Food Lion did not bring a defamation claim, Food Lion could not recover any damages for injuries attributable to the *publication* of the videos, rather than the filming itself. *Id.* at 522. The court explained that Food Lion could recover publication damages—including losses "relating to its reputation, such as loss of good will and lost sales"—

only if Food Lion satisfied the First Amendment requirements for defamation actions, *i.e.* false statements of fact made with actual malice. *Id.* Because Food Lion did not show that the publication was false and made with the requisite malicious intent, Food Lion could not recover publication damages under other tort theories. *Id.* at 524.

Other cases are in accord with *Food Lion*. For example, in *Hornberger v. American Broadcasting Co., Inc.*, 351 N.J. Super. 577 (2002), the ABC show *Prime Time Live* secretly videotaped police officers conducting traffic stops of young African-American males and broadcast the videotapes. *Id*. at 585-86. The officers sued, claiming damages to their reputation. *Id.* Citing *Food Lion*, the New Jersey court of appeals held that the plaintiffs could not recover any damages arising from the *publication* of the recordings absent a valid claim for defamation: "Under *Hustler* and *Food Lion*, plaintiffs are not entitled to . . . reputational and emotional distress damages, resulting from a publication, without showing that the publication contained a false statement of fact that was made with actual malice." *Id.* at 630 (internal citations omitted); *see also, e.g.*, *Desnick*, 44 F.3d at 1355 (similar); *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1204 (D. Idaho 2015) (similar).

Plaintiffs' tort claims here closely mirror those raised by *Food Lion*, and fail for the same reasons. Like *Food Lion*, Plaintiffs have brought claims for fraud, trespass, and unfair competition, seeking monetary damages for alleged harms arising from Defendants' publication such as reputational harm and emotional distress. *See Food Lion*, 194 F.3d at 512-13. To satisfy the First Amendment, Plaintiffs must allege both that Defendants' publications constituted false *assertions of fact*, and that Defendants made those publications with the requisite malice. *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1288-91 (9th Cir. 2014). Plaintiffs have not met either requirement. First, Plaintiffs have not identified any false statements published by Defendants. Indeed, Plaintiffs face a significant obstacle in so doing, as CMP's videos consist of recordings of Plaintiffs' own staff members. "The fact that a statement is true, or in this case accurately quoted, is an absolute defense to a defamation action." *Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993) (citing Restatement (Second) of Torts § 581A (1977)); *Smith v. Sch. Dist.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) ("[G]enerally, a plaintiff cannot be defamed by the use of his own words.").

Second, Plaintiffs cannot point to any evidence suggesting that CMP acted either negligently or with actual malice. Indeed, the fact that CMP published full videos at the same time as the highlight videos, allowing exactly the sort of attempted refutation that Plaintiffs undertook, directly contradicts an allegation of malice. See FAC, ¶ 128-29 (comparing highlight videos with longer videos, both available to the public). These deficiencies fatally undermine Plaintiffs' fraudulent-misrepresentation claim because damages are an essential element of a fraud claim. *See Lazar*, 12 Cal. 4th at 638. Plaintiffs do not allege any damages other than those flowing from CMP's *publications*, and Plaintiffs fail to satisfy the First Amendment for claims of publication damages.

IX. Plaintiff Has Failed To State A Claim For Violation Of California Penal Code § 632.

Plaintiffs' Ninth Cause of Action raises a claim for unlawful recording of confidential conversations without the consent of all participants under California Penal Code § 632. *See* FAC, ¶¶ 211-17; *see also* Cal. Penal Code § 637.2 (authorizing civil suits for violations of § 632). This claim, brought by eight corporations, concerns alleged recording of unidentified individuals at the San Francisco NAF conference, FAC, ¶¶ 64-74, 212, 214. It fails to state a claim for relief.

A. Plaintiffs have failed to state a claim under Penal Code § 632 as to recordings at the NAF Annual Meeting.

California law proscribes non-consensual recording of a conversation *only if* that conversation constitutes a "confidential communication." Cal. Penal Code § 632(a). "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan*, 27 Cal. 4th at 776-77. "[A] communication is not confidential when the parties may reasonably expect other persons to overhear it." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003). "Other persons" are persons other than those "***who listen[] with the speaker's knowledge and intent.***" *Id.* (emphasis added). The statute specifically provides that the category "confidential communication" "excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Pen. Code § 632(c).

While conversations that take place at a large event do not categorically fall outside the scope of section 632, such conversations must exhibit some indicia of secrecy, such as covering one's mouth. *See Cuviello v. Feld Ent., Inc.*, 304 F.R.D. 585, 591 (N.D. Cal. 2015) (holding that conversation on sidewalk was confidential because speaker looked around to see whether others were around and leaned in close to the ear of the listener, while non-parties were across the street). Merely alleging that non-consensual recordings of conversations occurred does not state a claim for relief under section 632.

Plaintiffs' Complaint fails to plead facts giving rise to a plausible inference that the allegedly recorded conversations at the San Francisco NAF conference fall within the definition of "confidential communications." Indeed, the lengthy Complaint fails to allege any particular circumstances of the alleged recorded communications at the San Francisco NAF conference. All that Plaintiffs claim is that Defendants recorded unspecified conversations that took place at the large conference. FAC, ¶¶ 64-74, 212, 214. Not only does the Complaint not identify specific conversations that it contends were recorded, it does not provide any detail whatsoever regarding where any of the purportedly recorded conversations took place. *See* FAC, ¶¶ 64-74, 212, 214. It says nothing about whether other attendees were nearby, how close those other attendees were, who those other attendees were, whether those other attendees were looking at the parties to the conversation, how loud the background noise was, or how loudly the parties to the conversation were speaking. In short, the Complaint provides none of the details necessary to assess whether the conversation participants had "an objectively reasonable expectation that the conversation [was] not being overheard or recorded." *Flanagan*, 27 Cal. 4th at 776. Alleging, without more, that non-consensual recordings of conversations occurred does not state a plausible claim for relief under section 632. *Turnbull v. Am. Broad. Cos.*, No. cv-03-3554-SJO, 2004 WL 2924590, at * 16 (C.D. Cal. Aug. 19, 2004) (citing *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 237 (1998)).

To the extent that Plaintiffs rely on putative non-disclosure agreements, the California Supreme Court has expressly rejected the notion that confidentiality depends on whether the participants expected that "the conversation would not be divulged to anyone else." *Flanagan*, 27 Cal. 4th at 773 (quotation marks omitted). In assessing the confidentiality of a conversation, courts

must "focus[] on 'simultaneous dissemination [of the conversation],' not 'secondhand repetition.'" *Id.* at 775 (quoting *Ribas v. Clark*, 38 Cal. 3d 355, 360 (1985)). Nothing in the non-disclosure agreements affects whether third parties could overhear conversations at the meeting. *See generally* FAC, Ex. H-J. Even assuming that the non-disclosure agreements limit subsequent *repetition* of conversations, they have no bearing on the *overhearing* of conversations – and *Flanagan* decisively holds that only the latter is relevant for liability under section 632. *Flanagan*, 27 Cal. 4th at 776.

Further, limiting conference attendance to NAF members "and trusted others" again does nothing to prevent these other attendees from overhearing conversations, let alone venue employees and staff. Whether a third party can overhear a conversation has nothing to do with whether that person is a NAF member, or whether they are "trusted." Even at a limited-attendance event, the reasonable expectation that third parties might overhear a conversation precludes the conversation from being "confidential." *See Turnbull v. Am. Broad. Cos.*, No. cv-03-3554-SJO, 2005 WL 6054964, at *6 (C.D. Ca. Mar. 7, 2005) (noting that where two people talked openly in a closed actors' workshop and were aware that another person was within earshot, conversation was not confidential). At most, attendees' affiliation with NAF might affect whether the person was likely to repeat the conversation, a consideration that – as noted above – does not affect the confidentiality analysis. *See Flanagan*, 27 Cal. 4th at 776.

Likewise, even if the topic of a conversation is highly sensitive, this does not demonstrate that every conversation at the conference was confidential. "[A]n expectation of a confidential communication cannot be derived from the content of the communication for the purpose of this statute [*i.e.*, § 632]." *Vera v. O'Keefe*, Civ. Case No. 10-cv-1422-L(MDD), 2012 WL 3263930, at *5 n.3 (S.D. Cal. Aug. 9, 2012); *see also Flanagan* 27 Cal. 4th at 773 (rejecting section 632 test based on the content of the communication). The confidentiality of a conversation depends on whether it might be overheard, not whether its topic is "sensitive."

Thus, Plaintiffs have failed to state a claim for violation of Penal Code § 632 as to recordings of conversations at the NAF Annual Meeting in San Francisco.

In addition, Plaintiffs have failed to allege facts showing that they have standing to assert the privacy interests of individuals under section 632. "Although a corporation may not pursue a

common law action for invasion of privacy, it may bring an action for violation of the Privacy Act." *Coulter v. Bank of Am.*, 28 Cal. App. 4th 923, 930 (1994). A claim by a corporation, however, requires "eavesdrop[ping] upon or record[ing] confidential *communications of corporations*." *Ion Equip. Corp. v. Nelson*, 110 Cal. App. 3d 868, 880 (1980) (emphasis added). Thus, Plaintiffs must plead facts showing that the allegedly recorded individuals were recorded while acting in their capacity as employees of one of the eight Planned Parenthood corporations bringing this claim: PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC, and PPRM. FAC, p. 57. The Complaint fails to plead facts suggesting that any employees who attended the San Francisco NAF Conference were attending on behalf of their employers. Plaintiffs only plead that: "Staff from PPFA and Planned Parenthood affiliates regularly attend the NAF annual conferences," and "Staff representatives from PPFA, PPPSW, PPMM, PPOSBC, PPNC, PPGC, PPCFC, and PPRM attended the NAF 2014 annual conference in San Francisco." FAC, ¶¶ 66, 212. These two statements hardly plead that any or all statements made by Plaintiffs' staff attending the San Francisco NAF Conference were made on behalf of their employers. *See Ion Equip. Corp.*, 110 Cal. App. 3d at 880. In fact, the descriptions of NAF conferences in the Complaint actually state that the conferences are networking opportunities for individuals: "The NAF conference . . . provides unique opportunities for abortion and other reproductive health care providers to meet, learn about the latest research, and to network . . . ." FAC, ¶ 66. "Attendees include clinicians, facility administrators, counselors, researchers, educators, and thought leaders in the pro-choice field . . . ." *Id*. Plaintiffs lack standing to assert a § 632 claim.

B. Plaintiffs fail to allege a § 632 violation at the Nucatola and Gatter meetings.

Plaintiffs' Ninth Claim for Relief refers solely to conversations at the 2014 NAF conference. *See* FAC, ¶¶ 212-14. To the extent, however, that Plaintiffs seek to rely on recorded meetings with (1) Mary Gatter and Laurel Felczer, and (2) Deborah Nucatola, in southern California, *see* FAC, ¶¶ 75-76, 95-97, the Complaint fails to state a claim under § 632.

First, the Complaint fails to plead facts giving rise to a plausible inference that Gatter, Felczer, or Nucatola were acting in their capacities as employees of the Plaintiffs who brought the

Ninth Cause of Action. *See Ion Equip. Corp.*, 110 Cal. App. 3d at 880. Regarding the meeting with Mary Gatter and Laurel Felczer, Plaintiffs have not alleged that either of them were employees of any of the Plaintiffs bringing this claim – in fact they allege the opposite. *See* FAC, ¶ 95-96 ("Mary Gatter, the Medical Director of California Planned Parenthood affiliate PPPSGV" "and a PPPSGV colleague"). Thus Plaintiffs PPFA, PPNC, PPPSW, PPMM, PPOSB, PPGC, PPCFC and PPRM have not sufficiently pleaded facts alleging that they have standing to bring a claim for violation of Penal Code section 632 for statements made by either Gatter or Felczer.

Regarding the meeting with Deborah Nucatola, although Plaintiffs identify Nucatola as an employee of Plaintiff PPFA, Plaintiffs have not alleged sufficient facts to show that she was acting in her capacity as a PPFA employee. *Compare* FAC, ¶ 69 ("PPFA Senior Director of Medical Research, Dr. Deborah Nucatola") *with id.* at ¶¶ 75-76 (description of meeting with Nucatola with no reference to PPFA). Plaintiffs allege essentially the opposite, stating that "Defendants parlayed the 'professional' relationships they [had] forged" to set up a networking lunch meeting. FAC, ¶ 75-76; *compare also id.* at ¶ 95 ("Daleiden expressed an interest in discussing PPPSGV's operations and a possible partnership for fetal tissue donations.") *with id*. at ¶ 76 (no reference to any Plaintiff corporation and simply stating: "Dr. Nucatola met with Daleiden"). Plaintiffs have not sufficiently pleaded facts alleging that Plaintiff PPFA has standing to bring a claim for violation of Penal Code section 632 for statements made by Nucatola.

Nor did Plaintiffs plead sufficient facts to show that the Nucatola meeting was a "confidential communications" under Penal Code section 632. Communications made in a public restaurant do not satisfy the requirements of "confidential communications" under that section. *Wilkins v. Nat'l Broad. Co.*, 71 Cal. App. 4th 1066, 1080 (1999) ("Penal Code section 632 prohibits the recording only of 'confidential' conversations. This conversation was not confidential under the terms of the statute and *O'Laskey* and *Coulter*. Accordingly, videotaping the lunch meeting did not violate Penal Code section 632.").

The only objective facts alleged in the Complaint concerning this meeting are that Nucatola "sat with her back to the corner wall of the restaurant" and "the music and ambient noise in the restaurant were very loud." FAC, ¶ 76. Even if Nucatola had been sitting with her back to the

corner wall, that would be an insufficient basis on which to defeat the presumed lack of confidentiality of the conversation in this public setting. The Complaint merely alleges that her position "enabled her to be able to observe the presence of others" but carefully stops short of saying that she did in fact observe the presence of others and lower her voice or curb the conversation because of the presence of others. As to the volume of music and ambient noise (caused presumably by the presence of other patrons), such is the case with many crowded locations, but that does not convert these very public venues into places in which there is a reasonable expectation of not being overheard by others. To the contrary, such nearby noise may necessitate that individuals speak even louder to be heard.

For the reasons described above, Plaintiffs have failed to state a claim for breach of California Penal Code section 632 by recording meetings with Gatter, Felczer, or Nucatola.

Finally, even if the alleged recordings had violated section 632, California law definitively holds that subsequent *disclosures* of unlawfully recorded conversations do not violate section 632. *Lieberman*, 110 Cal. App. 4th at 167 ("Penal Code section 632 does not prohibit the disclosure of information gathered in violation of its terms."); *Coulter*, 28 Cal. App. 4th at 930 ("Section 632 prohibits *recording* a confidential communication without consent of all parties. It says nothing about publishing the communication to a third party."). Thus, the Court should dismiss Planned Parenthood's section 632 claim for damages arising from post-recording *disclosure* of recordings.

C. Plaintiffs fail to state a § 632 claim against Lopez.

Plaintiffs have not pleaded any facts alleging that Defendant Lopez attended the San Francisco NAF Conference, or attended the dinner meetings with Gatter, Felczer, or Nucatola. Thus, Plaintiffs have failed to state a claim for breach of California Penal Code section 632 by Defendant Lopez.

X. Plaintiffs' Claim for Violation of California Penal Code § 634 Fails to State a Claim.

Plaintiffs' Tenth Claim is premised on the Defendants' alleged trespass onto NAF's leased property at the 2014 NAF conference held in San Francisco. FAC, ¶ 215-19. California Penal Code § 634 makes it a criminal offense for any person to "trespass[] on property for the purpose of

committing any act, or attempting to commit any act, in violation of Section . . . 632 . . .” Cal. Penal Code § 637.2 states: “[a]ny person who has been injured by a violation of this chapter [sections 630 to 638.53] may bring an action against the person who committed the violation. . . .”

For the reasons stated above, *supra* Part IX, Plaintiffs have failed to allege “any act in violation of Section 632,” so this claim likewise fails to state a claim for relief. Moreover, Plaintiffs’ Tenth Claim also fails because Plaintiffs were not injured by the alleged violation and because they have failed to allege facts sufficient to show a trespass under California law.

A. Plaintiffs Do Not Have Standing to Bring a Claim Under Penal Code Section 634 Because The Alleged Trespass Was Against NAF.

Even if Plaintiffs had stated a valid claim under section 632, Plaintiffs would lack standing to bring a claim under section 634 because no trespass was committed against Plaintiffs.

Only the National Abortion Federation could bring a claim for trespass by Defendants at the 2014 NAF annual conference in San Francisco. *See Smith v. Cap Concrete, Inc.*, 133 Cal. App. 3d 769, 774 (1982) (“An action for trespass may technically be maintained only by one whose right to possession has been violated.”); *see also* FAC, ¶ 219 (“NAF possessed a right to exclusive use of the real property they leased for the 2014 NAF conference held in San Francisco in 2014.”). Second, within the Invasion of Privacy Act, claims must be brought by the party whose rights were violated, not merely by parties who suffered alleged tangential injuries. For example, a claim for violation of Penal Code section 632 can only be brought by the individual recorded – not by others who may suffer damages as a result of that recording. *See Ion Equip. Corp.*, 110 Cal. App. 3d at 880 (recorded communications must be “communications of corporations”); *see also Turnbull*, 2004 WL 2924590, at *16 (refusing to enjoin the defendant from using hidden cameras in newsgathering as a result of California Penal Code section 632 because it would be an assertion of the rights of third parties).

Here, Plaintiffs’ inability to stand in the shoes of NAF is clear in the insufficiency of its pleadings. They offer no facts regarding the property over which they allege NAF to have had a possessory interest. Plaintiffs allege only that Defendants registered for and attended “the NAF conference in San Francisco, which was held from April 5 to April 8, 2014.” FAC, ¶ 68. Plaintiffs

then allege only that "NAF possessed a right to exclusive use of the real property it leased for the 2014 NAF conference held in San Francisco in 2014." *Id.* at ¶ 219. At no point in the FAC do Plaintiffs identify the real property where the NAF conference was held within San Francisco or the nature of the "real property" NAF purportedly "leased" for the meeting. Absent identification of the site of the meeting and the nature of the possessory interest, Plaintiffs cannot state that NAF had any interest in the property, let alone a possessory interest with exclusive control necessary to sustain a trespass claim. Plaintiffs' pleading offers nothing more than insufficient "labels and conclusions" that NAF had a possessory interest in real property. *Iqbal*, 556 U.S. at 678.

B. Plaintiffs Do Not Plead Sufficient Facts to Allege Trespass Under the California Penal Code.

Penal Code section 637.2 creates a cause of action for persons injured by "a violation" of any provision of the chapter. Thus, in bringing a claim under Penal Code § 634, a litigant must first plead that there has been a violation of Penal Code section 634, a criminal statute, an element of which is the commission of a trespass. Consequently, to maintain that Defendants committed trespass against NAF, Plaintiffs must also plead the existence of any of the aggravating factors that must be present for criminal trespass under California law. *See, e.g.*, Cal. Penal Code §§ 601, 602, 602.5, 602.8. Absent one of these statutory aggravating factors, Defendants cannot be liable for committing a trespass against NAF under the California Penal Code, and thus cannot be liable to Plaintiffs for any highly tangential injury they suffered.

Among other deficiencies, Plaintiffs have failed to allege that Defendants trespassed at the NAF meetings, because they have not shown that NAF had a possessory property interest in the hotels at which the NAF meetings occurred. To maintain a trespass action, a plaintiff must show that it has a "possessory interest in the property" at issue. *Cap Concrete*, 133 Cal. App. 3d at 775. Plaintiffs concede that NAF did not *own* the venues at which the NAF conferences took place, but rather leased portions of those venues for the brief length of the conferences. FAC, ¶ 219. As noted above, a person who contracts to use space in a hotel does not obtain a possessory interest in the property but rather a right to "mere use without the actual or exclusive possession." *Young v. Harrison*, 284 F.3d 863, 868 (8th Cir. 2002) (collecting cases). Thus, even assuming Defendants

entered the NAF meetings without valid consent from NAF, those entries do not constitute trespasses under California law. Therefore, Plaintiffs have failed to allege a violation of California Penal Code § 634.

XI. Plaintiffs' Eleventh and Twelfth Claims for Violation of State Wiretapping Laws Fail to State a Claim for Relief.

Plaintiffs bring claims under Florida Criminal Procedure and Corrections Code, Title XLVII, Section 934, and Maryland Annotated Code, Courts and Judicial Proceedings Article, Section 10-402, based on the recordings made at the PPFA conferences in Florida and the NAF conference in Maryland. Florida's and Maryland's wiretapping laws require the showing of both a subjective and objective expectation of privacy in the conversation, *i.e.*, a reasonable expectation of privacy under the circumstances in which the recording took place.

Florida law prohibits recording oral communications when "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting . . . ." Fla. Stat. § 934.02. This means that "for an oral conversation to be protected under section 934.03 *the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable*." *State v. Smith*, 641 So.2d 849, 852 (Fla. 1994) (quotation marks and citations omitted) (emphasis added).

Similarly, Maryland law prohibits recording "oral communications" from a "private conversation." Md. Code Ann., Cts. & Jud. Proc. §§ 10-401(13)(i), 10-402(a)(1). Plaintiffs must have "both a subjectively and objectively reasonable expectancy of privacy." *Hawes v. Carberry*, 103 Md. App. 214, 220 (1995). Maryland has adopted the federal standard emerging from the Fourth Amendment to the United States Constitution for "reasonable expectation of privacy" for purposes of the Maryland Wiretap Act. *Fearnow v. Chesapeake & Potomac Tel. Co.*, 104 Md. App. 1, 33 (1995) ("*Fearnow I*"); *compare Katz v. United States*, 389 U.S. 347 (1967).

The FAC does not identify any specific conversations that it contends were recorded. Nor does it provide any detail whatsoever regarding where any of the purportedly recorded conversations took place. *See* FAC, ¶¶ 118-23, 233-34. It says nothing about whether other

attendees were nearby, how close those other attendees were, who those other attendees were, whether those other attendees were looking at the parties to the conversation, how loud the background noise was, or how loudly the parties to the conversation were speaking. In short, the Complaint provides none of the details necessary to assess whether the conversation participants "had both a subjectively and objectively reasonable expectancy of privacy." *Hawes*, 103 Md. App. at 220; *Smith*, 641 So.2d at 852 (requiring "an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable").

Merely alleging that non-consensual recordings of conversations occurred does not state a plausible claim for relief under section 10-402. Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Plaintiffs have not pleaded any facts giving rise to the plausible inference that the conversations were confidential. Thus, Plaintiffs' Complaint asserts nothing more than the "sheer possibility" that the allegedly recorded conversations were of individuals with a "reasonable expectation of privacy," and that reasonable expectation of privacy is an essential element of a claim under Maryland and Florida law. *Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363, 376 (1996) ("*Fearnow II*"); *Smith*, 641 So. 2d at 852.

Instead of making the requisite allegations about the objective and subjective reasonableness of an expectation of privacy in conversations, Plaintiffs' claim that *all* conversations occurring at NAF meetings are necessarily clothed with an objective and subjective reasonable an expectation of privacy. *See* FAC, ¶¶ 228, 234; *see also id.* at ¶ 90. This view cannot be squared with the text of either the Florida or Maryland law or the respective Supreme Courts' interpretations of the statutes. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 10-402(a)(1); *Fearnow II*, 342 Md. 363; Fla. Stat. § 934; *Smith*, 641 So. 2d at 852. The notion that every participant in every conversation at a multi-day conference with hundreds of attendees would harbor an objectively reasonable expectation of privacy defies human experience. FAC, ¶ 66, 118.

According to Plaintiffs, its staff members' expectation of privacy at the Baltimore NAF conference was reasonable because (1) all attendees had executed non-disclosure agreements; (2) NAF's security program acted to ensure that communications made during the meeting would

be restricted to "NAF members and trusted others;" and (3) "the nature and the subject matter of the conferences were highly sensitive." FAC, ¶ 234. Similarly, its staff members' expectation of privacy at the PPFA conferences was reasonable, according to Plaintiffs, because: (1) all attendees had executed agreements stating that their interests were consistent with those of Plaintiffs; (2) Plaintiff PPFA's security program acted to ensure that communications made during the meeting would be restricted to "conference participants and trusted others;" and (3) "the nature and subject matter of the conferences were highly sensitive." FAC, ¶ 228. None of these points supports a finding of either a subjective, or an objective, reasonable expectation of privacy for absolutely every conversation that took place.

Florida has specifically rejected the proposition that closed business dealings meet the test for "reasonable expectation of privacy" for section 934. *Cohen Bros., L.L.C. v. ME Corp., S.A.*, 872 So. 2d 321, 324-25 (Fla. Dist. Ct. App. 2004); *Morningstar v. State*, 428 So. 2d 220, 221 (Fla. 1982); *Jatar v. Lamaletto*, 758 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 2000). Importantly, the agreements which allegedly state that Defendants agreed that their interests were consistent with those of Plaintiffs nowhere establish that Plaintiffs would have a "reasonable expectation of privacy" in their communications. Instead, by the absence of any discussion of privacy or confidentiality, they clearly show that Plaintiffs' conferences were events where there would be no expectation of privacy. *Compare* FAC, Ex. B, Exhibit Space ¶ 1 (Terms and Conditions for exhibitors at PPFA conferences – not containing any discussion of confidentiality, and only stating: "PPFA may exclude exhibitors whose products or services are not consistent with PPFA policies"); Ex. D, Exhibit Space ¶ 1 (same); *with id.* at Ex. H (Confidentiality Agreement for exhibitors at NAF conferences).

As to the NAF conference held in Maryland, the execution of non-disclosure agreements is irrelevant to the "reasonable expectation of privacy" analysis. *Stewart v. Evans*, 351 F.3d 1239, 1244 (D.C. Cir. 2003) ("This Court has held repeatedly that the Fourth Amendment [reasonable expectation of privacy] does not prohibit the obtaining of information revealed to a third party . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."). "Statements that a person

'knowingly expose[s] to the public' are not made with a reasonable expectation of privacy and therefore are not protected as 'oral communications' under the [Maryland] wiretap law[]." 85 Op. Atty. Gen. Md. 225 (2000) (quoting *Malpas v. State*, 116 Md. App. 69 (1997) (finding no reasonable expectation of privacy in statements overheard through apartment wall). Lastly, the subject matter of the conferences is simply not relevant to the analysis.

In fact, the only reasonable inference to draw from the well-pleaded allegations in the Complaint and its exhibits is that the individuals recorded *could not* have had a reasonable expectation of privacy. Under the Federal standard, which Maryland has adopted, courts have routinely rejected unlawful recording claims under facts closely analogous to those alleged in the Complaint. *See Fearnow I*, 104 Md. App. at 33.

For example, in *Matter of John Doe Trader Number One*, 894 F.2d 240 (7th Cir. 1990), the Seventh Circuit considered whether the Federal Wiretap Act applied to recordings made of an individual on the floor of the Chicago Mercantile Exchange. *Id.* at 241-42. In arguing that he had a reasonable expectation of privacy that would render the recordings unlawful, the recorded individual made almost precisely the same arguments on which Plaintiffs rely. In particular, he claimed that three factors gave rise to a reasonable expectation of privacy: (1) "the private nature of the exchange;" (2) "the security surrounding the Exchange and its membership requirements;" and (3) "the Exchange's rule prohibiting tape recorders on the trading floor." *Id.* at 243; *compare* FAC, ¶ 234. The Seventh Circuit rejected the argument that these factors could give rise to a reasonable expectation of privacy in a busy commercial setting, even one with restricted access and substantial privacy regulations. *Matter of John Doe Trader No. One*, 894 F.2d at 244. The court held, "if Doe really did believe the Exchange rule protected him from the recording of his conversations, his belief was naïve rather than reasonable." *Id.* Here too, no person who took part in conversations that took place in a crowded professional convention could have a reasonable expectation of privacy, especially if they engaged in conversations with strangers or had conversations that could be overheard by others in the room. *See Med. Lab. Mgmt. Consultants*, 306 F.3d at 818 (explaining that an individual "could have no reasonable expectation of limited privacy in a workplace interaction with three strangers that was purely professional and touched upon nothing private and

personal to himself"); *Kemp v. Block*, 607 F. Supp. 1262, 1264-65 (D. Nev. 1985) (explaining that where a third party can overhear a conversation "with the naked ear," a speaker has no reasonable expectation of privacy).

XII. Plaintiffs Thirteenth and Fourteenth Causes of Action Fail to State a Claim for Invasion of Privacy Under Common Law or the California Constitution.

Plaintiffs fail to state a claim for the common-law privacy tort of intrusion into seclusion or for violation of the right privacy under the California Constitution, Art. I, § 1.

A. Plaintiffs Lack Standing To Bring This Claim on Behalf of their Staff.

In support of their assertion of standing to bring this claim on behalf of their staff, Plaintiffs offer a conclusory recital of the elements of associational standing. FAC, ¶ 239. As Plaintiffs evidently concede, *see id.*, artificial entities cannot bring claims for invasion of privacy under common-law privacy torts or the California Constitution. *See Coulter*, 28 Cal. App. 4th at 930 (common-law privacy torts); *SCC Acquisitions, Inc. v. Superior Ct.*, 243 Cal. App. 4th 741, 755-56 (2015) (California Constitution). And Plaintiffs' associational-standing allegation fails for several reasons. First, Plaintiffs cannot assert associational standing on behalf of their employees. Associational standing "has no application to a corporation's standing to assert the interests of its employees." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 n.15 (11th Cir. 1993). "Associational standing is reserved for organizations that 'express the[] collective views and protect the [] collective interests' of their members." *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1109 (9th Cir. 2006).

Second, both the claims raised and the relief sought by Plaintiffs "require[] the participation" of Plaintiffs' individual employees. *Associated Gen. Contractors of Am.*, 713 F.3d at 1194. Privacy claims almost inherently require the participation of that person whose privacy was allegedly invaded. "It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded." *Ass'n for L.A. Deputy Sheriffs v. L.A. Times Commc'ns, LLC*, 239 Cal. App. 4th 808, 821 (2015) (applying Calif. Const. Art. I, sec. 1) (original emphasis); *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal. App. 3d 59, 62 (1975) (same for

common law invasion of privacy).

In addition, because Plaintiffs seek money damages, this case necessarily requires the participation of Plaintiffs' individual employees. "[C]laims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the [associational-standing] test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (holding that union failed to establish associational standing because it sought monetary damages on behalf of its members). As the Supreme Court has explained, "an association's action for damages running solely to its members would be barred for want of the association's standing to sue," because individual members' "participation would be required." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996).

For this reason, courts have applied a near-categorical rule that associations may not sue for money damages on behalf of their members. *See Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (rejecting associational-standing claim because "the damages claims are not common to the entire membership, nor shared by all in equal degree"); *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997) ("It is generally accepted that associational standing is precluded where the organization seeks to obtain damages on behalf of its members."); *Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002) ("[D]amages claims usually require significant individual participation, which fatally undercuts a request for associational standing."); *Air Transp. Ass'n of Am. v. Reno*, 80 F.3d 477, 483 (D.C. Cir. 1996) (explaining that "damages claims are not common to the entire membership, nor shared by all in equal degree, and consequently there is simply no way the extent of the harm to the [association's] members can be determined without individualized proof" (quotations omitted)).

Plaintiffs also lack associational standing to raise common-law and constitutional privacy torts—even to the extent that they seek injunctive relief—because resolving the underlying merits of those claims depends on fact-intensive, situation-specific inquires that "require[] the participation of individual members in the lawsuit." *Associated Gen. Contractors*, 713 F.3d at 1194. Where resolving the merits involves fact-bound inquiries that differ among an organization's

members, the organization lacks associational standing to bring the claims. *See Spindex Physical Therapy USA, Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1293 (9th Cir. 2014).

Here, the privacy torts involve situation-specific, fact-bound inquiries that will necessarily require significant participation by individual employees. "A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matters as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). Similarly, a privacy claim under the California Constitution requires a plaintiff to establish the existence of a legally protected privacy interest, a reasonable expectation of privacy under the circumstances, and a serious invasion of the plaintiff's privacy interest. *Hill v. NCAA*, 7 Cal. 4th 1, 35-37 (1994). Thus, whether Defendants have violated the privacy rights of Plaintiffs' individual employees depends upon specific facts that will differ between employees, such as the specific circumstances of each alleged recording and whether each recorded individual *actually* had an expectation of privacy, *see Hernandez*, 47 Cal. 4th at 286 (requiring that "*the plaintiff has*" an expectation of privacy (emphasis added)). Plaintiffs could not possibly prosecute their privacy claims without extensive involvement by their individual employees, and this defeats associational standing. *Associated Gen. Contractors*, 713 F.3d at 1194. The necessity of individual employees' involvement defeats Plaintiffs' claims for both damages *and* injunctive relief. *Unocal, Inc.*, 176 F.R.D. at 344.

B. Plaintiffs Have Failed to Allege Sufficient Facts Establishing The Elements of Common Law Intrusion.

"A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matters as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez*, 47 Cal. 4th at 286. Plaintiffs have failed to plausibly allege either of these two elements.

First, the Complaint lacks allegations that could give rise to the plausible inference that the unspecified Planned Parenthood staff had a reasonable expectation of privacy in the allegedly

recorded conversations, and in fact undercuts any such inference. Plaintiffs allege that the "nature and subject matter of the conferences were highly sensitive." FAC, ¶¶ 240, 246. However, "highly sensitive" is different from private. National security secrets are highly sensitive, but they would not support a claim for invasion of privacy because they are not personal. "The expectation of limited privacy in a communication . . . is reasonable only to the extent that the communication conveys information private and personal to the declarant." *Med. Lab. Mgmt. Consultants*, 306 F.3d at 816; *see also Wilkins v. Nat'l Broad. Co.*, 71 Cal. App. 4th 1066, 1078 (1999) (noting that there was no intrusion into plaintiffs' "personal lives, intimate relationships, or any other private affairs"); Restatement (Second) of Torts § 652A, cmt. B.

Here, Plaintiffs have specifically alleged that the recorded conversations dealt with business arrangements and the development of professional contacts. FAC, ¶¶ 69, 71, 80, 90, 192. Indeed, the Thirteenth and Fourteenth Claims specifically identify them as "private *business* conversations." *Id.* at ¶¶ 241, 247 (emphasis added). Further, Plaintiffs assert standing to bring statutory claims for unlawfully recording their employees, which standing assumes that the Plaintiffs have a "possessory interest" in the communication. *Smoot v. United Transp. Union*, 246 F.3d 633, 640 (6th Cir. 2001). Such commercial conversations cannot support invasion of privacy claims. Speakers generally have little or no reasonable expectation of privacy in conversations with relative strangers on business topics. *See, e.g.*, *Med. Lab. Mgmt. Consultants*, 306 F.3d at 818 (noting that a plaintiff "could have no reasonable expectation of limited privacy in a workplace interaction with three strangers," especially where they were business-related communications); *Wilkins*, 71 Cal. App. 4th at 1078 (holding that recorded conversation was not private in part because it was conducted with strangers and among strangers).

Second, the Complaint provides little if any detail regarding "the extent to which other persons had access to the subject place, and could see or hear the plaintiff . . . ." *Hernandez*, 47 Cal. 4th at 287. Courts focus heavily on facts regarding the physical space in which the alleged intrusion occurred, including "the physical layout of the area intruded upon, its relationship to the [location] as a whole, and the nature of the activities commonly performed in such places." *Id.* at 290. The Complaint provides no information regarding where at the conferences the allegedly recorded

conversations occurred or whether other attendees could overhear the conversations.

Plaintiffs allege general circumstances at both NAF and PPFA conferences, including the existence of purported non-disclosure agreements, to claim Plaintiffs' staff could be deemed to have a reasonable expectation of privacy in all conversations that took place at the conferences. This theory finds no support in the law. *Matter of John Doe Trader No. One*, 894 F.2d at 243-44 (holding that "the security surrounding the Exchange and its membership requirements" did not create a reasonable expectation of privacy).

Finally, the Complaint fails to plausibly allege that the alleged intrusions occurred in a manner highly offensive to a reasonable person. A reasonable person may find the recording of business conversations at a professional conference to be surprising, perhaps annoying, and possibly even somewhat offensive, but not "highly offensive." The conversations did not take place in enclosed or intimate settings. The subject matter was not personal. Defendants did not invite the revelation of personal secrets, details of private life, or similar confidences. The circumstances of the recordings were not "highly offensive" to a reasonable person.

C. Plaintiffs' allegations fail to state a claim for violation of the right to privacy under the California Constitution.

A claim based upon the California constitutional right to privacy has three elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. Further, "[i]f the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests." *Cnty. of L.A. v. L.A. Cnty. Emp. Relations Comm'n*, 56 Cal. 4th 905, 926 (2013) (citing *Hill*, 7 Cal. 4th at 35-38).

Plaintiffs' Fourteenth Claim tracks word-for-word its Thirteenth Claim for common law intrusion. Thus, Plaintiffs have failed to specify the legally protected privacy interest they believe was invaded. Plaintiffs have also failed to allege facts showing that the alleged invasions of privacy were "sufficiently serious in their nature, scope, and actual or potential impact to constitute an *egregious* breach of the social norms underlying the privacy right." *Id.* at 929 (emphasis added). As noted in the preceding section, recording business conversations in open settings at a professional

conference without the participants' consent falls far short of being an egregious breach of social norms. Also, where the defendant is a private actor, he is not required to establish a "compelling interest" to justify the invasion, but only that is "legitimate" or "important." *Pettus v. Cole*, 49 Cal. App. 4th 402, 440 (1996). California law recognizes such a competing interest in the practice of newsgathering: "[T]he constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may – as a matter of tort law – justify an intrusion that would otherwise be considered offensive." *Shulman*, 18 Cal. 4th at 236. Defendants did not disseminate Plaintiffs' staff's mental health records, *Susan S. v. Israels*, 55 Cal. App. 4th 1290 (1997), or collect DNA samples, *People v. Buza*, 231 Cal. App. 4th 1446 (2014). Recording newsworthy business conversations with Plaintiffs' staff was not an egregious violation of social norms, and Plaintiffs have not met the threshold of California Constitution Art. I, § 1.

CONCLUSION

WHEREFORE Defendants respectfully request this Court dismiss the First Amended Complaint in its entirety under Rules 12(b)(1) and 12(b)(6), and that it grant them all other relief to which they are justly entitled as a matter of law.

Respectfully submitted,

/s/ Catherine Short
Counsel for Defendants CMP and BioMax

Catherine W. Short; [redacted]
LIFE LEGAL DEFENSE FOUNDATION
[redacted]

Charles S. LiMandri; [redacted]
Paul M. Jonna; [redacted]
Teresa L. Mendoza; [redacted]
Jeffrey M. Trissell; [redacted]
FREEDOM OF CONSCIENCE DEFENSE FUND
[redacted]

Attorneys for Defendants

The Center For Medical Progress,
BioMax Procurement Services, LLC

Catherine W. Short; [redacted]
LIFE LEGAL DEFENSE FOUNDATION
[redacted]

Thomas Brejcha, *pro hac vice*
Peter Breen, *pro hac vice*
THOMAS MORE SOCIETY
[redacted]

Matt Heffron, *pro hac vice*
BROWN & BROWN, LLC
[redacted]

Attorneys for Defendant David Daleiden

/s/ Catherine Short
Counsel for Defendant David Daleiden

Edward L. White III, *pro hac vice*
Erik M. Zimmerman, *pro hac vice*
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Vladimir F. Kozina; [redacted]
MAYALL HURLEY, P.C.
[redacted]

Attorneys for Defendant Troy Newman

/s/ Edward L. White III
Counsel for Defendant Troy Newman

Glenn Dickinson; [redacted]
LIGHTGABLER
[redacted]

/s/ Glenn Dickinson
Counsel for Defendant Phillip Cronin

Michael Millen; [redacted]
[redacted]

/s/ Michael Millen
Counsel for Defendant Albin Rhomberg

Charles S. LiMandri; [redacted]
Paul M. Jonna; [redacted]
Teresa L. Mendoza; [redacted]
Jeffrey M. Trissell; [redacted]
FREEDOM OF CONSCIENCE DEFENSE FUND
[redacted]

/s/ Charles S. LiMandri
Counsel for Defendant Gerardo Adrian Lopez

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

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

/s/ Catherine Short
Counsel for Defendants
David Daleiden, CMP, and BioMax