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11 **UNITED STATES DISTRICT COURT,**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 PLANNED PARENTHOOD FEDERATION) Case No. 16-cv-00236 (WHO)
14 OF AMERICA, INC., et al.,)
) Judge William H. Orrick, III
15 Plaintiffs,)
) Defendants' Motion to Dismiss Pursuant
16 vs.) to Rule 12(b)(6) and 12(b)(1) of the
) Federal Rules of Civil Procedure
17 CENTER FOR MEDICAL PROGRESS, et)
18 al.,) Hearing Date: July 6, 2016, 2:00 p.m.
)
19 Defendants.) Courtroom 2, 17th Floor
)

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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, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, 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

1
2 Plaintiffs' Complaint constitutes a baseless attempt to employ RICO's punitive remedies
3 and other civil remedies to suppress and punish Defendants' speech activities. The Complaint
4 asserts a long series of claims against Defendants. But even though Plaintiffs' alleged injuries flow
5 exclusively from Defendants' *publication* of information and recordings of Plaintiffs' employees,
6 Plaintiffs never claim defamation or assert any defamation-type tort. This omission is extremely
7 telling. Plaintiffs' Complaint constitutes a blatant attempt to bypass the restrictions imposed by the
8 First Amendment on collecting damages for speech activities. This attempt fails.

9 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
10 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.
11 662, 678 (2009) (quotation omitted). "Where a complaint pleads facts that are merely consistent
12 with a defendant's liability, it stops short of the line between possibility and plausibility of
13 entitlement to relief." *Id.* (quotation omitted). The complaint must include "factual content that
14 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
15 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.

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

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

26
27 Plaintiffs' RICO claim fails because they have not been "injured in [their] business or
28

1 property by reason of” any alleged racketeering activities, *see* 18 U.S.C. § 1964(c), and they
2 therefore lack statutory RICO standing. “Financial losses, in and of themselves, are insufficient to
3 confer standing under RICO.” *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364 (9th Cir. 2005).
4 “A civil RICO ‘plaintiff only has standing if, and can only recover to the extent that, he has been
5 injured in his business or property by the conduct causing the violation.’” *Canyon Cnty. v.*
6 *Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) (quoting *Sedima v. Imrex Co.*, 473 U.S.
7 479, 496 (1985); *see also Oscar v. Univ. Students Co-op Ass’n*, 965 F.2d 783, 784 (9th Cir. 1992)
8 (en banc) (“[P]ersonal injuries are not compensable under RICO”); 18 U.S.C. § 1964(c) (civil
9 RICO claim requires that a person is “injured in his business or property by reason of a violation of
10 section 1962 of this chapter”). “Without a harm to a specific business or property interest—a
11 categorical inquiry typically determined by reference to state law—there is no injury to business or
12 property within the meaning of RICO.” *Canyon Cnty.*, 519 F.3d at 975 (quotation omitted).

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

23 It is widely recognized that *reputational* harm does not constitute an injury to business or
24 property sufficient to support RICO standing. *See, e.g., In re Teledyne Def. Contracting Derivative*
25 *Litig.*, 849 F. Supp. 1369, 1372 n. 1 (C.D. Cal. 1993) (noting that injuries to “business reputation”
26 are not cognizable under RICO); *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 954
27 (8th Cir. 1999) (“Damage to reputation is generally considered personal injury and thus is not an
28 injury to ‘business or property’ within the meaning of 18 U.S.C. § 1964(c).”); *City of Chi. Heights*

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

7 Plaintiffs attempt to boot-strap RICO standing from non-RICO reputational injury by
8 alleging that they made various financial expenditures as a result of the reputational injuries. *See*
9 FAC, ¶ 161. But “[f]inancial losses, in and of themselves, are insufficient to confer standing under
10 RICO.” *E.I. Dupont*, 431 F.3d at 364. Those financial losses must result from injury to a business
11 or property interest, not from a reputational injury. “Without a harm to a specific business or
12 property interest . . . there is no injury to business or property within the meaning of RICO.” *Diaz*,
13 420 F.3d 897, 900 (9th Cir. 2005) (en banc) (relying on *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992)).

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

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

1 non-parties, such as individual meeting attendees. *See Holmes v. Secs. Investor Prot. Corp.*, 503
2 U.S. 258, 268-69 (1992) (“[A] plaintiff who complains of harm flowing merely from the
3 misfortunes visited upon a third person by the defendant’s acts [is] generally said to stand at too
4 remote a distance to recover.”); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir.
5 1988) (holding that shareholders lacked RICO standing based on injury to corporation).

6 Finally, to the extent that Plaintiffs’ alleged injuries amount to having been fraudulently
7 induced to contract with Defendants, such injuries are not cognizable under RICO. Where, as here,
8 a plaintiff alleges that false statements induced it to enter into a commercial contract, but the
9 plaintiff received at least market price for what it gave, the plaintiff has not been “injured in [its]
10 business or property by reason of” the alleged racketeering activities. 18 U.S.C. § 1964(c); *see*,
11 *e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228-29 (2d Cir. 2008) (explaining that “in
12 [RICO] cases that sound in fraud in the inducement, [expectation damages] plainly are not
13 [available]”); *Heinold v. Perlstein*, 651 F. Supp. 1410 (E.D. Pa. 1987) (rejecting a RICO plaintiff’s
14 argument “that he sustained injury because he lost the benefit of his bargain,” and holding that
15 there is no RICO standing “[w]here, as here, the only property to which a plaintiff alleges injury is
16 an expectation interest that would not have existed but for the alleged RICO violation”); *Price v.*
17 *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that where the plaintiffs did “not
18 allege that the value of the [baseball] cards that they did receive [was] less than the consideration
19 paid,” the plaintiffs had failed to allege an injury supporting RICO standing); *Line v. Astro Mfg.*,
20 993 F. Supp. 1033, 1037 (E.D. Ky. 1998). So also here: the fact that conference organizers
21 received the fees they charged in exchange for the right to attend their events (*see* FAC, ¶ 158)
22 defeats any claim that Plaintiffs were injured “in business or property.”

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

24 To establish a RICO claim, a plaintiff must show that the defendants committed two or
25 more criminal offenses enumerated by the statute. *See* 18 U.S.C. §§ 1961(1) & (5), 1962. Plaintiffs’
26 RICO claim relies on two sets of putative predicate violations: violations of the federal wire-fraud
27
28

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

3 **1. The Complaint fails to sufficiently allege wire fraud.**

4 The three basic elements of a wire or mail fraud claim are “(A) the formation of a scheme to
5 defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent
6 to defraud.” *Eclectic Props. East*, 751 F.3d at 997. The impetus behind the federal wire and mail
7 fraud laws “was to protect the people from schemes to deprive them of their money or property.”
8 *McNally v. United States*, 483 U.S. 350, 356 (1987), *superseded in part on other grounds by* 18
9 U.S.C. § 1364. The vast majority of allegedly deceptive acts do not fall within the term “defraud”;
10 to the contrary, the term is limited to “wronging one in his property rights by dishonest methods or
11 schemes, and usually signif[ies] the deprivation of something of value by trick, deceit, chicane or
12 overreaching.” *Id.* at 358 (quotation marks omitted); *see also Cleveland v. United States*, 531 U.S.
13 12, 19 (2000) (“[Section] 1341 protects property rights only.”). Simply put, the intent of a wire
14 fraud scheme is to financially enrich the participants by wrongly acquiring money or property from
15 someone through deception. *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989).

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

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

1 (“UTSA”). *See* Cal. Civ. Code §§ 3426 *et seq.*; Colo. Rev. Stat. §§ 7-74-101 *et seq.*; Md. Code,
2 Commercial Law, §§ 11-1201 *et seq.*; Tex. Civil Practice & Remedies Code § 134A.001 *et seq.*
3 Under California law, the UTSA preempts and abrogates *all* claims for appropriation of
4 confidential or proprietary information, regardless of whether that information satisfies the
5 statutory definition of a trade secret. *See, e.g., SunPower Corp. v. SolarCity Corp.*, No. 12-cv-
6 00694-LHK, 2012 WL 6160472, at *5-6 (N.D. Cal. Dec. 11, 2012) (collecting numerous
7 authorities); *see also, e.g., Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.*, No. 12-
8 cv-2079, 2013 WL 4027858, at *7 (S.D. Cal. Aug. 5, 2013). To Defendants’ knowledge, the state
9 courts of Colorado, Maryland, and Texas have not addressed this issue, but the overwhelming
10 weight of authority from other UTSA jurisdictions similarly holds that the UTSA abrogates state-
11 law rights in confidential or proprietary information that do not qualify as trade secrets. *See*
12 *SunPower Corp.*, 2012 WL 6160472, at *5-6 (collecting cases); *see also* Robert C. Denicola, *The*
13 *New Law of Ideas*, 28 Harv. J. L. & Tech. 195, 215-16 (2014); James Pooley, Trade Secrets,
14 § 2.03[6] (2009). Thus, in states that have enacted the UTSA, if a person’s informational interest
15 does not constitute a trade secret under the UTSA, the interest does not constitute a protectable
16 property interest under state law at all. *See SunPower Corp.*, 2012 WL 6160472, at *5-6 & sources
17 cited therein. Here, none of the allegations in the Complaint give any reason to believe that the
18 purportedly proprietary or confidential information that Defendants allegedly obtained constitute
19 “trade secrets” under the UTSA. Thus, that information does not constitute property under
20 California, Colorado, Maryland, or Texas law, and its acquisition cannot support a wire-fraud
21 violation.

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

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

10 Importantly, the *Cleveland* Court rejected an expansive view of wire-fraud “property,”
11 because it “stray[ed] from traditional concepts of property,” imposed a “sweeping expansion of
12 federal criminal jurisdiction,” and violated the rule of lenity. *Id.* at 24-25. In contrast to this
13 guidance, Plaintiffs rely on a sweeping, virtually unlimited interpretation of “money or property”
14 through the vague and intangible interests asserted in their Complaint. FAC, ¶ 159; *see also*
15 *Monterey Plaza Hotel Ltd. P’ship v. Local 483 of the Hotel Emps. Union*, 215 F.3d 923, 926-27
16 (9th Cir. 2000) (rejecting a RICO claim based on union activity where “the Union’s conduct may
17 have been vexatious or harassing, but it was not acquisitive”).

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

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

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

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

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

17 The other RICO predicates alleged in the Complaint are putative violations of 18 U.S.C.
18 § 1028, the federal identity-theft statute. See FAC, ¶ 160. The sole factual basis for this claim is
19 Plaintiffs’ assertion that certain Defendants presented fake photo IDs to gain access to certain
20 conferences, meetings, and offices. *Id.* at ¶¶ 85, 86, 113, 120. However, merely possessing a false
21 identification and presenting it to gain entry into a building or meeting does not violate § 1028;
22 otherwise, nearly every college bar across the country would be a RICO enterprise, and countless
23 American college students would be federal felons. See *United States v. Rohn*, 964 F.2d 310, 312
24 (4th Cir. 1992) (“Congress could have criminalized mere possession of false identifications. It did
25 not, however, write the statute in this way.”).

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

1 § 1028(a), and conspired to do the same in violation of 18 U.S.C. § 1028(f).” FAC, ¶ 160. Such
2 allegations are textbook examples of what *does not* satisfy Fed. R. Civ. P. 8(a)(2). “A pleading that
3 offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not
4 do. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Such allegations, “because they are no more
6 than conclusions, are not entitled to the assumption of truth.” *Id.* at 679.

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

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

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

1 the use of any “means of identification” other than the mere name, “Brianna Allen.” But under
2 § 1028(d)(7), a “means of identification” is a name or number “used to identify a specific
3 individual.” Other than an allegation of a news report that one of Daleiden’s classmates with whom
4 he has had no contact for several years was named Brianna Allen, FAC, ¶ 38, the FAC alleges no
5 facts from which a reasonable inference could be drawn that the defendants “knowingly” used an
6 identification with this name for the purpose of identifying this alleged classmate. Allen is a very
7 common surname, and Brianna is a particularly common name among women in their 20s.¹ The
8 fact that an unidentified news source managed to locate someone else of the same name whose path
9 might have crossed Daleiden’s several years ago is an insufficient basis from which to infer any
10 knowing intent to identify this individual.

11 Moreover, the Complaint fails to allege that any defendant used the identification with the
12 intent to commit any federal crime. The only other federal crime alleged in the complaint is wire
13 fraud, which fails to state a claim for the reasons stated above. And even assuming that the
14 Complaint adequately pleaded violations of Cal. Penal Code § 632, violations of that statute do not
15 constitute a state-law felony, as required for a violation of §1028(a)(7). *See* Cal. Penal Code
16 § 632(a) (providing that violations of § 632 are punishable by imprisonment “not exceeding one
17 year”); *United States v. Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) (explaining that
18 Congress has a “long-standing practice of equating the term ‘felony’ with offenses punishable by
19 more than one year’s imprisonment”); *see also Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002)
20 (“California prohibits the recording of a telephone call without consent from all parties, but only if
21 the call includes a ‘confidential communication.’ (Pen. Code, § 632, subd. (a).) Violation of the law
22 is a misdemeanor.”). Moreover, even if the alleged use of the identification were to constitute a
23 violation of § 1028(a)(7), the Complaint does not allege that the identification of Brianna Allen was
24 used more than once. Thus, assuming *arguendo* that the single use of the identification violated

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26
27 ¹ LinkedIn lists 73 profiles for users named “Brianna Allen,” while Facebook has well over one
28 hundred users with the same name.

1 § 1028(a)(7), it would not support the existence of a racketeering enterprise under RICO. *See* 18
2 U.S.C. § 1961(5) (requiring “at least two acts of racketeering activity”).

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

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

12 RICO imposes liability only if the defendant’s conduct is both the but-for cause and the
13 proximate cause of the plaintiff’s asserted RICO injuries. *Holmes*, 503 U.S. at 268-69. This
14 proximate cause requirement demands that there be a “direct relation between the injury asserted
15 and the injurious conduct alleged.” *Id.* at 268. “The proper referent of the proximate-cause
16 analysis” is the predicate violation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006).
17 “[T]he compensable injury flowing from a RICO violation necessarily is the harm caused by the
18 predicate acts.” *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 13 (2010) (quotation marks omitted);
19 *see also Canyon Cnty.*, 519 F.3d at 975 (quoting *Sedima*, 473 U.S. at 496). “When a court evaluates
20 a RICO claim for proximate causation, the central question it must ask is whether the alleged
21 violation led *directly* to [the] plaintiff’s injuries.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d
22 1137, 1149 (9th Cir. 2008) (citation omitted) (emphasis added). “The general tendency of the law,
23 in regard to damages at least, is not to go beyond the first step.” *Associated Gen. Contractors of*
24 *Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (quotation marks omitted).

25 Here, Plaintiffs allege a complex causal chain of events between Defendants’ alleged
26 predicate acts, numerous other intervening acts of Plaintiffs, Defendants, and non-parties, and the
27 injuries that Plaintiffs allegedly sustained from those intervening acts: (1) Defendants used
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1 deception to access abortion-related conferences; (2) Defendants met various abortion-related
2 personnel at the conferences and meetings; (3) Defendants set up follow-up meetings and site visits
3 with some such persons; (4) Defendants secretly recorded conversations at meetings, conferences,
4 and follow-up meetings; (5) Defendants publicly released certain recordings; (6) various unrelated
5 third parties, such as legislative bodies, internet commentators, vandals, and commercial vendors,
6 took adverse actions toward Plaintiffs after viewing Defendants' recordings; and (7) Plaintiffs
7 voluntarily incurred various costs to address such third-party actions, such as responding to
8 government investigations and increasing security.

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

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

28

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

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

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

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

1
2 Plaintiffs' RICO claim suffers from another deficiency. As discussed in detail below, *see*
3 *infra* Part VIII, the First Amendment bars an action to collect money damages for injuries
4 attributable to speech, unless the plaintiff satisfies the exacting standards of *New York Times v.*
5 *Sullivan*—*i.e.*, false statement(s) of fact made with actual malice. *See Food Lion, Inc. v. Capital*
6 *Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). Plaintiffs have made no such allegation here—
7 in fact, despite their numerous claims, they have not alleged a defamation-type tort at all. Their
8 RICO claim, therefore, must be dismissed on this ground as well.

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

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

16 First, the allegations in the Complaint make clear that Defendants and the other individuals
17 who allegedly made recordings were “parties” to the recorded conversations within the meaning of
18 § 2511(2)(d). “[A] ‘party to the communication’ under § 2511(2)(d) is defined as a party who is
19 present when the oral communication is uttered and need not directly participate in the
20 conversation.” *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1361 (S.D. Fla.
21 2005). Where a person wears a hidden recording device on her person and records conversations
22 that take place around her, that person is a “party” to the communications within the meaning of
23 § 2511(2)(d). *Sussman v. Am. Broad. Cos.*, 186 F.3d 1200, 1201-02 (9th Cir. 1999) (applying
24 § 2511(2)(d) because the person who made surreptitious recordings was a “participant” because
25 that person “used various surveillance devices to record the activities around her”). The Complaint
26 expressly alleges that Defendants and their alleged associates recorded conversations in which they
27 took part. *See, e.g.*, FAC, ¶¶ 71, 76, 90, 97, 102, 108, 110, 115, 122-23.

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

13 Thus, “to survive a motion to dismiss, a plaintiff must plead sufficient facts to support an
14 inference that the offender intercepted the communication for the purpose of a tortious or criminal
15 act that is *independent* of the intentional act of recording.” *Caro*, 618 F.3d at 100 (emphasis
16 added); *see also Google Cookie Litig.*, 806 F.3d at 145. Courts will dismiss Wiretap Act claims for
17 failure to plead a tortious or criminal purpose. *See, e.g., Henning v. Narconon Fresh Start*, No. 14-
18 cv-2379, 2015 WL 4601690, at *4 (S.D. Cal. July 28, 2015) (dismissing Wiretap Act claim on Rule
19 12(b)(6) motion for inadequately pleading criminal or tortious purpose); *In re Intuit Privacy Litig.*,
20 138 F. Supp. 2d 1272, 1278-79 (C.D. Cal. 2001) (same).

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

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

9 Further, breach of contract does not qualify as “criminal or tortious” under § 2511(2)(d). It
10 is axiomatic that a breach of contract is not a tort. *See* BLACK’S LAW DICTIONARY 1526 (8th ed.
11 2004) (defining “tort” as “[a] civil wrong, other than a breach of contract . . .”). Nor is breach of
12 contract a criminal offense. Thus, any alleged breach of contract or intent to breach a contract has
13 no bearing on the analysis under § 2511(2)(d).

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

16 Moreover, because both of Plaintiffs’ claims that arise under federal law fail to state a
17 plausible claim for relief, this Court also should dismiss Plaintiffs’ state-law claims for lack of
18 federal jurisdiction. The Court does not have diversity jurisdiction over Plaintiffs’ complaint under
19 28 U.S.C. § 1332 because there is not complete diversity among the parties. *See In re Digimarc*
20 *Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008) (“Diversity jurisdiction
21 requires complete diversity between the parties—each defendant must be a citizen of a different
22 state from each plaintiff.”); FAC, ¶¶ 20-26 (pleading facts showing that several plaintiffs are
23 California citizens for jurisdictional purposes), ¶¶ 29-31, 33-36 (pleading facts showing that several
24 defendants are California citizens for jurisdictional purposes). Because the Court lacks federal-
25 question and diversity jurisdiction over Plaintiffs’ remaining state-law claims, the Court should
26 dismiss all of Plaintiffs’ state-law claims. *See* 28 U.S.C. § 1367(c).

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

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

12 Second, Plaintiffs’ civil conspiracy claim is barred by the single-entity rule. “It is basic in
13 the law of conspiracy that you must have two persons or entities to have a conspiracy. A
14 corporation cannot conspire with itself any more than an individual can, and it is the general rule
15 that the acts of the agent are the acts of the corporation.” *Black v. Bank of Am.*, 30 Cal. App. 4th 1,
16 6 (1994) (quotation omitted); *see also Marmott v. Md. Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir.
17 1986) (applying Maryland law). “When a corporate employee acts in the course of his or her
18 employment, on behalf of the corporation, there is no entity apart from the employee with whom
19 the employee can conspire.” *Black*, 30 Cal. App. 4th at 6. Here, Plaintiffs have claimed that all of
20 the individual defendants are agents of CMP and/or BioMax, and that CMP and BioMax are not
21 legally distinct entities. *See, e.g.*, FAC, ¶ 41, 173. Because a corporation cannot conspire with itself
22 or its agents, the alleged conspiracy identified by Plaintiffs does not include more than one legally
23 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.

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25
26 “[T]he elements of a cause of action for breach of contract are (1) the existence of a
27 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4)
28 the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821

1 (2011); *see also* *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). The Complaint’s
 2 Fourth Claim, brought by PPFA alone, lacks factual allegations that Defendants have breached an
 3 agreement with PPFA and that any alleged breach proximately caused damage to PPFA. The
 4 Complaint’s Fifteenth Claim lacks factual allegations that Defendants’ breached their agreement
 5 with PPGC and PPCFC and that any alleged breach proximately caused damage to these Plaintiffs.

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

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

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

23 Exhibit space is limited. [PPFA/MeDC] reserves the right to award exhibit space only
 24 to those Exhibitors whose exhibits will best meet the educational, scientific, or
 25 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.

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

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

3 Moreover, the purported contractual obligation to participate in the meetings in a way that
4 “would be useful to attendees and beneficial to the interests of their clients and patients” is too
5 indefinite and vague to be enforced, even if it applies to exhibitors rather than sponsors. A contract
6 must state the rights and obligations of the parties with sufficient definiteness and clarity such that
7 “the promise and performances to be rendered by each party are reasonably certain.” *Stice v.*
8 *Peterson*, 355 P.2d 948, 952 (Colo. 1960) (quotation omitted); *see also Soderlun v. Pub. Serv.*
9 *Comm’n*, 944 P.2d 616, 620 (1997) (collecting cases); 1 Williston on Contracts § 4:18 (4th ed.
10 1990) (“It is a necessary requirement that an agreement, in order to be binding, must be sufficiently
11 definite to enable the courts to give it an exact meaning.”); *Moncada v. W. Coast Quartz Corp.*, 221
12 Cal. App. 4th 768, 793 (2013). Here, the agreements do not give the Court any objective, rational
13 way to determine whether Defendants participated in a “useful” or “beneficial” way. FAC, Ex. B, ¶
14 1.

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

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

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

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

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

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

26 Damages are an essential element of pleading a claim for breach of contract. *W. Distrib.*,
27 841 P.2d at 1058. Plaintiffs’ breach of contract claim also fails because the damages they allegedly
28 sustained were not reasonably foreseeable. Plaintiffs allege that they were “forced to expend

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

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

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

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

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

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

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

14 To be considered an intended third-party beneficiary, a party must show that the contract
15 was made *expressly* for his or her benefit, *i.e.*, "in an express manner; in direct or unmistakable
16 terms; explicitly; definitely; directly." *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.App.4th
17 949, 957 (2005). "[A]n intent to make the obligation inure to the benefit of the third party must
18 have been clearly manifested by the contracting parties." *Id.* at 957-58.

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

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

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

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

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

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

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

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

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

1 participation, and obtained the credentials necessary to participate in the conferences. FAC, ¶¶ 105-
2 08, 120-21. Plaintiffs contend that this consent was vitiated because Defendants allegedly
3 misrepresented their identities and intentions in order to gain entry to the meetings. FAC, ¶ 193.
4 Numerous courts have rejected trespass claims where the defendants misrepresented their identities
5 or intentions in order to conduct surreptitious filming on businesses' property. *See, e.g., Desnick v.*
6 *Am. Broad. Cos.*, 44 F.3d 1345, 1351-53 (7th Cir. 1995) (holding that undercover filming of doctor
7 by journalists posing as patients did not give rise to a trespass claim); *Baugh v. CBS, Inc.*, 828 F.
8 Supp. 745, 757 (N.D. Cal. 1993) (rejecting trespass claim where television film crew recorded and
9 broadcast a domestic-violence victim in her home, even though the victim expressly stated that she
10 did not consent to filming in her home); *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609
11 N.W.2d 607, 613-14 (Mich. App. 2000) (holding that a consumer advocate who misrepresented her
12 identity and purpose to gain access to a business's property and surreptitiously film did not commit
13 trespass, because she obtained consent, albeit through misrepresentations). These cases have
14 recognized that such scenarios do not implicate "the specific interests that the tort of trespass seeks
15 to protect." *Desnick*, 44 F.3d at 1352; *see also Berger v. CNN, Inc.*, No. CV 94-46, 1996 WL
16 390528, at *5 (D. Mont. Feb. 26, 1996) (granting summary judgment in favor of defendants on
17 trespass claim because, among other things, the defendants—who were filming the execution of a
18 search warrant—"did not invade the property interests protected by the tort of trespass").

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

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

1 requested nominal damages here. *See* FAC, pp. 65-66. Where a plaintiff “did not request nominal
2 damages” and cannot prove “any other damages as a result of the alleged trespass,” the plaintiff’s
3 trespass claim necessarily fails. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806,
4 820 (9th Cir.2002). Thus, Plaintiffs’ trespass claim necessarily fails.

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

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

16 Plaintiffs concede that Defendants entered the clinics with consent from clinic staff. FAC,
17 ¶ 193. For the reasons stated in the foregoing subsection, this consent was not invalid merely
18 because Defendants allegedly misrepresented their identities and/or intentions. Moreover, as
19 discussed above, this consent was not somehow retroactively vitiated by Defendants’ alleged post-
20 visit disclosure of information that they allegedly agreed to keep confidential. *See id.* (“PPGC and
21 PPRM both conditioned their consent on Defendants’ promise to keep all information
22 confidential.”). As the court explained in *Baugh*, a defendant commits a trespass only if she
23 exceeds the plaintiff’s consent *while on the premises*; later conduct cannot retroactively vitiate the
24 consent to the defendant’s presence on the premises. *See Baugh*, 828 F. Supp. at 756-57 (“[T]he
25 camera crew acted within the scope of Baugh’s consent while they were on the premises. If they
26 exceeded the scope of Baugh’s consent, they did so by broadcasting the videotape, an act which
27 occurred after they left Baugh’s property and which cannot support a trespass claim.”); *see also*
28

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

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

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

10 Plaintiffs’ Seventh Cause of Action raises a claim under California’s Unfair Competition
 11 Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.* “The UCL defines unfair competition as
 12 ‘any unlawful, unfair or fraudulent business act or practice,’” and establishes three distinct theories
 13 of liability. *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009) (quoting Cal. Bus. & Prof. Code
 14 § 17200); *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). The
 15 purpose of the UCL “is the protection of consumers.” *Annuziato v. eMachines, Inc.*, 402 F. Supp.
 16 2d 1133, 1137 (C.D. Cal. 2005). Here, the Complaint fails to allege that Defendants engaged in any
 17 unlawful, unfair, or fraudulent conduct within the meaning of the UCL.

18 **A. Plaintiffs fail to allege any “unlawful” conduct within the meaning of the UCL.**

19 To claim that Defendants have engaged in “unlawful conduct,” Plaintiffs assert that
 20 Defendants have violated 18 U.S.C. §§ 1962(c) and 2511, California Penal Code §§ 632 and 634, §
 21 10-402 of the Courts and Judicial Proceedings Article of the Annotated Maryland Code, and
 22 Section 934 Title XLVII of the Florida Criminal Procedure Law. FAC, ¶ 198. As described in this
 23 Motion, Plaintiffs fail to state claims for relief under these laws, and thus Plaintiffs cannot satisfy
 24 this prong of the UCL. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th Cir. 2014).

25 **B. Plaintiffs fail to allege “unfair” conduct within the meaning of the UCL.**

26 Plaintiffs also cannot satisfy the “unfair” prong of the UCL. Plaintiffs’ UCL claim relies on
 27 alleged harms to their economic interests. FAC, ¶ 201. Where a non-consumer plaintiff invokes the
 28

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

9 **C. Plaintiffs fail to allege “fraud” within the meaning of the UCL.**

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

13 To recover for statements made to the public, a plaintiff must show that a “reasonable
14 consumer” is likely to be deceived by the statement. *Williams v. Gerber Prods. Co.*, 552 F.3d 934,
15 938 (9th Cir. 2008). “The UCL’s purpose is to protect both consumers and competitors by
16 promoting fair competition in commercial markets for goods and services.” *Kasky v. Nike*, 27 Cal.
17 4th 939, 949 (2002). CMP’s videos have nothing to do with commercial activity and make no
18 appeal to “consumers” at all. This prong of Plaintiffs’ claim falls outside the scope of the UCL.

19 To the extent that Plaintiffs’ UCL fraud claim relies on misrepresentations made to
20 Plaintiffs, the claim fails as a matter of law because Plaintiffs cannot obtain any relief under the
21 statute. The only forms of relief available under the UCL are restitution and injunctive relief
22 against repetition of the allegedly unlawful or fraudulent conduct. *Mazza v. Am. Honda Motor Co.*,
23 666 F.3d 581, 591 (9th Cir. 2012). Plaintiffs cannot obtain injunctive relief because they have not
24 alleged that Defendants will make any similarly false, reliance-inducing representations to them in
25 the future. *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1015 (N.D. Cal. 2014) (holding that a plaintiff
26 could not obtain injunctive relief under the UCL because he could not “plausibly allege that he is
27 likely to be fraudulently induced by the same representations he now claims he knows are false”).
28

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

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

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

21 Plaintiffs’ Eighth Cause of Action raises a claim for fraudulent misrepresentation. FAC,
 22 ¶¶ 204-10. A claim for fraudulent misrepresentation requires: “(a) misrepresentation (false
 23 representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to
 24 defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Lazar v.*
 25 *Superior Ct.*, 12 Cal. 4th 631, 638 (1996) (quotation omitted); *Sundberg v. TTR Realty, LLC*, 109
 26 A.3d 1123, 1130 (D.C. 2015) (identical elements under D.C. law); *Bristol Bay Prods., LLC v.*
 27 *Lampack*, 2013 CO 60, ¶ 26 (2013) (identical elements under Colorado law); *Exxon Corp. v.*
 28 *Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011) (identical elements under Texas law);

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

2 Moreover, Plaintiffs must allege a “complete causal relationship between the fraud or deceit
3 and the plaintiff’s damages.” *City Solutions, Inc. v. Clear Channel Commc’ns*, 365 F.3d 835, 840
4 (9th Cir. 2004). “Even at the pleading stage, the complaint must show a cause and effect
5 relationship between the fraud and damages sought; otherwise no cause of action is stated.” *Marble*
6 *Bridge Funding Grp. v. Euler Hermes Am. Credit Indem. Co.*, No. 5:12-cv-02729-EJD, 2015 WL
7 971761, at *5 (N.D. Cal. Mar. 2, 2015) (internal citation omitted).

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

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

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

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

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

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

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

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

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

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

11 Plaintiffs’ Ninth Cause of Action raises a claim for unlawful recording of confidential
12 conversations without the consent of all participants under California Penal Code § 632. *See* FAC,
13 ¶¶ 211-17; *see also* Cal. Penal Code § 637.2 (authorizing civil suits for violations of § 632). This
14 claim, brought by eight corporations, concerns alleged recording of unidentified individuals at the
15 San Francisco NAF conference, FAC, ¶¶ 64-74, 212, 214. It fails to state a claim for relief.

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

18 California law proscribes non-consensual recording of a conversation *only if* that
19 conversation constitutes a “confidential communication.” Cal. Penal Code § 632(a). “[A]
20 conversation is confidential under section 632 if a party to that conversation has an objectively
21 reasonable expectation that the conversation is not being overheard or recorded.” *Flanagan*, 27 Cal.
22 4th at 776-77. “[A] communication is not confidential when the parties may reasonably expect
23 other persons to overhear it.” *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168
24 (2003). “Other persons” are persons other than those “*who listen[] with the speaker’s knowledge*
25 *and intent.*” *Id.* (emphasis added). The statute specifically provides that the category “confidential
26 communication” “excludes a communication made in a public gathering . . . or in any other
27 circumstance in which the parties to the communication may reasonably expect that the
28 communication may be overheard or recorded.” Cal. Pen. Code § 632(c).

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

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

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

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

7 Further, limiting conference attendance to NAF members “and trusted others” again does
8 nothing to prevent these other attendees from overhearing conversations, let alone venue
9 employees and staff. Whether a third party can overhear a conversation has nothing to do with
10 whether that person is a NAF member, or whether they are “trusted.” Even at a limited-attendance
11 event, the reasonable expectation that third parties might overhear a conversation precludes the
12 conversation from being “confidential.” *See Turnbull v. Am. Broad. Cos.*, No. cv-03-3554-SJO,
13 2005 WL 6054964, at *6 (C.D. Ca. Mar. 7, 2005) (noting that where two people talked openly in a
14 closed actors’ workshop and were aware that another person was within earshot, conversation was
15 not confidential). At most, attendees’ affiliation with NAF might affect whether the person was
16 likely to repeat the conversation, a consideration that – as noted above – does not affect the
17 confidentiality analysis. *See Flanagan*, 27 Cal. 4th at 776.

18 Likewise, even if the topic of a conversation is highly sensitive, this does not demonstrate
19 that every conversation at the conference was confidential. “[A]n expectation of a confidential
20 communication cannot be derived from the content of the communication for the purpose of this
21 statute [*i.e.*, § 632].” *Vera v. O’Keefe*, Civ. Case No. 10-cv-1422-L(MDD), 2012 WL 3263930, at
22 *5 n.3 (S.D. Cal. Aug. 9, 2012); *see also Flanagan* 27 Cal. 4th at 773 (rejecting section 632 test
23 based on the content of the communication). The confidentiality of a conversation depends on
24 whether it might be overheard, not whether its topic is “sensitive.”

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

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

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

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

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

26 First, the Complaint fails to plead facts giving rise to a plausible inference that Gatter,
27 Felczer, or Nucatola were acting in their capacities as employees of the Plaintiffs who brought the
28

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

8 Regarding the meeting with Deborah Nucatola, although Plaintiffs identify Nucatola as an
9 employee of Plaintiff PPFA, Plaintiffs have not alleged sufficient facts to show that she was acting
10 in her capacity as a PPFA employee. *Compare* FAC, ¶ 69 (“PPFA Senior Director of Medical
11 Research, Dr. Deborah Nucatola”) *with id.* at ¶¶ 75-76 (description of meeting with Nucatola with
12 no reference to PPFA). Plaintiffs allege essentially the opposite, stating that “Defendants parlayed
13 the ‘professional’ relationships they [had] forged” to set up a networking lunch meeting. FAC,
14 ¶ 75-76; *compare also id.* at ¶ 95 (“Daleiden expressed an interest in discussing PPPSGV’s
15 operations and a possible partnership for fetal tissue donations.”) *with id.* at ¶ 76 (no reference to
16 any Plaintiff corporation and simply stating: “Dr. Nucatola met with Daleiden”). Plaintiffs have not
17 sufficiently pleaded facts alleging that Plaintiff PPFA has standing to bring a claim for violation of
18 Penal Code section 632 for statements made by Nucatola.

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

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

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

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

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

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

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

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

25 Plaintiffs’ Tenth Claim is premised on the Defendants’ alleged trespass onto NAF’s leased
26 property at the 2014 NAF conference held in San Francisco. FAC, ¶ 215-19. California Penal Code
27 § 634 makes it a criminal offense for any person to “trespass[] on property for the purpose of
28

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

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

8 **A. Plaintiffs Do Not Have Standing to Bring a Claim Under Penal Code Section**
 9 **634 Because The Alleged Trespass Was Against NAF.**

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

12 Only the National Abortion Federation could bring a claim for trespass by Defendants at the
 13 2014 NAF annual conference in San Francisco. *See Smith v. Cap Concrete, Inc.*, 133 Cal. App. 3d
 14 769, 774 (1982) (“An action for trespass may technically be maintained only by one whose right to
 15 possession has been violated.”); *see also* FAC, ¶ 219 (“NAF possessed a right to exclusive use of
 16 the real property they leased for the 2014 NAF conference held in San Francisco in 2014.”).
 17 Second, within the Invasion of Privacy Act, claims must be brought by the party whose rights were
 18 violated, not merely by parties who suffered alleged tangential injuries. For example, a claim for
 19 violation of Penal Code section 632 can only be brought by the individual recorded – not by others
 20 who may suffer damages as a result of that recording. *See Ion Equip. Corp.*, 110 Cal. App. 3d at
 21 880 (recorded communications must be “communications of corporations”); *see also Turnbull*,
 22 2004 WL 2924590, at *16 (refusing to enjoin the defendant from using hidden cameras in
 23 newsgathering as a result of California Penal Code section 632 because it would be an assertion of
 24 the rights of third parties).

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

1 then allege only that “NAF possessed a right to exclusive use of the real property it leased for the
2 2014 NAF conference held in San Francisco in 2014.” *Id.* at ¶ 219. At no point in the FAC do
3 Plaintiffs identify the real property where the NAF conference was held within San Francisco or
4 the nature of the “real property” NAF purportedly “leased” for the meeting. Absent identification of
5 the site of the meeting and the nature of the possessory interest, Plaintiffs cannot state that NAF
6 had any interest in the property, let alone a possessory interest with exclusive control necessary to
7 sustain a trespass claim. Plaintiffs’ pleading offers nothing more than insufficient “labels and
8 conclusions” that NAF had a possessory interest in real property. *Iqbal*, 556 U.S. at 678.

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

11 Penal Code section 637.2 creates a cause of action for persons injured by “a violation” of
12 any provision of the chapter. Thus, in bringing a claim under Penal Code § 634, a litigant must first
13 plead that there has been a violation of Penal Code section 634, a criminal statute, an element of
14 which is the commission of a trespass. Consequently, to maintain that Defendants committed
15 trespass against NAF, Plaintiffs must also plead the existence of any of the aggravating factors that
16 must be present for criminal trespass under California law. *See, e.g.*, Cal. Penal Code §§ 601, 602,
17 602.5, 602.8. Absent one of these statutory aggravating factors, Defendants cannot be liable for
18 committing a trespass against NAF under the California Penal Code, and thus cannot be liable to
19 Plaintiffs for any highly tangential injury they suffered.

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

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

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

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

12 Florida law prohibits recording oral communications when "uttered by a person exhibiting
13 an expectation that such communication is not subject to interception under circumstances
14 justifying such expectation and does not mean any public oral communication uttered at a public
15 meeting" Fla. Stat. § 934.02. This means that "for an oral conversation to be protected under
16 section 934.03 *the speaker must have an actual subjective expectation of privacy, along with a*
17 *societal recognition that the expectation is reasonable.*" *State v. Smith*, 641 So.2d 849, 852 (Fla.
18 1994) (quotation marks and citations omitted) (emphasis added).

19 Similarly, Maryland law prohibits recording "oral communications" from a "private
20 conversation." Md. Code Ann., Cts. & Jud. Proc. §§ 10-401(13)(i), 10-402(a)(1). Plaintiffs must
21 have "both a subjectively and objectively reasonable expectancy of privacy." *Hawes v. Carberry*,
22 103 Md. App. 214, 220 (1995). Maryland has adopted the federal standard emerging from the
23 Fourth Amendment to the United States Constitution for "reasonable expectation of privacy" for
24 purposes of the Maryland Wiretap Act. *Fearnow v. Chesapeake & Potomac Tel. Co.*, 104 Md. App.
25 1, 33 (1995) ("*Fearnow I*"); compare *Katz v. United States*, 389 U.S. 347 (1967).

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

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

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

17 Instead of making the requisite allegations about the objective and subjective
18 reasonableness of an expectation of privacy in conversations, Plaintiffs’ claim that *all*
19 conversations occurring at NAF meetings are necessarily clothed with an objective and subjective
20 reasonable an expectation of privacy. See FAC, ¶¶ 228, 234; see also *id.* at ¶ 90. This view cannot
21 be squared with the text of either the Florida or Maryland law or the respective Supreme Courts’
22 interpretations of the statutes. See Md. Code Ann., Cts. & Jud. Proc. §§ 10-402(a)(1); *Fearnow II*,
23 342 Md. 363; Fla. Stat. § 934; *Smith*, 641 So. 2d at 852. The notion that every participant in every
24 conversation at a multi-day conference with hundreds of attendees would harbor an objectively
25 reasonable expectation of privacy defies human experience. FAC, ¶ 66, 118.

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

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

10 Florida has specifically rejected the proposition that closed business dealings meet the test
11 for “reasonable expectation of privacy” for section 934. *Cohen Bros., L.L.C. v. ME Corp., S.A.*, 872
12 So. 2d 321, 324-25 (Fla. Dist. Ct. App. 2004); *Morningstar v. State*, 428 So. 2d 220, 221 (Fla.
13 1982); *Jatar v. Lamaletto*, 758 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 2000). Importantly, the
14 agreements which allegedly state that Defendants agreed that their interests were consistent with
15 those of Plaintiffs nowhere establish that Plaintiffs would have a “reasonable expectation of
16 privacy” in their communications. Instead, by the absence of any discussion of privacy or
17 confidentiality, they clearly show that Plaintiffs’ conferences were events where there would be no
18 expectation of privacy. Compare FAC, Ex. B, Exhibit Space ¶ 1 (Terms and Conditions for
19 exhibitors at PPFA conferences – not containing any discussion of confidentiality, and only stating:
20 “PPFA may exclude exhibitors whose products or services are not consistent with PPFA policies”);
21 Ex. D, Exhibit Space ¶ 1 (same); with *id.* at Ex. H (Confidentiality Agreement for exhibitors at
22 NAF conferences).

23 As to the NAF conference held in Maryland, the execution of non-disclosure agreements is
24 irrelevant to the “reasonable expectation of privacy” analysis. *Stewart v. Evans*, 351 F.3d 1239,
25 1244 (D.C. Cir. 2003) (“This Court has held repeatedly that the Fourth Amendment [reasonable
26 expectation of privacy] does not prohibit the obtaining of information revealed to a third party . . .
27 even if the information is revealed on the assumption that it will be used only for a limited purpose
28 and the confidence placed in the third party will not be betrayed.”). “Statements that a person

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

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

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

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

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

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

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

9 In support of their assertion of standing to bring this claim on behalf of their staff, Plaintiffs
 10 offer a conclusory recital of the elements of associational standing. FAC, ¶ 239. As Plaintiffs
 11 evidently concede, *see id.*, artificial entities cannot bring claims for invasion of privacy under
 12 common-law privacy torts or the California Constitution. *See Coulter*, 28 Cal. App. 4th at 930
 13 (common-law privacy torts); *SCC Acquisitions, Inc. v. Superior Ct.*, 243 Cal. App. 4th 741, 755-56
 14 (2015) (California Constitution). And Plaintiffs’ associational-standing allegation fails for several
 15 reasons. First, Plaintiffs cannot assert associational standing on behalf of their employees.
 16 Associational standing “has no application to a corporation’s standing to assert the interests of its
 17 employees.” *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 n.15
 18 (11th Cir. 1993). “Associational standing is reserved for organizations that ‘express the[] collective
 19 views and protect the [] collective interests’ of their members.” *Fleck & Assocs. v. City of Phoenix*,
 20 471 F.3d 1100, 1109 (9th Cir. 2006).

21 Second, both the claims raised and the relief sought by Plaintiffs “require[] the
 22 participation” of Plaintiffs’ individual employees. *Associated Gen. Contractors of Am.*, 713 F.3d at
 23 1194. Privacy claims almost inherently require the participation of that person whose privacy was
 24 allegedly invaded. “It is well settled that the right of privacy is purely a personal one; it cannot be
 25 asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must
 26 plead and prove that *his* privacy has been invaded.” *Ass’n for L.A. Deputy Sheriffs v. L.A. Times*
 27 *Commc’ns, LLC*, 239 Cal. App. 4th 808, 821 (2015) (applying Calif. Const. Art. I, sec. 1) (original
 28 emphasis); *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal. App. 3d 59, 62 (1975) (same for

1 common law invasion of privacy).

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

12 For this reason, courts have applied a near-categorical rule that associations may not sue for
13 money damages on behalf of their members. *See Warth v. Seldin*, 422 U.S. 490, 515-16 (1975)
14 (rejecting associational-standing claim because "the damages claims are not common to the entire
15 membership, nor shared by all in equal degree"); *Nat'l Coal. Gov't of Union of Burma v. Unocal,*
16 *Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997) ("It is generally accepted that associational standing is
17 precluded where the organization seeks to obtain damages on behalf of its members."); *Penn.*
18 *Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002)
19 ("[D]amages claims usually require significant individual participation, which fatally undercuts a
20 request for associational standing."); *Air Transp. Ass'n of Am. v. Reno*, 80 F.3d 477, 483 (D.C. Cir.
21 1996) (explaining that "damages claims are not common to the entire membership, nor shared by
22 all in equal degree, and consequently there is simply no way the extent of the harm to the
23 [association's] members can be determined without individualized proof" (quotations omitted)).

24 Plaintiffs also lack associational standing to raise common-law and constitutional privacy
25 torts—even to the extent that they seek injunctive relief—because resolving the underlying merits
26 of those claims depends on fact-intensive, situation-specific inquiries that "require[] the
27 participation of individual members in the lawsuit." *Associated Gen. Contractors*, 713 F.3d at
28 1194. Where resolving the merits involves fact-bound inquiries that differ among an organization's

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

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

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

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

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

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

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

23 Second, the Complaint provides little if any detail regarding “the extent to which other
24 persons had access to the subject place, and could see or hear the plaintiff” *Hernandez*, 47 Cal.
25 4th at 287. Courts focus heavily on facts regarding the physical space in which the alleged intrusion
26 occurred, including “the physical layout of the area intruded upon, its relationship to the [location]
27 as a whole, and the nature of the activities commonly performed in such places.” *Id.* at 290. The
28 Complaint provides no information regarding where at the conferences the allegedly recorded

1 conversations occurred or whether other attendees could overhear the conversations.

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

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

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

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

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

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

CONCLUSION

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

16 Respectfully submitted,

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

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

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