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Attorney for Defendant Rhomberg

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., et al.,

Plaintiffs,

vs.

CENTER FOR MEDICAL PROGRESS, et
al.,

Defendants.

NO.: 16-cv-00236 (WHO)

**DEFENDANT RHOMBERG'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT; POINTS
AND AUTHORITIES THEREON**

[F.R.CIV.P. 56]

Judge: Orrick
Date: January 16, 2019
Time: 2:00 p.m.
Location: Courtroom #2 (17th Fl.)

1 TO THE PLAINTIFFS IN THIS ACTION:

2 Please take notice that on Wednesday, January 16, 2019, at 2:00 p.m., or as soon thereafter
3 as the matter can be heard in Courtroom #2, 17th Fl., of the United States District Court located at
4 450 Golden Gate Ave., San Francisco, CA, defendant Albin Rhomberg will, and hereby does,
5 move this court for FRCP Rule 56(d) Summary Judgment on the complaint and all causes of action
6 therein filed against him by all Plaintiffs (including, without limitation, PLANNED
7 PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD: SHASTA-
8 DIABLO, INC. dba PLANNED PARENTHOOD NORTHERN CALIFORNIA; PLANNED
9 PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC
10 SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED
11 PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PLANNED
12 PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES,
13 INC (aka PLANNED PARENTHOOD CALIFORNIA CENTRAL COAST); PLANNED
14 PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED
15 PARENTHOOD OF THE ROCKY MOUNTAINS; and PLANNED PARENTHOOD GULF
16 COAST AND PLANNED PARENTHOOD CENTER FOR CHOICE).

17 Alternately, if said motion is not granted in full, defendant Rhomberg will move the court
18 for partial Summary Judgment against all Plaintiffs as follows:

- 19 1. As to each Plaintiff, said Plaintiff cannot meet the elements of its First Claim because
20 they incurred no proximately caused damages.
- 21 2. As to each Plaintiff, said Plaintiff cannot meet the elements of its Third and Eighth Claim
22 because they incurred no proximately caused damages.
- 23 3. As to each Plaintiff, said Plaintiff lacks standing to bring its Seventh Claim.

24
25 PLEASE TAKE FURTHER NOTICE that the court will decide this motion based upon this
26 notice and the incorporated points and authorities, the declaration of Michael Millen, Esq., any
27 other papers filed by plaintiff between now and the hearing, the complete file and records of this
28

1 action, and such other oral and documentary evidence which the court allows for presentation at the
2 time of hearing.

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Dated: December 4, 2018



MICHAEL MILLEN, ESQ.
ATTORNEY FOR
DEFENDANT RHOMBERG

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

The issues upon which defendant Rhomberg seeks summary judgment are each and every cause of action of each and every plaintiff against said defendant. The issues upon which defendant Rhomberg seeks partial Summary Judgment are as follows:

- 1. As to each Plaintiff, said Plaintiff cannot meet the elements of their First Claim because they incurred no proximately caused damages.
- 2. As to each Plaintiff, said Plaintiff cannot meet the elements of their Third and Eighth Claim because they incurred no proximately caused damages.
- 3. As to each Plaintiff, said Plaintiff lacks standing to bring their Seventh Claim.

INTRODUCTION

Defendant Albin Rhomberg is named in three claims in this action: the First (RICO), the Third (Civil Conspiracy) and the Seventh (Calif. Bus & Prof. Code 17200 – UCL). Plaintiffs state that their civil conspiracy claim seeks to recover “[a]ll damages by all Plaintiffs claiming fraud.” Declaration of Michael Millen in Support of Rhomberg’s Motion for Summary Judgment (“Millen Dec.”), Exhibit A (Plaintiffs’ Second Amended Initial Disclosures) at 11. Thus, the Third Claim (Civil Conspiracy) as to Mr. Rhomberg is essentially the Eighth Claim, for fraudulent misrepresentation, as there are no other causes of action based on fraud.

There is no genuine dispute as to the material facts and no Plaintiff can establish all necessary elements of each of their three claims. As to the First and Eighth Claims, Plaintiffs cannot show proximately caused damages, an element of both claims. As to the Seventh Claim, Plaintiffs seek only injunctive relief and lack standing to seek such relief because there is no real and immediate threat of repeated injury.

For these reasons, the Court should grant summary judgment for Defendant Albin Rhomberg.

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STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.” FRCP Rule 56(c). “Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Defendants may seek summary judgment “upon all or any part” of a claim or action. F.R. Civ. P. Rule 56(a)

INTRODUCTION

In their First Amended Complaint, Plaintiffs alleged that the Defendants engaged in a conspiracy involving fake identities, fake companies, fake ID’s, illegal recording, and misleadingly edited videos, with the purpose of harming Plaintiffs. Based on these allegations, they brought claims under RICO, California Bus. & Prof. Code §17200, and fraudulent misrepresentation against all Defendants. Defendant Rhomberg seeks judgment on all these claims.

ARGUMENT

I. PLAINTIFFS CANNOT SHOW PROXIMATELY CAUSED DAMAGES AS TO THE FIRST CLAIM (RICO)

In its Order on Motions to Dismiss and Strike in this case, the Court ruled that Plaintiffs could not rest their RICO claim on their mail and wire fraud allegations, nor on any claim alleged by Plaintiffs other than that of producing or transferring false identification documents. Order on Motions to Dismiss and Strike (Dkt. 124) at 11-13. Thus, plaintiffs only have a RICO cause of action to the extent they can show damages directly flowing from the production or transference of those false documents.

1 All ten plaintiffs claim that they suffered RICO damages because the false IDs enabled
 2 defendants to create surreptitious video recordings. However, this Court noted that RICO imposes
 3 liability only if the defendant’s conduct is the proximate cause of the plaintiff’s asserted RICO
 4 injuries. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992). Any recoverable
 5 damages occurring by reason of a violation of §1962(c) will flow from the commission of the
 6 predicate acts. *Sedima v. Imrex Co.* 473 U.S. 479, 497 (1985). “[T]he compensable injury flowing
 7 from a [RICO] violation ... ‘necessarily is the harm caused by [the] predicate acts.’” *Hemi Grp.,*
 8 *LLC v. City of N.Y.*, 559 U.S. 1, 13 (2010).

9 More specifically, this Court “thoughtfully reviewed the cases cited by both sides” on the
 10 issue of proximate causation and concluded that Plaintiffs “may not be able to recover for damages
 11 that were not *directly* caused by the actions of defendants, but caused instead by the intervening
 12 actions of *third parties*” Order (Dkt. 124) at 16 (original emphasis).

13 The Court went on to note that some of Plaintiffs’ alleged damages, specifically “the increase
 14 in security costs at conferences, meetings, and clinics that plaintiff incurred when *they learned* about
 15 defendants’ infiltration of their conferences, meetings, and clinics,” were more directly tied to
 16 defendants’ conduct and might be recoverable. *Id.* (original emphasis). Using this rationale,
 17 defendant Rhomberg requests judgment in his favor on the RICO claim because none of the damages
 18 meet the Court’s enunciated test.

19 **A. Seven Plaintiffs Have made No Claim of Infiltration and Thereby**
 20 **Have No Claim of “Direct” Causation Damages for a RICO claim**

21 Three of the plaintiffs (PPFA, PPRM, PPGC/PPCFC¹) claim that defendants
 22 fraudulently gained entrance to their own physical facilities or conferences and surreptitiously
 23 engaged in video recording. First Amended Complaint (“FAC”) (Doc. 59) ¶¶ 80, 109, 111, and
 24 191. None of the other seven plaintiffs (PPNC, PPMM, PPSW, PPLA, PPOSBC, PPCCC²,
 25 and PPSGV) make such a claim. Thus, to the extent any of these seven suffered damages

26 ¹ PPCFC leases space from PPGC and operates out of PPGC’s facility. FAC ¶28. Plaintiffs
 27 treat the entities as one for purposes of damages, and Defendant will do the same.

28 ² PPSBVSLO has changed its name to Planned Parenthood California Central Coast
 (“PPCCC”)

1 related to the video recordings, the damage could only have been caused by the publication of,
2 or commentary upon, the video recordings themselves.

3 However, this court has already found that “plaintiffs may not be able to recover for
4 damages that were not directly caused by the actions of defendants, but caused instead by
5 intervening actions of third parties who were motivated by the videos and press release[s] by the
6 Human Capital Project.” Order (Dkt. 124) at 16. This ruling is a natural outflow of *Hemi Grp.,*
7 *LLC*, 559 U.S. at 12, which rejected a RICO plaintiff’s “foreseeability” of harm test in favor of
8 a “direct relationship” test.

9 A review of the discovery responses by these seven plaintiffs confirms that all of their
10 claimed damages have nothing to do with the “fraudulently gained entrance” allegations. As an
11 example, PPNC claims as damages various security and IT enhancements, staff safety training,
12 and “staff time” related to the release of the videos. Millen Decl., Ex. 2 (Damages Chart), pp.
13 028-029. PPM claims similar expenses along with graffiti removal and security guard
14 expenses. *Id.* at 031-041. The other affiliates are similar, i.e., PPSW (*Id.* at 043-044), PPLA
15 (*Id.* at 046-053), PPOSBC (*Id.* at 055-056), PPCCC (*Id.* at 058-060), and PPPSGV (*Id.* at 062-
16 66).³ None of these bear any direct connection to the physical act of any defendant gaining
17 entrance to the facilities or conferences of PPFA, PPRM, PPGC/PPCFC.

18 **B. One Plaintiff has Made No Claim for Damages and therefore has no**
19 **RICO Claim**

20 One of the plaintiffs in this action, PPRM, has stated it is only seeking injunctive relief
21 in this action and has made no claim for damages. Millen Decl. Ex. 2, p. 10, fn. 2. Obviously,
22 defendant Rhomberg has no RICO liability as against a party who does not claim to have
23 suffered damage.⁴

24 _____
25 ³ Some of these affiliates ask for damages related to website hacking, but the court has
26 already indicated that the website hack by unknown third parties is too attenuated for a RICO
27 damages claim. Order on Motions to Dismiss and Strike (Dkt. 124) at 16.

28 ⁴ During this litigation, PPFA has given “grants” (apparently out of generosity and not out of any
legal obligation) to various of its affiliates such as PPRM to help pay for security upgrades.
Regardless, PPFA’s discretionary decision to provide security grants to affiliates is not a
proximately caused damage attributable to any defendant’s escorted entry into a PPGC or PPRM

C. The Remaining Three Plaintiffs Who Claim Infiltration Cannot Show “Direct” Causation of Damages for a RICO claim

As noted previously, this court left open the possibility that the plaintiffs who alleged they were “infiltrated” and claimed damages (PPFA, PPGC/PPCFC) might be able to prove a causal nexus in regards to “the increase in security costs at conferences, meetings, and clinics that plaintiff incurred when *they learned* about defendants’ infiltration of their conferences, meetings, and clinics”. Order (Dkt. 124) at 16. However, “[h]ow far the actual causal link stretches for each category of damages plaintiffs allege is something that will need to be developed in discovery and tested on summary judgment.” *Id.* at 16-17.

i. PPGC/PPCFC Cannot Show a Causal Nexus for Damages

The complaint and plaintiffs’ discovery responses show there is no such direct causal relationship between the PPGC/PPCFC damages and defendants’ actions. In regards to defendants’ alleged infiltration of PPGC, the complaint states that on April 9, 2015, “PPGC staff permitted Defendants into the private facility to discuss a possible professional relationship”. FAC p. 33, ¶116. However, the only damages PPGC is claiming are security equipment, security staff, legal fees related to government investigations, and staff time related to the release of videos. Millen Decl. Ex. 2 (Damages Chart), p. 068. None of these claimed expenses would have prevented Daleiden and Merritt from entering the facility, nor will they prevent a future similar infiltration. Hiring additional security personnel would not have stopped PPGC staffers from ushering defendants into the facility. Similarly, installing physical security enhancements would not have prevented defendants from entering and touring the facility as guests. Simply put, none of PPGC’s expenditures are even rationally related to foiling the methods, largely based on personal interactions, that defendants used to gain access

facility nor any defendants’ attendance at a PPFA conference. Millen Decl. Ex. 2 (Second Amended Response to Newman Interrogatory), No. 20, p. 10 [PPFA damages itemization showing grants to affiliates]; Millen Decl Ex. 5 (PPFA Amended Response to Rhomberg Interrogatory), No. 19, pp. 5-7; Millen Decl Ex. 6 (PPFA Second Amended Response to Rhomberg Interrogatory), No. 20, pp. 5-6. Moreover, these grants to PPRM, all made in March 2016, were for security costs related to “increased opposition activity” due to reaction from the videos, not because either PPRM or PPFA simply learned that Defendants had entered the facility. Millen Decl. Ex. 8, Bates 15550 -15556.

1 to PPGC’s facility. Much less were such expenditures “directly caused” by Defendants’
2 presence in PPGC’s facility.⁵

3 ii. PPFA Cannot Show a Causal Nexus for Damages

4 PPFA claims that it incurred certain costs related to averting a future sham company from
5 infiltrating its conferences. Before analyzing the exact nature of those costs, however, it is necessary
6 to review the principle the Court considered in ruling on the Motion to Dismiss that “the
7 compensable injury flowing from a [RICO] violation ... ‘necessarily is the harm caused by [the]
8 predicate acts.’” *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 13 (2010) (quotation marks omitted).

9 In the instant case, the sole type of predicate act at issue is that of producing and/or
10 transferring fake ID’s (18 U.S.C. §1028). *See* Order (Dkt. 124) at 11 (“Plaintiffs, therefore, cannot
11 rest their RICO claim on their mail or wire fraud allegations.”) As explained below, this alleged
12 violation does not even reach the first step in the alleged causation chain, summarized by this Court
13 as “(1) defendants used the fake identifications and communications to access the meetings and
14 record plaintiffs’ staff, and (2) plaintiffs were harmed by the breach of their security protocols.” (*Id.*
15 at 14.)

16 While PPFA has conclusorily alleged that Defendants used fake IDs in order to gain access to
17 its conferences, PPFA never alleged that it used or relied on the *contents* of those IDs to determine
18 suitability for admission to a conference. Discovery has confirmed that Plaintiffs took no steps to
19 vet the names of exhibitor personnel before or at the time of entry into the conferences. *See* Millen
20 Decl., Ex. 3 (Plaintiffs’ Response to Daleiden Interrogatory), pp. 6-8 (conspicuously omitting vetting
21 of attendees as a step PPFA took to ensure that the attendance at any Planned Parenthood conference
22 was limited to “health care providers and other professionals committed to providing high quality
23

24
25 ⁵ Like PPRM, PPGC also received security grants from PPFA, for which PPFA is seeking
26 recovery. As noted above, PPFA’s discretionary grant is not damages chargeable to
27 Defendants. Moreover, as with the PPRM grants, these grants were neither for expenditures
28 in any way related to preventing a similar infiltration, nor for curing any negative
consequences of Defendants’ mere presence at the facility. Millen Dec. Ex. 2 (Damages
Chart), at pp. 068; Millen Decl. Ex. 8, Bates 329-333 and 15527-32,

1 reproductive health care”). In the case of Defendants Daleiden and Lopez ⁶, BioMax’s pre-existing
 2 relationship with Deborah Nucatola assured their admission. Millen Dec. Ex. 4 (PPFA Response to
 3 Rhomberg Interrogatories), No. 6, pp. 7-8 (“Plaintiff did not require a reference for BioMax to
 4 exhibit at the 2014 North American Forum on Family Planning due to the fact that BioMax was
 5 known to Dr. Deborah Nucatola, (Plaintiff’s then-Senior Director of Medical Services).”) *See also*
 6 FAC ¶84.

7 Thus, the act of producing a fake ID with an assumed name, that Daleiden later used at a
 8 PPFA conference, was unnecessary to gain access to the conferences. Daleiden could have used his
 9 own name and ID, *as Defendant Adrian Lopez did*, and he would have been admitted to the PPFA
 10 conferences, *just as Lopez was*. (See FAC ¶36 (“Lopez . . . represented himself. . . as Biomax’s
 11 ‘Procurement Technician’”); ¶83 (“...Lopez registered as Exhibitor[.]”); *see also* Exhibits A & C to
 12 FAC, p. 3 (showing “Adrian Lopez” as being a BioMax representative); *by contrast, compare with*
 13 ¶31 (Daleiden was “[u]sing the fake name Robert Daoud Sarkis”).

14 The production of fake IDs was not a proximate cause, even of the “but for” variety, of
 15 Defendant Daleiden’s or Lopez’ admission to PPFA conference. *A fortiori* there is no proximate
 16 causation between the production of IDs and any security measures PPFA took upon learning of
 17 Defendants’ infiltration.

18 Even if there were proximate causation between producing a fake ID and Daleiden’s
 19 admission to the PPFA conferences, PPFA’s later security measures, as thoroughly explained in the
 20 following section, are well beyond the “first step” required to find proximately caused damages
 21 under RICO.⁷ As the Supreme Court reiterated in *Hemi Group*, “[t]he general tendency of the law,
 22 in regard to damages at least, is not to go beyond the first step,” . . . and that “general tendency”
 23

24 _____
 25 ⁶ Contrary to the allegations in the Complaint, only Daleiden and Lopez attended the three PPFA
 26 conferences at issue. Merritt did not attend any PPFA conference. Doc. 78-1, ¶6 (Merritt Decl.
 27 ISO Motion to Strike); Millen Decl. Ex. 7 (CMP/BioMax Responses to PPFA Interrogatories),
 28 Nos. 13 & 16, pp. 9-12).

⁷ Because, as noted above, the *use* of fake IDs is not a RICO predicate act, even accepting *arguendo*
 Plaintiffs’ theory of causation, the use itself would be the “first step” after the RICO predicate act,
 and any monetary damages incurred by Plaintiffs would be many steps beyond that first step.

1 applies with full force to proximate cause inquiries under RICO.” *Hemi Group, supra*, 559 U.S. at 2
 2 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
 3 519, 534 (1983)) (internal citation omitted).

4 Plaintiffs cannot show any proximately caused damages to support their RICO claim. All of
 5 the damages alleged in the complaint arose from a long chain of events, including public reaction to
 6 the video and Plaintiffs’ own response to that reaction. No damages were proximately caused by
 7 Defendants’ alleged production or transfer of fake IDs, or even the subsequent use of a fake ID.
 8 Summary judgment should be granted against all Plaintiffs as to the First Claim (RICO).

9 II. PLAINTIFFS CANNOT PREVAIL AGAINST RHOMBERG ON THEIR EIGHTH CLAIM
 10 (FRAUDULENT MISREPRESENTATION)

11 “Under California law, “[a] complete causal relationship between the fraud or deceit and the
 12 plaintiff’s damages is required.” *City Solutions, Inc. v. Clear Channel Commc’ns*, 365 F.3d 835, 840
 13 (9th Cir. 2004) (quoting *Small v. Fritz Cos.*, 30 Cal.4th 167, 202 (2003)). For the reasons stated in
 14 the prior section, Plaintiffs PPGA, PPRM, and PPGC/PPCFC, the only Plaintiffs bringing a fraud
 15 claim, cannot show the requisite complete causal relationship between Defendants’ alleged
 16 fraudulent misrepresentations and any of their claimed damages.

17 As with Plaintiffs’ RICO claim, this Court noted in its Order denying other defendants’
 18 Motion to Dismiss that many of Plaintiffs’ claimed damages were caused indirectly, “by the
 19 *publication* of the videos and related Human Capital Project press which resulted – through the acts
 20 of third-parties – in increased security threats, harassment and acts of violence.” The Court agreed
 21 that such damages must be distinguished from those which are recoverable, i.e., “damages that were
 22 *directly* caused by the breaches of plaintiffs’ security measures themselves.” Order (Dkt. 124) at
 23 33-34 (original emphasis). The Court noted that “plaintiffs may have implemented security measures
 24 simply upon discovering defendants’ breaches before the full extent of the publications was known
 25 and the backlash from them occurred.” *Id.* at 34.

26 As discussed in the preceding section, all security measures undertaken at clinics were in
 27 response to publication of the videos. There were no damages for security costs incurred by PPGC or
 28

1 PPRM on account of simply learning of Defendants’ entry into the clinics because those entries were
2 by invitation, unscrupulously gained or not.

3 Similarly, while Plaintiff PPFA spent money to increase numerous aspects of conference
4 security in response to learning of Defendants’ infiltration, none of these measures were in any sense
5 remedial vis-à-vis that infiltration either. In other words, none of the expenditures fixed anything
6 broken by the Defendants. PPFA did not have to change locks on doors, distribute new passcodes on
7 computer terminals, or take any other steps to remediate any harm caused or even theoretically
8 threatened by Defendants’ presence at the conferences.

9 Instead, PPFA hired security consultants who performed many tasks to increase security at
10 conferences. Millen Decl. Ex. 8, Bates 1671 – 1715. However, the costs of a security review and
11 getting recommendations, or even carrying out recommendations to prevent future infiltrations
12 cannot be charged to Defendants as damages.

13 Damages “has a well-understood general definition in the law.” *O’Donnell v. Tristar*
14 *Esperanza Props., LLC (In re Tristar Esperanza Props., LLC)* (Bankr. 9th Cir. 2013) 488 B.R. 394,
15 400. Damages are, as the name suggests, “Money claimed by, or ordered to be paid to, a person **as**
16 **compensation for loss or injury.**” *Damages, Black’s Law Dictionary* (10th ed. 2014) (emphasis
17 added). The cost of improvements that a plaintiff decides to undertake to better its condition,
18 including protecting against future harms by clever investigators who use their own unique
19 techniques to gain access, are not damages properly attributable to defendants.

20 If PPFA were able to recover for its security enhancements to prevent future infiltrations,
21 then:

22 • A defendant found liable for trespass should be forced to pay not only for damage to the
23 real property, but also for erecting a fence to keep out future trespassers.

24 • A defendant found liable for battery should be forced to pay not only for medical bills and
25 lost wages, but also for the cost of plaintiff taking self-defense courses or hiring a body guard.

1 • A defendant found liable for conversion should be forced to pay not only for the cost to
2 recover, repair, and/or replace the converted items, but also for a security system to protect the item
3 against future harm or loss. *Cf.* CACI 2102; Civil Code §3336.

4 • Prime Time Live and its reporters should have been forced to pay the costs of Food Lion
5 consulting with experts and implementing procedures to prevent future undercover reporters from
6 getting access to its stores by misrepresentation. *Cf. Food Lion, Inc. v. Capital Cities/ABC Inc.*, 194
7 F.3d 505, 512-15 (4th Cir. 1999) (finding defendants had engaged in fraud but overturning jury
8 award to Food Lion of damages for wages and extra administrative time spent on defendants'
9 fraudulent employment)

10 None of these scenarios reflects the law of torts and damages, particularly in federal court. It
11 is well-settled that a plaintiff “cannot manufacture standing [i.e., injury-in-fact] by choosing to make
12 expenditures based on hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty*
13 *Int'l USA*, 568 U.S. 398, 417 (2013); *see also Id.* at 416 (“Respondents' contention that they have
14 standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing –
15 because the harm respondents seek to avoid is not certainly impending.... If the law were otherwise,
16 an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by
17 making an expenditure based on a nonparanoid fear.”).

18 In short, the cost of PPFA’s efforts to prevent a future infiltration are not proximate damages
19 caused by Defendants’ actions. Because Plaintiffs PPFA, PPRM, and PPGC/PPCFC incurred no
20 proximately caused damages from Defendants’ alleged fraud, summary judgment must be granted as
21 to the fraud claim.

22 III. PLAINTIFFS CANNOT PREVAIL ON THEIR SEVENTH CLAIM (CALIF. BUS. & PROF.
23 CODE §17200)

24 Plaintiffs seek only injunctive relief on their Seventh Claim, brought under California
25 Business and Profession Code §17200 (UCL). Order (Dkt. 124) at 30. Under the UCL, a plaintiff
26 may not seek damages but instead may seek only restitution for an “interest any money or property,
27 real or personal, which may have been acquired by means of such unfair competition” and, in
28 addition, injunctive relief. Cal. Bus. & Prof. Code §17203. In this case, because no plaintiff is

1 seeking restitution, the only question before the court as to each plaintiff is whether that plaintiff
2 may obtain injunctive relief.

3 Under the UCL, as amended by California’s Proposition 64, the plaintiff must meet the
4 standard for federal Article III standing for any type of relief it seeks. *Buckland v. Threshold Enters.,*
5 *Ltd.*, 155 Cal.App.4th 798, 814 (2007) (overruled in part on other grounds, *Kwikset Corp. v. Super.*
6 *Ct.*, 51 Cal. 4th 310, 337 (2011)). Moreover, a UCL plaintiff must, as per normal legal principles,
7 show the presence of imminent harm that an injunction could remedy. *Mayfield v. United States*,
8 599 F.3d 964, 970 (9th Cir. 2010) (“To establish Article III standing, a plaintiff must show inter alia
9 that he faces imminent injury on account of the defendant's conduct. . . . Nor does speculation or
10 subjective apprehension about future harm support standing. Once a plaintiff has been wronged, he
11 is entitled to injunctive relief only if he can show that he faces a real or immediate threat . . . that he
12 will again be wronged in a similar way”) (internal quotation marks and citations omitted). Moreover,
13 “Article III demands that an ‘actual controversy’ persist through all stages of litigation.”
14 *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Plaintiffs must satisfy these requirements
15 “throughout the life of the lawsuit.” *Wittman v. Personnhuballah*, 578 U.S. ____ ,136 S. Ct. 1732,
16 1736 (2016).

17 In the instant case, Plaintiffs could not show a real or immediate threat of harm when they
18 filed the complaint; much less can they now.

19 Plaintiffs filed this action six months after the first CMP video release on July 14, 2015.
20 FAC ¶128. They did not move for a preliminary injunction, but instead sought only permanent
21 injunctive relief against defendants entering Planned Parenthood conferences or offices “without
22 fully disclosing their true identity” and with an intent to record, and also prohibiting defendants from
23 recording any private meeting with Planned Parenthood staff without the informed consent of all
24 parties being recorded. FAC p. 65, ll. 16-24.

25 At the pleading stage, Plaintiffs and this Court relied on Defendant Newman’s statements
26 that “this is just the beginning, we have moles and spies deep inside the abortion cartel” to show a
27 threat of ongoing conduct. Order (Dkt. 124) at 31. However, Newman’s entire statement, released at
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1 or near the time of the first CMP video release, was: “But this is just the beginning, we have moles
2 and spies deep inside the abortion cartel. And at the time of our choosing, we will release more
3 damning evidence of the abortion cartel’s illegal, ghastly, and repugnant butchery.” FAC ¶132.

4 And release more evidence they did. As the weeks and months rolled on, Defendants released
5 more videos (*Id.* at ¶¶133 - 141), during all of which time Plaintiffs did not seek injunctive relief.
6 All of the videos were based on undercover recordings made prior to the first release. *Id.* at ¶¶ 81,
7 97, 98, 105, 109, 111.

8 Mr. Newman’s comment is more reasonably understood as an intent to release more videos,
9 not to engage in future infiltrations or recordings. When the complaint was filed, nine months after
10 the last surreptitious recording of Planned Parenthood staff (*Id.* at ¶¶118 - 122), there was no longer
11 a “real or immediate threat” that Plaintiffs would be “wronged again in a similar way,” i.e., by
12 infiltrations of conferences or clinics, or by surreptitious recording. Indeed, if Plaintiffs had felt such
13 an “imminent” threat existed, they would have sought immediate injunctive relief.

14 Discovery and developments in the three years since the lawsuit was filed only reinforce the
15 conclusion that Plaintiffs lack Article III standing to seek injunctive relief because they face no
16 imminent threat of injury. In response to interrogatories propounded by PPFa concerning
17 Defendants’ plans, Defendants CMP and BioMax responded: “Defendants have no definitive plans
18 at this time to attend or enter any of Plaintiffs’ or the National Abortion Federation’s future
19 conferences, meetings, or facilities.” Millen Dec., Ex. 7 (CMP/BioMax Responses to PPFa’s
20 Interrogatories), Nos. 20-22, pp. 15-16. This response was provided almost two years ago. Newman
21 has not been on the board of or an officer of Defendant CMP for almost three years. *National*
22 *Abortion Federation v. Center for Medical Progress*, 2016 U.S. Dist. LEXIS 14485 (N. D. Cal. Feb.
23 5, 2016) at *9 (noting that Newman was a board member and secretary of CMP until January 2016).
24 Past harms are not sufficient to make out a case for a “real and immediate threat of repeated injury.”
25 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir, 2007). Plaintiffs, who throughout the
26 almost three years of this litigation have never sought any preliminary injunctive relief, have no
27 evidence of a real and immediate threat of repeated injury by any of the Defendants. Plaintiffs’
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claims of threatened future harm are purely “conjectural and hypothetical,” and insufficient to support standing under Article III.

Summary judgment should be entered on Plaintiffs’ Seventh Claim.

CONCLUSION

Defendant Albin Rhomberg has shown that, as to Plaintiffs’ ability to prove their claims against him, there are no triable issues of fact, and, as a matter of law Rhomberg is entitled to judgment in his favor on all claims as brought by each and every Plaintiff in this action.

Dated: December 4, 2018



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