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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiff, vs. THE CENTER FOR MEDICAL PROGRESS, et al., Defendants.	Case No. 3:16-CV-00236 (WHO) Hon. Donna M. Ryu Defendants CMP, BioMax, Daleiden and Newman's Motion to Compel Production of Documents from Plaintiffs and Third-Parties Advanced Bioscience Resources, Inc. and the Regents of the University of California; and Defendant Newman's Motion to Compel Response to Interrogatory from Plaintiffs Hearing Date: Nov. 29, 2018, 11:00 a.m. Oakland Courthouse, Courtroom 4

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NOTICE OF MOTION

TO PLAINTIFFS AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE THAT on November 29, 2018, at 11:00 a.m., in Courtroom 4 of the Honorable Donna M. Ryu at the United States District Court for the Northern District of California, Oakland Courthouse, 3rd Floor, 1301 Clay Street, Oakland, CA 94612, the Center for Medical Progress ("CMP"), BioMax Procurement Services, LLC ("BioMax"), David Daleiden ("Daleiden"), and Troy Newman, will and hereby do move this Court for two orders: (1) an order compelling Plaintiffs Planned Parenthood Federation of America ("PPFA"), Planned Parenthood: Shasta-Diablo dba Planned Parenthood Northern California ("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 ("PPOSBC"), Planned Parenthood Central Coast California ("PPCCC"), 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 "Plaintiffs") to produce documents responsive to CMP's and Newman's separate document requests and to provide an appropriate response to Newman's interrogatory; and (2) an order compelling third-parties Advanced Bioscience Resources ("ABR") and the Regents of the University of California to produce documents responsive to CMP's document subpoena.

This motion is made on the grounds that said documents are relevant to the subject matter of the action and do not relate to privileged matters, and the refusal to produce them is without justification. This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the previously filed Declaration of Paul M. Jonna (Dkt. 326-1), the previously filed discovery responses at Dkt. 196-1 and 201-1, the previously filed congressional reports at Dkt. 303-3 and 307, and the concurrently filed Declarations of Paul M. Jonna and David Daleiden.

MOTION TO COMPEL REGARDING PLAINTIFFS' FETAL TISSUE PROCUREMENT PROGRAMS[1]

Defendants' at-issue document requests and interrogatory, and Plaintiffs' objections to them, are attached to the Declaration of Paul M. Jonna or have been previously filed at Dkt. 201-1 (Newman RFP Nos. 10–16) and Dkt. 196-1 (Newman Interrog. No. 8). The written discovery falls into five categories: (1) Plaintiffs' scheme to profit from the sale of fetal tissue; (2) Plaintiffs' modifying abortion procedures to facilitate profiting from the sale of fetal tissue; (3) Plaintiffs' violations of the federal partial-birth abortion ban to facilitate profiting from the sale of fetal tissue; (4) Plaintiffs' procurement of tissue from born-alive infants to facilitate profiting from human tissue; and (5) Plaintiffs' procuring and selling fetal tissue without donor consent. Jonna Decl., ¶ 7.

The parties met and conferred regarding these requests, which resulted in Plaintiffs serving amended responses to certain requests in category 1 above. *Id.* at ¶ 8. After further meet and confer, Plaintiffs agreed to produce a portion of the documents they produced in response to various Congressional investigations, but only a small portion which included no internal emails, and only if all of the Defendants waived their right to seek any additional discovery on the issues above. *Id.* at ¶ 9. Plaintiffs have also refused to identify each person who was responsible for Plaintiffs' compliance with fetal tissue donation laws in Response to Newman Interrogatory 8. Dkt. 196-1. Defendants request that the Court order Plaintiffs to produce the categories of documents and information identified in the discovery requests and the Declaration of Paul M. Jonna. The documents and information are necessary to establish Defendants' affirmative defenses of veracity, unclean hands, public policy, and Cal. Pen. Code § 633.5. They are also relevant to other issues such as impeachment and causation.

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[1] Pursuant to the Court's Standing Order on Civil Discovery, the pre-trial schedule is laid out in the Declaration of Paul M. Jonna, Esq., ¶ 2. However, this case involves First Amendment rights. As a result, the various defendants have a right to appeal the orders adjudicating their dispositive motions. *See* Cal. Civ. Proc. Code § 425.16(i); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). Therefore, it is unlikely that this case will actually proceed to trial in September 2019.

1. Response to Plaintiffs' Relevance Objection.

"[T]he test for relevance is not overly exacting: evidence is relevant if it has any tendency to make more or less probable a fact that is of consequence in determining the action." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-00236-WHO(DMR), 2018 WL 2441518, at *6 n. 7 (N.D. Cal. May 31, 2018) (Ryu, J.) (quotation marks, ellipses, and brackets omitted); *see also id.* at *6 (explaining the broad scope of discovery).

1.1. Defendants' Substantial Veracity Defense.

1.1.1. *Background law on the Proximate Causation and First Amendment bars to publication damages.*

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997) (*Food Lion I*), *aff'd*, 194 F.3d 505 (4th Cir. 1999) (*Food Lion II*), the district court held that damages that flow from the publication of a broadcast are proximately caused by the publication, and not any preceding illegal or tortious activity, such as trespass or fraud. *Food Lion I*, 964 F. Supp. at 966. In *Food Lion II*, the Fourth Circuit affirmed, but on a different basis and without repudiating the reasoning of the district court. The Fourth Circuit held that all of the damages at issue were *reputational* publication damages, which are barred by the First Amendment unless the plaintiff proves defamation. *Food Lion II*, 194 F.3d 5 at 522. The *Food Lion II* rationale is far more developed, and flows from Supreme Court cases, including *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).[2]

To ensure that the plaintiff does not improperly receive publication-damages, the Court assumes, and instructs the jury, that the defendant's speech **must be assumed as true for all purposes.** If the plaintiff "d[oes] not challenge the content of the broadcast by bringing a libel suit," then **"[f]or the purposes of . . . th[e] case, it is assumed that the content of the [defendant's] broadcast about [the plaintiff] [i]s true."** *Food Lion I*, at 959; *see also id.* at 962 ("[T]he broadcast must be assumed to be true") (emphasis added); *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 30 F.

[2] *Food Lion I* did not rely on that rationale out of a desire to avoid answering constitutional questions if the issue could be resolved on other grounds. *Food Lion I*, at 959. The reasoning of both *Food Lion I* and *Food Lion II* has been accepted by this Court. Dkt. 124, Order on Pleadings Motions, at 32:8-34:7 (*Food Lion I*), 34:8-36:11 (*Food Lion II*). The reasoning has also generally been accepted by the Ninth Circuit. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 n. 9 (9th Cir. 2018).

Supp. 2d 1182, 1199 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) ("**In *Food Lion* and *Frome v. Renner*, the courts assumed the truth of the broadcast because the plaintiffs failed to bring a defamation or libel claim.**") (emphasis added); *Frome v. Renner*, No. 97 CIV 5641, 1997 WL 33308718, at *1 (C.D. Cal. Oct. 1, 1997) ("[T]he Court did not consider either the tape or the transcript in reaching its decision.").

The practical differences (if any) between *Food Lion I* and *Food Lion II* are not entirely clear. *Food Lion I* has been principally applied in the fraud context, but there is no reason why its proximate causation analysis would not apply in other contexts. In contrast, the *Food Lion II* analysis applies to all claims, and has been specifically applied to breach of contract. *See Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 530–33 (6th Cir. 2007); *Cty. of Orange v. McGraw Hill Co., Inc.*, 245 B.R. 151, 154–55 (C.D. Cal. 1999); *Anderson v. Blake*, No. CIV-05-0729-HE, 2006 WL 314447, at *3 (W.D. Okla. Feb. 9, 2006), *aff'd*, 499 F.3d 1228 (10th Cir. 2007). Under *Food Lion II*, the reputational delimitation is not a distinction between economic and non-economic damages, but rather damages that flow from harm to reputation. Thus, lost business revenue is not recoverable. *La Luna Enterprises, Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 388, 392 (S.D.N.Y. 1999).

In engaging in this analysis, courts take a holistic and practical look at "the injuries actually sustained" and the purpose of the plaintiff's artful pleading. *Compuware Corp.*, 499 F.3d at 530–33 (6th Cir. 2007) ("[A]lthough Compuware . . . purports to seek only rescission of the contract and return of the sums it paid to Moody's, it is inescapable that Compuware seeks compensation for harm caused to its reputation. . . . [I]ts only injuries are defamation-type harm."). If the damages are damages which could be recovered via a defamation claim, and the plaintiff does not bring a defamation claim, they are not recoverable. *Cf. La Luna Enterprises*, 74 F. Supp. 2d at 388, 392 ("If allowed to proceed on this claim, plaintiff could succeed regardless of . . . the truth or falsity of the broadcast. . . . Defendants' motion to dismiss the fraud claim is therefore granted.").

1.1.2. *The Court should rule that Defendants' accusations against Plaintiffs must be accepted as true for all purposes.*

Here, in response to the *Food Lion* cases, Plaintiffs first argued that they should be able to recover damages stemming from Defendants' publications without proving defamation, by proving

that the damages were not proximately caused by "the content of the videos." Rather, Plaintiffs argued, "the mere fact of identifying abortion providers by name and image caused the increase in harassment alleged in the FAC." Dkt. 99, Oppo. to Anti-SLAPP Motion, at 12:25-26. The Court disagreed, holding instead that Plaintiffs are limited to "damage [that was] the 'direct' result of defendants' fraud in securing access to plaintiffs' private conferences and clinics." Dkt. 124 at 33:17-19; *see also id.* at 34:2-6 ("[P]laintiffs may have implemented security measures simply upon discovering defendants' breaches before the full extent of the publications was known and the backlash from them occurred. . . . [The *Food Lion* cases] may at summary judgment or trial prevent plaintiffs from recovering on some categories of damages.").

Recognizing that the allowable damages that the Court referenced would be extremely small, if not non-existent, Plaintiffs have switched gears. Now, Plaintiffs allege that all of their "damages from publication" stem from the claim that Plaintiffs were "engaging in a criminal conspiracy to make money off of aborted fetal parts." Dkt. 258, Disc. Ltr. Brief, at 3. Apparently, Plaintiffs believe that even though they have not pleaded defamation, if they prove defamation, then they can recover reputational-publication damages. This is incorrect. The failure to plead defamation is fatal to many of Plaintiffs' categories of claimed damages.

In light of the governing law discussed above, Defendants anticipate that the Court will instruct the jury that they must assume that the claims made in Defendants' videos are true. Defendants further expect that the Court will then instruct the jury that it must determine whether the claimed damages flow from Defendants' publications because, if they do, they are unrecoverable. If the Court agrees and proceeds in this fashion, then Defendants agree with Plaintiffs that the requested discovery is not proportional. If, however, the Court disagrees, then Defendants will be severely prejudiced without the discovery which is the subject of this motion. Thus, at this juncture, Defendants need either (1) a ruling from the Court that everything that Defendants have said about Plaintiffs (including the allegations of illegal conduct) will be assumed as true for summary judgment and trial purposes; or (2) an order overruling Plaintiffs' relevance objection and requiring Plaintiffs to produce the withheld discovery noted herein.

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1.1.3. *In the alternative, the Court should grant discovery regarding the affirmative defense of substantial veracity.*

If the Court is unwilling to rule that Defendants' claims must be accepted as true for all purposes, then Defendants have the right to obtain discovery establishing, and then present evidence to the jury establishing, that Defendants' statements about Plaintiffs were substantially true. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) ("Factual truth is a complete defense to defamation."); *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180–81 (2000) ("It is sufficient if the substance of the charge is proven true, irrespective of slight inaccuracy in the details, 'so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark.'") (citations omitted).

With respect to Plaintiffs' current strategy, it appears to be an argument that stems from 42 U.S.C. § 289g-2(e)(3), which lists the only allowable reimbursable costs relating to the transfer of fetal tissue. Defendants believe that Plaintiffs will argue that, although they may have violated 42 U.S.C. § 289g-2 by receiving payment for costs which are not legally reimbursable, overall they still did not make a net profit (or the profit made was nominal); therefore, any statement by Defendants that Plaintiffs were intentionally violating the law *for the purpose of* profiting, as opposed to unintentionally violating the law, would be false. *See* Dkt. 303-3 at 396 (Select Investigative Panel Final Report: "Planned Parenthood Affiliates' Cost Schedules Compare to the Defined Allowable Costs in 42 U.S.C. § 289g-2"). Defendants dispute Plaintiffs' alleged honest intent—and believe that hundreds of thousands of dollars in profit were willingly made—but Plaintiffs may be able to convince a jury of honest intent if they are able to avoid providing the requested discovery. Therefore, Defendants need discovery to prove not only that Plaintiffs profited, but also that they intended to profit.

1.2. Defendants' Unclean Hands Defense.

The doctrine of unclean hands "bars relief to a plaintiff who has violated conscience, good faith or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his hands in acquiring the right presently asserted." *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1091–92 (C.D. Cal. 2016). "The doctrine of unclean hands requires 'that a plaintiff

act fairly in the matter for which he seeks a remedy.'" *Infor Glob. Sols. (Michigan), Inc. v. St. Paul Fire & Marine Ins. Co.*, No. C 08-02621 JW, 2009 WL 5909255, at *2 (N.D. Cal. Oct. 21, 2009) The doctrine applies where a plaintiff acted unconscionably, or exhibited bad faith or inequitable conduct in connection with the matter in controversy. *Id.* "The burden is on the one coming into a court of equity for relief to prove not only his legal rights but his clean hands." *Russell v. Soldinger*, 59 Cal. App. 3d 633, 646 (1976) (citation omitted). Here, as two comprehensive Congressional investigations determined, there is probable cause to believe that Plaintiffs have engaged in rampant violations of the law, Defendants discovered and publicized such violations, and that Defendants' discovery led to Plaintiffs' extensive efforts to cover them up. *See* Dkt. 303-3, 307. Cover-up also is evidence of guilt. As a result, Defendants are entitled to discovery to prove their defense of unclean hands. *See Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 620 (1992).

1.3. Defendants' Public Policy Defense.

Plaintiffs allege that certain defendants violated a non-disclosure and confidentiality agreement signed with Plaintiff PPGC. Dkt. 59, at ¶¶ 250–53. But "a promise [will be found] unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *United States v. Northrop Corp.*, 59 F.3d 953, 958 (9th Cir. 1995). Thus, Defendants are entitled to prove that the PPGC confidentiality agreement is unenforceable as a matter of public policy due to Plaintiffs' violation of federal and state law. *See, e.g., Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972), *cited with approval in Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., concurring) ("It is public policy . . . everywhere to encourage the disclosure of criminal activity. . . . [Here], the appellee may reasonably have felt that in adhering to the terms of its contract with the appellants it was silently watching a crime being committed."). Especially alongside the above and below arguments, Defendants' public policy defense provides a strong basis for the requested discovery.

1.4. Defendants' Cal. Pen. Code § 633.5 Defense.

For the reasons stated below in the next motion to compel, Defendants are entitled to documents responsive to category 4 above—Plaintiffs' procurement of tissue from born-alive infants—to substantiate their Cal. Pen. Code § 633.5 defense.

1.5. Defendants' Impeachment Strategy.

"[I]nformation that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable." Fed. R. Civ. P. 26 Adv. Comm. Note to the 2000 Amend.; *see also* Fed. R. Civ. P. 26 Adv. Comm. Note to the 2015 Amend. ("The 2000 Note offered three examples of information. . . . The examples were . . . 'information that could be used to impeach a likely witness.' Such discovery is not foreclosed by the amendments.")[3] Here, as laid out in the Jonna declaration, ¶¶14–19, Plaintiffs have repeatedly stated—not only that they did not make a net profit from their fetal tissue sales—but that they did not violate the law. Since Defendants' claims of illegality, and Plaintiffs' repeated disavowal of any wrongdoing, are at the heart of this case, and impeachment regarding Plaintiffs' statements would be relevant to many aspects of the case (including credibility), Defendants are entitled to discovery to show that Plaintiffs did, in fact, violate the law.

1.6. Defendants' Causation Strategy.

Throughout the Complaint, Plaintiffs put the truth or falsity of Defendants' statements about Plaintiffs and their practices directly at issue. *See, e.g.,* Dkt. 59, FAC, ¶ 12 ("This action is brought . . . to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign."). Nevertheless, during the litigation, Plaintiffs have stated that while "Defendants will be free to argue that the other ancillary accusations concerning consent forms or changing abortion method [or violating the partial birth abortion ban, violating HIPAA, procuring fetal tissue without consent, and procuring tissue from born-alive infants] may have triggered the public reaction that required substantial security increases . . . Plaintiffs are not required to prove that[, and Defendants are not entitled to discovery regarding whether,] every statement in the videos is false." Dkt. 326-1, Bomse Ltr., at 92 (citations omitted).

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[3] *See also Newsome v. Penske Truck Leasing Corp.*, 437 F. Supp. 2d 431, 436 (D. Md. 2006) ("A party must disclose impeachment evidence in response to a specific discovery request."); *Kalantari v. Spirit Mountain Gaming, Inc.*, No. C-02-09-004, 2003 WL 25758499 (Grand Ronde Tribal Ct. July 31, 2003) ("[E]ven if the information gleaned from an inspection of the surveillance room led to the discovery of material that could be used only for impeachment of Defendant's witnesses, that would be enough under the rule to permit Plaintiffs inspection.").

This is incorrect. "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998). "In determining whether . . . an article is libelous, it must be considered in its entirety. It may not be divided into segments and each portion treated as a separate unit." *Stevens v. Storke*, 191 Cal. 329, 334 (1923). Plaintiffs now wish to argue that it was the conspiracy allegation alone that caused the need for security increases (as implausible as that argument is). This entire argument seems contrived and twisted primarily to avoid reasonable discovery Plaintiffs should have anticipated when they brought their law suit.

Here, Defendants publicly accused Plaintiffs of profiting from the sale of fetal tissue, and committing numerous other crimes. But the "other" illegal conduct was expressly undertaken to facilitate the profiteering—it was not undertaken in a vacuum. Defendants' public accusations against Plaintiffs began in the summer of 2015. *See* Daleiden Decl., ¶ 4. At that time, CMP began releasing the results of its investigative journalism study into illegal practices in the fetal tissue procurement industry, with new information published on a weekly basis. *Id.* The timeline of publication is captured by CMP's blog page. *Id.*; *see also id.* at Ex. 10. Laid out in the Daleiden declaration are descriptions and links to the press releases published in 2015 by CMP. *Id.* at ¶¶ 6–16. The press releases are also attached to the Daleiden declaration. *Id.* at Exs. 11–21.

As the press releases amply demonstrate, along with their accompanying video footage, Defendants' accusations against Plaintiffs regarding other alleged illegalities, such as violations of the partial-birth abortion ban, were not ancillary—rather, they were key allegations made by Defendants directly in their press releases. *See* Ex. 11, Press Release, "Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortions to Sell Baby Parts." Those allegations simply do not make sense when divorced (as Plaintiffs attempt to do) from the allegation that Plaintiffs were selling fetal tissue for profit: Plaintiffs violated the partial-birth abortion ban, violated HIPAA, and obtained fetal tissue without donor consent, for the purpose of . . . selling fetal tissue at a loss? No, Plaintiffs violated those laws precisely because they had a perverse financial incentive to do so. The allegations simply cannot be split up; Defendants' statements must be read together. *See Van Vactor v. Walkup*, 46 Cal. 124, 134 (1873) ("[T]he Court below fell into the error of separating the alleged libel into two

parts, and construing each part separately, without reference to the other."). Since Plaintiffs seek damages flowing from Defendants' statements, Defendants are entitled to discovery to prove that everything Defendants said was true. Otherwise, Defendants are entitled to a jury instruction that all of Defendants' statements must be accepted as true. *See Food Lion I*, 964 F. Supp. at 959, 962.

2. Response to Plaintiffs' Burden/Proportionality Objection.

"[T]he scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1) (emphasis added). The notion that the requested discovery is inherently burdensome because it requests irrelevant documents and information must be rejected for the reasons discussed herein.

Additionally, in adjudicating burden disputes related to redaction, courts first look to whether redaction is required by law or voluntarily undertaken. If it is voluntarily undertaken, it is simply not a relevant burden. *See Fed. Trade Comm'n v. Amazon.com, Inc.*, No. C14-1038-JCC, 2015 WL 11256313, at *2 (W.D. Wash. Nov. 23, 2015). In addition, courts generally find that redactions are simply not necessary when a protective order is in place. *See, e.g., A.G. v. Oregon Dep't of Human Servs. ("DHS")*, No. 3:13-CV-1051-AC, 2014 WL 317016, at *6 (D. Or. Jan. 28, 2014); *United States v. Smith*, 985 F. Supp. 2d 506, 546 (S.D.N.Y. 2013); *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456, 458 (D.N.D. 2010).

Here, Plaintiffs' purported burden of producing documents is largely *self-imposed* because Plaintiffs have chosen to painstakingly review every document produced, provide a confidentiality designation for that document, insert Doe identifiers for every name, and then redact numerous portions of the documents to provide an additional level of protection. As a result, Plaintiffs contend that they should have to produce fewer documents because the burden (not required by any law) they have self-imposed is so great.

In contrast, Defendants believe that the protective order is more than sufficient to allay

Plaintiffs' concerns, and that Plaintiffs' use of Doe identifiers and additional redactions is wholly a self-imposed burden. When this case was filed, Defendants anticipated that Plaintiffs would run word-searches for wide swaths of documents, that they would all be produced with a confidentiality designation and uploaded into a database, and that Defendants would then be able to search those documents using that database. Instead, despite the fact that there are eleven corporate Plaintiffs, they have cumulatively produced fewer pages of documents in discovery than CMP itself has, which does not include the hundreds of hours of footage and 279 pages from a separate lawsuit. Plaintiffs' collective document production concerning the critical subject matters emphasized in this motion (*e.g.*, documents relating to fetal tissue procurement practices) *is a small fraction of their overall production.*

Producing the discrete categories of documents requested by Defendants is not disproportionately burdensome considering they are the key documents which Defendants need to establish their affirmative defenses and will be divided among eleven corporate plaintiffs.

3. Response to Plaintiffs' Privacy Objection.

Plaintiffs claim a right to privacy, which is inapplicable in the context of this lawsuit. Plaintiffs brought this lawsuit—an intrinsically public affair—*expressly* challenging the allegations of criminality central to the Defendants' videos, and now seek to shield themselves from discovery regarding those key claims. But "[a] party may [ ] waive [its] privacy rights by putting the contents at issue in a case." *Weiland v. City of Concord*, No. 13-CV-05570-JSC, 2014 WL 3883481, at *2 (N.D. Cal. Aug. 7, 2014); *see also Bertram v. Sizelove*, No. 1:10-CV-00583-AWI, 2012 WL 273083, at *3 (E.D. Cal. Jan. 30, 2012) ("The holder of a privacy right can waive it through a variety of acts, including by . . . instituting a lawsuit."); *see also Mitchell v. Superior Court*, 37 Cal. 3d 591, 604 (1984) ("'[F]undamental fairness' may require disclosure of otherwise privileged information or communications where plaintiff has placed in issue a communication which goes to the heart of the claim in controversy.").

Here, as stated above, the truth of Defendants' accusations goes directly to the heart of this case. Thus, the high relevance of the documents which Defendants seek outweighs any privacy concerns that Plaintiffs assert, if any privacy claim is remotely applicable. *See Stallworth v. Brollini*,

288 F.R.D. 439, 444 (N.D. Cal. 2012) (privacy claims are subject to a balancing test). Moreover, any privacy interest Plaintiffs have was waived by their bringing this suit. Not only is the truth of Defendants' statements one of their affirmative defenses, the alleged falsity of them is an element of many of Plaintiffs' claims. *Compare, e.g.*, Dkt. 59, FAC, ¶ 199 (Unfair Business Practice to "deceive . . . the public"); ¶¶ 9, 146 (damages include responding to governmental investigations caused by "CMP's fallacious claims"); ¶ 154 (interstate commerce affected by "diver[sion of] resources to . . . combat the misrepresentations"); *with Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (in cases subject to constitutional requirements, plaintiff must prove the statement is false).[4]

MOTION TO COMPEL REGARDING DEFENDANTS' CAL. PEN. CODE § 633.5 DEFENSE

"Nothing in Section . . . 632 . . . prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission . . . of . . . any felony involving violence against the person." Cal. Pen. Code § 633.5. "Murder is the unlawful killing of a human being." 18 U.S.C. § 1111. "[T]he word[] 'person' . . . include[s] every infant member of the species homo sapiens who is . . . complete[ly] exp[elled] or extract[ed] from his or her mother . . . at *any stage of development*, who after such expulsion or extraction breathes or *has a beating heart*." 1 U.S.C. § 8 (emphasis added); *see also* Cal. Health & Saf. Code § 123435 ("The rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously.").

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[4] Plaintiffs have also asserted that certain documents which they produced to Congress were privileged, but that the production of them to Congress did not waive the privilege. *See* Dkt. 326-1 at 129, 136–37. *But see United States v. Ruehle*, 583 F.3d 600, 612 (9th Cir. 2009) ("*[A]ny* voluntary disclosure of information to a third party waives the attorney-client privilege."). Defendants dispute non-waiver. *See Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, No. CIV S-03-2591 FCD EFB, 2007 WL 4170819, at *2 (E.D. Cal. Nov. 19, 2007) (the compelled production rule does not give party leave to re-raise privilege when it lost a motion to compel in a prior case). Nevertheless, Plaintiffs have offered to "produce the[documents] if defendants would agree that any such production would not constitute a waiver of the privilege." Dkt. 326-1 at 137. Thus, Defendants request that the Court order Plaintiffs to produce the documents without waiver, and the parties can later litigate whether privilege applies.

In determining "reasonableness" under § 633.5, "both the question of what [the recorder] actually believed at the time of recording . . . and whether that belief was reasonable would need to be resolved in order for [the recorder] to be exempted from liability." *Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 689 (E.D. Cal. 2009). One way of establishing an objectively reasonable belief is by "put[ting] forth [ ] evidence that people with [similar] training and experience would share [that] belief." *In The Matter Of: Alex Burdette, v. Expressjet Airlines, Inc.*, ARB Case No. 14-059, 2016 WL 454190, at *4 (DOL Adm. Rev. Bd. Jan. 21, 2016); *see also United States v. Yazzie*, 976 F.2d 1252, 1255–56 (9th Cir. 1992) (error to exclude lay opinion testimony on age of minor girl to establish reasonableness of defendant's belief she was of age).

Here, Defendants' "Human Capital Project" investigated, documented, and reported on illegal and unethical fetal tissue procurement practices in the abortion industry, with a special emphasis on the Planned Parenthood organization, after it was discovered that they were one of the most egregious violators of federal and state laws and ethical norms. Daleiden Decl., ¶ 3. As part of that investigation, CMP consulted with medical experts who informed it that, based on their reading of various scientific journal articles, it is highly likely that certain fetuses were harvested even though they met the legal definition of a "person" and thus were entitled to the same rights as any other person. *Id.* at ¶ 4.[5] Defendants later met a whistleblower named Holly O'Donnell who procured fetal tissue for StemExpress LLC from Plaintiff PPMM clinics. She informed Defendants that, on one occasion, she was instructed to harvest fetal tissue from a fetus which, as described, met the definition of a "person" under federal law. *Id.*

> So then I hear her [my trainer] calling: "Hey Holly come over here, I want you to see something kinda cool. It's kinda neat." So I'm over here and there's this moment I see it; I'm just flabbergasted. This is the most gestated fetus and closest thing to a baby I've seen. And, she's like: "Okay, I want to show you something." So she has one of her instruments and she just taps the heart and it starts beating. And I'm sitting here and I'm looking at this fetus and its heart is beating and I don't know what to think.

Ex. 17 at 4:01–36.

[5] Defendants were also aware of the highly publicized trial in 2013 of Dr. Kermit Gosnell who was convicted of murdering born-alive infants at his clinic, and other accounts from nurses and doctors who indicated that such born-alive infant cases are in fact widespread. Daleiden Decl., ¶ 4.

To be clear, the infant at issue described by Ms. O'Donnell was a viable 25 weeks old, but was significantly injured (either by the abortion procedure or Ms. O'Donnell's supervisor) such that it is unlikely that he could have survived even if provided with immediate medical care. Daleiden Decl., ¶ 4. This likely explains why StemExpress and PPMM employees did not feel that there was a need to attempt to save his life.[6] But affirmatively dissecting a legal person and harvesting his organs, even if he is on his deathbed, is precisely the type of violence against a person contemplated by Cal. Pen. Code § 633.5. Thus, Defendants intend to argue that, because they fit within § 633.5, none of their recordings violate Cal. Pen. Code § 632. *See* Dkt. 59, FAC, ¶¶ 211-17 (pleading violation of § 632); *see also id.* at ¶¶ 197-203 (pleading that violation of § 632 was an unfair business practice); *id*. at ¶¶ 218-25 (pleading that violation of § 632 was a predicate supporting violation of § 634).

Defendants believe that Plaintiffs will argue that Ms. O'Donnell's description of born-alive infant cases is a farce and too absurd to be believed. As a result, Defendants seek discovery showing that not only is such a situation not farcical, it actually occurs. Defendants further assert that the truth of their beliefs will provide both direct and circumstantial evidence that such beliefs were reasonable. Plaintiffs have also countered that the reasonableness of Defendants' beliefs can only be established based on what Defendants knew at the time they recorded. Dkt. 326-1, Bomse Ltr., at 94. There is no clear case-law on point, but Plaintiffs' position is untenable. If Plaintiffs intend to respond to Defendants' § 633.5 argument by stating that their facilities do *not* have born-alive infant cases, then Defendants need discovery to test that. Otherwise, Plaintiffs should be precluded from disputing that their facilities have unlawful born-alive infant cases—including the PPMM clinic where Ms. O'Donnell stated she experienced one.[7]

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[6] Indeed, a recent Hollywood blockbuster discussing the trial of convicted murderer Kermit Gosnell discusses how many medical practitioners believe it is more humane to affirmatively kill a non-viable infant rather than let him or her die naturally. *See* Ex. 22, (noting defense strategy to argue "Seems like it'd be more humane to just take a pair of scissors. . . ."); *see also id.* ("[T]he vast majority of the screenplay pulled verbatim from the grand-jury testimony and Gosnell's actual trial."). But affirmatively killing an individual, even if he or she is near death, is still murder. In the Gosnell case, because the infants were born alive, they were entitled to all legal safeguards even if not viable. The same is true here.

[7] Also of note, Ms. O'Donnell recently passed away and thus will be unavailable to testify at trial. *See* Ex. 23. Defendants believe this is a further basis for permitting discovery to establish that the case Ms. O'Donnell witnessed actually occurred.

On this issue, Defendant CMP propounded seven document requests, Nos. 10, 20–22, 24, 25, 131. They seek: (No. 10) documents regarding the use of the feticide digoxin; (Nos. 20–21) all documents containing the terms "intact," "in-tact," or "complete POC;" (No. 22) all documents containing both the terms "complete" and "fetus," or "complete" and "embryo;" (Nos. 24–25) all documents regarding inadvertent live births, and the procurement of fetal tissue from patients following inadvertent live births; and (No. 131) the total number and frequency of 2nd trimester abortions performed by PPOSBC. Defendants request that the Court order Plaintiffs to produce all responsive non-communication documents; and with respect to nos. 20–22 all communications within the control of the custodians identified at paragraph 13 of the Jonna declaration.

MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO THIRD-PARTY SUBPOENAS

In addition to the party discovery in this case, CMP and other Defendants propounded identical third-party subpoenas on the tissue procurement company Advanced Bioscience Resources, Inc. (ABR), Ex. 24, and five universities within the University of California system. Exs. 25–29. The document requests fall into four categories: (1) documents regarding Plaintiffs' scheme to profit from the sale of fetal tissue (Nos. 1–9, 13–19); (2) documents regarding Plaintiffs' modifying of abortion procedures to facilitate the profiting from selling fetal tissue (No. 10); (3) documents regarding Defendants' Cal. Pen. Code § 633.5 defense (Nos. 11, 12, 20–22); and (4) documents regarding Defendants generally (Nos. 23–25).

In response, ABR and the Regents of the University of California (on behalf of the five UC schools), served nearly identical objections. Exs. 30, 31. In those objections, both ABR and the Regents primarily objected on the basis of relevance, and cited to Plaintiffs' relevance objections and the previously filed motion to compel on this issue (which was withdrawn to facilitate further meet and confer). *See* Ex. 31 ("We have reviewed . . . PACER Document 166 filed – 6/14/2017[] and understand, based on the content of [the] letter, that plaintiffs have objected, on the same grounds, to discovery requests by defendant that essentially seek the same information defendants seek from The Regents."). The Regents' and ABR's use of the same objection is troubling, as is the fact that the same form objection, or a variant of it, was made by numerous other entities, including Colorado State University,

DaVinci Biosciences, DV Biologics,[8] and StemExpress, LLC. This cannot be coincidental. *Contrast Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998) ("[O]pposing counsel has an ethical duty not to . . . interfere with [the] valid enforcement [of a subpoena].").

This is troubling because prior to the attorney meddling, ABR did produce some documents in response to an earlier subpoena. Both ABR and Plaintiffs produced the invoices which ABR submitted to Plaintiffs PPPSW and PPMM. The PPMM invoices produced match, *but ABR and PPPSW produced different versions of the same invoice*. *Compare* Exs. 32, 33, *with* Exs. 34, 35. Further, the revenue totals and procurement totals, when added up based on the invoices produced by ABR and Plaintiff PPPSW, do not match the totals that PPPSW reported to the Select Investigative Panel for fiscal year 2015. *See* Dkt. 306 at 712; Dkt 307 at 307 (316 products of conception for $18,960).[9] However the ABR fetal tissue invoices for July 2014 to December 2014 alone—half of fiscal year 2015—show revenues of $21,120 from ABR for 352 fetal tissue donations. It is unclear to Defendants why the invoices are not identical, or why the numbers do not add up, but it is perfectly possible that the invoices were subject to tampering and someone falsely reported information to Congress. *See* Dkt. 303-3 at 183–92 (Referral of StemExpress, LLC to the U.S. Department of Justice for prosecution for destroying documents in violation of 18 U.S.C. § 1519). Thus, it is critical that Defendants obtain access to third-party documents to verify that Plaintiffs are not producing fabricated evidence.

In light of the narrow nature of the categories of documents which Defendants seek from the third-parties, the need to confirm the legitimacy of Plaintiffs' production, and the relevance arguments made above, the Court should order the UC schools and ABR to produce all non-privileged documents responsive to Defendants' subpoenas.

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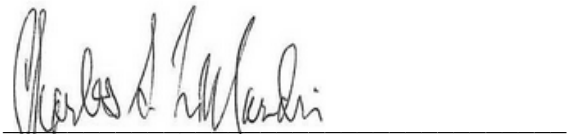
[8] DaVinci Biosciences and DV Biologics have already been successfully prosecuted for illegally selling fetal tissue for profit as a result of Defendants' investigation. *See* Dkt. 303 at 1 n 2.

[9] PPPSW's fiscal year, as reported on its 2015 form 990, is July 1 to June 30.

Respectfully submitted,

October 25, 2018,



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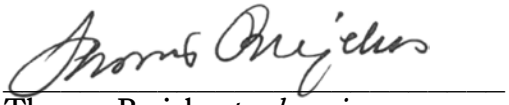

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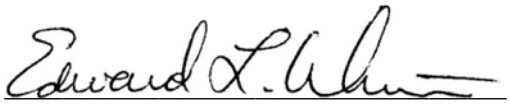

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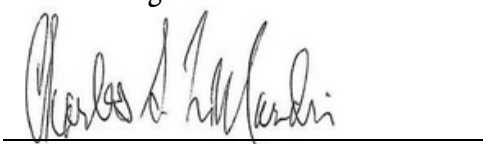
ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

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



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