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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION (NAF), Plaintiff, vs. THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN (aka "ROBERT SARKIS"); and TROY NEWMAN, Defendants.	Case No. 3:15-CV-3522 (WHO) Judge William H. Orrick, III Defendants the Center for Medical Progress, BioMax Procurement Services, LLC, and David Daleiden's Motion to Dismiss Plaintiff's Complaint Hearing Date: Oct. 3, 2018, 2:00 p.m. Courtroom 2, 17th Floor

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NOTICE OF MOTION

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 3, 2018, at 2:00 PM in Courtroom 2 of the Honorable William H. Orrick III at the United States District Court for the Northern District of California, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendants David Daleiden (Daleiden) and the Center for Medical Progress (CMP) will, and hereby do move to dismiss Plaintiff National Abortion Federation (NAF)'s claims for Fraudulent Misrepresentation, Promissory Fraud, Breach of Contracts, and Civil Conspiracy from its First Amended Complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendants respectfully request that this Court dismiss the First Amended Complaint of Plaintiff National Abortion Federation ("Plaintiff" or "NAF"), for the following reasons: (1) Plaintiff has failed to properly allege diversity jurisdiction. Accordingly, this Court lacks federal subject-matter jurisdiction. (2) Plaintiff's four state-law causes of action fail to state plausible claims for relief, so the First Amended Complaint should be dismissed.

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INTRODUCTION

Plaintiff National Abortion Federation's (NAF) First Amended Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). This Court lacks jurisdiction over the case because NAF is suing on behalf of its members, who are California citizens. And none of the First Amended Complaint's (FAC) four causes of action is adequately pleaded.

ARGUMENT

THIS COURT LACKS JURISDICTION OVER THIS LAWSUIT

After NAF's dismissal of its two federal claims, this Court no longer has subject-matter jurisdiction over this lawsuit. The remaining claims are state law claims that cannot support federal jurisdiction under 28 U.S.C. § 1331.

NAF pleads diversity of citizenship under 28 U.S.C. § 1332 as an alternative basis for jurisdiction. *See* Doc. 131, FAC, ¶ 24 ("No Defendant is a citizen of a different state than Plaintiff NAF."). But NAF pleads diversity of citizenship only among itself and Defendants. It fails to plead diversity among Defendants and its members, whom NAF itself claims are real parties in interest in this lawsuit: "This case is about an admitted, outrageous conspiracy . . . against NAF *and its constituent members*." *Id.* at ¶ 1.[1] Although NAF sometimes recites itself alongside its members as an entity that might be harmed from Defendants' alleged conduct, in truth, the harms that NAF speculates might result from disclosure of CMP's videos would all affect NAF's members, not NAF itself. *See, e.g.*, *id.* at ¶ 50 (referring to the "reputational harm and physical danger that *NAF members and other abortion providers* face. . . ." (emphasis added)). Any alleged threat to "safety, security, and privacy" would be to the NAF members whose activities may be described in the videos. Likewise, any speculative reputational harm would be felt by the NAF members who engage

[1] *See also, e.g.*, Doc. 131 at ¶¶ 171, 184, 191, 196, 200 (asserting "harm to the safety, security, and privacy of Plaintiff *and its members*, harm to the reputation of Plaintiff *and its members* . . . ."); *id.* ¶ 196 ("the purpose of these agreements was to protect NAF and NAF Confidential Information, and to protect NAF's staff, *its members*, and the attendees at NAF's annual meetings. NAF staff, *NAF members*, and attendees at NAF's annual meetings are intended third party-beneficiaries to each and every contract described in the preceding paragraphs"; *id.* ¶ 200 ("Plaintiff and *the intended third-party beneficiaries* described above have suffered and/or will suffer economic harm and other irreparable harm caused by Defendants' breaches, including harm to the safety, security, and privacy of Plaintiff *and its members*, harm to the reputation of Plaintiff *and its members* . . . .")

in fetal tissue trafficking activities and abortion, not by NAF itself.

In short, NAF is not "the party that feels the blow" (or in this case "may someday feel the blow") in this lawsuit. *CCC Info. Servs., Inc. v. Am. Salvage Pool Ass'n*, 230 F.3d 342, 347 (7th Cir. 2000). NAF members are the (potentially) affected parties, as evidenced by the parallel lawsuit in which many of those members assert many of the same claims that NAF purports to assert on their behalf here. *See* Doc. 59 in Case No. 3:16-cv-236, FAC, ¶ 67, 70 (discussing how NAF security measures are intended to protect members); ¶¶ 182-88 (bringing third-party beneficiary claim for breach of NAF contracts because purpose of contracts was "to protect the safety and security of NAF's . . . members").

This Court should reject NAF's attempts to bootstrap potential future injury to its members into a federal jurisdictional claim for itself and hold that the real parties in interest in this lawsuit are the members of NAF. Accordingly, the members of NAF would be the parties that matter for the purpose of determining diversity of citizenship. *Compare Nat'l Ass'n of Realtors v. Nat'l Real Estate Ass'n*, 894 F.2d 937, 940 (7th Cir. 1990) ("Since it is the members of [the trade association] who are the real parties in interest so far as the claim for damages on their behalf is concerned, it is their citizenship that counts for diversity purposes."), *with CCC Info. Servs., Inc.*, 230 F.3d at 347 (finding that association members who would be only "incidentally benefitted" by the association's lawsuit, as evidenced by, *inter alia*, their failure to bring a lawsuit on their own behalves, were *not* real parties in interest for the purpose of diversity jurisdiction); *see also Zee Medical Distributor Ass'n v. Zee Medical*, 23 F.Supp.2d 1151, 1156 (N.D. Cal. 1998) (holding that "when [an organization] sues solely in a representative capacity it is not the 'real party to the controversy' for the purposes of diversity").

As an association suing for alleged damages to its members, NAF is acting as those members' representative. In such cases, "federal courts must look to the individuals being represented rather than their collective representative to determine whether diversity of citizenship exists." *N. Tr. Co. v. Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990); *Majestic Ins. Co. v. Allianz Int'l Ins. Co.*, 133 F. Supp. 2d 1218, 1222 (N.D. Cal. 2001); *see also Zee Medical Distributor Ass'n*, 12 F.Supp.2d at 1156. NAF does not (and cannot) plead that it has no members who are citizens of California or Kansas, the states of which NAF alleges the Defendants are citizens. *See* Doc. 131, ¶¶ 10, 18-20. Thus, NAF fails to

establish complete diversity of parties as necessary to plead diversity jurisdiction. Because there is no other basis for federal jurisdiction, this case should be dismissed for lack of subject matter jurisdiction.

NAF FAILS TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED

After NAF's voluntary dismissal of most of its claims, only four remain: civil conspiracy, promissory fraud, fraudulent misrepresentation, and breach of contract. As to all of these causes of action, the FAC fails to state a claim for relief, and therefore it must be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation omitted). The complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663. The FAC does not meet this standard.

1. NAF Fails to State a Claim for Damages for any of its Claims for Relief Because It Has Not Alleged A Defamation Claim.

NAF's allegations fail to state a viable claim for damages. All of the damages claimed by NAF with respect to all of its claims for relief result from Defendants' *publication* of videos, not the alleged independent torts by which Defendants were able to record those videos. *See, e.g.,* Doc. 131, ¶¶ 32, 36, 50, 148, 160. Damages from the *publication* of any videos are not recoverable under the First Amendment unless accompanied by a defamation claim, which NAF does not assert.

First, NAF alleges that several videos of abortion providers and fetal tissue procurement personnel have been publicly disclosed, but it does not allege that any of these videos was taken at NAF meetings, nor that any of these videos was taken illegally, nor that it has standing to assert the rights of the parties in these videos. Accordingly, NAF cannot state a claim for damages arising from publication of these previously released videos.

Second, NAF does not make any claim of defamation. For a claim of damages from publication of information, this is fatal. NAF does not allege that the publication of any recording has contained or will contain any false statement, nor that any recording has been or would be

defamatory. Because NAF does not claim defamation and instead challenges only the manner in which the videos were taken, the First Amendment bars any claim for damages arising from the *publication* of the videos. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (*Food Lion II*) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

Food Lion, like this case, involved a plaintiff that sought damages for injuries to its reputation as a result of undercover journalists publishing truthful information about its actual business practices. The ABC program *Prime Time Live* sent two undercover reporters to infiltrate and secretly film Food Lion's meat-handling practices. The reporters obtained jobs at Food Lion under false pretenses, using fake identifications and making false representations on the job applications. They secretly filmed Food Lion employees handling meat, and the films were later broadcast on national television. *See id.* at 510-11. "Food Lion did not sue for defamation, but focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." *Id.* at 510. Food Lion did, however, seek to recover damages it claimed to have sustained as a result of consumers learning of its business practices on *Prime Time Live*, or "reputational damages from publication." *Id.* at 523. Food Lion admitted that it deliberately avoided pleading defamation to sidestep the heightened pleading standard for First Amendment violations under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which would have required proof that ABC had made a false statement of fact with "actual malice'" or reckless disregard for the truth or falsity of its statements. *Id.* at 522 (citing *Sullivan*, 376 U.S. at 279-80).

Recognizing this as an attempted "end run" around First Amendment protections of speech, the Fourth Circuit held that, because Food Lion did not claim defamation, Food Lion could not recover any damages for injuries attributable to the videos' *publication*: "Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts." *Id.* (internal citations omitted). "[A]n overriding (and settled) First Amendment principle precludes the award of publication damages." *Id.*

Other cases are in accord with *Food Lion II*. For example, in *Hornberger v. American*

Broadcasting Co., Inc., 351 N.J. Super. 577 (2002), the ABC show *Prime Time Live* secretly videotaped police officers conducting traffic stops of young African-American males and broadcast the videotapes. *Id.* at 585-86. The officers sued, claiming damages to their reputation. *Id.* Citing *Food Lion II*, the New Jersey court of appeals held that the plaintiffs could not recover any damages arising from the *publication* of the recordings absent a valid claim for defamation: "[P]laintiffs are not entitled to . . . reputational and emotional distress damages, resulting from a publication, without showing that the publication contained a false statement of fact that was made with actual malice." *Id.* at 630 (internal citations omitted).[2]

NAF's complaint suffers from the very same deficiency as the claims in *Food Lion II* and similar cases. NAF's claimed damages arise from the videos' publication (or anticipated publication). *See* Doc. 131, ¶¶ 32, 36, 50, 148, 160. Yet nowhere does NAF allege that the publication of these videos would or will involve any *untruthful* information, which is a prerequisite to recovering damages under the First Amendment. *See Hustler Magazine, Inc.*, 485 U.S. at 56 (requiring a showing that "the publication contains a false statement of fact" to permit damages due to publication under the First Amendment). Absent any allegation of a false statement of fact, no defamation claim is possible, and Plaintiff has not made any such allegation. Thus, all of NAF's claims for damages arising from the publication of any video(s) must be dismissed.[3]

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[2] *See also, e.g.*, *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("[I]nvestigative television reportage . . . is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast.") (internal citations omitted) (*citing Hustler Magazine, Inc.*, 485 U.S. 46 (1988))

[3] This argument is similar to one considered in the related case. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 839 (N.D. Cal. 2016). But the complaint in that action is not the same as NAF's Complaint here. Here, NAF pleads that no damages occurred prior to Defendants' publication of the Human Capital Project. *Compare* Doc. 131, ¶ 141 ("Before CMP went public . . . NAF and its members did not know . . . that Defendants had fraudulently obtained NAF Confidential Information and access to NAF's meetings, or that they had surreptitiously made recordings during those meetings. NAF was unaware of the fraud until Defendants began releasing the edited recordings on July 14, 2015."), *with Planned Parenthood Fed'n of Am.*, 214 F. Supp. 3d at 839 ("The allegations of damages currently included in plaintiffs' FAC do not clearly differentiate between damages that were directly caused by the breaches of plaintiffs' security measures themselves as opposed to damages that were caused by the publication of the videos and related Human Capital Project."). NAF also specifically pleads reputational harm, where Planned Parenthood did not. *See* Doc. 131 at ¶¶ 50, 109, 110, 121, 147, 200.

2. NAF's Cause of Action for Civil Conspiracy Fails to State a Claim for Relief.

NAF fails to state a claim for civil conspiracy for two independent reasons. First, as laid out in the rest of this Memorandum, NAF has failed to allege plausibly that Defendants committed any underlying tort. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 454, 510-11 (1994). Thus, absent a showing that an underlying tort occurred, there can be no actionable civil conspiracy. *Id.*; *Kenne v. Stennis*, 230 Cal. App. 4th 953, 968-69 (2014) (holding that the failure to establish an underlying tort defeated civil-conspiracy claim).

Second, NAF's civil conspiracy claim fails to allege conspiracy between more than one legally distinct person. "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Black v. Bank of Am.*, 30 Cal. App. 4th 1, 6 (1994) (quotation omitted). Here, NAF alleges that all of the individuals who participated in the alleged conduct acted as agents of BioMax and/or CMP. *See, e.g.*, Doc. 131, ¶¶ 13, 16, 21, 33, 92, 128, 132. "When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire." *Black*, 30 Cal. App. 4th at 6. NAF also alleges that CMP and BioMax do not have separate corporate identities, but rather that they are one and the same. *See* Doc. 131, ¶ 23. But "[a] corporation cannot conspire with itself." *Black*, 30 Cal. App. 4th at 6. Therefore, NAF's civil conspiracy fails.

3. NAF's Cause of Action for Promissory Fraud Fails to State a Claim for Relief.

NAF fails to state a plausible claim for promissory fraud under California law. "To plead promissory fraud, a plaintiff must plead the same elements as he would if asserting a general fraud claim." *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1271 (C.D. Cal. 2010). Thus, a claim for promissory fraud requires "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court*, 12 Cal. 4th 631, 638

(1996) (quotation omitted). In a promissory fraud claim, the "misrepresentation" occurs when the defendant enters into a contract under which it does not intend to perform. *Id.* ("A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.").

Here, NAF claims that when Defendants entered into the Exhibitor Agreement and Confidentiality Agreement, Defendants did not intend to fulfill their obligations under those agreements. This claim fails as stated above in Part 1, and for at least four additional reasons.

3.1. NAF HAS NOT RESCINDED ITS AGREEMENTS WITH DEFENDANTS.

NAF cannot raise its promissory fraud claim because it has reaffirmed its agreements with Defendants rather than rescinding them as required under California law. NAF's Sixth Cause of Action alleges breaches of the Exhibitor Agreement and the Confidentiality Agreements between NAF and Defendants. *See* Doc. 131, ¶¶ 193-200. These are the same agreements that underlie NAF's promissory fraud claim. *See id.*, ¶¶ 176-85. But "[a] party may not sue in fraud for damages caused by the fraudulent inducement of a contract without first rescinding the contract." *Goldman v. Seawind Grp. Holdings Ptd Ltd.*, Case No. 13-cv-01759, 2015 WL 433507, at *11 (N.D. Cal. Feb. 2, 2015); *see also Vill. Northridge Homeowners Assn. v. State Farm Fire & Cas. Co.*, 50 Cal. 4th 913, 931 (2010). Thus, for example, in *Goldman*, the court held that the plaintiffs' promissory-fraud claim was "legally precluded" because "plaintiffs have not rescinded the [contract] and instead have affirmed it twice by suing to enforce it, and therefore they cannot sue for promissory fraud." *Goldman*, 2015 WL 433507, at *11. Here, NAF has not rescinded its agreements with Defendants but instead has reaffirmed them by bringing Count Six of this case. Thus, NAF's Fourth Cause of Action is "legally precluded." *Id.*

3.2. NO MISREPRESENTATIONS BY DEFENDANTS COULD HAVE CAUSED NAF'S HARM.

Under California law, a claim for fraud requires that the plaintiff plead damages that were proximately caused by the fraudulent misrepresentation. *See Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1818 (1996). A fraud that does not proximately cause the plaintiff's injuries is not actionable. *See id.*at 1818-19. "If the promisor performs [a contract] or has not yet broken her promise, then any damages the claimant suffers are not the *proximate* result of the promisor's misrepresentation,

and there is no action for promissory fraud." Ayres & Klass, *Promissory Fraud Without Breach*, 2004 WISC. L. REV. 507, 509-10 (emphasis in original). In *Service by Medallion*, the court considered a promissory fraud claim where the parties had performed under a contract for several months, before the defendant terminated the contract. 44 Cal. App. 4th at 1818-19. The court rejected the promissory fraud claim, explaining that "it was the termination, not the misrepresentation [of an intent to perform the contract], that resulted in the alleged harm." *Id.* at 1819; *see also Hassanally v. JRAM Enters., Inc.*, No. B191600, 2007 WL 1990385, at *9 (Cal. Ct. App. July 11, 2007) (rejecting a promissory-fraud claim because the defendant had complied with its contractual obligations); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1368 (9th Cir. 1981) (holding that a party's "initial performance in accordance with its promises negates any possible inference of fraud").

As described in Part 5 below, NAF does not plead adequately that Defendants breached the Exhibitor Agreement or the Confidentiality Agreement. Because the FAC fails to allege that Defendants breached their contracts with NAF, any promissory misrepresentations by Defendants could not have proximately cause the harm allegedly sustained by NAF or its members.

3.3. NAF HAS NOT PLEADED ITS PROMISSORY FRAUD CLAIM WITH PARTICULARITY.

NAF's promissory fraud claims is based on the same alleged misrepresentations underlying NAF's breach of contract claim. *Compare* Dkt. 131 at ¶¶ 177-78, *with* Dkt. 131 at ¶¶ 194-95. However, as stated below in Part 5.4, NAF has failed to plead with particularity when and how they breached the Exhibitor Agreement by allegedly falsely "tout[ing] [BioMax] to attendees and NAF staff as a legitimate tissue procurement service." Dkt. 131 at ¶¶ 105, 129. Particularity is required for a fraud claim. Fed. R. Civ. P. 9(b). Therefore, NAF's promissory fraud claim fails.

3.4. THE EXHIBITOR AGREEMENT SHOWS THAT DEFENDANTS ENGAGED IN NO FRAUD.

Again, NAF's promissory fraud claim is based on the same alleged misrepresentations as NAF's breach of contract claim. But the Exhibitor Agreements contradict NAF's misrepresentation claims. *See* Part 5.4 below. Therefore, they undermine NAF's promissory fraud claim as well.

4. NAF's Cause of Action for Fraudulent Misrepresentation Fails to State a Claim for Relief.

NAF fails to state a claim for fraudulent misrepresentation for two reasons: (1) NAF cannot recover damages, an essential element of fraud, for the reasons stated in Part 1 above, and (2) it fails to

plead fraud with particularity. NAF's fifth cause of action is based on pure speculation. "In alleging fraud . . ., a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quotation omitted). For each allegedly false statement, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation omitted).

NAF's Count Five fails to pinpoint anything that is false or misleading. The FAC identifies five categories of representations underlying Count Five. Doc. 131, ¶ 187. Of falsity, the FAC simply alleges in the most general terms: "These representations were false." *Id.* This generic allegation of falsity falls short of Rule 9(b)'s particularity requirement. The cursory statements in Paragraph 187 leave Defendants to speculate precisely which specific statements of Defendants were allegedly false, and how the alleged representations are false. Count Five simply does not "set forth what is false or misleading about [the] statement[s], and why [they are] false." *Vess*, 317 F.3d at 1106.

Moreover, even if the Court were disposed to overlook their lack of particularity, the allegations do not give rise to a plausible claim for relief. The first category concerns "the false representations made in" the Exhibitor Agreements and Confidentiality Agreements which underlie NAF's breach of contract claim. But as shown in Part 5 below, Defendants made no false representations in those agreements. Categories two through five concern allegedly false emails, false web pages, false business cards, etc. But using pseudonymous information for purposes of investigative journalism is not fraudulent. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018) ("[A] false statement made in order to access a[] . . . facility . . . cannot on its face be characterized as made to effect a fraud"); Komal S. Patel, *Testing the Limits of the First Amendment: How Online Civil Rights Testing Is Protected Speech Activity*, 118 COLUM. L. REV. 1473, 1490 (2018) ("[T]here [i]s no fraud in a tester scheme because a scheme to expose publicly any bad practices that the investigative team discovered [i]s not fraudulent.") (quotation marks omitted).

NAF's complaint shows that in applying for, signing up, and exhibiting at the NAF conferences, Defendants did not do anything different from any other exhibitor except use

pseudonymous identities. Although the boundaries of the substantive rights of the press are not clear, using pseudonymous identities is squarely within them. *See Wasden*, 878 F.3d at 1194; Al-Amyn Sumar, *Animal Legal Defense Fund v. Wasden and Newsgathering: More Significant Than It Appears*, COMM. LAW., Winter 2018, at 12, 13 ("*Wasden* recognized constitutional protection for newsgathering in circumstances where *Alvarez* does not obviously apply: to non-governmental actors, on private property. That is a major expansion of the right[s] [of the press]—one that, though its precise contours are not entirely clear, has potentially important implications for other kinds of laws that impose liability for engaging in newsgathering activities.").

5. Plaintiff's Cause of Action for Breach of Contract Fails to State a Claim.

NAF's breach of contract claim is baseless. NAF claims that Defendants have breached Exhibitor Agreements dated February 5, 2014, and March 25, 2015 (Doc. 131-1, 1:31-5), and Confidentiality Agreements dated April 5, 2014, and April 18, 2015 (Doc. 131-2, 131-3, 131-4, 131-6). Doc. 131, ¶ 197. NAF fails to state a plausible claim that Defendants breached either type of agreement. NAF claims Defendants breached the Exhibitor Agreements because: (1) "Biomax is not a biological specimen procurement company," (2) "Biomax's exhibit for the annual meetings was not consistent with NAF's purposes," (3) "Biomax did not identify itself or its services truthfully and accurately," (4) "Defendants have disclosed information orally or visually at the annual meetings to third parties without NAF's written consent." Doc. 131, ¶¶ 194, 197. NAF claims Defendants breached the Confidentiality Agreements because: (5) "Defendants did make video, audio, photographic, or other recordings at the NAF annual meetings," (6) Defendants "have disclosed information learned at NAF's annual meetings to third parties without NAF's consent," and (7) Defendants "have not used information learned at NAF's annual meetings in order to enhance the quality and safety of services provided by NAF members and other annual meeting participants." *Id.* at ¶¶ 195, 197. For the reasons stated below, NAF has not plausibly alleged a claim for breach of contract, with respect to any[4] of its alleged breaches, and thus the Court should dismiss NAF's Count Six.

[4] Where there are multiple distinct claims for relief within a single pleaded count, and some of those claims for relief are legally untenable, a motion to dismiss can act to dismiss the barred claims for relief. *See Hill v. Opus Corp.*, 841 F. Supp. 2d 1070, 1081 (C.D. Cal. 2011).

5.1. (5), (6), AND (7): THE CONFIDENTIALITY AGREEMENTS LACK CONSIDERATION.

Every contract requires consideration. *Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 188 Cal. App. 4th 401, 423 (2010). NAF provided none to support the Confidentiality Agreements. NAF pleads that "exhibitors who wish to attend NAF's annual meeting must first submit an 'Application and Agreement for Exhibit Space.' . . . The Application and Agreement for Exhibit Space expressly incorporates NAF's 'Exhibit Rules and Regulations.' . . . **Once an exhibitor signs on to these conditions and submits the required written agreement, documentation and fees, it is registered as an exhibitor.**" Doc. 131, ¶¶ 68-69 (emphasis added); *see also* Doc. 131-1, 131-5 (Exhibitor Agreements). NAF further pleads that "with its fee," "Defendants purchased from NAF the right to set up an exhibit booth for Biomax, the right to attend the NAF annual meeting for 'Sarkis,' 'Tennenbaum,' and 'Allen,' and the right to participate in educational workshops. . . . Registration and payment of these fees was a precondition . . . to gain access to NAF's . . . annual meeting in San Francisco." Doc. 131, ¶¶ 95-97.

Then, "[o]n the first day of the meeting . . . [Defendants] all signed non-disclosure agreements." *Id.* at ¶¶ 100, 104. As (accurately) pleaded by NAF, Defendants purchased the right to attend NAF's conferences when they paid their fee and returned the Exhibitor Agreement, and NAF provided no further consideration for the Confidentiality Agreements. *See also id.* at ¶ 124 (Defendants "purchased the right" to attend 2015 NAF conference), ¶ 128 (Defendants later presented with NDAs). Indeed, the FAC implies (correctly), that Defendants were given no prior notice of the Confidentiality Agreements. They were not made aware of the expectation that they would sign additional Confidentiality Agreements until they showed up at the NAF Conferences expecting to be admitted, which was long after they had purchased the right to attend. *See id.* at ¶¶ 95, 100, 104, 124, 126, 128.

5.2. (2) AND (7): NAF HAS NOT PLAUSIBLY ALLEGED THAT DEFENDANTS USED NAF CONFERENCE INFORMATION IN A MANNER INCONSISTENT WITH ENHANCING THE QUALITY AND SAFETY OF ABORTION SERVICES.

The Confidentiality Agreement provides that "NAF Conference Information is provided to Attendees to help enhance the quality and safety of services provided by NAF members and other participants. Attendees may not use NAF Conference Information in any manner inconsistent with

these purposes." Doc. 131-2, ¶ 2. NAF claims that Defendants breached this provision by using NAF Conference Information in a manner inconsistent with enhancing the quality and safety of abortion services. That claim fails for two reasons. First, as explained in Part 5.6 below, "NAF Conference Information" covers at most information obtained through formal conference proceedings, and NAF's Complaint fails to allege plausibly that Defendants have used any such information.

Second, the purported obligations imposed by this provision are too open-ended to be enforceable under California law. "To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." *Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 793 (2013) (internal quotation marks and alteration omitted). A contractual provision is unenforceable if it "provides no rational method for determining breach or computing damages." *Id.* (internal quotation marks omitted); *see also Elite Show Servs., Inc. v. Staffpro, Inc.*, 119 Cal. App. 4th 263, 268 (2004); 1 WILLISTON ON CONTRACTS § 4:18 (4th ed. 1990) ("It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.").

There is no rational way for the Court to assess whether a party used NAF Conference Information to enhance the "safety" or "quality" of abortion services. NAF's allegation is evidence of the subjectivity of such judgments, because a disinterested observer would presumably regard rooting out illegal fetal tissue trafficking as a way of promoting the quality and safety of abortion services. The provision also provides no coherent basis for assessing damages in the event of breach. This is precisely the sort of provision that is too indefinite for a court to enforce.[5]

5.3. (5): NAF HAS NOT PLAUSIBLY ALLEGED THAT ANY RECORDING THAT OCCURRED AT THE NAF MEETINGS VIOLATED THE APPLICABLE AGREEMENTS.

NAF claims that the Confidentiality Agreement created a blanket ban on all recording at

[5] NAF pleads that alleged Breach 2 ("that Biomax's exhibit for the annual meetings would be consistent with NAF's purposes"), is practically identical to alleged Breach 7, addressed in this section. *See* Dkt. 131, at ¶ 22 (Defendants "held Biomax out as a legitimate fetal tissue procurement organization whose purpose was consistent with that of NAF's (*i.e.*, to enhance the quality and safety of services provided by NAF members)"). Therefore, Breach 2 fails for the same reasons as Breach 7.

NAF meetings. This position lacks support in the text of the agreement. Even if the Confidentiality Agreement were enforceable (which it is not, *see* Part 5.1, above), it would cover only recordings of formal conference proceedings. The Confidentiality Agreement provides that "Attendees are prohibited from making video, audio, photographic, or other recordings of the *meetings or discussions* at this conference." Doc. 131-2, ¶ 1 (emphasis added). The most natural reading of "the meetings . . . at this conference" is that it refers to programmed conference events. As noted below in Part 5.6, Paragraph 2 of the Confidentiality Agreement uses the term "discussions" to refer to formal conference events, not informal chatter among participants. Courts presume that contracts intend a word to carry the same meaning each time that word appears in the contract. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 526 (2003) (collecting cases). Here, "discussion" refers only to dialog that is part of the conference programming. The Confidentiality Agreement's no-recording provision applies only to formal NAF conference proceedings, not to informal or competitive business conversations in hallways and exhibit halls.

Furthermore, because the provision expressly prohibits filming "meetings or discussions," basic principles of contract interpretation dictate that it does not prohibit filming any other aspects of the meetings. California courts follow the maxim *expressio unius est exclusion alterius*—that the express inclusion of one thing implies the exclusion of all others. *See, e.g.*, *Stephenson v. Drever*, 16 Cal. 4th 1167, 1175 (1997). Here, the express prohibition on recording formal proceedings implies that there is no prohibition on recording informal conversations.

Even in its amended Complaint, NAF has produced nothing but the barest allegation that, "on information and belief," Defendants recorded two conference panels. Doc. 131, ¶ 109. Yet, regarding one of those panels, they admit that a presenter is merely "concerned"—not, e.g., "convinced" or "aware"—that Defendants recorded it. *Id.* Apart from that, the FAC makes only vague claims like "Defendants improperly and surreptitiously made video or audio recordings at the 2014 and 2015 annual meetings." Doc. 131, ¶ 182; *see also id.* ¶¶ 110, 131, 141, 145, 197. These allegations fail to plead a breach of contract with the requisite specificity. *See Levy v. State Farm Mut. Auto. Ins. Co.*, 150 Cal. App. 4th 1, 5 (2007) ("Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity."). Taken together, they

show nothing "more than the sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Thus, NAF has failed to state a plausible claim that Defendants' recordings breached the Confidentiality Agreement.[6]

5.4. (1), (2) AND (3): NAF HAS NOT PLAUSIBLY PLEADED THAT DEFENDANTS BREACHED THE EXHIBITOR AGREEMENTS

NAF's allegations that Defendants breached the two Exhibitor Agreements all fail. Portions of those two agreements are attached to the complaint as Exhibit A (Dkt. 131-1) and Exhibit E (Dkt. 131-5). *See* Dkt. 131 at ¶¶ 97-98, 123. But amazingly, NAF did not attach an entire Exhibitor Agreement to its Complaint, perhaps because doing so would defeat its claim for breach. Complete versions of Exhibit A and E are located at Dkt. 3-7 and Dkt. 3-13, pp. 7-8, respectively. The complete exhibits refute Plaintiff's factual allegations, revealing that nowhere does Biomax "describe[] itself . . . as a 'biological specimen procurement [and] stem cell research' organization," nor does Biomax state that it "was in the business of 'fetal tissue procurement' and 'human biospecimen procurement.'" *Compare* Dkt. 131, at ¶¶98, 123, *with* Dkt. 3-7, Dkt. 3-13. In response to instructions to "[l]ist the products or services *to be exhibited*," BioMax listed in 2014 "biological specimen procurement, stem cell research" (Dkt. 3-7, at 3) and in 2015 "fetal tissue procurement, human biospecimen procurement" (Dkt. 3-13, at 7).[7] But nowhere do the agreements ask what kind of organization BioMax is, or what services it actually *provides* elsewhere. NAF's characterization of the agreements is false.[8]

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[6] Paragraph 13 of the Exhibitor Agreement contains a prohibition on photography without consent, but NAF did not plead that Defendants breached that provision. *Compare* Doc. ¶ 194, *with id.* ¶ 195. That paragraph provides that "[p]hotography of exhibits by anyone other than NAF or the assigned Exhibitor of the space being photographed is strictly prohibited." Doc. 131-1, ¶ 13. Here again, the express prohibition on a specific form and context of recording—photographing exhibitor booths without the permission of the booth operator—implies that the Exhibitor Agreement does not prohibit recordings in other forms or contexts. *Stephenson v. Drever*, 16 Cal. 4th 1167, 1175 (1997).

[7] The Court should read the complete versions of those agreements into the FAC because no party disputes their authenticity. *See Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

[8] The Exhibitor Agreement contains additional language regarding how "Exhibitors must show only products provided by them in the regular course of their business." Dkt. 131-1 at ¶ 5. But there is no allegation that BioMax exhibited any products, only services. *See* Dkt. 131 at ¶ 89. In fact, a fetal tissue procurement company can only sell the service of procuring tissue, not the product of tissue itself. Selling tissue is a federal offense. 42 U.S.C. § 289g-2.

Similarly, nowhere in the Exhibitor Agreements did BioMax promise that its "exhibit for the annual meetings would be consistent with NAF's purposes." Dkt. 131, at ¶ 194. That language appears to refer to paragraph 2 of the Exhibitor Agreement fine print, which states that "Exhibitor expressly acknowledges NAF's **right to accept or reject** applications for exhibit space for any reason, including (without limitation), at NAF's sole discretion, that the proposed exhibit or the exhibitor's business, products, services, or performance in the fields are **not consistent with NAF's purposes and objectives**." Dkt. 131-1, at ¶ 2 (emphasis added). Defendants never denied NAF's right to accept or reject BioMax's application; indeed, NAF exercised that right by accepting BioMax's application.

Finally, NAF pleads that Defendants breached the Exhibitor Agreements because "Biomax did not identify itself or its services truthfully and accurately." Dkt. 131, at ¶ 197. This apparently references paragraph 15 of the Exhibitor Agreement, which states, "Exhibitor agrees to identify, display, and/or represent their businesses, products, and/or services truthfully, accurately, and consistently with the information provided in the Application." Dkt. 131-1, at ¶ 15. NAF's Complaint provides very little description of anything BioMax allegedly represented that was false. There are only two paragraphs that deal with how Defendants allegedly "identif[ied], display[ed], and/or represent[ed]" BioMax: paragraph 105 for the 2014 conference, and paragraph 129 for the 2015 conference. Those paragraphs state that BioMax "touted [itself] to attendees and NAF staff as a legitimate tissue procurement service." Dkt. 131, at ¶¶ 105, 129. That allegation lacks particularity. When did BioMax allegedly tout that? Not in the emails that NAF quotes. *See* Dkt. 131, at ¶ 92. NAF provides no description of when BioMax allegedly made that representation, which is insufficient to state a breach of contract claim. *Levy*, 150 Cal. App. 4th at 5.

Moreover, the only supposed evidence that BioMax's representations were false is NAF's bald assertion: BioMax is a "false entit[y]." Dkt. 131 at ¶ 84. But that is demonstrably untrue. BioMax is a duly incorporated limited liability corporation under California law. *Id.* at ¶ 18. It is not uncommon for journalists to set up real companies as part of their investigations, probably not least because infiltrating an already-existing company is fraught with danger. *See, e.g.*, *Food Lion II*, 194 F.3d at 516. And, as NAF admits, BioMax "would [not] have been allowed access to the annual meeting sessions" unless it were "a commercial firm." Dkt. 131 at ¶ 96. Defendants could not have

successfully attended NAF's conferences if they had not created an actual corporation with expertise in tissue procurement, which is a perfectly possible thing to do. Thus, NAF has not plausibly pleaded that Defendants breached the agreement to identify BioMax's services truthfully and accurately.

5.5. (1), (2) AND (3): NO DAMAGES WERE CAUSED BY THE ALLEGED BREACHES

"An essential element of a claim for breach of contract are damages resulting from the breach. Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach." *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060 (2002) (citations omitted). In determining proximate cause, courts "focus [their] opinion not on the metaphysical 'but for' sequence of events preceding [the] injury but rather on the question of whether the principles of logic, fairness, and justice dictate the defendant should be held liable in a given situation." *Johnson v. Greer*, 477 F.2d 101, 106 (5th Cir. 1973).[9]

As the Supreme Court has stated, "[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. What we mean by the word 'proximate,' one noted jurist has explained, is simply this: 'Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'" *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (quotation marks, citations, ellipses and brackets omitted). Indeed, "proximate cause is not about causation at all but rather involves an analysis of the policy considerations affecting the scope of the defendant's legal responsibility for the plaintiff's injury." Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 872 (2009). "It has often been noted that proximate cause analysis is a mechanism by which courts implement public policy judgments: the wrongfulness of a defendant's conduct is balanced against the severity of a plaintiff's harm, and the court determines whether the situation is one in which society should provide judicial redress." *Jarchow v.*

[9] *See also* Andrew L. Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong*, 66 TEX. L. REV. 469, 495 (1988) ("The general principles of foreseeability and proximate cause are elastic concepts that are designed to achieve justice in each particular case."); Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1202 (2013) ("[P]roximate cause inherently relates to policy").

Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 934 (1975), *overruled on other grounds by Soto v. Royal Globe Ins. Corp.*, 184 Cal. App. 3d 420 (1986).

In applying these principles to journalists, where the damages flow not from the misrepresentation-to-gain-access itself but from the later publication of truthful information, proximate cause ends at the publication, not the earlier misrepresentation. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 963 (M.D.N.C. 1997) (*Food Lion I*), *aff'd in pertinent part on other grounds*, *Food Lion II*, 194 F.3d at 522, the district court held that the plaintiff could not recover damages resulting from ABC's broadcast of undercover filming that depicted the plaintiff's food-handling practices in a negative light. As the court explained, the plaintiff's "lost sales and profits were the direct result of diminished consumer confidence in the store." *Id.* Earlier allegedly wrongful conduct "may have enabled" ABC to capture the plaintiff's practices on camera, "but it was the food handling practices themselves—not the method by which they were [obtained,] recorded or published—which caused the loss of consumer confidence." *Id.* Thus, ABC's misrepresentations to obtain access to the plaintiff's facilities did not cause the plaintiff's damages.

Similarly, in *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 n.9 (9th Cir. 2018), the Ninth Circuit reiterated that proximately-caused damages must flow from "the speech to gain entry to the facility, not the journalistic creation or speculative harm that may 'arise' after entry." This is because "[f]ocusing on such speculative harm sweeps in too many scenarios in which a person entering the property causes no harm to the property or its owner. This approach also places a value judgment on the reporting itself and undermines the First Amendment right to critique and criticize." *Id.* After all, "a false statement made in order to access a[] . . . facility . . . cannot on its face be characterized as made to effect a fraud"—but rather is protected activity taken in furtherance of First Amendment rights. *Id.* at 1194.

Here, all of the alleged damages flow from Defendants' alleged breach of the nondisclosure provisions of NAF's contracts, not from the alleged breach of the "nature of BioMax" provisions of NAF's contracts—there are no proximately-caused damages flowing form the alleged breach of those provisions. If the former provisions were never allegedly breached, NAF would not have known of latter alleged breaches. Doc. 131, ¶ 141 ("Before CMP went public . . . NAF . . . did not

know . . . that Defendants had . . . obtained . . . access to NAF's meetings"). Without damages, NAF's claim for breach of the "nature of BioMax" provisions necessarily fail.

5.6. (4) AND (6): NAF HAS NOT PLAUSIBLY ALLEGED THAT ANY ACTUAL OR POTENTIAL DISCLOSURES OF INFORMATION WOULD VIOLATE THE APPLICABLE AGREEMENTS.

NAF's First Amended Complaint fails to plausibly allege that any of Defendants' actual or potential disclosures violate either the Exhibitor Agreement or the Confidentiality Agreement.

5.6.1. As interpreted by NAF, the confidentiality provisions of both agreements violate anti-trust provisions and are overbroad to the point of invalidity.

NAF would have this Court hold that, through a standard-form contract of adhesion, it restrains any attendee at any of its conferences from disclosing any piece of information obtained during that conference—*i.e.*, from anyone, in any form, in any context—without NAF's written permission. Defendants reject that interpretation of the Agreements' terms, as described below. But it should also be noted that the broad secrecy requirement NAF purports to have imposed would be an illegal restraint of trade in violation of our nation's anti-trust laws.

"Every contract . . . in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1. Not all trade association activity is a "restraint of trade," of course. *See Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 586 (1925) (holding that trade associations that meet "without . . . reaching or attempting to reach any agreement or any concerted action with respect to . . . restraining competition, do not thereby engage in unlawful restraint of commerce"). But, "[b]y definition, trade associations are groups of competitors in a common trade or business. Because their association is a collective body, almost any activity they undertake is subject to strict scrutiny under the antitrust laws." ALLAN BROWNE, ET AL., CONTINUING EDUC. OF THE BAR: CAL. BUS. LITIG. § 5.63 (2018). Because NAF is a trade association, its contracts must be carefully scrutinized for anti-competitive effects.

Courts have found non-disclosure agreements as overbroad as those that NAF is proposing to be illegal restraints on trade. For example, in *Trailer Leasing Co. v. Assocs. Commercial Corp.*, the court held that a non-disclosure agreement was invalid for defining confidential information as including all information, even information that was plainly not confidential. No. 96 C 2305, 1996 WL 392135, at

*6 (N.D. Ill. July 10, 1996). ("[T]the non-disclosure agreement . . . seeks to prevent Chase from disclosing 'any methods and manners' of TLC's business regardless of whether the method or manner is confidential. Thus, the agreement extends beyond protecting possible legitimate interests of TLC."). Similarly, in *Lasership Inc. v. Watson*, the court rejected a confidentiality agreement, because it they are "unfavored restraints on trade," and the one at issue "prohibit[ed] [the party] from telling a neighbor for the rest of her life anything about [the other party], including information that is not proprietary in nature or worthy of confidence." 79 Va. Cir. 205 (2009); *see also Kindt v. Trango Sys., Inc.*, No. D062404, 2014 WL 4911796, at *7 (Cal. Ct. App. Oct. 1, 2014) ("We agree that the overly broad definition of confidential information, when coupled with the prohibition of its use in soliciting customers, makes the Confidentiality Agreement facially invalid.")[10]

The evaluation of a practice's anti-competitive effects is a practical, fact-specific inquiry, where the court weighs "the restraint's history, nature, and effect," the business's "market power," and the consumer's interests. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007). In this case, the only reasonable conclusion based on the available facts is that NAF's confidentiality requirements—especially as interpreted by NAF to include every shred of information communicated in any format or context at NAF conferences—restrain trade.

"Plaintiff NAF . . . is a professional association of abortion providers," Doc. 131, ¶ 10, whose "members collectively care for half the women who choose abortion in the United States an Canada each year." *Id.* In other words, NAF's "market power" in the abortion industry is staggering. In fact, NAF openly admits to having industry-wide influence: "Among other things, NAF . . . [s]ets the standards for quality abortion care and develops ethical principles for abortion providers. . . ." *Id.* For such a behemoth in the abortion industry to devise its industry-wide "standards" and "principles," and otherwise facilitate interactions—including the formation of business relationships—among major players in the abortion industry, under a cloak of secrecy is

[10] Although these cases arise most often in the employment context, the anti-competitive nature of a confidentiality agreement equally applies to NAF's attempt to impose secrecy over a tradeshow. *Ingrassia v. Bailey*, 172 Cal. App. 2d 117, 122 (1959) ("While it is obvious that the instant case does not involve an employer-employee relationship, we believe the principles enunciated in the route cases are here fully applicable.")

very clearly not the sort of anti-competitive restraint on trade that is "in the consumer's best interest." *Leegin*, 551 U.S. at 885-86. CMP's investigation provided ample evidence of the sort of illicit practices that can flourish when an industry is permitted to operate in secret. *See* Defendants' Request for Judicial Notice (showing CMP's investigation at NAF's conferences led to criminal referrals of NAF members and a successful prosecution).

NAF began requiring its annual meeting attendees to sign non-disclosure agreements in 2000, Doc. 131, ¶¶ 68, 70, right around when "[u]se of the partial birth abortion procedure achieved prominence as a national issue after it was publicly described by Dr. Martin Haskell . . . at the National Abortion Federation's September 1992 Risk Management Seminar." *Stenberg v. Carhart*, 530 U.S. 914, 987 (2000). "After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on 'partial birth abortion' proliferated." *Gonzales v. Carhart*, 550 U.S. 124, 140 (2007). If NAF had imposed its non-disclosure provisions earlier and courts had been willing to enforce them as imposing the blanket industry-wide secrecy that NAF seeks, the world may never have learned about a barbaric practice that a vast majority of Americans find abhorrent.

NAF claims that its non-disclosure agreements provide security for its members, *see* Doc. 131, ¶ 68, but even if that is true, it cannot justify an illegal restraint on trade. "The end does not justify illegal means. The endeavor [by a trade association] to put a stop to illicit practices must not itself become illicit." *Sugar Inst. v. United States*, 297 U.S. 553, 599 (1936).

For the reasons stated below, Defendants believe that the nondisclosure provisions of NAF's four agreements are narrower than NAF submits, and that Defendants did not violate them. But even by their actual terms, they purport to restrain conference attendees from disclosing "information that is not proprietary in nature or worthy of confidence," and they are not "narrowly tailored" to serve NAF's legitimate interests. *See Lasership*, 79 Va. Cir. 205 (2009). Given that they are also imposed unilaterally by a powerful industry player for the purpose of concealing the conduct of members from public scrutiny, the "rule of reason" dictates that they are illegal restraints on trade. *See Leegin*, 551 U.S. at 885-86. Under anti-trust law, a trade organization may not limit the transfer of all information about an industry for the purpose of precluding societal oversight of that industry. NAF's confidentiality agreements go too far. They restrain trade and are therefore illegal.

5.6.2. *The Exhibitor Agreement purports to prohibit disclosure of, at most, information provided by NAF itself in the context of formal conference proceedings.*

The Exhibitor Agreement cannot be read to prohibit disclosure of any information allegedly recorded by Defendants. At most, the Exhibitor Agreement purports to restrict the disclosure of information furnished by NAF itself in the context of formal conference proceedings. It states:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information **NAF may furnish** is confidential and not available to the public. Exhibitor agrees that all written information **provided by NAF**, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties.

Doc. 131-1, ¶ 17 (emphasis added). This text is not a model of clarity.

Courts should "interpret [contractual] language in context, rather than interpret[ing] a provision in isolation." *Am. Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245 (2006). The first sentence of Paragraph 17 explains that "any information ***NAF may furnish*** is confidential and not available to the public." Doc. 131-1, ¶ 17 (emphasis added). The immediately subsequent phrase reinforces that the contract restricts disclosure of "written information ***provided by NAF***." *Id.* (emphasis added). These expressions provide necessary context for interpreting the rest of the paragraph, which would otherwise be unreasonably broad.

Under the doctrine of *noscitur a sociis*, "courts will adopt a restrictive meaning of a listed item if acceptance of a broader meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." *Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court*, 192 Cal. App. 4th 727, 740 (2011). Applying that principle here, the phrase "written information provided by NAF" informs the interpretation of the immediately following phrase "or any information which is disclosed orally or visually." Doc. 131-1, ¶ 17; *see Blue Shield*, 192 Cal. App. 4th at 740. Therefore, only oral and visual information that was "provided by NAF" is protected under this paragraph. Similarly, the inclusion of the word "may" indicates that NAF may also furnish non-confidential information, leading to the plain requirement that the information be identified as confidential when furnished.

If "provided by NAF" modified only "written information" but not "information which is

disclosed orally or visually," the Exhibitor Agreement would dictate that information obtained from entities other than NAF be considered confidential if it was disclosed orally or visually but *not* if disclosed in written form. Such an interpretation would be absurd. *See Roden v. AmerisourceBergen Corp.*, 186 Cal. App. 4th 620, 651 (2010) (holding that California courts "must interpret a contract in a manner that is reasonable and does not lead to an absurd result"); *see also* Cal. Civ. Code § 1643 (requiring that a contract receive "such an interpretation as will make it . . . reasonable").

It would be equally absurd to conclude from the clumsily-drafted language of the Exhibitor Agreement that every shred of "information" disclosed by any person in any context at a NAF conference is "confidential." Elsewhere in the Exhibitor Agreement—immediately above the signature block—there is language stating that the signor will "hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting." Doc. 131-1. That passage puts no limitation on the term "confidential information," suggesting—in isolation—that an exhibitor would have to seek NAF's written permission before disclosing any information transmitted in any context by any person at the NAF Conference, no matter what its source or subject matter. But the definition of "confidential information" in Paragraph 17 has to inform the interpretation of the more generic passage. "Specific terms of a contract govern inconsistent, more general terms." *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1099 (9th Cir. 2006); *see also* Cal. Code Civ. Proc. § 1859. Paragraph 17 defines "confidential information" as a far narrower class of information: information that is "furnished" or "provided" by NAF.

As stated above in Part 5.5.1, to the extent that the Exhibitor Agreement purports to prohibit disclosure of even public information, it is an illegal restraint of trade. NAF's even broader interpretation of the Exhibitor Agreement would put it even farther beyond the pale.[11] "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect." Cal. Civ. Code § 1643; *see also Weddington Prods., Inc. v. Flick*,

[11] *See also Uniroyal Goodrich Tire Co. v. Hudson*, 1996 WL 520789, at *9 (6th Cir. Sept. 12, 1996) (unpublished per curiam) ("[O]nce confidential information is placed in the public realm, it is no longer confidential . . . ."); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002) (declining to enforce confidentiality agreements that were "so broad that they cover information that cannot possibly be considered confidential").

60 Cal. App. 4th 793, 816 (1998) (holding that an agreement "must not only contain all the material terms but also express each in a reasonably definite manner").

If there is any sense to be made of the Exhibitor Agreement's convoluted and self-contradictory confidentiality terms, it is that they purport to protect *at most* information "provided" or "furnished" by NAF, *i.e.*, itself in official conference materials and proceedings—*not* information exchanged informally among conference attendees and exhibitors. If there were any ambiguity about the scope of the Exhibitor Agreements it would have to be resolved in favor of Defendants and against NAF. The Exhibitor Agreements are standard-form contracts of adhesion. The *contra proferentem* canon requires that "ambiguities in standard form contracts are to be construed against the drafter." *Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913 (2014) (internal quotation marks omitted). Therefore, if the confidentiality provisions of the Exhibitor Agreements admit of more than one interpretation, the Court must apply the least restrictive possibility.

5.6.3. *The Confidentiality Agreement also purports to protect, at most, proprietary information disclosed in formal conference proceedings.*

Like the Exhibitor Agreement, the Confidentiality Agreement purports to limit disclosure only of information provided in a formal context, such as in presentations, workshops, and similar formal contexts. The Confidentiality Agreement provides that:

> NAF Conference Information includes all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means. NAF Conference Information is provided to Attendees to help enhance the quality and safety of services provided by NAF members and other participants. Attendees may not use NAF Conference Information in any manner inconsistent with these purposes.

Doc. 131-2, ¶ 2. The agreement further provides that "Attendees may not disclose any NAF Conference Information to third parties without first obtaining NAF's express written consent, which will not be unreasonably withheld." *Id.*, ¶ 3.

Under the same basic principles of contract interpretation discussed above, the phrase "all information ***distributed or otherwise made available*** at this conference by NAF or any conference participants ***through all written materials, discussions, workshops, or other means***," must be

interpreted to include only information provided in formal conference proceedings, not informal conversations among conference participants. *Id.*, ¶ 2 (emphasis added).

The terms "workshops" and "written materials," as well as the verb "distributed," plainly suggest discrete, formal disclosures such as meeting handouts, presentations, workshops, and similar media. *Noscitur a sociis* requires that other items in the same list—"discussions" and "other means"—be interpreted in a manner that makes them *not* "markedly dissimilar to the other items in the list." *Blue Shield*, 192 Cal. App. 4th at 740. Information exchanged in informal conversations among conference attendees *is* "markedly dissimilar" from "workshops" and "written materials," not least because one would never describe it as being "*distributed* or otherwise *made available*." Therefore, it makes no sense to interpret "discussions" or "other means" to include such conversations. Doc. 131-2, ¶ 2. Interpreting the Confidentiality Agreement to apply to all informal conversations that occur at NAF meetings would also yield the same absurd results as would interpreting the Exhibitor Agreement to apply that broadly. *See* Part 5.5.2.

Furthermore, the second sentence in Paragraph 2 of the Confidentiality Agreement confirms that the first sentence refers only to information disclosed in formal presentations, not informal discussions: "NAF Conference Information is provided to Attendees to help enhance the quality and safety of services provided by NAF members and other participants." Doc. 131-1, ¶ 2. This would be an awkward and unnatural way to describe informal conversations that take place between conference participants; informal, non-scripted conversations with other participants are not "provided to attendees," nor can NAF claim that they have any specific purpose. That description plainly refers to the programmed content of the conference: formal presentations, workshops, written materials, etc. Thus, reading the two sentences together, "NAF Conference Information" refers only to the content of formal conference proceedings, not to informal conversations between participants. *See AB Grp. v. Wertin*, 59 Cal. App. 4th 1022, 1035 (1997) (explaining that the various provisions of a contract must be read together).

As noted with respect to the Exhibitor Agreement, the terms of the Confidentiality Agreement are still unenforceable in that they purport to restrain disclosure of information that does not merit the classification "confidential." *See* Part 5.6.2. But NAF's even broader interpretation

would make the Confidentiality Agreement a flagrantly illegal restraint of trade. *See* Part 5.6.1. Finally, because NAF drafted the Confidentiality Agreement, the Court should resolve any uncertainty as to the scope of the agreement in favor of Defendants. *Rebolledo*, 228 Cal. App. 4th at 913.

5.6.4. *NAF does not allege that Defendants have disclosed or will disclose any information covered by the agreements.*

The FAC fails to allege any facts giving rise to the plausible inference that Defendants have disclosed any information furnished by NAF in the context of a formal conference proceeding. It does not allege that Defendants were "furnished" or "provided" any non-public information at any conference proceeding. With regard to videos that Defendants already have released, the FAC alleges that a video refers to NAF's medical director and twelve employees of NAF members. Doc. 131, ¶ 115. NAF claims that "[o]n information and belief, Daleiden and his cohorts learned of these individuals at NAF's annual meeting in San Francisco." *Id.* But even if this were true, NAF has failed to allege that Defendants learned of these identities from formal proceedings at a NAF meeting. Thus, the Complaint alleges nothing "more than the sheer possibility that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 678, and such allegations fail to state a claim for relief, *id.*

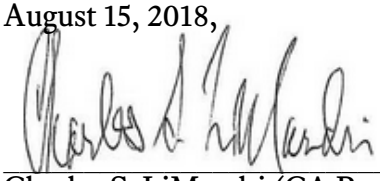
NAF also fails to plausibly allege that any possible videos that might be released in the future would contain any information that Defendants learned through formal means at an NAF meeting. NAF simply alleges that Defendants may have made some unspecified recordings at NAF meetings. *See, e.g.*, Doc. 131, ¶¶ 182, 197. Indeed, NAF claims (in Counts now dismissed) that Defendants recorded "private" business conversations. *See id.*, ¶¶ 226, 228. The closest that NAF comes (and only after Defendants made this argument in their first Motion to Dismiss) to alleging that Defendants even have the capability of releasing formally disclosed information is the bare allegation that, "on information and belief, Defendants wrongfully recorded [two presentations]." *Id.*, ¶ 109. Taken together, these allegations plainly do not show anything "more than the sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Thus, NAF has failed to state a plausible breach-of-contract claim, and the Court must dismiss Count Six of the FAC.

CONCLUSION

For the foregoing reasons, Defendants request that the Court grant their Motion to Dismiss.

Respectfully submitted,

August 15, 2018,



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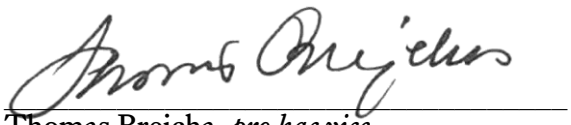

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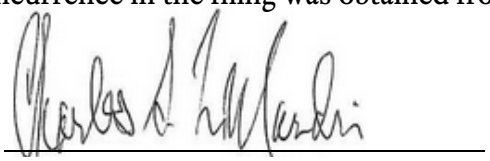
ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

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



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