UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al., Plaintiffs-Appellees, v. ALBIN RHOMBERG, Defendant-Appellant, and CENTER FOR MEDICAL PROGRESS; et al., Defendants.	No. 20-16773 D.C. No. 3:16-cv-00236-WHO (Northern California)

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ON APPEAL FROM THE ENTRY OF FINAL JUDGMENT
IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE WILLIAM ORRICK, PRESIDING

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Opening Brief of Defendant-Appellant Albin Rhomberg

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INTRODUCTION

In 1904 Upton Sinclair left for Chicago to gather evidence for his blockbuster expose on the meatpacking industry. His biographer noted that "by no more elaborate a disguise than the carrying of a dinner pail and armed with a few simple lies appropriate to the area in which he was investigating, he had no trouble going everywhere and noting everything." Like so many undercover journalism projects, Sinclair's novel changed the world, with fellow reformer and future British prime minister Winston Churchill noting that it "pierces the thickest skull and most leathery heart." The public outcry created by *The Jungle* changed the dynamic in Congress and spurred reform.

David Daleiden attempted the same: he assumed an identity, gave a pretextual cover story, and told some simple lies about running a (shell) company (BioMax) that was deeply interested in buying aborted fetal organs. The resulting recorded interviews with those willing to unlawfully sell had a profound effect on the public and lawmakers, resulting in two congressional reports recommending prosecution of numerous industry actors.

In response, Planned Parenthood and several affiliate clinics decided to sue on the grounds of fraud and related causes of action. The challenge with fraud (as opposed to defamation) was coming up with the most basic element of any action

at law: damages. Defendants' mere acts of misrepresenting their identities, entering conferences and clinics, and surreptitiously recording did not directly damage the Plaintiffs, and even the lower court agreed that the First Amendment protected Daleiden's later publications of those interviews.

Nevertheless, the district court allowed claims of fraud, trespass, and RICO conspiracy against undercover journalists to go to a jury. It then affirmed the jury's award of hundreds of thousands of dollars in compensatory damages for expenses voluntarily undertaken by Plaintiff Planned Parenthood Federation of America (PPFA) to improve its security to prevent a future infiltration by investigative journalists. The district court also affirmed the jury's award of compensatory damages for personal security costs incurred by PPFA and three other plaintiff Planned Parenthood affiliates in light of public reaction to the undercover videos as well as punitive damages.

The district court admitted, over objection, expert and other testimony about historical acts of violence against abortion providers that had no connection to the parties in this case or their actions. The court also allowed several of Plaintiffs' witnesses to provide the equivalent of victim impact statements about *their* reaction to the publication of the undercover videos and *their* resulting notoriety even though only their corporate employers were plaintiffs. Yet the district court

steadfastly refused to instruct the jury that it should not award as damages any costs arising from publication of the videos. Instead, it instructed the jury that the First Amendment was *not* a defense to the claims Plaintiffs presented.

The court also imposed injunctive relief against defendant Albin Rhomberg and the other defendants, prohibiting them from engaging in investigative activities that had not taken place for over five years and for which no evidence showed an immediate threat of recurring.

The lower court judgment, punishing Rhomberg as a RICO "conspirator" for assisting an investigative journalism project, must be reversed.

STATEMENT OF ISSUES[1]

1. Whether the district court erred in holding that damages may be awarded against Defendants for costs incurred by Plaintiff PPFA to upgrade security to prevent future infiltrations by the Defendants or others.

2. Whether the court erred in holding that damages may be awarded against Defendants for costs incurred by Plaintiffs PPFA, PPGC, PPOSBC and PPPSGV to provide personal security for employees.

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[1] Pursuant to FRAP 28(i), Rhomberg incorporates by reference the Opening Briefs of Appellants Merritt (No. 20-16820), Newman (No. 20-16068), and Center for Medical Progress et al. (No. 20-16070) including all assignments of error in those briefs.

3. Whether the court erred in holding that damages could be awarded under RICO on the theory that the RICO predicate acts were allegedly a "crucial component" of a plan that ultimately resulted in damages, rather than being the direct or proximate cause of any damages.

4. Whether the court erred in failing to instruct the jury that it could not award damages, whether compensatory or punitive, based on alleged harms arising from publication of videos.

5. Whether the court erred in allowing the highly prejudicial testimony of David Cohen, Michelle Davidson, and other witnesses concerning historical acts of violence and intimidation against abortion providers that had no connection to the parties and issues in the instant case.

6. Whether the court erred in granting summary judgment on Plaintiffs trespass claims because Defendants had misrepresented their identities to gain consent to enter.

7. Whether there was insufficient evidence to find Appellant Rhomberg liable as a co-conspirator for Plaintiffs' RICO, fraud, and unlawful recording claims.

8. Whether the court erred in awarding injunctive relief against all Defendants to prohibit conduct that indisputably had not occurred for five years; for

which there was no evidence of a real and immediate threat of recurrence; and which had not caused Plaintiffs any harm that did not flow from constitutionally protected publication.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Defendant Albin Rhomberg appeals from a final judgment, entered on April 29, 2020. Along with the other defendants, Rhomberg timely filed a joint post-trial motion under Federal Rules of Civil Procedure 50(b); all post-trial motions were denied on August 19, 2020. Doc. 1116. Rhomberg timely filed a notice of appeal on September 14, 2020. ER 1–3. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

From 2013 to 2015, Defendant Daleiden, a pro-life activist, formed the Center for Medical Progress, for the purpose of conducting an undercover investigation, entitled the "Human Capital Project," into the procurement and use of tissue and organs from aborted human fetuses, with the intention of creating an Internet documentary on the topic. 1-ER-53 at ¶3. The investigation phase of the project included Daleiden and other investigators assuming fictional identities and attending biotech and abortion industry conferences in order to meet individuals

involved in fetal tissue procurement and research. 1-ER-53 at ¶4-7. In the tradition of undercover journalism, Daleiden surreptitiously recorded his conversations with these individuals, in crowded exhibit halls and conference rooms, at meetings in restaurants, and during visits to abortion facilities.[2] 1-ER-53-58 at ¶¶ 26, 34, 38, 40, 42, 45.

Daleiden recruited others to help him in this video project, including Appellant Albin Rhomberg. 1-ER-53 at ¶7. In early 2013, Daleiden asked Rhomberg to be on the board of the Center for Medical Progress ("CMP"), the non-profit organization Daleiden created to sustain his investigative activities and be the conduit for the final video releases. Rhomberg agreed. 1-ER-53 at ¶2; 5-ER-1116:6-18; 4-ER-1242:8-1245:22.

On July 14, 2015, Daleiden released the first segment of his project. This segment was a "highlight video" of a lunch meeting with Deborah Nucatola, Senior Medical Director of Planned Parenthood Federation of America (PPFA). The segment, and additional segments published in the ensuing weeks, garnered significant public attention, including significant negative attention for Planned Parenthood and certain abortion providers whose recorded conversations were made public by videos. 2-ER-150:5-9.

[2] For a complete chronology of the investigation stage of the Human Capital Project, *see* 18-ER-5018-5019.

PPFA and seven California Planned Parenthood affiliates filed suit on January 14, 2016. 25-ER-6739. Joined by Planned Parenthood of the Rocky Mountains and Planned Parenthood Gulf Coast/Center for Choice, they filed their First Amended Complaint (the operative complaint) on March 24, 2016. 24-ER-6625. All Defendants filed motions to dismiss under Fed. R. Civ. Proc. 12(b)(6) and anti-SLAPP motions under California Code of Civil Procedure §425.16 which the lower court denied. 2-ER-124. Following Defendants' unsuccessful appeal of the denial of the anti-SLAPP motions, the case proceeded through discovery to summary judgment and trial.

In May 2019, the parties filed cross-motions for summary judgment. The district court granted summary judgment to Plaintiffs on various discrete issues, two of which are relevant to defendant Rhomberg: 1) finding an interstate nexus for the alleged RICO predicate acts of producing false IDs, and 2) imposing liability on all trespass claims. 2-ER-272-273.

The court granted summary judgment to Defendants as to recording claims dropped by various Plaintiffs. 2-ER-273-274. But more importantly, the court made rulings concerning the allowable and excluded damages under RICO and other damages claims, drawing the line at those caused by the actions of third parties. These rulings had the effect of dismissing the RICO claims of six of the

plaintiffs. 2-ER-157 -158, 167-169. The remaining plaintiffs (PPFA, PPPSGV, PPOSBC, and PPGC/PPCFC) claimed to have damages that fell into the categories deemed allowable under the court's formulation and were allowed to proceed on their RICO and fraud claims. Dkt. 820-1 (Ex. A).

These claims and the remaining claims (other than three additional claims dropped by Plaintiffs after the summary judgment stage) proceeded to trial. *See* 18-ER-5020-5021; 3-ER-598:17-21. In light of the district court's ruling on allowable and disallowed damages, Defendants moved *in limine* to exclude irrelevant and prejudicial evidence of historical acts of violence or criminality against abortion providers, as well as testimony or other evidence about the emotional reactions of Plaintiffs' staff to the defendants' conduct and publications. The district court denied these motions without explanation. 1-ER-130.

During the 17-day trial, the court allowed the equivalent of "victim impact" testimony about the effects of the defendants' publications on Plaintiffs' staff even though those staff members were not parties to the suit. It repeatedly refused to instruct the jury that it should not award damages resulting from publication. *See* Section II. It also allowed, over renewed defense objections, putative expert and lay testimony about the alleged history of violence against abortion providers. *See* Section III.

The jury found all Defendants liable, either directly or as conspirators, on every claim presented. The jury awarded both compensatory and punitive damages against all defendants except Lopez, in accordance with the Plaintiffs' request.

In post-trial proceedings, the district court entered an injunction against all Defendants except Lopez, enjoining them from engaging directly or indirectly in the types of investigative conduct at issue in the trial, i.e., using misrepresentation to gain access to Plaintiffs' conferences or facilities, and making surreptitious recordings of conversations with Plaintiffs' staff.

Defendants filed post-trial motions under Rule 50(b). These motions were denied in their entirety. 1-ER-2. This appeal followed.

SUMMARY OF ARGUMENT

The reversible errors discussed in this brief fall into two main categories. First, the district allowed damage claims to go to the jury where there were no legally compensable damages to be awarded, and it denied post-trial motions for judgment notwithstanding the verdict awarding those damages. Plaintiffs suffered no damages proximately caused by the defendants' conduct, whether that conduct was classified as RICO violations, fraud, trespass, breach of contract, or unlawful recording. Rather, their damages were the result of their voluntary decisions to make certain expenditures in two areas: 1) PPFA hiring consultants and taking

other measures to secure its conferences against future infiltrations, and 2) PPFA, PPGC, PPPSGV, and PPOSBC undertaking personal security measures for staff members in light of the public's reaction to the publication of the CMP videos.

Second, the court egregiously admitted irrelevant, inflammatory, prejudicial testimony about the "history of anti-abortion violence" by one expert and several lay witnesses. The court compounded this error by allowing prejudicial "victim impact" testimony about the effect of the video releases on Planned Parenthood personnel, but refusing to instruct the jury that harms from publication were not compensable damages.

Additionally, the Court also erred when it granted summary judgment for Plaintiffs PPFA, PPGC, and PPRM on their trespass claims. Defendant's misrepresentation of their identity did not negate Plaintiff's consent for them to enter nor did it invade the property interests protected by the tort of trespass.

The court also erred in granting injunctive relief against the defendants, prohibiting them from engaging in conduct which had not occurred for five years and for which there was no evidence of a "real and immediate threat" of recurrence.

Finally, there was insufficient evidence to hold Rhomberg liable as a conspirator on the RICO, false promise, or statutory recording claims. There was

no evidence that Rhomberg knew or should have anticipated anything about Daleiden producing false ID's, the sole RICO predicate underlying the RICO "conspiracy," nor that he knew or could have known the particular factors that allegedly made the recordings illegal.

STANDARD OF REVIEW

A jury's verdict must be upheld if supported by "substantial evidence." *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017). This Court reviews the district court's grant or denial of a renewed motion for judgment as a matter of law *de novo*. The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016).

When a legal determination such as the proper elements of an award of damages is reviewed, a *de novo* standard is applied. *In re Air Crash Disaster near Cerritos*, 982 F.2d 1271, 1275 (9th Cir. 1992).

Review of a jury instruction challenged for misstatement of the law is *de novo*. *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 976 (9th Cir. 2009).

An erroneous jury instruction affecting the substantial rights of a party is grounds for reversal "unless it affirmatively appears from the whole record that it was not prejudicial." *Id.* at 977.

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017). When the court's decision to grant injunctive relief rests on an interpretation of a state statute, review is *de novo*. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 335 (9th Cir. 1996).

Reviewing the effect of erroneous evidentiary rulings begins with a presumption of prejudice, which can only be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict if the evidence had not been admitted. *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010).

ARGUMENT

I. PLAINTIFFS SHOWED NO PROXIMATELY CAUSED DAMAGES

A. Voluntary upgrades are not damages.

Plaintiff PPFA was awarded $366,873 in "infiltration damages" under four claims: RICO, trespass, fraud, and breach of the PPFA exhibitor agreements. 18-ER-4879, 4883, 4890, 4894.

Defendants did not break any security system. They did not damage anything belonging to PPFA. They did not create any new security vulnerabilities for PPFA. Rather, Defendants took advantage of existing vulnerabilities to gain access to PPFA conferences, and PPFA responded by incurring costs to study and upgrade their conference security measures to prevent a future infiltration.

PPFA Director of Events and Conferences, Brandon Minow explained:

> [S]ecurity is one of those things that has to constantly evolve to match the threats and the risks that you are aware of. And so after the defendants infiltrated our conferences and events, *we went out and put in processes and practices to guard against that, and guard against any other potential innovation that they may have in thinking of ways to potentially infiltrate.*

13-ER-3571-:4-11 (emphasis added). Thus, PPFA's "damages" were incurred as a direct result of PPFA's decision to hire security consultants to prevent future infiltrations using the same means, or even new ones. Plaintiffs were awarded the costs not only for security measures to address "pre-existing vulnerabilities" that Defendants did not create, but also for security upgrades that are catered specifically toward preventing infiltration techniques that Defendants did not

utilize.[3] The law does not allow either type of recovery. *See, e.g.*, *Point 4 Data Corp. v. Tri-State Surgical Supply & Equip., Ltd.*, No. 11CV0072-CBA-RLM, 2014 WL 12769275, at *10 (E.D.N.Y. Sept. 17, 2014) (cost of security upgrades not recoverable because plaintiff "seeks the cost of a new security system that will prevent others from exploiting the same pre-existing vulnerabilities that [defendant] exploited," but defendant "did not in any way alter the existing security system used by [plaintiff]. It did not create any vulnerability that did not previously exist.") *see also People v. Silva*, No. C080378, 2016 WL 4761936, at *3 (Cal. Ct. App., 2016) ("[T]he existing security system is not damaged as the result of the defendant's criminal conduct. The installation of a new security system may well have been a prudent step by the hostel management, but to award that by way of restitution would leave the hostel better off, and thus constitutes an improper windfall.")

As detailed below, PPFA's expenses categorized as "infiltration damages" and awarded by the jury fell into five categories: 1) payments to Kroll Services for an "immediate response" (26-ER-7104); 2) payments to Thacher Services for a vetting practices review, development, and implementation (26-ER-7106); 3)

[3] *See, e.g.*, 13-ER-3502:4-17 (invoice 25-ER-6868 includes a charge for screening Planned Parenthood employees).

media monitoring by Kroll for "threats," beginning over five months after the first release (26-ER-7108); 4) security guard services for PPFA meetings (26-ER-7109); and 5) hardware and services for controlling access to future conferences (26-ER-7110). All of these expenditures were entirely voluntary on PPFA's part, and were not in any sense remedial of any legally cognizable harm caused by the Defendants.

i. Kroll Services ($108,978)

Within days (or actually hours) of the first video release, PPFA knew the full extent of Defendants' scheme. 26-ER-6915; 6-ER-1560:14-1562:20; 9-ER-2293:8-2296:13. Being concerned about the possible existence of other security vulnerabilities, PPFA retained Kroll Services for a comprehensive assessment of its security systems and potential upgrades. PPFA offered no evidence that any amounts paid to Kroll for these services were "damages" that Defendants proximately caused. PPFA's Minow described Kroll's services in these terms:

> Kroll came in and helped us think about . . . the data that we were collecting from potential attendees in advance; what information we were collecting from them to register, whether that be full names, date of birth, home address, various identifying factors that could be used to verify identities. They helped us look at our practices around physical on-site registration, what was needed to verify the authenticity of that person when they showed up to check in. We looked at our

> vetting processes, what we do with that data, how we evaluate it to determine it, as well as our physical security presence on-site; what we do and how we guard against any sort of infiltrations.

13-ER-3560:14-3561:1. PPFA COO Galloway similarly testified that Kroll was retained to "help us think about" and "help us figure out" and "help us figure out and assess" various security issues. 8-ER-2178:22-2179:4, 8-ER-2183:7-12, 9-ER-2194:20-2195:8. While these consulting services might have been appealing and reassuring to PPFA, they did not repair any *damage* proximately caused by Defendants' conduct, whether that conduct is characterized as fraud, trespass, breach of contract, or RICO violations.

Kroll was retained because PPFA was concerned about "different channels" for infiltration that Defendants did not engage in. 8-ER-2180:14-17. While PPFA was free to purchase security upgrades to prevent others from exploiting existing vulnerabilities, these are not damages directly caused by Defendants' actions.

ii. Thacher Services ($265,153)

PPFA voluntarily chose to retain another consultant, Thacher Services. The amounts paid to Thacher were not for damages that Defendants proximately caused. Minow described this second category of expenses as follows:

> Thacher came with sort of a longer lens. Thacher was the group that helped us evaluate our processes, understand a sustainable

> model for how we move forward guarding against future infiltrations. . . . They created a report which led to long term and sustainable ways for us to balance our data, our registration practices and our security practices.

13-ER-3562:4-11. Galloway admitted that he hired Thacher to prevent "harm [to PPFA] in terms of our *mission and brand*." 9-ER-2272:17-24 (emphasis added).

PPFA was free to pay for services to evaluate risks and make recommendations as to protecting itself against future infiltrations for any reason, including to protect its mission and brand, but the costs of those voluntarily retained services are not damages directly caused by Defendants' actions. Indeed, according to Galloway, PPFA's security overhaul in 2015 and 2016 was so comprehensive and overarching that the "security plans and our models today are largely built on a lot of the foundation that we laid both with Kroll in the immediate and Thacher over the course of those first few months." 13-ER-3565:20-23.

iii. Kroll Services for media monitoring ($44,228)

Galloway testified that Kroll was retained again from January to March of 2016 (six to eight months following the first video release; over a year after the last conference infiltration) to monitor social media ahead of certain events in order to identify opposition who "intend us *harm in terms of our brand*, in terms of who we

are." 9-ER-2222:12-2223:6 (emphasis added). Once again, there is no evidence that these brand-protecting expenditures were "damages" proximately caused by Defendants' actions, particularly the production or transfer of false IDs in 2013.

iv. Guard Services for PPFA meetings ($29,339)

Galloway described his thinking in hiring guards for four PPFA events as creating a "visual deterrent barrier to infiltration." 9-ER-2217:4-9. His "hope would be that you would think twice before giving a fake ID and not having, you know – or a fake badge or whatever it is." 9-ER-2212:15-22. PPFA was free to experiment with whatever methods it wanted to deter future attempted infiltrations of whatever gatherings it wanted, including lobbying events with the Congressional Black Caucus (9-ER-2214:24-2215:20), "division level" retreats in July and October (9-ER-2212:2-2213:2), and policy conferences (9-ER-2219:17-2220:1), but there is no nexus between these voluntary expenditures and the Defendants' actions, particularly the conduct of producing or transferring false IDs in 2013.

v. Conference Badging, ID Scanners, and LexisNexis ($41,467)

PPFA paid $7,554 to Express Badging, "a company that we engaged with to provide the equipment and labor associated with on-site badging technology and real-time scanning badging technology for the 2017 national conference," *two years* after the last infiltration. 13-ER-3570:2-5. But BioMax did not make fake conference badges; it obtained them through the normal registration process. 13-ER-3578:13-23. Thus, had this system been in place in 2014 and 2015, the only difference is that BioMax attendees would have been handed official, higher-tech badges. Moreover, by purchasing this system, PPFA now has a new system with new functions. 13-ER-3570:13-25. This is not a damage caused by Defendants; it is an upgrade for which PPFA presumably received full value for its money.

PPFA also paid $20,891 for ID scanners "to scan identification and connect directly to the database to verify it." 13-ER-3568:8-11. Again, PPFA upgraded its security capability with new equipment, and presumably received full value for its money. This is not a damage caused by Defendants.

Finally, from September 2016 to May 2018 (from one to three years after it learned of the infiltration), PPFA paid a monthly subscription fee to LexisNexis, totaling $13,022, that allowed it to take the names and other information that it gathered from event attendees and "confirm those identities, in addition to other areas of research that are done as part of our vetting, like social media, thought

checks and profile follows, et cetera." 13-ER-3566:2-8. None of these voluntary expenditures were to remediate damages proximately caused by Defendants.

In sum, imagine if a ne'er-do-well broke into corporate offices, wrote "Kilroy was Here" on the whiteboards of all the conference rooms using an available marker, and then left. It might be sensible for the company to hire a consultant who recommends electronic ID badge locks, facial recognition software, and motion-sensitive video cameras everywhere, but the cost for such consulting and resulting upgrades would not fall on the white board vandal as the intrusion itself merely highlighted, and did not create, the need for such security. Similarly, Defendants are not liable for the costs of PPFA thinking about, studying, and upgrading its conference security to prevent future infiltrations of any kind by Defendants or anyone else.

B. Personal security expenses for Plaintiffs' employees are not recoverable damages

The First Amendment does not tolerate awarding damages for merely giving someone else a PR black eye. If it did, whistleblowers, gadflies, and virtually all journalists would be sued out of existence. To prevent this, First Amendment jurisprudence is clear: where a plaintiff seeks damages resulting from a

publication, it must satisfy the First Amendment requirements that govern defamation claims (i.e., falsity and actual malice), regardless of the cause of action raised. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (intentional infliction of emotional distress claim premised on publication must satisfy First Amendment defamation standard); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (same for invasion of privacy); *Blatty v. N.Y. Times Co.*, 42 Cal.3d 1033, 1042-43, 1044-46 (1986) (same for intentional interference with prospective economic advantage); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (same for breach of duty of loyalty and trespass).

Attempting to circumvent this First Amendment bar to damages, Plaintiffs (and the district court) characterized their personal security damages as non-reputational and not resulting from publication. They failed, however, to present any evidence at trial to support that characterization. On the contrary, Plaintiffs' witnesses repeatedly testified that the measures for which they sought compensation were taken in response to the perceived public reaction to the publication of the videos. Specifically:

- PPFA COO Melvin Galloway admitted that he authorized the initial weeks of personal security for Deborah Nucatola ($37,960) because the publication of the

video threw her into "this spotlight. And so I authorized and asked for 24/7 protection for Deb." 9-ER-2230:14-2231:5; 26-ER-7114.

● Nucatola's testimony was consistent with Galloway's in attributing the motivating factor to the public's reaction to the publication of the video featuring her. Plaintiffs themselves argued, " . . . Dr. Nucatola's testimony [] demonstrates that PPFA's security staff hired an armed guard for her in response to threats that she received the morning that the video was published." 18-ER-5017:20-22.[4]

● After a several month hiatus, Galloway authorized about two more weeks of personal security for Nucatola ($11,400) because of the publicity surrounding the videos: "Planned Parenthood had an incident and -- a security incident. And part of my fear was that that would reverberate in terms of the videos being -- of the infiltration being surfaced again." 9-ER-2233:12-20; 26-ER-7114. Here, the words "being surfaced" are code for "gaining public attention."

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[4] While Plaintiffs repeatedly claimed their staff received threats, at trial they produced no documentation of any such threats, and provided only vague generalizations. For example, PPRM witness Kevin Paul testified about "statements that were directed at Dr. Ginde that threatened her life." 13-ER-3397:7-18. However, on cross-examination, he identified the "threat" to which he was referring (26-ER-6918) as a Twitter post, uncovered while PPRM was "monitoring the Internet." 14-ER-3725:22-3726:4. The "threat" consists of political commentary posted on an unknown third party's Twitter feed about what form of punishment would be appropriate for Dr. Ginde in light of the life sentence received by Kermit Gosnell, an abortionist convicted of murder. 14-ER-3727:3-15. This exhibit (introduced by the defense) is the only documentation in evidence of any alleged "threat" against Planned Parenthood following the CMP videos.

● Galloway also admitted that the so-called "essential monitoring" services ($3,557) were contracted because of the publication of the videos: "Their open-source databases, any – you know, Facebook, Twitter, we're able to see any occurrence of their names as a result of the *release of the video*." 9-ER-2234:11-2235:8 (emphasis added); 26-ER-7114.

● PPPSGV CEO Sheri Bonner hired personal security ($6,105) for Gatter "after the video came out where she was targeted and her face appeared in the video" out of concern for what people might think or how they might react to "what the narrated parts of the video" said. 6-ER-1547:16-17; 6-ER-1571:12-22; 6-ER-1573:5-1574:1. Armed security was provided only *after* the Gatter video was released because Bonner "had a concern that someone might watch the videos and react unlawfully." 7-ER-1704:20-1705:1. A $3,000 subscription to Reputation.com was purchased only *after* a video of Dr. Gatter was published. 7-ER-1713:25-1714:7; 26-ER-7114. Bonner explained that the Reputation.com service was "intended to take any mention or any places on the internet where her personal information could be, to remove that from the internet." 6-ER-1553:2-8 Defendants are not responsible for satisfying Dr. Gatter's desire to remove from the internet information posted by third-parties.

● PPGC witness Jeffrey Palmer testified that the videos' "publication" resulted in "threats," and "in response to those events" PPGC provided security for Melissa Farrell, including personal security, relocating her to another home, and installing a camera system at her home ($20,208). 8-ER-2031:18-2032:15. As to the peephole at Ann Schutt-Aine's home ($409) installed at the recommendation of NAF's security director, the only connection that Palmer could draw with the Defendants' infiltration was that "the events that occurred in the prior months, including the videos . . . just added more emphasis to the need to be thorough." 8-ER-2039:6-2040:2; 26-ER-7114.

● PPOSBC witness Jon Dunn admitted that he decided to hire security guards for Jennefer Russo ($3,060) and pay for a security system at her home ($3,789) only after the video featuring her was published, not eight months earlier when they first found out that Planned Parenthood had been infiltrated. 7-ER-1834:20-1835:6 ("[W]e felt that the threat to her was significantly increased once she did appear in a video that was published. So that's why we waited for the security.") 26-ER-7114.

● Dunn also admitted that PPOSBC spent $12,000 on subscriptions to Reputation.com for himself and Russo "[g]iven the potential heightened threat that we thought might exist as a result of the posting of the videos" *(*7-ER-1785:24-

1786:18), because the "videotapes and the release of the videotapes created an environment that was significantly changed for people who worked at Planned Parenthood." 7-ER-1840:19-1842:17; 26-ER-7114.

Thus, all the amounts awarded by the jury under the heading of personal security were for expenditures made by Plaintiffs as a response to Defendants' *publications* coupled with fears about what third-parties might do. These expenditures were not "directly" or proximately caused by the underlying alleged fraud, trespass, breach of contract, unlawful recording, or RICO. *Cf. Food Lion v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956, 962-63 (M.D.N.C. 1997) ("Food Lion's lost profits and lost sales were not proximately caused by Defendants' tortious activities. Food Lion's lost sales and profits were the direct result of diminished consumer confidence in the store").

In ruling on the summary judgment motions and post-trial motions, the lower court asserted that there was evidence that the Plaintiffs were motivated to undertake personal security measures not simply by the public reaction or anticipated public reaction to the publications, but by "the *direct* acts of defendants." The court theorized that Plaintiffs had taken these measures "upon learning of the deception." 2-ER-157-158 (original emphasis), 213; 1-ER-13. The court provided no citations, or even hints, about what evidence it was referring to,

and in fact, its theory is contrary to the evidence that, in each case, the security measures were undertaken in response to the video releases.[5]

The verdict awarding $101,488 to PPFA, PPPSGV, PPOSBC, and PPGC, in "damages" for personal security expenses was not supported by any evidence as to any claim, and the district court erred in not granting Defendants' Rule 50(b) motion.

C. The District's Court's "crucial component" test does not equate to RICO "proximate causation"

Plaintiffs' general failure to prove actionable damages proximately caused by Defendants' purportedly unlawful or tortious conduct, discussed previously, is particularly glaring in the context of their RICO claim. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the

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[5] Although the lower court maintained steadfastly that these alleged "direct" damages were conceptually distinct from publication damages barred by the First Amendment, it was unable to maintain the fiction consistently. In a pre-trial hearing, the Court stated, "I will allow damages for the personal security costs of protecting people whom the defendants targeted *in the videos* regardless of when the plaintiffs learned of the targeting. Those damages flow directly from the defendants' acts." 18-ER-5128:8-12 (emphasis added). Thus, the lower court inadvertently admitted that the individuals received protection not because of "targeting and surreptitious recording" simpliciter (2-ER-159; 1-ER-13), but because of the subsequent release of videos featuring those individuals.

alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). "The general tendency of the law, in regard to damages at least, is *not to go beyond the first step*. Our cases confirm that the 'general tendency' applies with full force to proximate cause inquiries under RICO." *Hemi Group, LLC v. City of New York,* 559 U.S. 1, 10 (2010) (emphasis added; internal quotation marks and citations omitted). Plaintiffs were required, but failed, to prove that the predicate acts alleged (unlawful production and transfer of false IDs) directly caused economic losses. The "proper referent of the proximate-cause analysis" under RICO is the predicate acts alleged. *Anza*, 547 U.S. at 458.

Here, a long series of actions – by Defendants, Plaintiffs, and unrelated third parties – intervened between the asserted RICO predicate acts of producing and transferring false IDs and Plaintiffs' decision to make the expenditures they were awarded as damages.

The jury apparently reached the same conclusion, finding that no Plaintiff suffered any RICO injury that was distinct from the damages that the jury awarded for the trespass, fraud, contract, and recording claims, all of which were based on conduct distinct from and occurring well after the production of IDs. 18-ER-4876. Thus, by definition, no Plaintiff was *directly* harmed by the alleged predicate acts of producing or transferring false IDs.

For instance, the jury awarded PPFA $366,873 in RICO damages for conference "infiltration" along with $52,917 for personal "security". 18-ER-4894. The same amounts were also awarded to PPFA under (A) the trespass claim, 18-ER-4878, (B) the breach of PPFA exhibitor agreements claim, 18-ER-4883, (C) the false promise fraud claim, 18-ER-4890, and (D) the intentional misrepresentation fraud claim, 18-ER-4888. Additionally, the same $52,917 was also awarded under the federal recording claim (18-ER-4917) and $49,360 of the amount awarded under breach of the NAF agreements and the California, Florida, and Maryland recording claims. 18-ER-4884, 4897, 4902, 4906. None of these alleged acts were RICO predicate acts. If, as the jury concluded, the wrongful acts of trespass, breaches of contract, intentional misrepresentations, and/or unlawful recording at issue led to financial injuries, then the earlier RICO predicate act of producing three false IDs did not *directly* cause PPFA financial harm.

Similarly, the personal security expenditures for Dr. Gatter that were awarded to PPPSGV were far removed from the production of false IDs. Neither Gatter nor anyone else at PPPSGV saw the IDs, was aware of them, or relied on them. Rather, the IDs, produced in 2013, were shown to PPFA staff in order to gain access to a PPFA conference in October 2014. At that conference, Deborah Nucatola introduced Daleiden to Dr. Gatter. After the conference, Daleiden e-

mailed Dr. Gatter about fetal tissue procurement at PPSGV. They arranged a lunch meeting, which took place in February 2015. Five months later, on July 21, 2015, CMP released footage of this meeting, and PPPSGV CEO Sheri Bonner hired personal security. Four days later, Bonner discontinued the security detail. 6-ER-1549:8-11; 6-ER-1552:10-14; 6-ER-1570:16-20. To assert that the costs of the security detail were a "direct" damage from the production of false IDs is to drain the word "direct" of all significance.

In denying Defendants' motion under Rule 50(b), the district court rewrote the standard for allowable damages under RICO. The court held that, because the "fake ID's were the crucial component to achieve [Defendants'] goals," the element that damages be directly caused by the RICO predicate acts was satisfied. 1 ER-17-18 (also referring to the production and transfer of IDs as a "critical act" and "necessary and critical part" of Defendants' plan). Thus, the district court held, contrary to longstanding Supreme Court precedent, that "but for" causation is sufficient to find a defendant liable for damages under RICO. *Cf. Hemi Group,* U.S. 1at 13 (2010) "[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a "but for" cause of his injury, but was the proximate cause as well.'").

As discussed previously, PPFA's conference "infiltration damages" were not damages at all (Section I(A)), and the personal "security damages" were expenses arising solely from CMP's publication of the Human Capital Project videos (Section I(B)). Neither category of "damages" were economic losses proximately caused by the production or transfer of false IDs. The indirect relationship between Defendants' alleged predicate acts and Plaintiffs' claimed damages is fatal to Plaintiffs' RICO claim under Supreme Court precedent, where "the compensable injury flowing from a [RICO] violation . . . necessarily is the harm caused by [the] predicate acts." (citation simplified); *see also Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018)).

The lack of proximate damages, an essential element of RICO liability, mandates reversal of the judgment as to Plaintiffs' RICO claims.[6]

II. THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT NO DAMAGES COULD BE AWARDED FOR HARMS ARISING FROM PUBLICATION OF VIDEOS.

[6] The RICO claim also fails because the plaintiffs failed to prove the interstate commerce element for the alleged predicate acts and also failed to show a pattern of predicate acts, as set forth in Appellant Newman's Opening Brief (No. 20-16068), at Sections IA and IB, incorporated by reference herein.

Since the outset of this litigation, Defendants have argued that Plaintiffs did not have any legally compensable damages. *See e.g*. 2-ER-360, 375, 379-383. In its ruling on the motions for summary judgment, the district court agreed that the bulk of Plaintiffs' claimed damages were not allowable but carved out two categories of allowable damages: expenses for upgrading security, and expenses for personal security for individuals "targeted" for recording. 2-ER-157-158, 213. As discussed *supra*, Section I(A), the first category is not damages at all.

As to the second category, the district court purported to see evidence in the record that some plaintiffs "upon learning of the deception, paid for personal security expenses for some of their employees who were targeted for recording," and therefore such expenses "are tied *directly* to defendants' conduct and plaintiffs' reaction to discovering it." 2-ER-213 (original emphasis).

The district court's discernment of such evidence is particularly striking in light of the fact that no Plaintiff argued that it had provided security "upon learning" that its employee had been recorded. On the contrary, the record establishes that, after the first video, featuring Dr. Nucatola, was released, PPFA hired security because of alleged "threats" from third parties against her (18-ER-5017:20-22), and PPSGV, PPGC, and PPOSBC did not take undertake personal security measures until the videos featuring their respective employees were

released. Section I(B), *supra*. Indeed, to hire personal security guards "upon learning" that Daleiden had merely recorded his consensual conversation with an employee several months earlier would have been irrational.

The district court thus created a theoretical distinction between 1) plaintiffs incurring personal security expenses *because of public reaction to published videos*, in which case the expenses were publication damages *barred* by the First Amendment, and 2) plaintiffs incurring the identical personal security expenses *based simply on learning that the employee had been recorded* months earlier, without reference to past or future publications, in which case the damages were, in the Court's opinion, *allowable*.

Even assuming *arguendo* there was evidence in the record supporting the second scenario (there was none), the jury should have been instructed that it should not award as damages any costs resulting from the first scenario, i.e., publication.

"A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiffs' invalid theory of the case, from the filing of the original complaint onwards, was that it was entitled "to recover damages for the ongoing harm to Planned Parenthood *emanating from the video smear*

campaign." 25-ER-6742 at ¶11; 24-ER-6629 at ¶12 (emphasis added). Defendants' contrary theory was that such publication damages are not permitted, and this theory is fully supported by law and was ultimately (if only putatively) adopted by the district court. The evidence before the jury demonstrated that plaintiffs were seeking damages resulting from the publication of the CMP videos. Section I(B), *supra*. Conversely, there was *no* evidence to support the district court's alternative theory that Plaintiffs incurred these expenses simply "upon learning" that the employees had been recorded. Thus, there was an overwhelming evidentiary foundation for instructing the jury that it should not award damages resulting from publication. But the court refused to do so.

Moreover, various witnesses were permitted to make the equivalent of victim impact statements about the effect of the publications on themselves and other staff of their affiliates. Defendants filed a motion *in limine* to preclude such testimony (18-ER-5229-5230), which was denied. 1-ER-130. At trial Plaintiffs' very first witness, the CEO of PPCCC (which sought only statutory damages for the recording of one staff member) was allowed to testify, over defense objections, about her reactions and those of her staff, to the release of the Nucatola video:

> Q. Can you recall what it was like at your affiliate in the days after that first video came out?
> MR. MILLEN: Objection, Your Honor. 403, prejudicial and relevancy.

> THE COURT: And what is the relevance, Ms. Bomse?
> MS. BOMSE: The relevance is the impact on Planned Parenthood staff of learning that there was an undercover video.
> THE COURT: All right. I'll overrule the objection. You can proceed.
> . . .
> Q: . . . what was the reaction to that video coming out?
> A. A lot of concern, a lot of fear. Concern about Dr. Nucatola. Concern about the types of, you know, anti-abortion violence and activity that could face our organizations. Concern for the, you know, safety and well-being of our staff and our patients.

4-ER-730:14-731:24. The court allowed similar testimony about emotional distress of non-parties, fueled by unfounded rumors, to be elicited from other Planned Parenthood witnesses:

> Q. All right. And did you come to learn what impact the recording of Dr. Russo had on your staff?
> A. Well, not only was Dr. Russo very upset about it, but many of our staff were also very concerned about it. You know, what was happening around the country and what had happened to Dr. Nucatola and Dr. Gatter was well known among my staff, as well as between Dr. Russo and myself. So they were deeply concerned about her safety as well.

7-ER-1791:10-17. *See also* 7-ER-1662:17-1663:19 ("Q. Okay. Did you have any concerns for your own safety? A. I did. Q. And can you tell me were there things that were relayed to you about what was being said on social media that caused you to feel those concerns? A. Yes. MR. MIHET: Objection. Calls for hearsay. THE COURT: It does, but this goes to state of mind. Overruled."); 6-ER-1555:18-1556:3 ("I experienced how upset and anxious and sort of insecure our staff were

feeling when this came out"); 8-ER-2032:16-2033:11; 8-ER-2129:4-11; 9-ER-2396:18-21; 9-ER-2420:21-25; 13-ER-3397:7-3398:6.

The Court allowed such testimony, over Defendants' objections, thus further leading the jury to believe that they should consider the impact of the publications in assessing both compensatory and punitive damages.

Defendants repeatedly asked the court, both in written and oral argument, to instruct the jury concerning the impermissibility of awarding damages based on publication. 19-ER-5053, 5054, 5058, 5065, 5068, 5070, 5073, 5074, 5079; 18-ER-4978-4980; 13-ER-3627:17-20; 15-ER-4178:13-4180:3. The district court repeatedly, without explanation, refused to do so. 13-ER-3630:12-13 ("I'm not planning to say anything with respect to publication damages"); 15-ER-4162:22-23 ("I'm not going to give the publication damages instruction"); 15-ER-4179:22-23 ("I do understand that argument. It's been made . . . many times."); 1-ER-96.

"Jury instructions *must fairly and adequately cover the issues presented*, must correctly state the law, and must not be misleading. Prejudicial error results from jury instructions that, when viewed as a whole, *fail to fairly and correctly cover the substance of the applicable law*." *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002) (emphasis added). The sole jury instruction regarding the First Amendment read: "The First Amendment is not a defense to the claims in this

case for the jury to consider." 1-ER-98. The district court's failure to instruct the jury on the central issue of the First Amendment bar to publication damages was prejudicial error necessitating reversal of the underlying judgment. Such an instruction was necessary not only to prevent an improper award of compensatory damages, but also to guard against a jury award of punitive damages based on the consequences of the publication of the CMP videos.

III. THE COURT ERRED IN ADMITTING GENERIC BACKGROUND INFORMATION REGARDING VIOLENCE AGAINST ABORTION PROVIDERS

The trial court's erroneous classification of publication damages as allowable "direct" damages paved the way for the admission of highly prejudicial, hearsay testimony from multiple witnesses.[7] *See* Section II, *supra*. But the court's

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[7] 7-ER-1784:9-1785:7 ("A. . . . Because based on what we had heard about what had happened to some of the other medical directors, the harassment and the threats –
MS. SHORT: Objection. Hearsay.
THE COURT: Overruled. This is explaining why he did what he did.
A: Based on what we heard about what happened with the other medical directors, Dr. Russo and I both were very concerned for her safety. And so I hired a security service to accompany her wherever she was to be sure she was safe.
MS. MAYO: Q. And what was it that you learned about what had happened to the other medical directors?
A.Well, we heard -- I mean, Dr. Russo was very close to both Dr. Nucatola and Dr. Gatter, and so they were talking ever since the release of those videotapes, and we were well aware of the levels of harassment, even death threats, that were

admission of unfairly prejudicial evidence did not stop there. Plaintiffs proffered David Cohen as an expert on the history of anti-abortion violence.

Prior to the trial, Defendants challenged Cohen's qualifications and moved to exclude his testimony as irrelevant and unfairly prejudicial. Dkt. 641. In opposition, Plaintiffs explained:

> Professor Cohen offers three opinions: (1) that the CMP videos must be considered within the context and history of violence, targeted harassment and invasion of privacy of abortion providers; (2) that abortion providers are aware of the history of violence and therefore videos that targeted them and made inflammatory claims about selling "baby body parts" would have caused abortion providers to fear harassment or attack, and (3) that no one well-versed in the history of anti-abortion extremism, which includes Defendants, could be unaware of the disruption that would result from the release of the videos.

19-ER 5292-5293. Notably, each of these three opinions is centered around the publication of the CMP videos while making no mention of the actions of defendants preceding the publication of the videos. Thus, Plaintiffs proffered Prof. Cohen specifically to support their invalid theory that they were entitled to damages resulting from the publication of the CMP videos because "[t]he history of the anti-abortion movement and its association with threats, harassment and violence directed at abortion providers made everything that happened after the

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happening to them. And so Dr. Russo anticipated that that very well could happen to her, and we provided the security to ensure her safety.")

video release 'an entirely predictable outcome.' See Expert Report of David S. Cohen at 5,10." 19-ER-5304.[8]

The district court properly rejected this theory of recovery, instead drawing "the line for compensable damages between those caused by defendants' direct conduct and those caused by third parties." 2-ER-140. This ruling rendered Cohen's indisputably prejudicial testimony irrelevant to the issues in the case.

However, the district court decided that Cohen's testimony was relevant for a purpose not proposed by the Plaintiffs, specifically, on "whether the steps plaintiffs took after they learned of defendants' intrusions and the steps plaintiffs took to provide personal security for members of their staff that were targeted by defendants were reasonable." 2-ER-159, n.17.[9] In other words, the court found expert witness testimony on the history of violence against abortion providers was somehow relevant to determining the reasonable response to discovering months

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[8] Plaintiffs failed to describe, much less prove, any specifics regarding "everything that happened" after the release of the videos, leaving those details up to the imagination of the reader.

[9] The lower court ruled that Cohen could also testify "concerning his understanding of whether there was an increase in the number or types of threats to abortion providers following the release of the HCP videos." 2-ER-264. However, Plaintiffs later abandoned that assertion and, as with the summary judgment proceedings, did not put on any evidence of an increase in threats or criminal acts directed at abortion providers following the release of the CMP videos. 11-ER-2983:2-6.

after the fact that an undercover pro-life journalist took doctors out to lunch and hob-nobbed with them at conferences.

Prior to trial, Defendants moved to exclude evidence of historical acts of violence or other criminal acts directed at abortion providers. 18-ER-5224-5227. The district court denied the motion without explanation (with the limited exception that Plaintiffs were not allowed to refer to defendants as murderers or terrorists).1-ER-130.

During trial, Defendants renewed their motion to exclude Cohen's testimony, on the grounds that Plaintiffs had proffered no evidence suggesting its enhanced conference security measures were related to fears about violence against abortion providers (as opposed to fears about another public relations debacle). Dkt. 945. Plaintiffs also presented no evidence that the personal security expenses were anything but reactions to publication and thereby constitutionally barred. Thus, even if Cohen's testimony were somehow relevant, any such hypothetical relevance was far outweighed by its prejudicial nature. *Id.*

Judge Orrick again denied the motion without explanation (11-ER-2979:8-13) and allowed Cohen to give highly prejudicial testimony concerning the

"history of violence against abortion providers," none of which had any connection to the parties or actions in this case.[10] Cohen testified, *inter alia*:

> There was an arson in 1976 in Oregon. Another one in Minnesota. There was a fire bomb thrown in the face of a receptionist in 1977 in Cleveland, Ohio . . . Someone came into the procedure room and threw a fire bomb and exploded the clinic. . . . On March 10th, 1993, Michael Griffith in Pensacola, Florida went to the clinic there -- or one of the clinics there, and as the doctor was exiting his car and entering the clinic, Michael Griffith shot him and killed him. Dr. David Gunn was his name. . . . [H]arassment takes a serious toll on abortion providers' lives; both their emotional and psychological life, . . . Because people in the field know about this. They know about the arsons. They know about the bombings. They know about the murders and they know about this individualized harassment. And so the concern is that it hasn't yet happened to me, but it could happen to me. People in my field have been murdered for what they do. They have been murdered at home, at church, at work. Sending the message that you are not safe anywhere, ..."

12-ER-3327:21-24; 12-ER-3328:2-3, 17-20; 12-ER-3333:10-12; 12-ER-3334:17-25. And on and on.

In their motion *in limine* to exclude testimony related to historical acts of violence, Defendants also sought to exclude the testimony and accompanying exhibits of Michelle Davidson of the National Abortion Federation (NAF). 18-ER-

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[10] Defendants also objected at trial to Cohen's qualifications as an expert on "the history of violence against abortion providers," but the court overruled these objections as well. 12-ER-3324:15-23.

5224-5227. As noted above, the motion was denied without explanation. Ms. Davidson took the stand and testified, as "background," about "anti-abortion opposition activity," including an arson, at an abortion clinic in New Mexico where she worked. 12-ER-3244:9-3247:8. But primarily she testified about her work for NAF gathering information from media reports, abortion providers, and other sources. From these various sources, NAF compiles an annual report on anti-abortion "violence and disruption," from murder to picketing.

Accompanying Ms. Davidson's testimony, a NAF report covering the years 1977 to 2014 (25-ER-6899) was entered into evidence, over Defendants' objection that the report was hearsay and did not fall under the business records exception. The Court overruled the objection, holding that the report was "a record kept in the ordinary course of business." 12-ER-3255:7-3256:2. This was error as the "record" simply consisted of an amalgamation of hearsay facts and figures generated by *other entities* who did not send a custodian at trial to be cross-examined on the reliability of those facts and figures. 12-ER-3251:13-3253:19.

Defendants also moved to exclude testimony from Melissa Fowler of the National Abortion Federation concerning historical acts of violence against abortion providers. Dkt. 888. The district court, however, overruled the objections, saying that the evidence was relevant to why NAF put its conference security

protocols in place. 5-ER-1209:9-1212:6. However, NAF is not a party to this case, and the question of *why* it put conference security protocols in place was irrelevant to the issues in the case. Nonetheless, Ms. Fowler was permitted to testify about alleged "threats and harassment" from seeing "e-mails [abortion providers] have received" and going "on-site when there has been an incident of major violence at a clinic." 5-ER-1270:1-22.

At other points in the trial, the court overruled defense objections to testimony from other witnesses about historical acts of violence or harassment against abortion providers. As with the prejudicial "victim impact" testimony (Section II, *supra*), the trial court set the ground rules with the first Planned Parenthood witness, the CEO of PPCCC, which was not seeking compensatory damages:

> Q. So what was -- what was -- learning that information about who was involved in creating the videos, did that -- what did that cause -- what did that cause you to think and do vis-à-vis your staff?
>
> A. Well, you know, this country has a long history of anti-abortion opposition and violence.
>
> MS. SHORT: Objection, Your Honor. Lacks foundation.
>
> THE COURT: Again, this -- this information goes to the state of mind and it's not offered for the truth. You may proceed. Overruled.

> . . .
>
> Q. Why were you worried about Dr. Siegfried?
>
> A. Well, again, this country has a long history of anti-abortion violence and about doctors being targeted for that violence.

4-ER-735:12-21; 4-ER-743:13-744:3 (continuing objection lodged and overruled). Again, similar evidence followed from other witnesses. 7-ER-1847:21-1848:1 (Dunn: "Not only have I been aware of death threats, but physicians have been murdered"); 6-ER-1549:4-6 ("medical providers who do reproductive healthcare, including abortion . . . have been killed"); 6-ER-1556:8-1557:4 ("people who provide abortion tend to be targeted by people who are anti-abortion"); 6-ER-1495:12-1496:4 ("it's actually kind of a frightening job to have. We had -- two of the clinics that I worked at were firebombed . . . We had an anthrax mailing"); 9-ER-2386:17-2387:8 (learning that her home address was published on anti-abortion website was "terrifying").

Finally, the Court read to the jury irrelevant adverse inferences drawn from Newman's 2003 book, concerning Newman's belief that it was appropriate for society to implement judicial execution of abortion providers for their "blood

guilt," as well as Newman's maintenance of a website with the names and clinic addresses of abortion providers. 14-ER-3891:2-17.[11]

The lower court failed to balance the minimal-to-nonexistent relevance of any of this testimony against its indisputably prejudicial impact. At no point in ruling on the Defendants' written or oral objections did the Court even acknowledge the prejudicial effect of Cohen's, Davidson's, Fowler's, or other witnesses' testimony about historical acts of violence or harassment.

Because the district court failed to conduct a balancing test under FRE 403, review of the lower court's decision is *de novo*. *U.S. v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018).

Unfair prejudice under FRE 403 "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *White v. Ford Motor Co*. 500 F.3d 963, 977 (9th Cir. 2007) (internal quotation marks omitted). "Evidence is unduly prejudicial if it creates a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk is disproportionate to the probative value of the offered evidence." *United States v. Loughry*, 660 F.3d 965, 971 (7th Cir. 2011). "In applying Rule 403, the district *court must balance the probative value of the evidence against the effect of its non-*

[11] *See* Opening Brief of Newman, Section II, incorporated by reference herein.

probative aspect -- and must assess the danger that admission of the evidence will *unfairly* prejudice the defendant." *United States v. Layton*, 855 F.2d 1388, 1402 (9th Cir. 1988) (simplified; original emphasis). The district court's admission of two witnesses (Cohen and Davidson) to testify exclusively about "anti-abortion violence and harassment," as well as the admission of testimony from other witnesses about criminal and harassing acts by anti-abortion individuals, would inevitably prejudice the jury against the defendants. This testimony would also lead the jury to believe that such historical background was relevant to the damages, especially punitive damages, to be awarded. Indeed, Plaintiffs argued precisely this point to support their request for punitive damages. 16-ER-4427:11-4429:11.

Even if the district court had conducted a FRE 403 balancing analysis, its decision to admit evidence of historical acts of anti-abortion violence, unrelated to the issues in the case, was an abuse of discretion. "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005).

The district court committed reversible error in admitting the hearsay, irrelevant, and unfairly prejudicial testimony of Cohen, Davidson, Fowler, and

other witnesses about historical acts of "anti-abortion violence" completely unrelated to the parties or issues in the case.[12] It also erred in admitting Trial Exhibit 994 (25-ER-6899), which should have been excluded under FRE 403 and 802, as well as in granting the adverse inference concerning Newman's writings about punishing abortion providers. This erroneously admitted evidence tainted the entire trial and necessitates reversal of the judgment *in toto*.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON TRESPASS

The district court granted Plaintiffs' motion for summary judgment on their claims for trespass based on Defendants' visits to the Planned Parenthood facilities in Texas (PPGC) and Colorado (PPRM), as well as for their paid attendance at PPFA conferences held in hotels in Florida and Washington, D.C. 2-ER-208.

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[12] In stark contrast to the district court's lack of concern over the prejudicial effect of evidence admitted against the Defendants, the Court exhibited considerable sensitivity to what might be prejudicial toward Plaintiffs. For example, the Court authorized several redactions of 25-ER-6808-14, a project proposal created by Daleiden in 2013 to explain his investigative project to prospective supporters. While Plaintiffs wished to introduce the document into evidence, they asked to redact portions that were "particularly 403, particularly prejudicial" – to Plaintiffs. 9-ER-2372:4-9. The lower court agreed and allowed the redactions. 9-ER-2381:15-19.

"Trespass to real property occurs when a person enters another's land without consent." *Wilen v. Falkenstein*, 191 S.W.3d 791, 797 (Tex. App. 2006); *Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1012 (Colo. App. 1991) ("Trespass is an entry upon the real property of another without the invitation or permission"). Conversely, a consented entry such as Defendants' "will not support an action in trespass." *Hawthorne v. Fisher*, 33 F. Supp. 891, 896 (N.D. Tex. 1940). "[T]o maintain an action for trespass, it is the plaintiff's burden to prove that the entry was wrongful, and the plaintiff must do so by establishing that entry was unauthorized or without its consent." *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 425 (Tex. 2015).

It is undisputed that Plaintiffs consented to Defendants' entry into all the areas at issue in the trespass claims. 1-ER-57. Indeed, Daleiden paid almost ten thousand dollars to be admitted to the three PPFA conferences held at hotels in Florida and Washington, D.C., and those admission fees were never refunded. 11-ER-2952:1-5; 11-ER-2987:11-21;11-ER-2997:1-23; 11-ER-3071:22-12-ER-3073:5.

In holding Defendants liable for trespass, the district court relied on the Restatement of Law: "If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his

interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm." RESTATEMENT (SECOND) OF TORTS § 892B. However, "[t]he rule . . . is limited to substantial mistakes, known to the actor, concerning the nature of the invasion or the extent of the harm that is to be expected. *If the consent is induced by mistake concerning other matters, the rule does not apply*." *Id*. at cmt. g (emphasis added). "Mistake concerning other matters" is described "sometimes by saying that the mistake goes merely to the 'inducement' of the consent, rather than to the essence of what is consented to; sometimes by saying that it goes merely to a 'collateral' matter." *Id*.

Thus, the issue is whether the fact that Defendants concealed their identities as undercover journalists was a "substantial mistake" which would vitiate consent, or whether it was simply a "collateral" matter. It was the latter.

In *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018), the Ninth Circuit struck down a statute which criminalized "entry into an agricultural production facility by . . . misrepresentation." In so doing, the Ninth Circuit analyzed whether the statute criminalized conduct protected by the First Amendment. The Ninth Circuit struck the law down because it was targeted at "investigative journalists," noting that "lying to gain entry merely allows the speaker

to cross the threshold of another's property, including property that is generally open to the public." *Id*. at 1195.[13] The entry itself does not cause legally relevant harm. *Id.* *See also Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1205 (D. Utah 2017) (following "the reasoning of the Fourth and Seventh Circuits that gaining access to a business by concealing an organizational affiliation, even if that concealment was the reason access was granted, does not alone cause a legally cognizable trespass harm").

Similarly here, Defendants' misrepresentations to gain entry merely allowed them to cross the threshold of Plaintiffs' property. *Wasden*, 878 F.3d at 1194-95. *See also Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) ("'Testers' who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law . . . [T]he defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes . . . But the entry was not . . . an interference with the ownership or possession of land"); *Am. Transmission, Inc.*

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[13] Places "open to the public" are those to which a person is invited to enter even after engaging in misrepresentation. *See, e.g.*, *Pitts Sales, Inc. v. King World Prods., Inc.*, No. 04-60664-CIV-COHN, 2005 WL 4038673, at *4 (Bankr. S.D. Fla. July 29, 2005) (The defendant "did not gain access to special areas of Plaintiff's property that others could not have accessed simply by telling Plaintiff that they were interested in selling magazines for Pitts Sales or any other companies traveling with Pitts Sales.")

v. Channel 7 of Detroit, Inc., 239 Mich. App. 695, 708–09 (2000) ("[T]he trial court properly granted summary disposition of plaintiffs' trespass claim. Although Stern misrepresented her purpose, plaintiffs' consent was still valid because she did not invade any of the specific interests relating to the peaceable possession of land that the tort of trespass seeks to protect.")

The district court attempted to distinguish this entire line of cases. According to the lower court, *Wasden* merely "struck down part of an overbroad criminal statute" while affirming that "journalists do not have carte blanche to lie or misrepresent themselves to gain access to an otherwise secure or private facility." Doc. 753 at 65. The lower court ignored this Court's discussion of cases dismissing civil trespass claims against journalists, specifically *Desnick* and *Food Lion*. *See Wasden*, 878 F.3d at 1196 ("'consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for . . . lawful reasons to revoke his consent' because that entry does not infringe upon the specific interests trespass seeks to protect") (quoting *Desnick*). In *Wasden*, this Court said that *Desnick* and *Food Lion* both "foreshadowed" the decision in *U.S. v. Alvarez*, 567 U.S. 709, 718-19 (2012). The language in *Desnick*

was "prescient in its tracking of *Alvarez*'s reasoning: some lies quite simply do not inflict any material or legal harm on the deceived party." *Wasden*, at 1196.[14]

The lower court distinguished *Desnick* and *Am. Transmission* on the grounds of "context," specifically that Defendants gained access to *abortion* facilities, by using "false identifications and misrepresentations about a fake company operating in an industry where discretion and confidentiality are expected if not contractually required." Doc 753 at 66, n. 67. Thus, according to the lower court, Planned Parenthood's real property, as well as the real property of others in the abortion "industry," enjoys greater protection than other real property (*Am. Transmssion*), including medical offices (*Desnick*), home offices (*Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 291 (2005)), and homes (*Baugh v. CBS, Inc*., 828 F.Supp. 745 (N.D. Cal. 1993)). The lower court found this legal elevation of abortion providers' property rights so clear cut that it granted summary judgment for Plaintiffs on these claims, including trespass onto *PPFA's rented hotel conference spaces*. The only authority cited by the lower court in support of its "context" argument was *Shiffman v. Empire Blue Cross and Blue Shield,* 681 N.Y.S.2d 511 (N.Y. App. Div. 1998), a

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[14] For the same reason, Defendants' "misrepresentations" to gain entry here were "pure speech" protected by the First Amendment and therefore not fraudulent. *Wasden,* 878 F.3d at 1194. The representations were for the purpose of exposing illegal conduct, not for material gain or advantage, and inflicted no legally cognizable harm. *See id*.

three-paragraph opinion that devoted half a sentence to the legal question of misrepresentation invalidating consent. 2-ER-204, n.67. Although *Shiffman* mentions use of a false identity and false insurance card, the decision turned on the court's unqualified assertion that "consent obtained by misrepresentation or fraud is invalid," a generalization rejected by this Court and others.[15]

The district court's grant of summary judgment to PPFA, PPGC, and PPRM on their respective trespass claims should be reversed and judgment entered for Defendants.

V. THERE WAS INSUFFICIENT EVIDENCE TO FIND RHOMBERG LIABLE AS TO ANY CLAIM

In order for this Court to find that the jury had a legally sufficient and reasonable evidentiary basis to find for Plaintiffs in their claims against Rhomberg, the Plaintiffs were required to prove each element of each claim for at least one Defendant, as well as *all* elements of conspiracy with regard to Rhomberg. Plaintiffs

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[15] The lower court also suggested that Defendants' conduct fell into the exception of *Alvarez* and *Wasden* because "plaintiffs have evidence (and a reasonable juror could find) that defendants intended to trespass for purposes of their material gain and to inflict harms on plaintiffs . . ." 2-ER-203. However, the court granted summary judgment to Plaintiffs (taking the issue away from the jury) without specifying what this evidence was, to which defendants it pertained, and whether the harm intended was "legally cognizable." *Alvarez*, 567 U.S. at 723.

failed to adduce evidence sufficient to show that Rhomberg was involved in a conspiracy to commit numerous wrongful acts.

A. RICO Conspiracy

Plaintiffs' RICO Conspiracy claim against Rhomberg fails because Plaintiffs failed to adduce substantial evidence that he conspired to violate RICO through producing or transferring false identification. To establish RICO conspiracy liability for Rhomberg, Plaintiffs needed to prove that he agreed to participate in the conspiracy with the knowledge and intent that at least one member of the racketeering conspiracy would intentionally commit, or cause, or aid and abet the commission of, two or more racketeering acts. *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993) (citation omitted) ("[A] defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise.") Evidence that merely shows that Rhomberg knew about plans to infiltrate conferences and meet with and record abortion providers and others involved in fetal tissue procurement is insufficient to meet that burden.

During their case, Plaintiffs failed to present any evidence that Rhomberg even knew about, much less agreed and intended to further or facilitate, the

production, procurement, or transfer of false identification documents. In his trial testimony, Daleiden clearly denied Rhomberg's involvement with anything relating to false identification documents. Rhomberg did not know the project would use false IDs; it was not discussed in board meetings that Rhomberg telephonically attended with Daleiden and Newman; Rhomberg and Newman were "basically in the background" of the project. 13-ER-3073:9-3076:11. Rhomberg's testimony on this topic matched Daleiden's. Although Rhomberg knew that some pretexts were being used in order to meet with abortion providers and others involved in fetal tissue procurement, he believed Daleiden was an unknown person, and he was not aware or involved with planning whether Daleiden would need a false identity. 5-ER-1128:20-1129:11. Rhomberg knew that Daleiden had worked for Live Action as its Director of Research, but Daleiden's work was all behind the scenes, as far as Rhomberg knew. 5-ER-1132:8-1133:25; 5-ER-1136:4-1137:2. Rhomberg never discussed with Daleiden that Daleiden would be having an ID made for the investigation. 5-ER-1241:2-9. Based on his own experience, he did not have any reason to think that Daleiden would need one. 5-ER-1241:10-17. Rhomberg did not believe that Daleiden would necessarily have to show an ID to enter the clinics he went to because people who "have the[] confidence" of the workers or who are "known" do not have to show IDs; he explained that Daleiden is "very capable . . .

of winning the confidence of people." Rhomberg believed that Daleiden could have just been waved in without showing ID (*as happened at the PPRM facility*, 14-ER-3698:17-25). 5-ER-1137:3-1140:8. In fact, Rhomberg first learned about the IDs after the videos came out. 5-ER-1241:18-1242:7.

At no time did Plaintiffs present evidence suggesting that Rhomberg knew Daleiden would be obtaining a false ID for himself. At no time did Plaintiffs present evidence that Rhomberg knew that other investigators were using assumed names, much less that Daleiden obtained false IDs for them. The closest Plaintiffs came to showing Rhomberg's knowledge that Daleiden even had an alias is a short recording of a phone call Daleiden made from within PPGC during Daleiden's site visit to the clinic in April of 2015. During this phone call, Daleiden identified himself as "Robert Sarkis." 10-ER-2692:25-2694:8. At most, this could show that over a year after Daleiden produced his homemade ID, and a year after he first used his homemade ID to enter the NAF 2014 conference (and a mere 90 days before the public release phase of the project began), Rhomberg knew Daleiden was using the alias "Robert Sarkis." This is a far cry from providing evidence that Rhomberg agreed to participate in a conspiracy with the knowledge and intent, or even should have known, that Daleiden or anyone else would be producing or transferring multiple false IDs, in violation of federal law.

Plaintiffs failed to establish the elements required to prove that Rhomberg conspired to commit a pattern of RICO violations.

B. Promissory Fraud

PPFA's claim of promissory fraud arises from the alleged promises made in the 2014 Forum Agreement, the 2015 MeDC Agreement, the 2015 National Conference Agreement, and the PPGC NDA. 1-ER-100-101.

Plaintiffs adduced no evidence to show that Rhomberg knew any of the other Defendants had registered for, or would be attending, any conferences hosted by PPFA, much less that there were agreements related to such conferences. Rhomberg knew nothing about the PPFA exhibitor agreements until after the videos were released. 5-ER-1247:8-13. Daleiden testified that he alone signed up and paid for the conferences. 12-ER-3076:10-11.

Similarly, Plaintiffs failed to adduce any evidence that Rhomberg was aware that David had signed any agreement with PPGC. Rhomberg testified that he was unaware of the existence of this agreement, let alone the precise terms which PPGC would need to show were intentionally violated so as to prove fraud. 5-ER-1247:14-24.

C. Unlawful Recordings

Plaintiffs have not offered any evidence to prove the elements of a conspiracy in regard to the recording claims.[16] In order to hold Rhomberg liable, Plaintiffs must show that Rhomberg agreed with and supported the other Defendants in intentionally recording a confidential or private oral communication in a manner, in a jurisdiction, and under circumstances that would violate federal and/or applicable state law. During their case, Plaintiffs failed to present any evidence that Rhomberg knew of, agreed with, or supported the other Defendants in allegedly planning to record a "confidential communication" or "oral communication" meeting the applicable statutory definitions.

With respect to the federal recording claims, Plaintiffs failed not only to show that the recordings were made with the intent to "violate civil RICO", but also that Rhomberg knew of, agreed with, and supported such an intention.

As to all the recording claims, Rhomberg knew the project would involve undercover recording (5-ER-1098:15-1099:3; 5-ER-1109:3-1110:3) but such recording is illegal only in a minority of jurisdictions, under defined conditions. Rhomberg was "impressed by how much David Daleiden was checking with

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[16] *See also* Merritt's Opening Brief, Sections I and III (No. 20-16820), concerning the legal errors and insufficiency of the evidence regarding all recording claims.

multiple lawyers and so on, it seemed to be, about every aspect of the thing from when he first approached me," even including moral theologians; "I was quite impressed that he was very thorough and careful about that." 5-ER-1240:11-1241:1. There was simply no evidence suggesting that Rhomberg knew, or should have known, that recordings would be made of confidential communications in one of the minority of states that have all-party consent statutes.[17] Even as to recordings made in all-party consent jurisdictions, there was no evidence that Rhomberg knew, or even *could* have known in advance, that the subject recordings would be made in confidential locations where the other party would have a reasonable expectation of privacy or reasonably believe the conversations would not be overheard. To conclude otherwise is sheer speculation, not reasonable inference.

Thus, Plaintiffs failed to show that Rhomberg knew of, agreed with, and supported the other Defendants in any plan to record a confidential communication without the consent of all the parties to the conversation in a jurisdiction where such consent is required. The record contains no proof beyond speculation to support a verdict against Rhomberg on the recording claims.

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[17] Thirty-five states and the District of Columbia allow recording with the consent of only one party to the conversation. Recording Phone Calls and Conversations, https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations (last visited February 17, 2021).

D. Punitive Damages

Rhomberg incorporates by reference the assignments of error and arguments of Appellant Merritt' Opening Brief at Section IV concerning the sufficiency of the evidence and the legal errors underlying the award of punitive damages against each of the Defendants, including Rhomberg.

VI. THE DISTRICT COURT ERRED IN AWARDING INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS TO PROHIBIT PAST CONDUCT THAT INDISPUTABLY HAD NOT OCCURRED FOR MANY YEARS

Plaintiffs' claim to injunctive relief is predicated on violations of the California Unfair Business Practices Act (Bus. & Prof. C. 17200 et seq), common law trespass, and the Florida and federal recording laws. With these predicates, the district court enjoined Defendants and all those acting in concert with them from entering Plaintiffs'[18] conferences and facilities and from surreptitiously recording private conversations with Plaintiffs' staff where all parties' consent is required

[18] In this section, "Plaintiffs" refers to all named plaintiffs other than PPLA and PPMM.

under local law. Even if Plaintiffs had made out the elements of any of these claims, they would still not be entitled to this injunctive relief.[19]

To have standing to seek injunctive relief, a plaintiff must show that the threatened harm is "real and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) The harm cannot be speculative or based on "subjective apprehension." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) ("Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a real or immediate threat . . . that he will again be wronged in a similar way.") (quoting *Lyons*, 461 U.S. at 111) (1983) (internal quotation marks and ellipsis omitted). "Past wrongs" are not sufficient to make out a case for the requisite "real and immediate threat of repeated injury." *Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citing *Lyons*, 461 U.S. at 103). The threat of injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). In other words, the "threatened injury must be *certainly* impending to constitute injury in fact" and "allegations of

[19] Defendants are not liable for Florida or federal recording claims (Merritt's Opening Brief, Section I); therefore injunctive relief is not available under those claims. The court's erroneous grant of summary judgment on the trespass claims was discussed in Section IV, *supra*.

possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (original emphasis; cleaned up).

Here, the only basis for the district court's finding of a threat of repetition of the enjoined conduct (entering by misrepresentation and surreptitious recording) by Rhomberg, Newman, or Merritt was that they are committed opponents of abortion. 1-ER-60-61, ¶51-53 (Newman) ¶54 (Rhomberg); ¶55 (Merritt).[20] In the case of Daleiden, in addition to his opposition to abortion (¶48-49), the court included the fact that, in 2019, Daleiden released footage recorded years earlier, during the 2013-2015 investigation. *Id*. at ¶ 59-60. The district court also found that CMP is "operational and intends to do multiple projects," (¶57) but failed to note that Newman and Rhomberg have not been on the CMP board for years (Dkt. 609-1 at 30:19-21) and Merritt was merely an independent contractor for CMP on various occasions in 2013-2015. 1-ER-53-54, ¶7.

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[20] The district court also stated, "The jury impliedly found that Defendants' activities pose a threat of continued criminal conduct." 1-ER-85, ¶2. This implied finding is based on the complex jury instruction concerning the pattern element of the RICO violation, which is based on the production and transfer of false IDs. The jury was instructed that, to find a pattern, the jury must find that "the acts of racketeering had a relationship to each other which *posed* a threat of continued criminal activity." 1-ER-102 Doc. 1006 at 62 (emphasis added). The court read into this element of RICO an "implied" jury finding that, unless enjoined, the Defendants *currently pose* a threat of committing further criminal acts of *other* natures, such as trespass and recording.

Daleiden himself, much less any of the other individual defendants, had not engaged in the enjoined conduct for over five years at the time the injunction issued. Indeed, the lower court itself found that "CMP and BioMax were created for the purpose of carrying out the HCP" (1-ER-80), which was a specific "video campaign." 1-ER-53. The evidence-gathering phase of the HCP ended in 2015, yet the district court found that the history of Defendants' beliefs and conduct, including entirely legal conduct, "demonstrates a strong likelihood of future violations by defendants themselves or by defendants working in active concert with others." 1-ER-74.

The lower court's only supporting citation was *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) and particularly, this Court's statement: "Permanent injunctive relief is warranted where, as here, defendants' past *and present misconduct* indicates a strong likelihood of future violations." *Id.* at 564 (emphasis added). However, unlike in *Orantes-Hernandez*, here there was no "present misconduct," much less present misconduct in defiance of a preliminary injunction. *Cf. Orantes-Hernandez*, 919 F.2d at 555-556. The specific conduct enjoined here was voluntarily discontinued in 2015, and there was no basis for finding it is likely to be resumed by any defendant.

Even if the imminent threat were established, an injunction is still an equitable remedy that does not issue as a matter of course. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). According to well-established principles of equity,

> [A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). As to the first two *eBay* factors, the lower court went outside the findings of fact (drafted by Plaintiffs) to make an additional finding that "a significant portion of plaintiffs' injuries could not adequately be addressed by damages or were difficult to measure if not impossible to accurately value as part of a request for damages. Those injuries include plaintiffs' staff reactions to the intrusions . . . and the disruptions to the normal work of plaintiffs" in order to conduct investigations of and remediate the intrusions. 1-ER-68. In support, the district court provided three citations: 1) the testimony of the CEO of PPPSGV (elicited by the court) that Gatter *appearing in a video* "increased [staff] anxiety" (6-ER-1555:18-1556:3); 2) Nucatola's

testimony that, since she *appeared in a video* that received nationwide attention, she has a hard time trusting people and has to watch what she says (8-ER-1933:18-1934:11); and 3) PPFA Events Coordinator Minow's testimony that the Defendants' conference infiltrations had damaged the attendees' sense of trust. (13-ER-3601:10-19).

These citations do not support the district court's conclusions that any Plaintiff (much less all of them) was injured by work disruptions occasioned by the defendants' intrusions. Rather, they show that, once again, the primary source of the "injuries" was the defendants' *publications*, not their intrusions.

As to the fourth *eBay* factor, the public interest, the district court's reasoning could support any California-linked target of undercover investigative work in obtaining an injunction against media outlets and advocacy groups, permanently prohibiting future "fraudulent" business practices involving misrepresentation to gain access. Any California business could claim that it provides some benefit in making goods or services available to the public, and that undercover investigations cause "irreparable harm" in the form of unsettling employees and diverting staff time toward preventing further investigations or responding to media inquiries. (*Cf.* 1-ER-73.) Only under the district court's view of the

abortion industry as deserving of special protection would Planned Parenthood be uniquely entitled to an injunction in the public interest.[21]

The judgment enjoining Defendants should be reversed.

CONCLUSION

The underlying judgment should be reversed and judgment entered for Defendant Rhomberg on all claims.

STATEMENT OF RELATED CASES

On Dec. 3, 2020, this court ordered that the instant case be consolidated with case Nos. 20-16068, 20-16070, and 20-16820. In addition, all defendant-appellants filed a joint Notice of Appeal from the district court's grant of attorney's fees (21-15124).

[21] The district court gave short shrift to Defendants' argument that it should take into account the public benefit conferred by the investigation of fetal tissue procurement practices. 1-ER-72-73. In response, Rhomberg incorporates by reference the Opening Brief of CMP/Biomax/Daleiden/Lopez at Section I(C).

Respectfully Submitted,

LIFE LEGAL DEFENSE FOUNDATION

Dated: February 26, 2021 By: 

CATHERINE SHORT
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Dated: February 26, 2021 By: 

MICHAEL MILLEN
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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