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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,

Defendants.

Case No. 16-cv-00236-WHO

Hon. William H. Orrick, III

Defendant Sandra Susan Merritt's Motion to Dismiss Plaintiffs' First Amended Complaint Under FRCP 12(b)(6)

Date: July 6, 2016
Time: 2:00 p.m.

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 6, 2016, in Courtroom 2 of the Honorable William H. Orrick at the United States District Court for the Northern District of California, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Sandra Susan Merritt will move this Court to dismiss causes of action one through fifteen of Plaintiffs' First Amended Complaint for failure to state claims upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant Merritt respectfully submits the following Memorandum of Points and Authorities in support of her motion and incorporates by reference her Motion to Strike under California Code of Civil Procedure §425.16, filed and served simultaneously herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Sandra Susan Merritt ("Merritt") is a resident of San Jose, California, who allegedly attended various meetings and conferences in 2014 and 2015. (First Amended Complaint, "FAC" ¶35). Plaintiffs allege that between April 5 and April 8, 2014, Ms. Merritt attended the National Abortion Federation ("NAF") conference in San Francisco, using the name and title, "Susan Tennenbaum, CEO of BioMax," as an exhibitor. (FAC ¶68, Exhibit G). Plaintiffs further allege that, on July 25, 2014, Ms. Merritt, using the name "Susan Tennenbaum," met with Planned Parenthood physician Dr. Deborah Nucatola at a Southern California restaurant to discuss fetal tissue procurement. (FAC ¶¶75, 76). According to Plaintiffs, on February 6, 2015, Ms. Merritt, using the name "Susan Tennenbaum," then met with Planned Parenthood physician Dr. Mary Gatter and a colleague at a Pasadena restaurant to discuss fetal tissue procurement. (FAC ¶¶95, 97). Then, on April 7, 2015, Plaintiffs allege that Ms. Merritt met with a physician from Planned Parenthood of the Rocky Mountains at offices and a clinic in Denver, Colorado to discuss fetal tissue procurement. (FAC

¶¶109-110). Plaintiffs further contend that, on April 9, 2015, Ms. Merritt met with staff from Planned Parenthood of the Gulf Coast at offices and a clinic in Houston, Texas to discuss fetal tissue procurement. (FAC ¶¶111, 115). Plaintiffs then allege that, between April 18 and 21, 2015, Ms. Merritt attended the NAF national conference in Baltimore, Maryland as an exhibitor. (FAC ¶¶118, 120, Exhibit K).

In addition to the foregoing meetings and conferences, Plaintiffs also allege that Defendants, including Ms. Merritt, attended Planned Parenthood fora and the national conference in 2015 (FAC ¶¶81-90, 98, 105). However, the agreements related to those events which Plaintiffs have attached to and incorporated into their First Amended Complaint show that Ms. Merritt, also known as "Susan Tennenbaum," **was not registered for those events and did not execute any of the agreements**. (FAC Exhibits A, C, E, F).

Information gathered at the NAF and Planned Parenthood meetings was used in videos produced by the Center for Medical Progress ("CMP") as part of its Human Capital Campaign and published on CMP's Website, YouTube and Facebook. (FAC ¶124).

LEGAL ARGUMENT

Ms. Merritt's motion to dismiss under Rule 12(b)(6) must be granted unless Plaintiffs have alleged "enough facts to state a claim to relief that is plausible on its face," *i.e.*, "more than a sheer possibility that a defendant has acted unlawfully." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a Rule 12(b)6 motion, Plaintiffs must allege more than labels, conclusions or a formulaic recitation of the elements of a cause of action, but facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Plaintiffs have failed to meet the standard as to any of the fifteen causes of action in the First Amended Complaint, so that Complaint should be dismissed in its entirety.

I. PLAINTIFFS DO NOT HAVE STANDING TO BRING A CIVIL RICO CLAIM.

Plaintiffs' first cause of action, for purported violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964(c), must be dismissed because Plaintiffs lack standing to bring a civil suit based upon RICO against Ms. Merritt. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). To state a claim under RICO, Plaintiffs must allege all of the following: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Id.* Most importantly, and fatally to Plaintiffs' claim, Plaintiffs only have "standing if, and can only recover to the extent that, [they] [have] been injured in [their] business or property by the conduct constituting the violation." *Id.* Mere financial losses, and particularly remote financial losses, are insufficient to confer standing under RICO. *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 364 (9th Cir. 2005); *Holmes v. Sec. Inv'r Prot. Corp*., 503 U.S. 258, 268 (1992).

The Supreme Court has restricted "injury to their business or property" under RICO to the definition accorded the term under the antitrust laws. *Holmes*, 503 U.S. at 268-69. Accordingly, Plaintiffs must show a direct relationship between the purported actions of Ms. Merritt and actual injuries to Plaintiffs' business or property. *Id.* at 268. Notably, merely alleging losses connected to increased costs of doing business occurring sometime after the purported misconduct, as Plaintiffs do here, is insufficient to confer standing. *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 984 (9th Cir. 2008). In *Canyon County*, the Ninth Circuit specifically rejected claims similar to Plaintiffs' claims, holding that it would be inappropriate to award damages based upon Plaintiff fulfilling its duty to provide services to the public. *Id.* Similarly here, Plaintiffs are asking this Court to find that they suffered injury compensable under RICO because they paid for increased security at their clinics and spent money responding to government investigations. (FAC ¶161). In fact, Plaintiffs themselves demonstrate that these costs are not attributable to anything Ms. Merritt might have done, but are simply the cost of engaging in their chosen business. Plaintiffs allege that there were more than 400

security incidents at its centers in California between 2010 and 2015. (FAC ¶49). Accepting those allegations as true for present purposes, if Plaintiffs wanted to remain in business they would need to increase security in order to ensure the safety of employees and clients. Indeed, Plaintiffs state that they instituted security measures at their conferences and clinics **prior** to Ms. Merritt's alleged activities for just that reason. (FAC ¶¶79, 84, 112). Similarly, Plaintiffs allege that Planned Parenthood is one of the country's largest healthcare providers, offering services to more than 2 million people every year. (FAC ¶2). Such a large organization providing healthcare, which is highly regulated and subsidized by the government, could be expected to have to respond to government inquiries regarding their operations. Costs associated with those investigations would be a consequence of providing healthcare services, not attributable to Ms. Merritt's attendance at conferences and meetings with Plaintiffs' staff. Plaintiffs have not and cannot allege that Ms. Merritt's activities as an exhibitor at conferences and participant in business meetings injured their business or property interests. At most, Plaintiffs might have alleged a connection between CMP's release of videos several months after Ms. Merritt's activities and some added business expenses. That connection, even if proven, does not confer standing upon Plaintiffs to bring a civil RICO claim against Ms. Merritt. *Sedima*, 473 U.S. at 496.

In a series of decisions rejecting similar RICO claims brought by abortion providers, the Supreme Court refused to expand the definition of underlying predicate acts so as to enlarge the concept of injury to property interests and confer standing upon abortion providers for challenges to pro-life activists' First Amendment activities. *NOW v. Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"); *Scheidler v. NOW*, 537 U.S. 393 (2003) ("*Scheidler II*"); *Scheidler v. NOW*, 547 U.S. 9 (2006) ("*Scheidler III*"). Similar to what Plaintiffs are attempting here, plaintiffs in the *Scheidler* cases tried to use RICO to punish pro-life advocates for their First Amendment activities. *Scheidler I*, 510 U.S. at 253. The *Scheidler* plaintiffs tried to expand the concept of "property interest" to include intangible

rights and to remove the requirement that property has to be taken from a property owner in order to state a claim of extortion as a predicate act under RICO. *Scheidler II*, 537 U.S. at 404-05. The Supreme Court rejected Plaintiffs' arguments and concluded that the pro-life advocates "did not commit extortion because they did not 'obtain' property from" the providers or those seeking their services. *Id.* at 397. In concurring opinions in both *Scheidler I* and *Scheidler II*, justices emphasized that RICO should not be used to punish First Amendment activity. In *Scheidler I*, Justice Souter said, "I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Scheidler I*, 510 U.S. at 265 (Souter, J., concurring). Similarly, Justice Ginsburg warned that expanding RICO as the *Scheidler* plaintiffs suggested could threaten to impose criminal and civil penalties on protected activity such as the civil rights era sit-ins. *Scheidler II*, 537 U.S. at 411 (Ginsburg, J., concurring). This case presents just such a scenario, and this Court should reject Plaintiffs' similar attempt to expand the definition of property interest so as to attain RICO standing to punish Ms. Merritt's First Amendment activities.

II. PLAINTIFFS CANNOT STATE A CLAIM FOR VIOLATION OF 18 U.S.C. §2511

The text of 18 U.S.C. §2511 and Ninth Circuit precedent establish that Plaintiffs cannot state a claim for violation of the federal wiretapping act against Ms. Merritt. Section 2511(2)(d) specifically excludes recordings made by someone who is not acting under color of law, who is a party to the subject conversation, "**unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.**" *Id*. (emphasis added). Plaintiffs allege that Ms. Merritt recorded conversations between herself and others taking place around her (FAC, ¶¶ 71, 76, 97, 110, 115, 122), which under Ninth Circuit precedent would mean that she was a party to the communication within the language of Section 2511(2)(d). *Sussman v. ABC*, 186 F.3d 1200, 1201-02 (9th Cir. 1999).

As a participant in the alleged conversations, Ms. Merritt would be exempt from liability unless the recordings were made "**for the purpose of**" committing any criminal or tortious act. 18 U.S.C. §2511(2)(d) (emphasis added).

In *Sussman*, the Ninth Circuit clarified that the purpose for which the recording was made, not whether the recording itself violated a law, is the critical consideration under Section 2511(2)(d). 186 F.3d at 1202. Plaintiffs cannot state a claim under 18 U.S.C. §2511 unless they can demonstrate that Ms. Merritt "taped the conversation for the purpose of violating Cal. Penal Code §632, for the purpose of invading [Plaintiffs'] privacy, for the purpose of defrauding [Plaintiffs], or for the purpose of committing unfair business practices." *Deteresa v. ABC*, 121 F.3d 460, 467 n.4 (9th Cir. 1997). Here, Plaintiffs' allegations of tortious conduct (which as discussed more fully *infra*, are insufficient to state claims) relate to activities **prior to** or during the meetings which were allegedly recorded, not to how the tapes were used. Plaintiffs acknowledge that the taped conversations were used to create informational videos posted online, not to blackmail or otherwise gain any kind of financial advantage at Plaintiffs' expense. (FAC ¶124). The subjects addressed in the videos were of great public importance, as seen in the numerous investigations, media stories and other circumstances that have arisen since the videos were published. (FAC ¶146). Therefore, the recordings were made not only for lawful purposes, but for newsgathering, which is protected under the First Amendment. *Sussman*, 186 F.3d at 1202. The second cause of action must be dismissed.

III. PLAINTIFFS CANNOT STATE A CLAIM FOR CONSPIRACY.

Plaintiffs' third cause of action for conspiracy must be dismissed because there is no distinct claim for conspiracy under California law, and Plaintiffs have not alleged sufficient facts to state an underlying tort claim which could be the subject of a conspiracy. *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997). Conspiracy is not an independent tort but allows tort recovery only against a party who already owes the duty and is not immune from

liability based on applicable substantive tort law principles. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 (1994).

Therefore, Plaintiffs cannot state a valid civil conspiracy cause of action without stating a claim for an underlying tort, and even then Plaintiffs' claim would have to be dismissed unless they have stated specific action on the part of Ms. Merritt within the applicable sections of the First Amended Complaint under which Plaintiffs purport to assert tort claims. *Entm't Research Grp.*, 122 F.3d at 1228. Plaintiffs must "clearly allege specific action on the part of each defendant" and must make such allegations "within the sections of the complaint that contain plaintiff's claims for the underlying torts." *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 948 (N.D. Cal. 2003). As discussed further *infra* and *supra*, Plaintiffs have not alleged underlying tort causes of action against Ms. Merritt and so clearly cannot meet this standard. Without sufficient underlying tort claims, there cannot be a claim for conspiracy under California law and Plaintiffs' third cause of action must be dismissed.

IV. PLAINTIFFS CANNOT STATE BREACH OF CONTRACT CLAIMS.

Plaintiffs' fourth cause of action alleges breach of agreements related to Planned Parenthood's national conference in Washington, D.C. and two fora in Florida. The agreements attached to the First Amended Complaint as Exhibits A-F do not show Ms. Merritt, even under the name "Susan Tennenbaum," as a party to those agreements. By contrast, "Susan Tennenbaum" is listed as a party to the agreements related to the NAF annual conferences and the visit to Planned Parenthood of the Gulf Coast's facilities. (Exhibits G, K and M). Ninth Circuit precedent and Federal Rule of Civil Procedure 10(c) provide that if a complaint is accompanied by attached documents, then the documents are part of the complaint for all purposes. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). Furthermore, "[w]hen the allegations of the complaint are refuted by an attached document, the court need not accept the allegations as being true." *Hudson v.*

Sherwood Sec. Corp., 1989 WL 534960 at *1 (N.D. Cal. 1989) (citing *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir.1958)). And, if the terms of the exhibits and allegations of the complaint are inconsistent, **then the language in the exhibits prevails**. *Ott*, 265 F.2d at 646 n.1. That being the case, the terms of Exhibits A-F, which do not list Ms. Merritt as a party to the agreements, prevail over Plaintiffs' inconsistent allegations. Therefore, Plaintiffs cannot state a claim against Ms. Merritt for breach of agreements to which she was not a party, and the fourth cause of action must be dismissed.

Similarly, Plaintiffs cannot state a claim under the fifth cause of action because they were not parties to the agreements related to the NAF conferences and cannot claim a right to relief as third party beneficiaries. *NovelPoster v. Javitch Canfield Group*, 2014 WL 5687344 at *5 (N.D. Cal. 2014). "The general rule among federal courts applying California law is that one who is not a party to a contract does not have standing to sue for breach of that contract." *Id.* Plaintiffs also cannot claim standing as third party beneficiaries. A party has standing as a third party beneficiary only if the contract is expressly entered into for the intended benefit of the third party and the contracting parties' intent to confer a benefit on the third party appears in the terms of the agreement. *Andrew Smith Co. v. Paul's Pak, Inc.*, 754 F. Supp. 2d 1120, 1133 (N.D. Cal. 2010); *Kronemyer v. Motion Picture Bond Co*., 102 F. App'x 536, 537-38 (9th Cir. 2004). The terms of the agreements for the NAF conferences show an intent to protect the interests of NAF, including holding NAF (and only NAF) harmless for any loss, damage or injury, granting NAF (and only NAF) sole discretion for changes to the agreements and requiring NAF's (and only NAF's) consent for disclosure of confidential information. (FAC Exhibits G, K, I). None of the terms speak to benefitting Plaintiffs, their staff or any other third party not affiliated with NAF. Consequently, Plaintiffs cannot establish standing as third party beneficiaries of the NAF agreements and the fifth cause of action for breach of the NAF agreements must be dismissed.

Finally, Plaintiffs' fifteenth cause of action based upon alleged breach of a confidentiality and non-disclosure agreement with Planned Parenthood of the Gulf Coast (Exhibit M) is also factually insufficient and must be dismissed. To state a claim for breach of contract under Texas law,[1] Plaintiffs must allege: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App. 2014). None of these factual prerequisites are sufficiently stated by Plaintiffs, particularly facts relating to a purported breach of the agreement.

Plaintiffs allege that Ms. Merritt breached the agreement by disclosing "confidential information." (FAC ¶¶250-251). The agreement defines confidential information as:

> (i) all written information of the Disclosing Party, and (ii) all oral information of the Disclosing Party, which in either case is identified at the time of disclosure as being of a confidential or proprietary nature or is reasonably understood by the Recipient to be confidential under the circumstances of the disclosure."

(Exhibit M, p. 2 ¶1). Therefore, disclosure of oral or written information would be a breach of the agreement only if the speaker identified it or if Ms. Merritt reasonably understood it to be "confidential" at the time of the conversation. (*Id.*). Plaintiffs do not even describe the substance of the conversations, let alone allege that speakers prefaced the conversations with statements that the information was "confidential" or otherwise presented the material under circumstances that would lead Ms. Merritt to understand that it was "confidential." (FAC ¶¶250-251). Plaintiffs are attempting to cover all conversations that occurred between Ms. Merritt and staff members at the Houston clinic with a cloak of confidentiality, regardless of whether they dealt with the weather, the décor of the office, or operational protocols for the clinic. However, the terms of the agreement foreclose that

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[1] Paragraph 8 of the subject agreement provides that it is to be governed by Texas law. *See* Exhibit M, p. 3.

possibility by explicitly requiring some indicia of confidentiality before the "recipient," in this case, Ms. Merritt, can be liable for a breach. This comports with the definition of "confidentiality" for purposes of invasion of privacy liability in the Ninth Circuit. *See Med. Lab. Mgmt Consultants v. ABC*, 306 F.3d 806 812-13 (9th Cir. 2002) (employees meeting with outsiders to discuss business matters do not have a protectable expectation that their conversations will remain private). Absent facts to show that Ms. Merritt was told or had reason to understand that certain statements made by Plaintiffs' staff were confidential, there cannot be a breach of contract claim and the fifteenth cause of action must be dismissed.

V. PLAINTIFFS CANNOT STATE CLAIMS BASED UPON TRESPASS.

Plaintiffs' sixth cause of action for trespass fails as a matter of law as to the PPFA annual conferences and fora since, as discussed in the preceding section, the agreements attached as Exhibits A to F show that Ms. Merritt was not registered as an attendee at the PPFA annual conferences or the fora in Florida. As for any claim related to the NAF meeting in Baltimore which Ms. Merritt did attend, these Plaintiffs cannot state a claim for trespass as to property leased by a third party. The Baltimore event was sponsored by, and therefore the property upon which it was held, was leased by NAF, not these Plaintiffs. Therefore, these Plaintiffs cannot state any claim for trespass under Maryland law. *Ford v. Baltimore City Sheriff's Office*, 149 Md.App.107, 129 (2002). To prevail on a cause of action for trespass, these Plaintiffs (Planned Parenthood affiliates) must establish: (1) an interference with a possessory interest in **their** property; (2) through the defendant's physical act or force against that property; (3) which was executed without their consent. *Mitchell v. Baltimore Sun Co.*, 164 Md.App. 497, 508 (2005) (emphasis added). The critical prerequisite for a trespass claim, a possessory interest in real property, is missing for these Plaintiffs. *Pruitt v. Wells Fargo Bank, N.A.*, 2015 WL 9490234 at *8 (D. Md. 2015).

As for the claim of trespass for the two Planned Parenthood clinics in Denver and Houston,

the claims fail because Plaintiffs themselves acknowledge that Ms. Merritt obtained the consent of Plaintiffs' staff at the facilities, and there are no allegations that she exceeded the conditions of consent during the time that she was on the property. (FAC ¶¶110, 113-115). In Colorado, trespass is defined as "a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property." *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). Consent is a defense to a trespass claim even when there was a mutual mistake of fact. *Corder v. Folds*, 292 P.3d 1177, 1180 (Colo. Ct. App. 2012). Under Texas law, "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). Plaintiffs cannot do so.

Furthermore, in a similar factual scenario, this Court has held that "**in a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass**." *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (emphasis added). In *Baugh*, a television camera crew entered the house of a domestic violence victim along with police officers. The camera crew obtained the victim's consent to enter by falsely representing that they were part of a victim-witness program for the District Attorney's office, and the victim consented to entry on condition that they would not publish any recording. *Id.* at 752. Later, the footage was broadcast on a local television show. *Id*. This court dismissed the victim's trespass claim on the ground that she had consented to the entry, **even though the consent was fraudulently induced**. *Id.* at 757. This court noted that the victim was actually claiming damages not for trespass, but for publication of the videos taken on her property against her authorization: "If [the camera crew] exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property and which cannot support a trespass claim." *Id.*

Plaintiffs' own FAC reveals that Ms. Merritt obtained their staff's consent to enter the clinics

and accompanied Plaintiffs' staff to meeting rooms and other locations within the clinics. (FAC ¶¶110, 113-15). There are no allegations that Ms. Merritt went to any portion of the property without Plaintiffs' staffs' consent. (*Id*.) As was true in *Baugh*, Plaintiffs here are not seeking damages for trespass, but for publication of videos taken on the property. *Id.* Consequently, if Ms. Merritt exceeded the scope of consent, she did so through the broadcasting of the CMP videos (if she was involved in that endeavor, which is not specifically alleged), which occurred **after** she left the property and cannot support a trespass claim. *Id.* Since Plaintiffs' staff consented to Ms. Merritt's entry upon the clinic properties, Plaintiffs cannot establish a claim for trespass and the sixth cause of action must be dismissed.

VI. PLAINTIFFS CANNOT STATE A CLAIM FOR UNFAIR COMPETITION.

Plaintiffs' seventh cause of action must be dismissed because they cannot state a claim against Ms. Merritt based upon violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200 *et seq*.

A. Ms. Merritt Did Not Engage In Any "Business Practices," Let Alone Unlawful, Unfair Or Fraudulent Practices.

Cal. Bus. & Prof. Code §17200 defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Critically, before there can be a claim under Section 17200, there must be an underlying "business practice." *Tecza v. Univ. of San Francisco*, 532 F. App'x 667, 668 (9th Cir. 2013). In *Tecza*, a university publicly disclosed that a student had received a special accommodation based upon a medical condition. *Id.* The Ninth Circuit affirmed the lower court's dismissal of a Section 17200 claim because the university's action did not constitute a business practice. *Id.* Likewise, in this case, Ms. Merritt's conversations at NAF conferences, two Planned Parenthood clinics and two restaurants which did not yield any agreements or transactions did not constitute "business practices." This is

further borne out by examining the purpose of the unfair competition law. The law governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Another purpose of the UCL "is the protection of consumers," *i.e.*, protection of the public as opposed to protection of a corporation's bottom line. *Annuziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). Plaintiffs' claims here seek protection of the latter, not the former, and so do not fit the underlying purpose of the statute. But even if Ms. Merritt's activities could be regarded as "business practices," they are not "unfair, unlawful or fraudulent" as required for liability under the UCL.

A non-consumer plaintiff seeking recovery for an "unfair" practice that it alleges has harmed its economic interests generally must show:

> conduct that threatens an incipient violation of **an antitrust law**, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or **otherwise significantly threatens or harms competition**.

Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014) (emphasis added). Ms. Merritt participated as an exhibitor at NAF conferences and met with Plaintiffs' staff at two clinics and two restaurants. (FAC ¶¶68, 75, 76, 95, 97, 109-111, 115, 118, 120). Ms. Merritt did not enter into any agreements or otherwise transact business with Plaintiffs in any of those meetings. (*Id.*). Information from those meetings was not used to drive business to Ms. Merritt or CMP, but was featured in CMP documentaries. (FAC ¶124). Plaintiffs do not and cannot allege that Ms. Merritt's meetings with Planned Parenthood representatives somehow implicated antitrust law or otherwise harmed competition between Planned Parenthood and Ms. Merritt, which is fatal to Plaintiffs' claim.

Plaintiffs have also failed to establish that Ms. Merritt's actions constituted unlawful conduct, and therefore cannot establish that Ms. Merritt's actions, even if they were considered business practices, were unlawful. *See Cel-Tech*, 20 Cal. 4th at 180 (UCL "borrows" violations of other laws

and treats them as unlawful business practices). Plaintiffs base their "unlawful practices" claim on purported violations of 18 U.S.C. §1962(c) (RICO); 18 U.S.C. §2511; Cal. Penal Code §§632 and 634; Md. Code Ann. Courts & Jud. Proc. §10-402 and Florida Statutes §934.10. (FAC ¶198). Since Ms. Merritt did not attend any meetings in Florida (Exhibits A-F), Florida law does not apply. As for the other purported violations, Plaintiffs have not alleged sufficient facts to state claims against Ms. Merritt for violations of those statutes. As discussed more fully *infra* Plaintiffs have not stated sufficient facts to state a claim for a violation of Cal. Penal Code §§632 and 634. As discussed more fully in Sections I and II above, Plaintiffs lack standing to bring a claim under 18 U.S.C. §1962(c) and cannot state a claim under 18 U.S.C. §2511. Finally, as discussed more fully *infra*, Plaintiffs have not stated sufficient facts to state a claim under Md. Code Ann. Cts. & Jud. Proc. §10-402. Absent allegations of unlawful conduct, there cannot be a claim for "unlawful business practices" under the UCL.

Finally, as described more fully in Section VII, *infra*, Plaintiffs have failed to allege a claim for fraud against Ms. Merritt. Therefore, there is no underlying claim of fraudulent conduct upon which Plaintiffs can base a claim under the UCL.

B. Even If Plaintiffs Could Establish An Unlawful, Unfair Or Fraudulent Business Practice, They Could Not Obtain Any Relief.

Plaintiffs could not obtain any relief under the UCL statute even if they could meet the prerequisites for liability (which, as stated above, they cannot). The only forms of relief available under the UCL are restitution and injunctive relief against repetition of the allegedly unlawful or fraudulent conduct. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012). Plaintiffs cannot obtain injunctive relief because they cannot allege that Ms. Merritt, who is now known to them (and the general public), could succeed in making false representations similar to those Plaintiffs allege were previously made, and that Plaintiffs would or could reasonably rely upon them.

See Frenzel v. AliphCom, 76 F. Supp. 3d 999, 1015 (N.D. Cal. 2014) (plaintiff could not obtain injunctive relief under the UCL because he could not "plausibly allege that he is likely to be fraudulently induced by the same representations he now claims he knows are false").

Plaintiffs also cannot obtain restitution which "requires both that money or property have been lost by [the] plaintiff, on the one hand, and that it have been **acquired by [the] defendant** on the other." *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 336 (2011) (emphasis added). Where the claimed economic injury involves a loss by plaintiff "without any corresponding gain by defendant" there is an "absence of any basis for restitution." *Id.* Courts have distinguished restitution, which is permitted under the UCL, from damages, which are not. *Bank of the West v. Superior Ct.*, 2 Cal. 4th 1254, 1266 (1992). "[D]amages are not available under section 17203. The only nonpunitive monetary relief available . . . is the disgorgement of money that has been wrongfully obtained or, in the language of the statute, an order 'restor[ing] … money … which may have been acquired by means of … unfair competition.'" *Id.* (internal citations omitted).

Plaintiffs label their request for relief as restitution, but upon examination it is apparent that they are seeking damages, which are not permitted under the UCL. Plaintiffs seek money for "damages" such as having to increase their security and to repair property damage caused by non-parties. (FAC ¶201). They do not and cannot seek the return of ill-gotten gains from Ms. Merritt since they do not and cannot allege that Ms. Merritt received any money or property from Plaintiffs. In short, Plaintiffs' UCL claim and the relief sought both fail as a matter of law.

VII. PLAINTIFFS CANNOT STATE CLAIMS BASED ON FRAUD.

Plaintiffs do not state sufficient facts to state a cause of action for fraud against Ms. Merritt. *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1126 (9th Cir. 2009). The "indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable

reliance, and damages." *Id.*[2] While misrepresentation, knowledge of falsity and intent to defraud can be averred generally, justifiable reliance and damages must be pled specifically to overcome a motion to dismiss. *Marble Bridge Funding Grp. v. Euler Hermes Am. Credit Indem. Co.*, 2015 WL 971761 at *5 (N.D. Cal. 2015). It is these last two elements that are particularly deficient in Plaintiffs' First Amended Complaint and require dismissal of the eighth cause of action.

Reliance exists when the misrepresentation was an immediate cause of plaintiff's conduct which altered his or her legal relations, and when, without such misrepresentation, plaintiff would not, in all reasonable probability, have entered into the contract or other transaction. *Marble Bridge*, 2015 WL 971761 at *5. In *Marble Bridge*, this Court found that plaintiff did not identify with particularity how its legal relations were altered by defendant's alleged fraud, and particularly how it relied on defendant's alleged factual concealments, when plaintiff did not make a payment to defendant. *Id.* Importantly for this case, one must ordinarily prove that he read or heard a misrepresentation to have relied on it. *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1088 (1993).

Damage allegations cannot be, as Plaintiffs' are here, merely recitations of additional business costs incurred at some point in time after the conduct at issue. Instead, Plaintiffs must allege a "complete causal relationship between the fraud or deceit and the plaintiff's damages." *City Solutions, Inc. v. Clear Channel Commc'ns*, 365 F.3d 835, 840 (9th Cir. 2004). "Even at the pleading stage, the complaint 'must show a cause and effect relationship between the fraud and damages sought; otherwise no cause of action is stated.'" *Marble Bridge*, 2015 WL 971761 at *5. When, as is the case here, there is a break in the causal chain between the alleged misrepresentation and the claimed damages, a plaintiff cannot state a cause of action for fraud. *Med. Lab. Mgmt. v. ABC*, 30 F.

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[2] Colorado, Texas and Maryland recognize the same elements for a fraud claim. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1160 (Colo. 2013); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011); *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 232 (1995).

Supp. 2d 1182, 1199 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002); *Frome v. Renner*, 1997 WL 33308718 *2 (C.D. Cal. 1997) (both citing *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 963 (M.D.N.C. 1997)). In *Med. Lab*, the court found that the subject of an undercover investigation of its diagnostic services could not sustain a fraud claim based upon allegations that it lost business and incurred other costs following the broadcast of the results of the undercover investigation. 30 F. Supp. 2d at 1189. Similarly in *Frome*, the court found a physician who was the subject of an undercover investigation could not sustain a fraud claim based upon lost profits following a broadcast in which the reporter who posed as a patient disparaged the physician. 1997 WL 33308718 at *2. As was true in *Med. Lab.*, the *Frome* court found that the physician's lost profits were not proximately caused by defendant's undercover investigation, but because of the program that "served as a forum through which the public could learn about [p]laintiff's medical practices" *Id.* Both cases relied upon the conclusion in *Food Lion* that the store had failed to establish that the lost profits and lost sales claimed as injuries were proximately caused by the alleged fraud of an undercover operation. *Food Lion*, 964 F.Supp. at 962–63. The *Food Lion* court reasoned that "**it was the food handling practices themselves—not the method by which they were recorded—which caused the loss of consumer confidence**." *Id.* (emphasis added). Similarly, here, it is the discussions of altering abortion procedures and harvesting and selling baby body parts revealed in the videos, not Ms. Merritt's identification of herself as Susan Tennenbaum of BioMax, that caused any purported business injuries alleged by Plaintiffs. As was true in *Food Lion*, *Frome* and *Med. Lab.*, Plaintiffs have failed to establish that their purported injuries were proximately caused by Ms. Merritt's use of the name and title Susan Tennenbaum of BioMax and subsequent conversations and meetings.

Moreover, Plaintiffs do not and cannot allege with sufficient specificity any detrimental reliance upon any representations Ms. Merritt made at either the NAF conferences or the meetings

at the Planned Parenthood offices in Denver and Houston. With regard to the NAF conferences, Plaintiffs do not allege the "who, what, where" of any conversations between Ms. Merritt and anyone affiliated with Plaintiffs. The only allegations that Plaintiffs make regarding the NAF conferences are that unspecified Defendants purportedly surreptitiously recorded conversations with unspecified conference attendees. (FAC ¶¶68, 122). Without identifying the parties to the purported conversations, Plaintiffs cannot establish justifiable reliance since a party must prove that he actually read or heard a misrepresentation in order to have relied upon it. *Mirkin*, 5 Cal.4th at 1088; *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 334 (2013). If the parties to the conversations are not identified, then Plaintiffs cannot establish that participants in conversations read or heard and relied upon any misrepresentation to their detriment. The same is true of the clinic visits in Denver and Houston, where, again, Plaintiffs do not identify the parties to the conversations other than that they worked at the clinics, and therefore cannot establish what, if anything, they read or heard from Ms. Merritt and relied upon to their detriment. *Bristol Bay*, 312 P.3d at 1161; *Exxon Corp.*, 348 S.W.3d at 219. Thus, the eighth cause of action must be dismissed.

VIII. PLAINTIFFS CANNOT STATE CLAIMS BASED ON INVASION OF PRIVACY.

Plaintiffs' ninth through fourteenth causes of action are grounded in invasion of privacy labeled as illegal recording, intrusion upon seclusion and the California Constitution's right to privacy in Article I, §1. Plaintiffs cannot state a claim under any of these theories. Plaintiffs do not have standing to allege claims for intrusion upon seclusion or the California Constitution, so causes of action thirteen and fourteen must be dismissed. As for the statutory invasion of privacy claims in the ninth through twelfth causes of action, Plaintiffs cannot establish that Ms. Merritt recorded confidential or private communications as defined under the statutes.

A. Plaintiffs Lack Standing To Bring Common Law And Constitutional Claims.

As corporations, Plaintiffs do not have standing to bring claims for invasion of privacy under common law or Article I, §1 of the California Constitution. *Fleck & Associates, Inc. v. Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006); *Chico Feminist Women's Health Ctr. v. Butte Glenn Med. Soc.*, 557 F. Supp. 1190, 1199-1200 (E.D. Cal. 1983); *Ion Equip. Corp. v. Nelson*, 110 Cal. App. 3d 868, 878-79 (1980). In *Fleck*, the Ninth Circuit upheld the dismissal of an invasion of privacy claim brought by the owner of a sex club against an ordinance prohibiting live sex acts. *Fleck*, 471 F.3d at 1102. The court said that "an analysis of the nature, history and purpose of the constitutional guarantee at issue," *i.e.*, right to privacy, "demonstrates that it is 'purely personal' and therefore incapable of being claimed by a corporation." *Id.* at 1104. "It is hard to imagine a constitutional guarantee that could be more inherently personal and therefore unavailable to a corporate entity, 'an artificial being, invisible, intangible, and existing only in contemplation of law.'" *Id.* at 1105 (citing *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)). Corporations do not have "private lives, let alone 'private lives in matters pertaining to sex' as Fleck would have it." *Id.* Similarly, corporations cannot claim "among the most intimate and fundamental of all constitutional rights," *i.e.*, the right to privacy in "procreative choice." *Chico Feminist Women's Health,* 557 F. Supp. at 1199. "The court concludes, therefore, that the Center lacks standing to sue for an invasion of its privacy under Article I, §1." *Id.* The same is true of Plaintiffs here. California law permits physicians to sue on behalf of their patients when the right to obtain an abortion is at issue, and the *Chico* court extended that right to a health clinic. *Id.* However, Plaintiffs here are not seeking to vindicate their patients' rights to obtain an abortion, but to vindicate a purported right of privacy in their own corporate business transactions. They lack standing to bring that claim.

Plaintiffs implicitly acknowledge that they lack standing by asserting that they are seeking

relief on behalf of their staff, purportedly relying upon the associational standing concept described in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). (FAC, ¶239, citing the *Hunt* factors). Associational standing is available only when an organization can show that 1) at least one of its members would have standing to sue in his own right, 2) the interests the suit seeks to vindicate are germane to the organization's purpose, and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Fleck*, 471 F. 3d at 1105-06. Associational standing is reserved for organizations that "express the[ ] collective views and protect the[ ] collective interests of their members," such as labor unions or associations founded to promote the interests of those involved in a particular industry. *Id.* (citing *Hunt*, 432 U.S. at 345). Neither the customers in *Fleck*, nor the employees here, are "members who have come together to form an organization for their mutual aid and benefit." *Id.* Furthermore, the privacy rights for which Plaintiffs are seeking redress are quintessential personal rights that cannot be vindicated except by the individual whose privacy has been invaded. *Id.* at 1104. Consequently, it is necessary for the affected individuals to participate, foreclosing Plaintiffs' claims for associational standing. Since Plaintiffs lack standing to assert claims for invasion of privacy either on their own behalf or on behalf of their employees, their thirteenth and fourteenth causes of action must be dismissed.

B. Plaintiffs Cannot Assert Claims For Statutory Invasion of Privacy.

In the eleventh cause of action, Plaintiffs seek relief under Fla. Stat. §934.10 related to activities at Planned Parenthood fora in Florida. Since the registration and confidentiality agreements related to those meetings show that Ms. Merritt did not attend, the Florida law cannot be applied to her and the eleventh cause of action must be dismissed. As to the remaining invasion of privacy/wiretapping statutes, Plaintiffs have failed to state sufficient facts to state claims against Ms. Merritt.

1. Plaintiffs Cannot State Claims Under the California Penal Code.

California law permits corporations to assert claims under Penal Code §§632-637, but Plaintiffs cannot state a claim against Ms. Merritt because they cannot demonstrate that she recorded any confidential communications and cannot assert an expectation of privacy in conversations in which Ms. Merritt was a party.

Conversations at the San Francisco NAF conference and in the Southern California restaurants were not "confidential communications" under Penal Code §632. A communication "made in a public gathering" or "**in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded**" is not confidential. Penal Code §632(c) (emphasis added). The determinative factor is not, as Plaintiffs allege, the subjective belief of the parties, but whether the party claiming confidentiality had an objectively reasonable expectation that the conversation was not being overheard or recorded. *Flanagan v. Flanagan*, 27 Cal.4th 766, 776-77 (2002). The question is not whether the participants expected that the conversation would not be divulged, but whether anyone else could overhear the conversation at the time it occurred. *Id.* at 775. "Under the terms of the statute, if someone does not reasonably expect the conversation to be confined to the parties, it makes no difference under the statute whether the person reasonably expects that another is listening in or not. The communication is not confidential." *Deteresa,* 121 F.3d at 464-65. Furthermore, merely stating that one of the parties believed that the subject matter was "sensitive" or "confidential" does not make it so. "[A]n expectation of a confidential communication cannot be derived from the content of the communication for the purpose of this statute." *Vera v. O'Keefe*, 2012 WL 3263930, at *5 n.3 (S.D. Cal. 2012).

The very circumstances under which the conversations at the NAF conference and restaurant meetings allegedly took place belie any claim that the conversations were confidential under Penal

Code §632. Plaintiffs offer no specifics about the parties or context of the conversations at the NAF conference, but claim that all conversations at the conference attended by hundreds of people over the course of several days were confidential. (FAC, ¶¶70, 214). Not only does that assertion defy logic, but it also defies Plaintiffs' own description of the NAF conferences as "unique opportunities for abortion and other reproductive health care providers to meet, learn about the latest research, and to network." (FAC ¶66). In addition, "[c]ompanies that apply to exhibit at NAF's annual meetings [which is what BioMax did] include health care product manufacturers, service providers, and reproductive rights advocates. (*Id.*). The entire point in exhibiting at an annual meeting like that would be to interact with the attendees. Key to such interactions, and indeed to the idea of "networking," is that conversations would be engaged in, and could be overheard or repeated, by many people. An exhibitor would not expect nor want to be secreted away in one corner of the room where its message would not be effectively communicated. In such an environment it would be objectively unreasonable to believe that a conversation would not be overheard.

Similarly, holding meetings in "Southern California restaurants" (FAC ¶¶76, 97) open to the public necessarily means that the conversations were not confidential under Penal Code §632, regardless of Dr. Nucatola's and Dr. Gatter's subjective expectations. (*Id.*). Plaintiffs' attempts to claim otherwise, by alleging that the parties sat in a private booth, with their backs to the wall, that there were few or no other patrons or that there was ambient noise, are unavailing, since none of those circumstances can overcome the fact that the physicians knowingly met at a place open to the general public where anyone could pass by and overhear the conversation. As the California Supreme Court has emphasized, it is the **potential** that the conversation could be overheard that is the critical component in whether a communication is confidential under Penal Code §632. *Flanagan*, 27 Cal.4th at 776-77.

In the tenth cause of action, Plaintiffs attempt to recycle their failed claim for trespass at the

NAF conference in San Francisco into a claim for violation of Cal. Penal Code §634. As discussed, *supra*, Plaintiffs do not have standing to assert a trespass claim for property leased by a third party, *i.e.*, NAF. Without an underlying trespass claim, there is no basis for Plaintiffs' claim of damages under Penal Code §634, particularly in light of the fact that Plaintiffs have also failed to state a claim under Penal Code §632. Consequently, Plaintiffs' claims under the California Penal Code, causes of action nine and ten, must be dismissed.

2. Plaintiffs Cannot State a Claim Under Maryland Law.

The same considerations that were fatal for Plaintiffs' claims under the California Penal Code also doom their twelfth cause of action for unlawful recording under Maryland law. Instead of using the term "confidential communication" to define when recording is prohibited, Section 10-402 uses the term "private conversation." Md. Code Ann., Cts. & Jud. Proc. §§10-401(13)(i), 10-402(a)(1). As is true under the California statute, the Maryland law requires an objectively reasonable expectation that a conversation is private. *Fearnow v. Chesapeake & Potomac Tel. Co.* 342 Md. 363, 376 (1996). Statements that a person knowingly exposes to the public are not made with a reasonable expectation of privacy and therefore are not protected under Maryland law, even when those statements are uttered in someone's home. *Malpas v. State*, 116 Md. App. 69, 84 (1997). Here, the statements which Plaintiffs claim are "private" were not made in a home, but in a public location amid hundreds of conference attendees and exhibitors. (FAC, ¶¶66, 233-236). Plaintiffs claim that all conversations at the NAF meeting in Baltimore were clothed with an expectation of privacy (FAC, ¶234), which does not comport with Maryland precedent, Plaintiffs' own description of the nature of the conference, or common sense.

As is true of the NAF conference in San Francisco, Plaintiffs offer no specifics about the parties or context of the conversations at the NAF conference in Baltimore, but simply claim that all conversations at the conference attended by hundreds of people over the course of several days were

confidential. (FAC, ¶¶70, 234). Those assertions contradict Plaintiffs' characterization of the NAF conferences as "unique opportunities for abortion and other reproductive health care providers to meet, learn about the latest research, and to network." (FAC ¶66). If Plaintiffs' staff attended the NAF conference with the expectation of networking with other abortion providers, then they necessarily could not have expected that the conversations they would have with other attendees would be private. Similarly, they could not reasonably expect that speaking with an exhibitor, such as Ms. Merritt, in a busy exhibit hall would not be overheard. In fact, the whole point of having exhibitors would be to network, *i.e.*, interact, with attendees in a manner that would be overheard. Neither exhibitors nor Plaintiffs' staff could reasonably expect that conversations at a networking conference would be private. *See Med. Lab. Mgmt.* 306 F.3d at 818. Therefore, Plaintiffs cannot state a claim for violation of Section 10-402 and the twelfth cause of action must be dismissed. Since Plaintiffs cannot allege sufficient facts or meet the standing requirements for claims based upon invasion of privacy in any of its iterations, the ninth through fourteenth causes of action must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' First Amended Complaint should be dismissed for failure to state causes of action upon which relief can be granted.

Dated: April 25, 2016

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2016, I filed the foregoing Motion to Dismiss electronically through the CM/ECF system, which caused counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,

Defendants.

Case No. 16-cv-00236-WHO

Hon. William H. Orrick, III

[PROPOSED] ORDER GRANTING Defendant Sandra Susan Merritt's Motion to Dismiss Plaintiffs' First Amended Complaint Under FRCP 12(b)(6)

Defendant Sandra Susan Merritt's Motion to Dismiss Plaintiffs' First Amended Complaint under FRCP 12(b)(6) is now before this Court for disposition. Having reviewed the pleadings filed by both parties and heard the arguments of counsel, the Court hereby finds that the Motion is well taken, and that there are good grounds for granting the relief requested.

THEREFORE, this Court hereby grants Defendant Sandra Susan Merritt's Motion to Dismiss Plaintiffs' First Amended Complaint under FRCP 12(b)(6). Said Complaint is hereby DISMISSED, with prejudice.

IT IS SO ORDERED.

DATED: _____

_____
Hon. William H. Orrick, III
United States District Judge