Nicolaie Cocis CA Bar # 204703
Law Office of Nic Cocis and Associates
nic@cocislaw.com
38975 Sky Canyon Dr., Suite 211
Murrieta, CA 92563
(951) 695-1400

Horatio G. Mihet*
Jonathan D. Christman*
Liberty Counsel
hmihet@lc.org
jchristman@lc.org
PO Box 540774
Orlando, FL 32854
(407) 875-1776
*Admitted pro hac vice

Attorneys for Defendant Sandra Susan Merritt

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 Strike Under California's Anti-SLAPP Law (CCP § 425.16)

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 strike Causes of Action three through ten, thirteen and fourteen of the First Amended Complaint ("Complaint") pursuant to California Code of Civil Procedure §425.16.

Defendant Merritt respectfully submits that Plaintiffs' Complaint should be stricken as a Strategic Lawsuit Against Public Participation (SLAPP) pursuant to California CCP §425.16 on the grounds that the claims arise from acts in furtherance of Defendant's exercise of her First Amendment rights of free speech and freedom of the press and that Plaintiffs cannot demonstrate a reasonable probability of prevailing on the merits in that the Complaint is not legally sufficient and is not supported by a sufficient prima facie showing of facts to support a favorable judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

California CCP §425.16, the "Anti-SLAPP" statute, was enacted to permit the swift dismissal of precisely this type of lawsuit, *i.e.*, "meritless claims that are aimed not at remedying legally cognizable harms but at chilling expression." *Manufactured Home Cmty, Inc. v. Cnty. of San Diego*, 544 F.3d 959, 963 (9th Cir. 2008). Anti-SLAPP motions can be brought in federal court to dismiss meritless state law claims, such as the third through tenth and thirteenth and fourteenth causes of action here, that are aimed at silencing Ms. Merritt's First Amendment activity. *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010); *United Tactical Sys., LLC v. Real Action Paintball, Inc*., 2015 WL 6955086, at *5 (N.D. Cal. Nov. 10, 2015).

STATEMENT OF FACTS

Sandra Susan Merritt ("Merritt") is an investigative journalist who resides in San Jose, California. (Declaration of Sandra Susan Merritt, "Merritt Declaration," ¶¶ 2-3) (attached hereto as Exhibit 1). Her investigative work has focused on the abortion industry, and she has spent many years researching industry practices. (*Id*. at ¶3). Her research revealed that abortion providers were doing business with fetal tissue procurement companies. (*Id*.). Her research further revealed that as part of those business dealings abortion providers, such as Plaintiffs, would alter abortion procedures so as to obtain an intact fetus from which organs could be harvested for sale to procurement companies. (*Id*.). Her research also revealed that in order to obtain the intact fetuses, abortion providers would perform what is known as "partial birth abortions," or would use techniques that would result in a live fetus being removed from the mother and then killed and dissected. (*Id*.).

Between 2013 and 2015, Ms. Merritt performed investigative work for the Center for Medical Progress' ("CMP") Human Capital Campaign. (*Id*. at ¶4). Her work included gathering information, including conversations with abortion providers related to what her research had indicated regarding the harvesting and selling of the body parts of aborted fetuses, particularly fetuses that were born alive or were killed using what is known as "partial birth abortion." (*Id*. at ¶¶3, 7).

During her work with CMP, Ms. Merritt used the name and title Susan Tennenbaum, Chief Executive Officer of BioMax Procurement Services, LLC. (*Id*. at ¶5). Using that name, Ms. Merritt attended the National Abortion Federation ("NAF") conferences in 2014 in San Francisco and 2015 in Baltimore, Maryland as an exhibitor. (*Id*. at ¶6). Using the name "Susan Tennenbaum," Ms. Merritt met with Planned Parenthood representatives at clinics in Denver, Colorado and Houston, Texas to discuss potential business transactions between BioMax and Planned Parenthood. (*Id*. at ¶7). Defendant David Daleiden was also present, using the name "Robert Sarkis." (*Id*.).

On July 25, 2014, Ms. Merritt, using the name Susan Tennenbaum, met with Planned

Parenthood physician Dr. Deborah Nucatola at a Southern California restaurant. (*Id*. at ¶8; First Amended Complaint, "FAC" ¶76). Defendant David Daleiden was also present, using the name "Robert Sarkis." (*Id.*). At that meeting, Ms. Merritt and Mr. Daleiden discussed a potential business transaction with Dr. Nucatola that would have involved BioMax purchasing fetal tissue specimens from Planned Parenthood. (*Id*.).

On February 6, 2015, Ms. Merritt and Mr. Daleiden, using the names "Susan Tennebaum" and "Robert Sarkis," met with Planned Parenthood physician Dr. Mary Gatter and a colleague at a Pasadena restaurant. (Merritt Declaration, ¶9; FAC ¶97). The parties discussed a potential business transaction between BioMax and Planned Parenthood which would have involved BioMax potentially purchasing fetal tissue specimens from Planned Parenthood. (Merritt Declaration, ¶9).

Ms. Merritt attended the NAF meetings, meetings at Planned Parenthood offices in Denver and Houston, and the meetings in the restaurants to gather information to be used in CMP's video reports evidencing abortion industry practices in harvesting and selling baby body parts. (*Id*. at ¶10). CMP published these video reports on its website, on YouTube and on Facebook. (FAC ¶124).

Ms. Merritt did not attend the PPFA North American Forum on Family Planning in Miami in October 2014, the PPFA Medical Directors Conference in Orlando in February 2015 or the PPFA annual conference in Washington, D.C. in March 2015. (Merritt Declaration, ¶6).

LEGAL ARGUMENT

In ruling on a motion to strike under Section 425.16, this Court must engage in a two-step process that involves shifting burdens. *Kearney v. Foley & Lardner LLP*, 590 F.3d 638, 648 (9th Cir. 2009). First, the defendant must make an initial prima facie showing that plaintiffs' challenged cause of action "arises from" an act in furtherance of defendant's rights of petition or free speech. *United Tactical Sys., LLC*, 2015 WL 6955086 at *5. Once Ms. Merritt has met her burden, then the burden shifts to Plaintiffs to demonstrate that they have a reasonable probability of prevailing on the merits.

Id. Emphasizing the importance of quashing SLAPP suits, the California legislature has amended Section 425.16 to state explicitly that the statute "shall be construed broadly," and the California Supreme Court has cautioned that a narrow construction "would serve Californians poorly." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 420 (9th Cir. 2014) ("*GLAAD*"). As was true in *GLAAD*, that broad construction and application of Section 425.16 to Plaintiffs' state law causes of action leads to the conclusion that the claims against Ms. Merritt must be stricken. *Id.*

I. PLAINTIFFS' CLAIMS TARGET MS. MERRITT'S EXERCISE OF HER FIRST AMENDMENT RIGHTS.

In determining whether Ms. Merritt has met her initial burden under Section 425.16, the critical consideration is "whether the cause of action is based on the defendant's protected free speech or petitioning activity." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002). A protected act of free speech under the statute includes "'any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest,' and '**any other conduct** in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (quoting Cal.Civ.Proc.Code § 425.16(e)(3)-(4)) (emphasis added). The court looks at the principal thrust or gravamen of plaintiffs' causes of action to determine whether the anti-SLAPP statute applies. *GLAAD*, 742 F.3d at 422. In *GLAAD*, the plaintiffs challenged CNN's decision to display videos without closed captioning, arguing that the decision violated the civil rights of deaf Californians. *Id.* The Ninth Circuit found that the gravamen of the complaint was a challenge to CNN's actions in furtherance of its right to report the news. *Id.* Reporting newsworthy events is free speech and usually requires the assistance of newsgathering, which can be construed as conduct in furtherance of the right to free speech under Section 425.16. *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 166 (2003). Thus, undercover

recordings made and incorporated into a broadcast in connection with an issue of public importance—such as dispensing of controlled substances, as in *Lieberman*—fall within the scope of Section 425.16. *Id.*

The same is true here. Plaintiffs' claims directly challenge Ms. Merritt's expressive and investigative activities in furtherance of free speech at various abortion industry events and meetings. Ms. Merritt attended the NAF conferences, meetings at Planned Parenthood clinics in Denver and Houston, and the restaurant meetings in California in her capacity as an investigative journalist working for CMP, gathering information on the abortion industry's practices with regard to the harvesting and sale of baby body parts. (Merritt Declaration, ¶10). Ms. Merritt's work, like the recording in *Lieberman*, was incorporated into video news reports produced by CMP and broadcast on its Website, Facebook, and YouTube. (FAC ¶124). As Plaintiffs acknowledge, the information contained in the broadcasts is of great public importance and has led to Congressional investigations, other news reports, and vigorous public debate. (FAC ¶146). As was true of the surreptitious recording in *Lieberman*, Ms. Merritt's newsgathering conduct here falls squarely within Section 425.16. *Id.*

II. PLAINTIFFS CANNOT MEET THEIR BURDEN OF DEMONSTRATING A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

Since Ms. Merritt has satisfied her burden of showing that Plaintiffs' causes of action arise from her newsgathering activities, Plaintiffs must demonstrate "a reasonable probability" of success on the merits. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001). This means that Plaintiffs must demonstrate that "the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [them] is credited." *Id.* When, as is true here, Plaintiffs provide "an insufficient legal basis for the claims or when no evidence of sufficient substantiality exists to support a judgment for the plaintiff," Ms. Merritt's motion to strike should be granted. *Id.*; *see also Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010).

None of Plaintiffs' state law claims is legally sufficient or supported by a prima facie showing of facts, and therefore all of them should be stricken.

A. Plaintiffs Cannot State Claims Based On Fraud.

Plaintiffs do not state sufficient facts to satisfy the elements of 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." *Vess*, 317 F.3d at 1105. "[A] plaintiff must set forth more than the neutral facts necessary to identify the transaction." *Id.* While misrepresentation, knowledge of its falsity, and intent to defraud can be averred generally, justifiable reliance and damages must be pled specifically in order 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. Mar. 2, 2015). These last two elements are particularly deficient in Plaintiffs' Amended Complaint and require finding that Plaintiffs cannot sustain their burden under Section 425.16 as to the eighth cause of action.

Reliance exists when the misrepresentation or nondisclosure was an immediate cause of plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she 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 specificity how its legal relations were altered by the fraudulent conduct attributed to the defendant, in particular, how it relied on the defendant's policy claims and alleged concealments of material fact when, in the end, it did not make a payment to defendant. *Id.* Also, 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).

Moreover, damage allegations cannot be, as Plaintiffs' are here, merely recitations of additional business costs incurred at some point in time after the behavior 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 (internal citation and quotes omitted). When, as is the case here, there is a break in the causal chain between the alleged misrepresentation (alleged presentation of a false identity by Ms. Merritt) and the claimed damages (increased business expenses following publication of the CMP videos), a plaintiff cannot state a cause of action for fraud. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 30 F. 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 the 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 investigation. *Food Lion*, 964 F. Supp. at 962–63. There, the court reasoned:

> Food Lion's lost sales and profits were the direct result of diminished consumer confidence in the store. While these losses occurred after the Prime Time Live broadcast, the broadcast merely provided a forum for the public to learn of activities which had taken place in Food Lion stores. Stated another way, tortious activities may have enabled access to store areas in which the public was not allowed and the consequent opportunity to film people, equipment and events from a perspective not available to the ordinary shopper, but **it was the food handling practices themselves—not the method by which they were recorded—which caused the loss of consumer confidence.** Those practices were not the probable consequence of Defendants' fraud and trespass and it cannot be argued under the evidence in this case that the filming of those practices by the Prime Time Live producers set any of those activities in motion.

Id. (emphasis added). Similarly, here, it is the discussions of altering abortion procedures and harvesting and selling baby body parts revealed in the CMP videos, not Ms. Merritt's identification of herself as Susan Tennenbaum of BioMax, that caused the congressional investigations, security costs, and other 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.

Plaintiffs also do not and cannot allege with sufficient specificity any detrimental reliance upon any representations Ms. Merritt allegedly made at either the NAF conferences or the private 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, as to the 2014 conference, that "on information and belief, [Defendants] took surreptitious video and audio recordings of conference attendees without their knowledge or consent," and, as to the 2015 conference, that Defendants "surreptitiously taped conversations with attendees and particularly targeted the staff of PPFA and its affiliates." (FAC ¶¶68, 122). The allegations do not specify whether it was Ms. Merritt and/or one of the other Defendants who allegedly took the video and audio recordings. Plaintiffs do not identify who the "conference attendees" were who purportedly were recorded in 2014 or in 2015 by some or all Defendants.

Plaintiffs allege some sort of "targeting" of their "staff and affiliates" in 2015, but again, do not identify who was purportedly targeted. Without identifying the parties to the purported conversations, Plaintiffs cannot establish justifiable reliance as a matter of law. 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. If the parties to the conversations are not identified, then Plaintiffs cannot establish that participants in conversations read or heard a misrepresentation by Ms. Merritt and relied upon the 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.

Since Plaintiffs are unable to allege sufficient facts to satisfy the reliance and damages elements required for fraud, they are unable to sustain their burden of demonstrating a probability of success on the merits of their claim for fraud against Ms. Merritt. Therefore, the eighth cause of action must be stricken under Section 425.16.

B. Plaintiffs Cannot State Claims Based On Invasion Of Privacy Against Ms. Merritt.

Plaintiffs' ninth, tenth, thirteenth, and 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. Each of these claims is fatally flawed and must be stricken under Section 425.16. 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 stricken. As for the statutory invasion of privacy claims in the ninth and tenth causes of action, Plaintiffs cannot establish that Ms. Merritt recorded confidential communications as defined under the statute. Furthermore, even if Plaintiffs could show improper recording of a confidential communication, Ms. Merritt is

exempt from liability under Cal. Penal Code §633.5 because she was recording evidence of a crime of violence against a person, *i.e.*, the killing of a baby via "partial birth abortion" or dissecting a baby born alive after an abortion for purposes of harvesting and selling a baby's body parts.

1. Plaintiffs lack standing to bring common law invasion of privacy claims.

As corporate entities, Plaintiffs do not have standing to bring claims for invasion of privacy under common law or Article I, §1 of the California Constitution. *Fleck & Assoc., 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 gay man's 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.*, the 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 (citing *Comm. to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 262 (1981)). "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 their own purported right of privacy in business transactions. They lack standing to bring these claims.

Plaintiffs implicitly acknowledge their lack of standing by asserting that they are seeking relief on behalf of their staff members, 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, 245 (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 stricken.

2. Plaintiffs cannot assert claims for statutory invasion of privacy.

California law permits corporations to assert claims under California Penal Code §§632-637, but Plaintiffs cannot state a claim against Ms. Merritt under those statutes because they cannot

demonstrate that she recorded any confidential communications, cannot assert an expectation of privacy in conversations in which Ms. Merritt was a party, and because she is exempt from liability under Cal. Penal Code §633.5.

California Supreme Court precedent and the text of Penal Code §632(c) establish as a matter of law that the conversations at the NAF conferences and in the Southern California restaurants were not "confidential communications" under Penal Code §632. Section 632(c) states that 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. (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). In *Flanagan*, the California Supreme Court emphasized that the question is not whether the participants expected that the conversation would not be divulged to someone else, but whether anyone else could overhear the conversation at the time it occurred. *Id.* at 775 (quoting *Ribas v. Clark*, 38 Cal.3d 355, 360 (1985)). "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 v. American Broad. Cos., Inc.*, 121 F.3d 460, 464-65 (9th Cir. 1997). 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 purported conversations at the NAF meetings and the restaurant meetings with Dr. Gatter and Dr Nucatola 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 conferences, but simply 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 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. Attendees include clinicians, facility administrators, counselors, researchers, educators, and thought leaders in the pro-choice field, who have longstanding commitments to health care, women's rights, and reproductive choice." (*Id.*). The whole point of a company exhibiting at an annual meeting like that would be to interact with the attendees, presumably as potential customers. Key to such interactions, and indeed to the very 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 secluded in one corner of the room where its message would not be effectively communicated. In such an environment, there is no objectively reasonable belief 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 purportedly subjective expectations and post hoc attempts to rationalize their beliefs. (*Id.*). Plaintiffs' attempt 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 with Mr. Daleiden and Ms. Merritt 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 would be overheard that is the critical component in whether a communication is confidential under Penal Code §632. *Flanagan*, 27 Cal.4th at 776-77.

The meetings at the Planned Parenthood clinics in Denver and Houston between unnamed employees and Defendants as potential customers (FAC ¶¶109-117) also do not meet the standard for confidential communications. *Med. Lab. Mgmt Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806 812-13 (9th Cir. 2002). Again, "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. Planned Parenthood employees meeting with third parties for purposes of discussing potential business transactions could not reasonably expect that their conversation would be confined to those in the room. Necessarily, they would expect that the proposed business transaction would be discussed by other people on both sides of the transactions. The Planned Parenthood employees would discuss the proposal with others in their corporation, and the BioMax representatives would be expected to discuss the proposal with others in their corporation. There could be no business transaction contemplated without the concept that numerous parties on both sides would discuss the terms and conditions and other aspects. This type of meeting differs significantly from an internal meeting between employees where personal and private matters might be exchanged. *Med. Lab. Mgmt*, 306 F.3d at 812-13. Employees or officers of a company meeting with outsiders to discuss putative business transactions do not have a protectable expectation that their conversations will remain private. *Id.*

Finally, even if the conversations could be found to meet the standards of Penal Code §632, Ms. Merritt would be exempt from liability under Section 633.5:

> Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person….

Ms. Merritt attended the meetings and conferences in her role as an investigative journalist gathering evidence of what she "reasonably believed to relate" to Planned Parenthood's commission of a "crime" of "violence" against the unborn children whose bodies were dissected and sold piecemeal. *Id.*; (*see also* Merritt Declaration ¶¶3, 10-11). Ms. Merritt believed that her research uncovered evidence that abortion providers were partially delivering babies using an illegal procedure known as "partial birth abortion," or were delivering live babies and then killing and dissecting them in order to procure "fetal tissue" to sell to third parties. (*Id.*). Her investigative undercover work with CMP was aimed at obtaining evidence that abortion providers were engaging in illicit practices that were archetypal examples of violence against persons. (*Id.*). That being the case, her actions would be exempt from liability under Penal Code §633.5, even if the communications involved were "confidential" for purposes of the statute, which they are not.

Since Plaintiffs cannot allege sufficient facts or meet the standing requirements for claims based upon intrusion upon seclusion, California Constitution Article I, §1 or California Penal Code §§ 632-637, the ninth, tenth, thirteenth, and fourteenth causes of action must be stricken.

C. Plaintiffs Cannot State Claims Based Upon Trespass Against Ms. Merritt.

Plaintiffs' sixth cause of action for trespass as to the PPFA annual conferences fail as a matter of law as to Ms. Merritt since she did not attend either of the PPFA annual conferences that are the subject of Plaintiffs' First Amended Complaint. (Merritt Declaration ¶6). As for Plaintiffs' claims (also in count six) of trespass for the two Planned Parenthood clinics in Denver and Houston, they fail as a matter of law because Plaintiffs acknowledge that Ms. Merritt obtained the consent of Plaintiffs' staff members at the facilities and did not exceed the conditions of consent during the time

that she was on the property. (FAC ¶¶110, 113-15).

Plaintiffs' allegations that the consent of clinic staff for Ms. Merritt to be on the properties in Denver and Houston was fraudulently obtained are not relevant at all, and do not change their admissions that **consent was, in fact, given**. *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993). As this Court said in *Baugh*, "**in a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass**." *Id*. (emphasis added). In *Baugh*, a television camera crew entered the house of a victim of domestic violence along with the responding police officers. They procured the victim's consent to enter the home by falsely representing that they were part of a victim-witness program for the District Attorney's office, and the victim expressly imposed as a condition of their entry 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 trespass claim on the ground that the victim had consented to the entry, even if 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.*

The same is true in this case. Ms. Merritt indisputably obtained the consent of Plaintiffs and their staff before entering the clinics in Denver and Houston, and she 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 these properties without Plaintiffs' consent. As was true in *Baugh*, Plaintiffs here are not seeking damages for trespass, but for publication of videos taken on the properties. *Id.* Consequently, assuming without conceding that Ms. Merritt exceeded the scope of consent, she allegedly did so through the broadcasting of the CMP videos, which occurred after she left the property and cannot support a trespass claim. *Id.*

The same result would obtain under Colorado and Texas law. 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). Since Plaintiffs' staff members 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 stricken.

D. Plaintiffs Cannot State Claims Based Upon Breach of Contract Against Ms. Merritt.

Plaintiffs' fourth cause of action for Breach of Contract based upon agreements related to the PPFA national conferences must be stricken as a matter of law, since Ms. Merritt did not attend those conferences and was not a party to those agreements. (Merritt Declaration, ¶ 6). Axiomatically, Plaintiffs cannot recover in contract against a person who was not a party to that contract.

As for the fifth cause of action based upon agreements related to the NAF conferences, Plaintiffs cannot state a claim because they were not parties to those agreements and they cannot claim a right to relief as third party beneficiaries. *NovelPoster v. Javitch Canfield Grp.*, 2014 WL 5687344 at *5 (N.D. Cal. 2014). The parties to the Exhibitor agreements, Exhibits G and K to the FAC, and Confidentiality Agreement, Exhibit I to the FAC, for the NAF conferences are NAF and Ms. Merritt. None of the Plaintiffs are parties, and thus do not have standing to sue for breach of the contracts. "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. To have standing as a third party beneficiary, the contract must be expressly entered into for the intended benefit of the third party, and the contracting parties' intent to confer a benefit on the third party "must appear 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 Exs. G, K, I). None of the terms speak to benefitting Plaintiffs, their staff or any other third party not affiliated with NAF. Therefore, Plaintiffs cannot establish standing as third party beneficiaries of the NAF agreements. The fifth cause of action for breach of the NAF agreements must be stricken.

E. Plaintiffs Cannot State A Claim for Conspiracy Against Ms. Merritt.

Plaintiffs' third cause of action for conspiracy must be dismissed as a matter of law 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; it cannot create a duty or abrogate an immunity. It 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).

Accordingly, in order for Plaintiffs to plead a valid civil conspiracy cause of action, there must be another tort upon which they could base their conspiracy claim. *Entm't Research Grp.*, 122 F.3d at 1228. Even if Plaintiffs had alleged sufficient facts to state underlying causes of action in

their First Amended Complaint (which as discussed *infra* and *supra* they have not) it would not have been enough to state a claim for conspiracy. *Id.* "Merely alleging underlying tort causes of action is clearly insufficient to support a conspiracy cause of action." *Id.* Instead, 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). Here, Plaintiffs have not even alleged underlying tort causes of action against Ms. Merritt and so clearly cannot meet this standard. As has been demonstrated herein, Plaintiffs have not alleged sufficient facts to state claims for fraud, invasion of privacy or trespass against Ms. Merritt. Without sufficient underlying tort claims, there cannot be a claim for conspiracy under California law. Consequently, Plaintiffs' third cause of action must be stricken.

F. Plaintiffs Have Failed To State The Necessary Underlying Claims To Support A Claim For Unfair Competition.

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

1. Ms. Merritt did not engage in any actions that could be construed as "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." Axiomatically, 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 meetings 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 nature and 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. Also, Plaintiffs and Ms. Merritt are not business competitors, so there is no threat to fair business **competition**. 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.

2. Plaintiffs cannot allege unfair conduct by Ms. Merritt.

A non-consumer plaintiff seeking recovery for an "unfair" practice which 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). Ms. Merritt participated as an exhibitor at NAF conferences and met with Plaintiffs' staff members at two clinics and two restaurants in her effort to gather information to be used in CMP's videos. (Merritt Declaration, ¶¶6-10). Ms. Merritt did not transact business with Plaintiffs in any of those meetings, but merely gathered information as an investigative journalist. (*Id.*). The information was used in CMP videos that documented the conversations as a means of informing the public, not as a means of harming

competition. Ms. Merritt's alleged conduct, and Plaintiffs' claims, have nothing whatsoever to do with antitrust or competitive concerns. Consequently, Plaintiffs do not and cannot allege that Ms. Merritt's meetings with Planned Parenthood representatives somehow implicated antitrust law and cannot establish unfair business practices.

3. Plaintiffs have not alleged any underlying unlawful conduct by Ms. Merritt.

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; California Penal Code §§ 632 and 634; §10-402 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code; and Section 934 Title XLVII of the Florida Criminal Procedure Law. (FAC ¶198). Since Ms. Merritt did not attend any meetings in Florida (Merritt Dec. ¶6), the Florida Criminal Procedure 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 in Section II.B.2, Plaintiffs have not stated sufficient facts to state a claim for a violation of California Penal Code §§ 632 and 634 under *Flanagan*, 27 Cal.4th at 776-77, and *Med. Lab. Mgmt. Consultants*, 306 F.3d at 812-13. As discussed more fully in Ms. Merritt's Motion to Dismiss filed simultaneously with this motion, Plaintiffs also fail to state the requisite predicate acts for a claim based upon 18 U.S.C. §1962(c) under, *inter alia*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) and *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003). Similarly, as discussed more fully in the accompanying Motion to Dismiss, Plaintiffs cannot state a claim under 18 U.S.C. §2511 as a matter of law because any recordings made by Ms. Merritt are permitted recordings under 18 U.S.C. §2511(2)(d). *See*

Sussman v. Am. Broad. Cos., 186 F.3d 1200, 1201-02 (9th Cir. 1999). Finally, as discussed more fully in the Motion to Dismiss, Plaintiffs have not stated sufficient facts to state a claim under §10-402 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code under, *inter alia*, *Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363, 376 (1996) and *Malpas v. State*, 116 Md. App. 69, 84 (1997). Absent allegations of unlawful conduct, there cannot be a claim for "unlawful business practices" under the UCL.

4. Plaintiffs have not alleged fraudulent conduct on the part of Ms. Merritt.

As described more fully in Section II.A, Plaintiffs have failed to allege a claim for fraud against Ms. Merritt under *Kearns*, 567 F.3d at 1126. Therefore, there is no underlying claim of fraudulent conduct upon which Plaintiffs can base a claim under the UCL.

5. 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 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) ("a plaintiff can only recover restitution and injunctive relief under the UCL"). Plaintiffs cannot obtain injunctive relief because they cannot allege that Ms. Merritt, who is now known to them (and to 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) (a plaintiff could not obtain injunctive relief under the UCL's fraud prong, 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 the 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 (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 any ill-gotten gain from Ms. Merritt, since Ms. Merritt did not receive any money or property from Plaintiffs. In short, Plaintiffs' UCL claim and the relief sought both fail as a matter of law. Therefore, their seventh cause of action must be stricken.

CONCLUSION

Plaintiffs' First Amended Complaint is a paradigmatic representation of why the California Legislature enacted Code of Civil Procedure §425.16, *i.e.*, a meritless claim aimed not at remedying legally cognizable harms, but at chilling expression and bedrock First Amendment liberties. All of the causes of action, but most particularly for this motion, all state law claims in counts three through ten, thirteen and fourteen, arise directly from Ms. Merritt's exercise of her First Amendment rights. Therefore, the burden shifts to Plaintiffs to demonstrate that they have a reasonable probability of prevailing on the merits.

Plaintiffs utterly fail to meet their burden as to these state law claims. Plaintiffs have not alleged sufficient facts to state claims for fraud, invasion of privacy, breach of contract, trespass, conspiracy or unfair competition against Ms. Merritt. Plaintiffs lack standing to bring many of the claims against Ms. Merritt, and even where there might be standing, there are not sufficient *prima facie* facts to state viable claims. Therefore, causes of action three through ten, thirteen and fourteen must be stricken under California's Anti-SLAPP statute.

For these reasons, Ms. Merritt's motion should be granted, and, pursuant to Code of Civil Procedure § 425.16(c), as a prevailing defendant, she should be awarded reasonable attorneys' fees and costs.

Dated: April 25, 2016

Respectfully submitted:

/s/ Horatio G. Mihet
Horatio G. Mihet*
Jonathan D. Christman*
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Tel: (407) 875-1776
Fax: (407) 875-0770
hmihet@lc.org
jchristman@lc.org
*Admitted pro hac vice

Nicolaie Cocis (CA Bar # 204703)
Law Office of Nic Cocis & Associates
38975 Sky Canyon Drive, Suite 211
Murrieta, CA 92563
Tel: (951) 695-1400
Fax: (951) 698-5192
nic@cocislaw.com

Attorneys for Defendant Sandra Susan Merritt

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2016, I filed the foregoing Motion to Strike 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.

/s/Horatio G. Mihet
Horatio G. Mihet*
Liberty Counsel
hmihet@lc.org
PO Box 540774
Orlando, FL 32854
(407) 875-1776
*Admitted pro hac vice
Attorney for Defendant
Sandra Susan Merritt

Nicolaie Cocis CA Bar # 204703
Law Office of Nic Cocis and Associates
nic@cocislaw.com
38975 Sky Canyon Dr., Suite 211
Murrieta, CA 92563
(951) 695-1400

Horatio G. Mihet*
Jonathan D. Christman*
Liberty Counsel
hmihet@lc.org
jchristman@lc.org
PO Box 540774
Orlando, FL 32854
(407) 875-1776
*Admitted pro hac vice

Attorneys for Defendant Sandra Susan Merritt

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

Declaration of Sandra Susan Merritt in Support of Motion to Strike Under California's Anti-SLAPP Law (CCP § 425.16)

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

I, Sandra Susan Merritt, hereby declare:

1. I am over the age of 18 years and am a Defendant in this action. I have actual knowledge of the following facts and if called upon to testify thereto could and would do so competently. This declaration is being submitted in support of the Motion to Strike the Amended Complaint Under California's Anti-SLAPP Law, Cal. Code of Civil Procedure §425.16.

2. I am a resident of San Jose, California.

3. I work as an investigative journalist. All of my investigative journalism has been involving the abortion industry. I have done extensive research over many years related to the abortion industry. My research revealed that abortion providers were doing business with fetal tissue procurement companies, and as part of those business dealings abortion providers such as Planned Parenthood would alter abortion procedures so as to obtain an intact baby from which organs could be harvested for sale to procurement companies. My research further revealed that in order to obtain intact fetuses, abortion providers would perform what is known as "partial birth abortions" or would use techniques that would result in a live fetus being removed from the mother and then killed and dissected.

4. Between 2013 and 2015 I performed investigative work for the Center for Medical Progress' ("CMP") Human Capital Campaign.

5. During my work with CMP, I used the name Susan Tennenbaum, Chief Executive Officer of BioMax Procurement Services, LLC.

6. Using that name, I attended the National Abortion Federation ("NAF") conferences in 2014 in San Francisco and 2015 in Baltimore, Maryland as an exhibitor. I did not attend the Planned Parenthood conferences in Florida or any of the national Planned Parenthood conferences mentioned in the Amended Complaint.

7. David Daleiden and I also met with Planned Parenthood representatives at clinics in Denver, Colorado and Houston, Texas to discuss potential business transactions between BioMax and Planned Parenthood related to fetal tissue specimens. These discussions were intended to further investigate ethical and legal issues which I learned about during my research. David was using the name Robert Sarkis.

8. David Daleiden and I met with Dr. Deborah Nucatola at a restaurant in Southern California on July 25, 2014 during the lunch hour. At that meeting, David Daleiden and I discussed a potential business transaction related to BioMax purchasing fetal tissue specimens from Planned Parenthood. This discussion was intended to further investigate ethical and legal issues which I had learned about during my research.

9. On February 6, 2015, David Daleiden and I met with Dr. Mary Gatter and a colleague at a restaurant in Pasadena to discuss a potential business transaction related to BioMax purchasing fetal tissue specimens from Planned Parenthood. This discussion was intended to further investigate ethical and legal issues which I had learned about during my research.

10. I participated in these meetings to gather information to be used in CMP's video reports evidencing abortion industry practices in harvesting and selling baby body parts.

11. I recorded these meetings because I believed that the communications would reveal evidence related to Planned Parenthood's commission of violent felonies against unborn, partially born, and born children whose bodies were dissected and sold piecemeal.

12. I have not done any investigative journalism with CMP or BioMax since spring 2015.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2016 at San Jose, California.

/s/ Sandra Susan Merritt*
Sandra Susan Merritt

* Original signature on file with counsel.

Nicolaie Cocis CA Bar # 204703
Law Office of Nic Cocis and Associates
nic@cocislaw.com
38975 Sky Canyon Dr., Suite 211
Murrieta, CA 92563
(951) 695-1400

Horatio G. Mihet*
Jonathan D. Christman*
Liberty Counsel
hmihet@lc.org
jchristman@lc.org
PO Box 540774
Orlando, FL 32854
(407) 875-1776
*Admitted pro hac vice

Attorneys for Defendant Sandra Susan Merritt

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 Strike Under Cal. CCP § 425.16

Defendant Sandra Susan Merritt's Motion to Strike the third through tenth, thirteenth and fourteenth causes of action of the First Amended Complaint under California's Anti-SLAPP statute, California C.C.P. §425.16, 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 third through tenth, thirteenth, and fourteenth causes of action of the First Amended Complaint constitute a Strategic Lawsuit Against Public Participation (SLAPP) pursuant to California CCP §425.16. This Court finds that the third through tenth, thirteenth and fourteenth causes of action arise from acts in furtherance of Defendant Merritt's exercise of her First Amendment rights of free speech and freedom of the press. This Court further finds that Plaintiffs cannot demonstrate a reasonable probability of prevailing on the merits, in that the third through tenth, thirteenth, and fourteenth causes of action are not legally sufficient and not supported by sufficient *prima facie* facts to support favorable judgments.

Therefore, there is good cause for granting Defendant's motion.

THEREFORE, this Court hereby grants Defendant Sandra Susan Merritt's Motion to Strike the third through tenth, thirteenth, and fourteenth causes of action of Plaintiffs' First Amended Complaint, and said causes of action are hereby stricken and dismissed.

FURTHERMORE, as prevailing party, Defendant is entitled to an award of attorneys' fees and costs pursuant to California CCP §425.16(c)(1) in an amount to be determined upon the filing of a fee petition with this Court.

IT IS SO ORDERED.

DATED: _____

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