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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF LOS ANGELES – CENTRAL DIVISION

15 STEMEXPRESS, LLC, and CATHERINE
DYER,

16 Plaintiffs,

17 vs.

18 THE CENTER FOR MEDICAL PROGRESS;
BIOMAX PROCUREMENT SERVICES, LLC,
19 DAVID DALEIDEN (aka "ROBERT SARKIS",
DOE 1 (aka "SUSAN TENNENBAUM") and
20 DOES 2 through 100, inclusive,

21 Defendants.

) Case No. BC589145
)
) **DEFENDANTS' MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF SPECIAL MOTION TO**
) **STRIKE [C.C.P. § 425.16] PLAINTIFFS'**
) **COMPLAINT**

) Date: August 26, 2015
) Time: 8:30 a.m.
) Dept: 73
) Judge: Hon. Rafael A. Ongkeko

22 Complaint Filed: July 27, 2015
23 Trial Date: None Set

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09/05/2015

1 **I. INTRODUCTION.**

2 Defendant Center for Medical Progress (CMP) is a California not-for-profit corporation
3 formed for the purpose of informing the public about the ethical issues surrounding certain
4 practices relating to biotechnology and research, and thereby serve as a catalyst for reform of
5 unethical practices. CMP carries out its work by means of investigative journalism that complies
6 with all applicable laws. Declaration of David Daleiden in Support of Special Motion to Strike
7 (“Daleiden Dec.”) ¶2. Defendant David Daleiden is an investigative journalist and the founder and
8 director of CMP. *Id.* at ¶¶2-3. Defendant BioMax Procurement Services, LLC is a California
9 Limited Liability Company that was formed by the other defendants to help facilitate their research
10 and investigation of certain industry practices relating to the procurement and selling of fetal tissue.

11 Plaintiff StemExpress is a for-profit corporation that acts as the middleman between
12 suppliers (abortion providers) and consumers (research facilities) of fetal organs and tissue.
13 Complaint ¶13-18. StemExpress is one of the subjects of CMP’s investigation of, and reporting on,
14 current fetal tissue procurement practices. This investigation has, from the first hours of its release
15 to the public, generated a tremendous amount of attention and controversy, including considerable
16 negative publicity for StemExpress and its founder and Chief Executive Officer, Plaintiff Catherine
17 Dyer.

18 By filing this action, StemExpress and Dyer seek to suppress information legally obtained
19 by CMP from being released to the public and to chill CMP and Daleiden from exercising their
20 First Amendment rights to engage in effective investigative journalism. This is despite the fact that
21 as a result of Defendants’ laudable investigative reporting, the United States Congress and twelve
22 states have now commenced official investigations into the illegal harvesting of fetal tissue, fetal
23 body parts, and whole fetal bodies, for profit.

24 **II. PROCEDURAL BACKGROUND.**

25 Plaintiffs filed this action on July 27, 2015, and at the same time sought a temporary
26 restraining order and order to show cause re preliminary injunction *without notice* to the
27 Defendants. The court, Honorable Joanne O’Donnell presiding, denied Plaintiffs’ application.
28 Plaintiffs then notified Defendants of their intent to apply for a temporary restraining order and

1 order to show cause on the following day. Although Plaintiffs had submitted their complaint and
2 moving papers to this Court on the morning of July 27 in conjunction with their unsuccessful
3 application, Plaintiffs nonetheless delayed, in violation of CRC 3.1206, until minutes before 5:00
4 PM on Monday afternoon before providing these papers to Defendants. Declaration of Catherine
5 W. Short, Esq., in Support of Motion to Strike, ¶4.

6 On Tuesday, July 28, Judge O'Donnell granted Plaintiffs' ex parte application for a
7 temporary restraining order to enjoin Defendants from releasing any video of the May 22, 2015,
8 meeting that is the subject of the First Cause of Action in the Complaint. Judge O'Donnell denied
9 the remainder of Plaintiffs' application for a temporary restraining order enjoining Defendants from
10 releasing the documents that are the subject of the Second through Sixth Causes of Action. Judge
11 O'Donnell also denied Plaintiffs' request for an order to show cause re preliminary injunction with
12 regard to the documents.

13 **III. THE COMPLAINT IS SUBJECT TO AN ANTI-SLAPP (C.C.P. § 425.16) MOTION.**

14 **A. C.C.P. § 425.16 Protects Conduct in Furtherance of the Exercise of Free Speech**
15 **and Petition.**

16 Code of Civil Procedure § 425.16(b)(1) provides:

17 A cause of action against a person arising from any act of that person in furtherance of
18 the person's right of petition or free speech under the United States Constitution or the
19 California Constitution in connection with a public issue shall be subject to a special
20 motion to strike, unless the court determines that the plaintiff has established that there
21 is a probability that the plaintiff will prevail on the claim.

22 Further, Code of Civil Procedure § 425.16(e)(4) provides:

23 As used in this section, 'act in furtherance of a person's right of petition or free speech
24 under the United States or California Constitution in connection with a public issue'
25 includes: . . . (4) any other *conduct* in furtherance of the exercise of the constitutional
26 right of petition or the constitutional right of free speech in connection with a public
27 issue or a issue of public interest.

28 (Emphasis added.)

The decision of *Delois v. Barrett Block Partners* provides a succinct summary of the nature
and procedure of C.C.P. § 425.16:

Determination of a special motion to strike involves a two-part inquiry. First, the court
decides whether the defendant has made a threshold showing that the challenged cause
of action is one arising from protected activity. If the court finds such a showing has

1 been made, it then determines whether the plaintiff has demonstrated a probability of
2 prevailing on the claim. Put another way, the plaintiff must demonstrate that the
3 complaint is both legally sufficient and supported by a sufficient prima facie showing
4 of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is
5 credited. Thus, plaintiff's burden as to the second prong of the anti-SLAPP test is akin
6 to that of a party opposing a motion for summary judgment. If the plaintiff fails to
7 carry that burden, the cause of action is subject to being stricken under the statute. In
determining whether defendant has satisfied her burden under the first prong of the
section 425.16 analysis, the critical consideration is whether the cause of action is
based on the defendant's protected free speech or petitioning activity. The anti-SLAPP
statute's definitional focus is not the form of the plaintiff's cause of action but, rather,
the defendant's activity that gives rise to her asserted liability—and whether that
activity constitutes protected speech or petitioning.

8 *Delois v. Barrett Block Partners*, (2009) 177 Cal.App.4th 940, 946-947 (citations omitted).
9 Defendants bringing an anti-SLAPP motion need not prove the suit was intended to or actually did
10 chill their speech. *Id.*

11 **B. The Claims Arise from the Defendants' Conduct in Furtherance of their**
12 **Constitutional Right to Free Speech and Petition.**

13 Three types of activity underlie all of Plaintiffs' claims: (1) Defendants recording a dinner
14 conversation between Dyer, two other StemExpress employees, Daleiden, and Doe No. 1; (2)
15 Defendants receiving documents directly from StemExpress; and (3) Defendants receiving
16 documents from a former employee of StemExpress. All three of these activities constitute conduct
17 in furtherance of CMP, BioMax and Daleiden's exercise of their constitutional right to free speech
18 and petition.

19 Defendants obtained the recording and the documents in the course of conducting an
20 investigation into possible illegal activity, with the purpose of documenting and exposing this
21 activity to the public to spur action and reform. The complained-of conduct is quintessential
22 newsgathering, protected by the First Amendment. Plaintiffs' complaint, therefore, is directed at
23 conduct (newsgathering) in furtherance of the exercise of the constitutional right to free speech and
24 petition:

25 Furtherance means helping to advance, assisting. Reporting the news is free
26 speech. Reporting the news usually requires the assistance of newsgathering,
27 which therefore can be construed as undertaken in furtherance of the news media's
right to free speech.

28 *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166 (citations omitted) (holding

1 that cause of action for violation of Penal Code § 632 based on surreptitious recording of doctor to
2 expose unlawful dispensing of controlled substances met the first prong of the anti-SLAPP test);
3 see also *Bartnicki v. Vopper* (2001) 532 U.S. 514, 527-528 (“this Court has repeatedly held that if a
4 newspaper lawfully obtains truthful information about a matter of *public significance* then state
5 officials may not *constitutionally* punish publication of the information, absent a need of the
6 highest order.”) (emphasis added; ellipses and quotation marks omitted).

7 Moreover, the complained-of conduct was performed in anticipation of spurring official
8 governmental investigations into fetal tissue procurement practices, which it has.¹ This conduct
9 constitutes pre-litigation conduct which is also protected under C.C.P. § 425.16:

10 The communication was made in connection with an official proceeding
11 authorized by law, a proposed complaint to the Attorney General seeking an
12 investigation. . . .The constitutional right to petition includes the basic act of . . .
13 seeking administrative action. Just as communications preparatory to or in
14 anticipation of the bringing of an . . . official proceeding are within the protection
of the litigation privilege . . . we hold that such statements are equally entitled to
the benefits of section 425.16. The fact that the communication was made to other
private citizens rather than to the official agency does not exclude it from the
shelter of the anti-SLAPP suit statute.

15 *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 (original ellipses
16 and quotation marks omitted).

17 Because CMP and Daleiden have made a prima facie showing that StemExpress’s First
18 through Eighth Causes of Action “arise from” conduct in furtherance of Defendants’
19 constitutionally-protected free speech or petition activity, the burden then shifts to Plaintiffs to
20 establish a probability of prevailing on their claims.

21 **IV. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR
22 CLAIMS.**

23 **A. First Cause of Action: Invasion of Privacy (Penal Code §632).**

24 Plaintiffs are not likely to succeed on the merits of their claim for invasion of privacy for
25

26 ¹ See Steven Ertelt, *South Carolina Becomes 12th State to Investigate Planned Parenthood
27 for Selling Aborted Babies*, Life News, Jul 30, 2015, [http://www.lifenews.com/2015/07/30/south-
28 carolina-becomes-12th-state-to-investigate-planned-parenthood-for-selling-aborted-babies/](http://www.lifenews.com/2015/07/30/south-carolina-becomes-12th-state-to-investigate-planned-parenthood-for-selling-aborted-babies/).

1 two reasons: (1) the dinner conversation on May 22, 2015, was not a confidential communication;
2 and (2) assuming *arguendo* the conversation was a confidential communication, the recording was
3 permissible because it was done for the purpose of gathering evidence related to the commission of
4 a felony involving violence against a person.

5 **1. The Dinner Conversation on May 22, 2015 Was Not a Confidential**
6 **Communication.**

7 Penal Code section 632(a) prohibits recording any "confidential communication" without
8 the consent of all parties to the communication. Section 632(c) defines "confidential
9 communication" to exclude a communication made in a public gathering or in any legislative,
10 judicial, executive or administrative proceeding open to the public, or in any other circumstance in
11 which the *parties* to the communication *may reasonably expect that the communication may be*
12 *overheard*. Cal. Pen. Code § 632(c); *see also Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768 ("a
13 conversation is confidential if a party to that conversation has an *objectively reasonable*
14 expectation that the conversation is not being overheard") (emphasis added).

15 On May 22, 2015, Daleiden arrived at the restaurant before anyone from StemExpress and
16 was seated by the hostess at a table in the dining area. Catherine Dyer, Kevin Cooksy, and Megan
17 Barr of StemExpress arrived within a few minutes of Daleiden's arrival. The group proceeded to
18 have a meeting over dinner that lasted approximately two and a half hours. Contrary to the
19 allegations in paragraphs 41-46 of the complaint, during that meeting, Dyer spoke for the most part
20 in a normal conversational tone. Dyer's normal conversational tone was uniformly robust, and she
21 gave no sign of concern that others might overhear the conversation. Although the area of the
22 restaurant where they were seated was rather empty when they arrived, nearby booths filled up as
23 the evening progressed, including the booth immediately behind Dyer. Dyer's tone of voice and
24 volume did not change. Daleiden Dec. ¶¶7-11; *see also* Exhibit A to the Notice of Lodgment in
25 Support of Defendants' Motion to File Under Seal (clips from the video recording of the May 22,
26 2015 meeting).

27 Contrary to the allegation in paragraph 45 of the complaint, Dyer did not make any effort to
28 ensure that restaurant staff would not hear the conversation. When staff came to the table, she made

1 no effort to stop the conversation, whether she or others were speaking. Also, immediately behind
2 where Daleiden was sitting, facing Dyer, was a station with a credit card slider where the waiters
3 and waitresses could print up receipts. Dyer did not pause in her conversation while the staff was
4 working there. Daleiden Dec. ¶¶7-11.

5 At no time did Dyer indicate any concern that they might be overheard or ask anyone at the
6 table to lower his or her voice. On the contrary, at one point, Cooksy told Dyer to lower her voice,
7 because Dyer was speaking without any regard for the fact that people were seated in the booth
8 immediately behind her. Despite Cooksy's warning, Dyer continued to speak in the same tone and
9 volume. Daleiden Dec. ¶¶7-11.

10 Aside from these specific facts showing that Dyer could reasonably expect that the
11 conversation would be overheard, the entirety of the situation contradicts Plaintiffs' claim that this
12 was a confidential communication. The group was having dinner in the open dining area of a
13 restaurant on a Friday night. However uncrowded the restaurant might have been when they
14 arrived, there was no reason to think that other diners would not gather there, and in fact many
15 others did, including a party at the booth immediately behind her. Daleiden Dec. ¶¶7-11. It was not
16 objectively reasonable for Dyer to believe that they would not be overheard. On the contrary, going
17 into this situation, it was objectively reasonable for Daleiden to believe that he would not be
18 recording a confidential communication, because it could be overheard.

19 **2. Even If the Dinner Conversation Was a Confidential Communication,**
20 **Recording the Conversation Was Not Prohibited Because the Purpose**
21 **Was to Gather Evidence of a Felony Involving Violence Against the**
22 **Person.**

23 Penal Code section 633.5 provides, "Nothing in Section . . . 632 . . . prohibits one party to a
24 confidential communication from recording the communication for the purpose of obtaining
25 evidence reasonably believed to relate to the commission by another party to the communication of
26 the crime of . . . any felony involving violence against the person."

27 Prior to their meeting with Plaintiff Dyer, Daleiden had spent over two years investigating
28 fetal tissue and organ procurement practices. Daleiden Dec. ¶¶3-4. In the course of his
investigation, he learned that, in order for fetal tissue and organs to be usable, the fetus cannot be

1 killed with digoxin before the procedure begins. He also learned that abortion providers will alter
2 the procedure to obtain more intact, and thus more valuable organs and tissues. Finally, he learned
3 that some providers will attempt to deliver the fetus intact, including an intact head. Daleiden Dec.
4 ¶¶3-4.²

5 Immediately after an abortion procedure, procurement technicians employed by companies
6 such as StemExpress step in to take over the handling of the tissue, organs, or "intact cases" to
7 ensure the best preservation of usable material. Daleiden Dec. ¶¶3-4. Daleiden had been informed
8 by a former StemExpress contractor that they sometimes receive fetues whose hearts are still
9 beating. Because fetuses marked for organ donation are not killed before the procedure begins, and
10 because some of these fetuses are delivered intact, it is reasonable to surmise that these babies
11 either die or are killed shortly after they are born. This is, depending on the precise location of the
12 infant at the time of its demise, either partial birth abortion (prohibited under 18 U.S.C. §1531) or
13 homicide.³

14 Megan Barr and Cate Dyer act as procurement technicians. Daleiden Dec. ¶6. Thus, CMP
15 and Daleiden reasonably believed that Dyer and Barr were involved in the commission of the
16 crimes of partial birth abortion and/or homicide. Daleiden Dec. ¶6. Moreover, Dyer, as CEO of
17 StemExpress, hires and arranges for the compensation of other procurement technicians to engage
18 in these acts. CMP and Daleiden thus reasonably believed that Dyer was involved in the
19

20 ² During Dyer's and Daleiden's conversation on May 22, Dyer acknowledged that they see
"lots of" intact cases at StemExpress's lab. Daleiden Dec. ¶12.

21 ³ The problem of abortion providers committing infanticide is significant and has been
22 addressed by both Congress and the Courts. See, e.g., 1 U.S.C. § 8 (Born-Alive Infants Protection
23 Act); *United States v. Montgomery* (8th Cir. 2011) 635 F.3d 1074, 1086 ("Congress has defined the
24 word 'person' to include any infant who is born alive."); *Planned Parenthood of Wis., Inc. v. Van
25 Hollen* (7th Cir. 2013) 738 F.3d 786, 802. ("On May 13, 2013, a Philadelphia abortion doctor, Dr.
26 Kermit Gosnell, was convicted of three counts of first-degree murder for the death of three infants
27 delivered alive but subsequently killed at his clinic."); John McCormack, *Video: Planned
28 Parenthood Official Argues for Right to Post-Birth Abortion*, May 29, 2013, *The Weekly Standard*,
[http://www.weeklystandard.com/blogs/video-planned-parenthood-official-argues-right-post-birth-
abortion_712198.html](http://www.weeklystandard.com/blogs/video-planned-parenthood-official-argues-right-post-birth-abortion_712198.html) (Planned Parenthood official testifying that Physicians should be permitted
to kill born alive infants following failed abortion); Sarah Terzo, *'She was alive and crying!':
Abortion nurse quits after baby born alive, left to die*, January 16, 2015, *Life Site News*,
[https://www.lifesitenews.com/pulse/she-was-alive-and-crying-abortion-nurse-quits-after-baby-
born-alive-left-to](https://www.lifesitenews.com/pulse/she-was-alive-and-crying-abortion-nurse-quits-after-baby-born-alive-left-to) (Nurse describing practice of killing born-alive infants at hospitals).

1 commission of solicitation to commit murder and/or conspiracy to commit murder.

2 Because CMP, BioMax, and Daleiden recorded their conversation with Dyer, Cooksy, and
3 Barr for the purpose of obtaining evidence relating to the commission by Dyer and Barr of felonies
4 involving crimes against the person, the recording was not prohibited by Penal Code § 632, and
5 therefore Plaintiffs' First Cause of Action fails.

6 **B. Second Cause of Action: Receipt of Stolen Property.**

7 California Penal Code § 496 prohibits the receipt of stolen property, enforceable in a civil
8 action. Defendants have not violated this section because the items received directly from
9 StemExpress and its employees were not a subject of theft, and any documents Defendants might
10 have received from Holly O'Donnell were not known by Defendants to be stolen.

11 In order to have liability under Penal Code § 496, the property received must have been an
12 item subject to theft under California law. See *People v. Norwood* (1972) 26 Cal.App.3d 148, 157
13 (“anything that could be the subject of theft can also be property under Penal Code section 496”).
14 Plaintiffs do not even allege that Defendants obtained the documents by theft, but rather admit that
15 employees of StemExpress willingly sent documents to Defendants. Complaint ¶¶5-6. While it is
16 true that Defendants did not reveal their entire purpose to StemExpress and received documents in
17 the course of such contact, this is not theft in the state of California and therefore Defendants are
18 not subject to liability under § 496. In order to be liable for receipt of items by “any false
19 representation or defense,” the property received by Defendants must constitute either money,
20 labor, or real or personal property. Cal. Penal Code § 484(a). The documents procured from
21 StemExpress do not fall into any of these categories. Furthermore, a confidentiality agreement was
22 not mentioned during any dealings with StemExpress until June 18, 2015, nearly a month after the
23 May 22 dinner conversation, *after* both Cooksy and Barr had sent Defendant Daleiden documents
24 from StemExpress. Daleiden Decl. ¶13; see also Compendium of Evidence in Support of Plaintiffs'
25 *Ex Parte* Application, Ex. 12, p.2 (email from Cooksy to Daleiden: “Let’s negotiate the attached
26 mutual NDA to enable the flow of information.”). Defendants obtained these documents lawfully,
27 and such property cannot constitute “stolen” property for the purposes of the statute because it is
28 not an appropriate subject of theft under the California Penal Code.

1 In order to be liable for documents received from Holly O'Donnell, Defendants must have
2 known that these were stolen. Cal. Penal Code § 496 (requiring that one in receipt of stolen
3 property "know[s] the property to be so stolen or obtained" in order to be civilly liable for
4 receiving stolen property). Defendants had no reason to "know" that any property Daleiden might
5 have obtained from Ms. O'Donnell constituted stolen property⁴ where Ms. O'Donnell lawfully
6 obtained documents as part of her employment with StemExpress, and Defendant Daleiden was not
7 aware that Ms. O'Donnell had signed a confidentiality agreement. See Daleiden Decl. ¶5.
8 Defendant Daleiden did not pay or otherwise offer any inducements for Ms. O'Donnell to
9 cooperate with his investigation—she willingly did so out of her desire to expose the practices of
10 StemExpress. *Id.* Moreover, because Mr. Daleiden did not himself violate any laws, his publication
11 of the contents of those documents is protected under the First Amendment. *Bartnicki v. Vopper*,
12 532 U.S. at 517 ("a stranger's illegal conduct does not suffice to remove the First Amendment
13 shield from speech about a matter of public concern").

14 Defendants' actions do not fall within the requirements for liability under § 496. Therefore,
15 Plaintiffs do not have a reasonable probability of success on their claim and Defendants' special
16 motion to strike should be granted.

17 **C. Third Cause of Action: Conversion.**

18 Plaintiffs are not likely to succeed on the merits of their claim for Conversion for several
19 reasons. Plaintiffs rest their conversion claim on Defendants' alleged obtaining of documents from
20 a former employee of Plaintiff StemExpress and Defendants' obtaining of documents from Plaintiff
21 StemExpress directly. Complaint ¶78. As an initial matter, Defendants cannot be liable for
22 conversion for the first category of documents, those allegedly obtained from a former employee of
23 Plaintiff StemExpress because they did not obtain any documents wrongfully. See Daleiden Dec.
24 ¶5. Plaintiff have failed to satisfy the "wrongful" prong of conversion. *Greka Integrated, Inc. v.*
25 *Lowrey* (2005) 133 Cal.App.4th 1572, 1581 (conversion claim dismissed where possession of

26 _____
27 ⁴ Defendants maintain that any property obtained by Ms. O'Donnell would not constitute
28 stolen property.

1 documents was not “wrongful”); *Ass’n for L.A. Deputy Sheriffs v. L.A. Times Communs. LLC*, 2015
2 Cal. App. Unpub. LEXIS 5095, *8-10 (Cal. App. 2d Dist. July 21, 2015) (there is a “wealth of both
3 State and Federal case law finding First Amendment protection for journalists who did not
4 themselves engage in the illegal conduct but had reason to know the information they had received
5 had been obtained illegally in the first instance.”) (quotation marks and brackets omitted).⁵

6 In addition, Defendants did not obtain any documents from StemExpress wrongfully.
7 Plaintiffs willingly shared those documents with Defendant for the purpose of “discuss[ing]
8 possible opportunities between the parties” and those opportunities were discussed. Complaint Ex.
9 A, pp.1-2; Dalaiden Dec. ¶13.

10 More importantly, however, is the fact that a conversion cause of action here requires
11 Defendants to have actually substantially interfered with Plaintiffs’ ownership or right of
12 possession of the documents. See *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1073; *Jordan*
13 *v. Talbot* (1961) 55 Cal.2d 597, 610 (conversion requires “substantial interference with the
14 possession or the right thereto”). Here, Plaintiffs willingly shared the documents and have never
15 requested them back – despite having a contractual obligation to do so before commencing
16 litigation. Complaint Ex. A, p.2 (“All documents . . . shall be promptly returned to the Disclosing
17 Party or destroyed, as requested and directed in writing by the Disclosing Party”); *Commercial &*
18 *Sav. Bank v. Foster* (1930) 210 Cal. 76, 82) (“The law is, of course, clear that where property has
19 lawfully come into possession of a party, he cannot be sued for possession, unless a demand has
20 been made upon him.”)

21 Moreover, generally the retention of copies of documents is insufficient to constitute
22 substantial interference. *FMC Corp. v. Capital Cities/ABC, Inc.* (7th Cir. 1990) 915 F.2d 300, 303

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25 ⁵ Moreover, the former employee’s possession of those documents it itself not a basis for a
26 claim for conversion since her obtaining of them was also not wrongful. *Greka Integrated, Inc. v.*
27 *Lowrey* (2005) 133 Cal.App.4th 1572, 1581 (“[The employee] stated in his declaration that he took
28 the documents home at the direction of [the company’s] chief executive officer. [The company]
presented no evidence to the contrary. Accordingly, it fails to make a prima facie showing that [the
employee’s] possession of the documents is “wrongful.” The trial court correctly concluded that [the
company] failed to show a probability of prevailing on its cause of action for conversion.”)

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1 (“[T]he receipt of copies of documents, rather than the documents themselves, should not
2 ordinarily give rise to a claim for conversion. The reason for this rule is that the possession of
3 copies of documents -- as opposed to the documents themselves -- does not amount to an
4 interference with the owner's property sufficient to constitute conversion.”) (citations omitted); see
5 also *id.* at 302 (“We think that, under the circumstances, the law of California should be applied to
6 FMC's claims.”). And the courts have even carved out a public policy exception permitting the
7 retention of copies of documents by investigative journalists, which clearly applies here. *Pillsbury,*
8 *Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1286; *FMC Corp. v. Capital*
9 *Cities/ABC, Inc.* (7th Cir. 1990) 915 F.2d 300, 305. Thus, Plaintiffs are unlikely to prevail on the
10 merits of their Third Cause of Action.

11 **D. Fourth and Sixth Causes of Action: Fraudulent Inducement of Contract and**
12 **Breach of Contract.**

13 Plaintiffs are not likely to prevail on their Fourth and Sixth Causes of Action for Fraudulent
14 Inducement of Contract and Breach of Contract, which center around the alleged breach of the
15 Nondisclosure Agreement: “BioMax has not fulfilled the promises embodied in Paragraph 3, 5, and
16 8 of the Nondisclosure Agreement;” “[o]n information and belief, BioMax has breached one or
17 more of its obligations under Paragraphs 3, 5, and 8 of the Nondisclosure Agreement. . . .”
18 Complaint ¶¶88, 101.

19 In support of those assertions, Plaintiffs allege that Paragraph 3 of the Nondisclosure
20 Agreement constitutes a promise “to not use any of StemExpress’ confidential information for any
21 purpose other than pursuing a business opportunity with StemExpress. . . .” Complaint ¶83. In fact,
22 the nondisclosure agreement only binds the signer not to use confidential information for any
23 purpose other than the “Purpose,” which is defined as the parties “wish[ing] to discuss possible
24 opportunities between the parties related to the procurement and supply etc.” Complaint Ex. A,
25 pp.1-2. There is a difference between “pursuing a business opportunity” and “discussing possible
26 opportunities” – which undoubtedly explains why Plaintiffs did not quote the actual language of the
27 agreement. The defendants did want to *discuss* possible business opportunities; that was their
28 purpose in contacting StemExpress, and that in fact is what they did discuss with StemExpress.

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1 As to the remainder of Paragraph 3, Plaintiffs have not alleged any facts showing that
2 Defendants have disclosed any confidential information of Plaintiff StemExpress, and in particular,
3 any confidential information received after Defendants executed the Nondisclosure Agreement on
4 June 23, 2015. Alleging as much on information and belief is insufficient. See Complaint ¶101.
5 Plaintiffs do allege that, at the May 22 meeting, Plaintiff Dyer informed Defendants that “a
6 comprehensive written confidentiality agreement would have to be executed by the parties” before
7 StemExpress would share documents, and that this agreement would cover their May 22
8 conversation. Complaint ¶48. In fact, however, Plaintiff Dyer said nothing about a confidentiality
9 agreement at the May 22 meeting. Daleiden Dec. ¶13. The first mention of such an agreement came
10 in a June 18 email from Kevin Cooksy, to which he attached a draft nondisclosure agreement. Prior
11 to June 18, Plaintiff StemExpress had sent other documents to Defendants without a nondisclosure
12 agreement in place.⁶

13 With regard to the other paragraphs in the Nondisclosure that were allegedly breached,
14 Paragraph 5 states that the signing party “agrees” that the confidential information belongs to the
15 disclosing party. Plaintiffs have presented no evidence that the Defendants have breached or
16 otherwise failed to uphold this paragraph. Additionally, Paragraph 8 states that the signing party
17 agrees to return or destroy any confidential information “as requested and directed in writing by the
18 Disclosing Party.” Complaint Ex. A, p.2. Plaintiffs have also presented no evidence that the
19 Defendants have breached or otherwise failed to uphold this paragraph. In fact, Plaintiffs have
20 never requested or directed Defendants to return or destroy any confidential information. Daleiden
21 Dec. ¶14. Thus, Plaintiffs are unlikely to prevail on the merits of their Fourth and Sixth Causes of
22 Action.

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25 ⁶ Plaintiffs do allege that Defendants published documents on the CMP website which were
26 obtained from Plaintiff StemExpress, and that some of those documents contain confidential
27 information. Complaint ¶30. Plaintiffs do not plead facts, however, concerning how or when
28 Defendants obtained those documents, whether those documents were obtained after the
Nondisclosure Agreement was signed and therefore covered by the Nondisclosure Agreement, or
whether those documents were obtained directly from StemExpress and not some third party.

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1 **E. Fifth Cause of Action: Intentional Interference with Contractual Relations.**

2 To prevail on its claim for intentional interference with contractual relations, StemExpress
3 must establish that (1) it had a valid and existing contract; (2) Defendants had knowledge of the
4 contract and intended to induce its breach; (3) the contract was in fact breached by the contracting
5 party; (4) the breach was caused by Defendants' unjustified or wrongful conduct; and (5)
6 StemExpress has suffered damage as a result of the breach. *Dryden v. Tri-Valley Growers* (1977)
7 65 Cal.App.3d 990, 995. StemExpress is not likely to succeed on the merits of its claim for
8 intentional interference with contractual relations for two reasons: (1) Defendants did not
9 intentionally induce Ms. O'Donnell to breach her agreement with StemExpress because Defendants
10 never received any documents from Ms. O'Donnell with the knowledge or awareness that such an
11 agreement was in place; and (2) StemExpress's contract with Ms. O'Donnell is void as it is
12 contrary to public policy.

13 **1. Defendants did not intentionally induce Ms. O'Donnell to breach her**
14 **agreement with StemExpress.**

15 StemExpress cannot prevail on its claim for intentional interference with contractual
16 relations because Defendants did not intentionally induce Ms. O'Donnell to breach her agreement
17 with StemExpress. To prevail on this cause of action, StemExpress must establish that Defendants
18 knew that Ms. O'Donnell had a contract with StemExpress that prohibited her from disclosing
19 information to Defendants and that Defendants induced Ms. O'Donnell to breach that contract. "It
20 is elementary that interference with contractual rights and economic advantage is an intentional
21 tort." *Dryden v. Tri-Valley Growers*, 65 Cal.App.3d at 996. "The act of inducing the breach must
22 be an intentional one. If the actor had no knowledge of the existence of the contract or *his actions*
23 *were not intended to induce a breach, he cannot be held liable though an actual breach results*
24 *from his lawful and proper acts."* *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984)
25 36 Cal.3d 752, 765 (emphasis in original).

26 Plaintiffs have presented no evidence that Defendants received documents from Ms.
27 O'Donnell knowing that Ms. O'Donnell had signed a confidentiality agreement. When Daleiden
28 contacted Ms. O'Donnell in the course of his investigation, he did not know that she was bound by

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1 any such agreement. He never received any documents from her with the knowledge that she was
2 bound by any such agreement. Daleiden Dec. ¶5. "The essential thing is the *purpose to cause the*
3 *result*. If the actor does not have this purpose, his conduct does not subject him to liability under
4 this rule *even if it has the unintended effect of deterring the third person from dealing with the*
5 *other.*" *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d at 765 (emphasis in
6 original) (emphasis in original). The undisputed evidence is that Defendants were unaware that
7 Ms. O'Donnell had a contract with StemExpress prior to the disclosure of the disputed information.
8 Accordingly, StemExpress cannot prevail on its claim for intentional interference with contractual
9 relations.

10 **2. StemExpress' contract with Ms. O'Donnell is void as it is contrary to**
11 **public policy.**

12 No cause of action for intentional interference with contractual relations exists where the
13 contract which is the subject of the action is contrary to public policy. *Renaissance Realty, Inc. v.*
14 *Soriano* (1981) 120 Cal.App.3d Supp. 13, 18. California courts have defined public policy as "the
15 principles under which freedom of contract or private dealing is restricted by law for the good of
16 the community. Another statement, sometimes referred to as a definition, is that whatever
17 contravenes good morals or any established interests of society is against public policy."
18 *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188.
19 StemExpress' contract is contrary to public policy because enforcing it would be against the
20 established interests of society.

21 Federal and California law prohibit acquiring, receiving, or otherwise transferring human
22 fetal tissue for valuable consideration. 42 U.S.C. § 289g-2; Cal. Health & Saf. Code § 125320.
23 During her employment with StemExpress, Ms. O'Donnell obtained evidence that StemExpress
24 was engaging in criminal activity by purchasing human fetal tissue for valuable consideration.
25 StemExpress alleges that Defendants induced Ms. O'Donnell to violate her contract with
26 StemExpress by disclosing evidence of StemExpress' criminal activity. Any disclosure by Ms.
27 O'Donnell of documents or information to Defendants would not violate the contract because the
28 contract is contrary to California's public policy of encouraging its citizens to disclose their

1 knowledge about criminal activity. Put another way, it is contrary to California's public policy to
2 allow a party to bring a tort action alleging that it has suffered damages arising from the disclosure
3 of its confidential information demonstrating that it is engaging in criminal activity. *See Petermann*
4 *v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d at 188; *cf. General Dynamics*
5 *Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1180-1181 (public policy makes it wrongful to
6 terminate an "employee who refuses to commit a crime, who reports criminal activity to proper
7 authorities or who discloses other illegal, unethical, or unsafe practices") (citations, ellipses and
8 brackets omitted). Accordingly, StemExpress cannot prevail on its claim of intentional interference
9 with contractual relations because the contract is void as it is contrary to public policy.

10 **F. Seventh and Eighth Causes of Action: Unfair Competition and Declaratory**
11 **Relief.**

12 Plaintiffs' Causes of Action for Unfair Competition and Declaratory Relief are predicated
13 on its other claims. Plaintiffs cannot succeed on the merits of the other causes of action because
14 Defendants conduct was neither unlawful, unfair, nor fraudulent. Consequently, Plaintiffs cannot
15 succeed on the merits of the claims for Declaratory Relief or Unfair Competition. Moreover,
16 where, as here, Plaintiffs' own conduct is unjust and unlawful, a claim for unfair competition must
17 fail and equitable relief must be denied. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17
18 Cal.4th 553, 580 (concurring opinion) ("If . . . plaintiff . . . has initiated the action for reasons
19 other than redressing unfair business practices, or has engaged in extortionate conduct . . .
20 equitable relief should be denied.")

21 **V. CONCLUSION.**

22 In light of the foregoing, the Court should grant Defendants' Special Motion to Strike.
23 Additionally, the Court should award Defendants' reasonable attorney fees and costs, pursuant to
24 CCP 425.16(c).

25
26 Dated: August 4, 2015

By: 

FREEDOM OF CONSCIENCE DEFENSE FUND

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