**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>**DAVID DALEIDEN AND SANDRA MERRITT,**<br><br>Defendants. | **Case Nos. 2502505 17006621**<br><br>**COMMITMENT ORDER**<br>(Order After Preliminary Hearing) |

## I. Introduction

The preliminary hearing was conducted between September 3, 2019 and September 18, 2019. On September 3, 2019, the Court issued a briefing schedule for the parties. On October 7, 2019, the parties submitted their initial briefs to the Court for consideration. On October 18, 2019, the People filed a Reply. On December 6, 2019, the Court orally issued the commitment order and referred to this order for the facts and circumstances justifying the order. Having read and considered the papers in this matter, heard all of the evidence during the preliminary hearing,

considered the exhibits moved into evidence, oral argument and any other admissible evidence presented to the Court during these proceedings, the Court issues the following commitment order.

## II. Applicable Law

The defendants are charged in the Amended Complaint with fourteen (14) counts of violating Penal Code section 632(a), recording of a confidential communication without the consent of the other person, as a felony; and one (1) count of violating Penal Code section 182(a), conspiracy to commit a violation of Penal Code section 632(a), as a felony. Penal Code section 632(a) states that any "person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio" is guilty of a crime.[1]

### A. Confidential Communications

Penal Code section 632(c) defines "confidential communication" for purposes of section 632(a) as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or

[1] Penal Code section 632 does not have a corresponding CALCRIM jury instruction. CACI 1809 states in relevant part: "1. That [name of defendant] intentionally [eavesdropped on/recorded] [name of plaintiff]'s conversation by using an electronic device; 2. That [name of plaintiff] had a reasonable expectation that the conversation was not being overheard or recorded; [and] 3. That [name of defendant] did not have the consent of all parties to the conversation to [eavesdrop on/record] it . . ." (CACI 1809.)

recorded." (Cal. Pen. Code § 632(a).) The California Supreme Court explained that "a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776-777.) A "communication is not confidential when the parties may reasonably expect other persons to overhear it." (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 168.) As the *Lieberman* court explained, "[t]he concept of privacy is relative. Whether a person's expectation of privacy is reasonable may depend on the identity of the person who has been able to observe or hear the subject interaction." (*Id.*) The determination of whether one has "a reasonable expectation that no one is secretly listening to a . . . conversation is generally a question of fact." (*Cuviello v. Feld Entertainment, Inc.* (2015) 304 F.R.D 585, 590-591, quoting *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1396.)

The courts have broadly construed the terms "public gathering" and "open to the public," found in Penal Code section 632(c). The fact that the conversation occurs in public, on a city street, in a restaurant or anywhere outdoors and amongst other individuals does not as a matter of law preclude prosecution under the statute. (See *Cuviello*, *supra*, 304 F.R.D. at p. 591-592 [motion to dismiss civil action denied where parties were filming each other during a public sidewalk demonstration where plaintiff took steps to ensure its conversation with another was private].) The *Cuviello* court also noted that private conversations can occur in public gatherings where steps are taken to ensure confidentiality. (*Id.* at p. 591.)

The courts have determined that the term public gathering under 632(c) "'connotes a public meeting of some sort.'" (*Cuviello, supra,* 304 F.R.D. at p. 592, quoting *ACLU v. Alvarez* (7th Cir. 2012) (Posner, J. dissenting); cf. *In re Kay* (1970) 1 Cal.3d 930 [characterizing "a large, public celebration held outdoors in a public park, featuring, in the course of a political campaign, a public official as the principal speaker" as a "public meeting" or "public gathering"].) Although

the statute did not provide a definition for "public gathering," the *Cuviello* Court concluded that Plaintiff had sufficiently alleged that his private conversation with a personal acquaintance did not amount to a communication made at a public gathering due to the efforts to maintain privacy during the conversation. (*Cuviello*, *supra*, 304 F.R.D. at p. 592, citing *Lieberman v. KCOP Television, Inc.*, (2003) 110 Cal.App.4th 156, 169 ["The presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve"]; see also *Safari Club v. Rudolph* (9th Cir. 2017) 862 F.3d 1113, 1126 ["The take-home message is that privacy is relative and, depending on the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location. . . . [t]he mere fact that Whipple's conversation took place in a public restaurant does not mean Whipple failed to advance a prima facie case for a violation of section 632"].) The fact that the recording took place in a location open to the public is simply one factor for the trier of fact to evaluate in determining whether the communication was confidential. (*Sanders v. Am. Broad Cos., Inc.* (1999) 20 Cal.4th 907, 915-916.) The determination of "[w]hether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances." (*Id.* at p. 911.)

The determination of whether the recording is of a confidential nature is an objective test. (*Coulter v. Bank of America National Trust and Savings Assn.* (1994) 28 Cal.App.4th 923, 929.) The defendant's self-interested statement of intent[2] has minimal value as "'[a] communication must be protected if *either* party reasonably expects the communication to be confined to the parties.'" (*Coulter*, *supra*, 28 Cal. App.4th at p. 929, emphasis in original,

[2] The subjective intent of the recorder is irrelevant. (*Coulter*, *supra*, 28 Cal. App.4th at p. 929, citing *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 248.)

internal citation omitted.) It is sufficient under the statute if the other party to the communication reasonably believes that the conversation was to be private. (*Ibid.*)

The defendant need not publish or disclose the confidential communication to another. (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1659–1660.) "Section 632 prohibits recording a confidential communication without consent of all parties. It says nothing about publishing the communication to a third party." (*Coulter*, *supra*, 28 Cal. App.4th at p. 930.) Nor does it matter that the conversations may have been relayed to others not immediately privy to the initial confidential communication. (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360–361 ["While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device"].)

**B. No Media Exception (Journalist Leniency Rule)**

Penal Code section 653(a) does not contain an express exception for media, journalists, or other First Amendment protected news-gathering agencies or activities. (See *Vera* v. *O'Keefe* (2011) 791 F. Supp.2d 959, 965.) "California's law is quite clear that persons who engage in news gathering are not permitted to violate criminal laws in the process." (*Id.*, citation omitted.) The California Supreme Court has previously rejected constitutional challenges to Penal Code section 632(a), finding that "[b]y providing an objective reasonableness standard regarding confidential communications [the section] is not overbroad and does not run afoul of the First Amendment." (*Flanagan*, *supra*, 27 Cal.4th at p. 967.) This is true even in the context of exposé news gathering. (*Vera, supra,* 791 F. Supp.2d at p. 967.) The press enjoys no immunity or exemption from generally applicable laws such as section 632(a). (*Shulman v. Group Productions, Inc.* (1998) 18 Cal. 4th 200, 238.) Section 632(a)

does not single out the press but is generally applicable to "all private investigative activity, whatever its purpose and whoever the investigator, and imposes no greater restrictions on the media than on anyone else." (*Id.* at p. 239, citations omitted.)

As the *Shulman* Court explained in concluding that section 632 did not infringe upon the constitutional rights of the press, it stated:

> [N]o constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast. . . . In short, the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.

(*Id.* at p. 968.)

**C. Affirmative Defenses under Penal Code section 633.5**

Penal Code section 633.5 provides an affirmative defense to a violation of Penal Code section 632(a), where the recording is for "the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of . . . any felony involving violence against the person[.]" (Cal. Pen. Code § 633.5.) The determination of whether the person reasonably believed they were acting to capture a communication regarding a crime such as violence against a person, is a question of fact typically reserved for the jury. (*Kuschner v. Nationwide Credit, Inc.* (E.D. Cal. 2009) 256 F.R.D. 684, 689 ["Although plaintiff has submitted a declaration stating his actual belief [under § 633.5], resolution of this issue plainly cannot be done on the pleadings. It requires the types of credibility determinations and weighing of evidence quintessentially performed by a fact-finder"].)

Section 633.5 focuses on the intent and purpose of the recorder. (Cal. Pen. Code § 633.5.) So long as the recorder's purpose is to obtain evidence that relates to an enumerated

felony or any felony involving violence against a person, the fact that the recorder does not succeed in obtaining their desired objective does not defeat the initial purpose or intent of the recorder. (*People v. Parra* (1985) 165 Cal. App.3d 874, 879 ["[Walker's] recording was clearly for the purpose of obtaining evidence of appellant's intent to carry out her prior written threats of physical violence; that [Walker] did not succeed in accomplishing such purpose does not alter that purpose"].) The recording need only be for "the purpose of obtaining evidence reasonably believed to relate to the commission of . . . any felony involving violence against the person." (Cal. Pen. Code § 633.5.) As such, the recording might "relate to" the innocence, guilt or indeterminate conduct of the person recorded. (See *Gensburg v. Lipset* (9th Cir. 1997) No. 94-16939, 1997 U.S. App. LEXIS 16276377, at *8-9; see also *People v. Suite* (1980) 101 Cal. App.3d 680, 688-689 [Section 633.5 authorized the routine taping of university police emergency calls regarding a bomb threat].)[3] However, the recorder's purpose and intent must be based on a reasonable belief formed at the time of the recording that the person they are recording is engaged in the commission of a felony involving violence against the person. (Cal. Pen. Code § 633.5.) Under this standard, it follows that information not known to or in the possession of the recorder at the time of the recording is not relevant to whether the recorder's belief was reasonable at the time of the recording.

**1. Burden of Proof on the Affirmative Defense**

The Court finds that the affirmative defense under Penal Code section 633.5 is not an element of the offense; however, it does bear upon the defendant's conduct in relationship to the offense. (*People v. Mower* (2002) 28 Cal.4th 457, 480-481.) "Where a statute allocates the burden of proof to the defendant on any other issue relating to the defendant's guilt, the

[3] The Court finds *Gensburg* persuasive on this point.

defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt." (*Id.* at p. 479, citing Cal. Evid. Code § 501.) As such, the People need not prove the absence of any affirmative defense; rather, the defense may present an affirmative defense to attack reasonable doubt or probable cause in the context of a preliminary hearing.

**D. Specific Intent**

Based on an analysis of the statute and the applicable law, the Court finds that the statute requires a finding of specific intent to commit the crime. In order to establish a violation of Penal Code section 632(a), the prosecution must establish that the defendant had the specific intent to record a confidential communication. (*People v. Superior Court* (1969) 70 Cal.2d 123, 133.) However, as discussed above, what constitutes a "confidential communication" is determined on an objective basis, the defendant's subjective belief is legally irrelevant. (*Coulter v. Bank of Am.* (1994) 28 Cal. App.4th 923, 929.)

**III. Commitment Order**

**A. Counts Being Held to Answer**

With the foregoing legal principles in mind, the Court makes the following determinations. The legal standard applicable to this stage of the case is whether the evidence would cause a person of ordinary prudence to strongly suspect the defendants, David Daleiden and Sandra Merritt, guilty of the offenses charged. Based on all of the evidence presented during the preliminary hearing, I find that the People have presented satisfactory evidence to support a reasonable belief that the following offenses were committed and that defendants committed them:

As to Counts 1, 2, 3, 5, 6, 7, 10, and 11 of the Amended Complaint, alleging violations of Penal Code Section 632(a), all as felonies, the evidence presented establishes sufficient

cause to believe that the defendants committed each and every element of the offenses as alleged.

As to Count 15 of the Amended Complaint, an alleged violation of Penal Code Section 182(a)(1), conspiracy to commit a violation of Penal Code section 632(a), a felony, the evidence presented establishes sufficient cause to believe that the defendants committed each and every element of the offense alleged. Accordingly, the defendants are held to answer on this count.

As to counts 1, 2, 3, 5, 6, 7, 10 and 11, the Court finds that the issue of whether these conversations were "confidential communications" as defined by the statute raises a sufficient factual issue that should be resolved by a jury. The Court further finds that there is sufficient direct and circumstantial evidence in the record of specific intent to violate the statute for purposes of the preliminary hearing. The People have produced sufficient evidence of probable cause as to these counts.[4] The Court is not persuaded to discharge these counts based on the presented affirmative defenses. Accordingly, the defendants are held to answer on these counts.

As to Does 1, 2, 3, 5, 6, 7, and 15, Defendant Merritt argues that she did not record these Does; therefore, these counts against her should be discharged. The Court finds that there is sufficient evidence of probable cause in the record to support a holding against Defendant Merritt on these counts based on an aiding and abetting theory, as well as conspiratorial liability. The Court finds that Defendant Merritt aided and abetted and conspired with the documentation of the fictitious company (BioMax) and the applications to get into the NAF

[4] The Court makes this finding as to both the Prop 115 and non-Prop 115 witnesses; and therefore, rejects the defendants' request to discharge the counts testified to by Agent Cardwell on these grounds.

conference. She had knowledge of the reasons for entering the conference (*i.e.*, to surreptitiously videotape the attendees) and she shared the same alleged criminal intent to capture these attendees on video engaged in confidential communications without their consent. There is sufficient evidence in the record for purposes of the preliminary hearing that Defendant Merritt aided and abetted and conspired with Defendant Daleiden to violate counts 1, 2, 3, 5, 6, 7 and 15.

**B. Discharged Counts**

As to Counts 4, 9, 12, 13, and 14, the Court is going to discharge these counts, which are all allegations of Penal Code section 632(a). The Court finds that based on the specific factual findings as to each of these counts that there is an absence of probable cause to establish that these conversations were "confidential communications" as defined by the statute.

**Doe 4**

The Court makes the following specific factual findings fatal to the element of "confidential communication" required by Penal Code section 632(a) as to Doe 4. Doe 4 is the CEO of Women's Whole Health. Doe 4 attended the NAF conference in San Francisco in April of 2014. Doe 4 recognized Defendant Daleiden from other conferences. During the NAF conference, Doe 4 spoke with Defendant Daleiden in two areas of the hotel where the conference was held. The video clips entered into evidence regarding Doe 4 reveal conversations in an elevator and on a balcony overlooking the main lobby of the hotel. Based on the video clips, the Court finds that these areas were open to the public and not part of the conference.

Doe 4 and Defendant Daleiden spoke about fetal tissue procurement during these conversations. Agent Cardwell did not ask Doe 4 if she could be overheard during her conversation with Defendant Daleiden either while she was in the elevator or in the lobby.

As to the elevator, the Court finds that an unknown person entered the elevator with Doe 4 and Defendant Daleiden during their conversation. Doe 4 and Defendant Daleiden did not change the subject of the conversation, the tone or the volume. The elevator is relatively small and each of the individuals in the elevator at the time were only a couple of feet from each other. The Court finds based on the evidence presented at the preliminary hearing that the conversation in the elevator could be overheard by the unknown third party who entered the elevator. Agent Cardwell conceded as much.

Furthermore, there is no evidence in the record that Doe 4 knew the women who entered the elevator, knew whether the woman was part of the conference, or whether she was wearing a conference badge. The Court finds that Doe 4 took no steps to ensure the conversation could not be overheard by the unknown person who entered the elevator.

As to the conversation on the balcony of the hotel lobby, the conversation took place in a portion of the hotel open to the public—including non-guests of the hotel. Doe 4 and Defendant Daleiden did not confine their conversation in either subject, tone or volume. The Court finds based on the video and the testimony of Agent Cardwell that anyone walking pass the conversation could overhear it. Moreover, there is no evidence in the record to suggest that these individuals walking by the conversation were limited to conference attendees. The conversation took place on a balcony in the main lobby of the hotel where all members of the public had access. Furthermore, there is no evidence in the record that Doe 4 took reasonable steps to ensure that the conversation Doe 4 had with Defendant Daleiden, on the balcony in the lobby of the hotel, could not be overheard or recorded by the general public.

Based on the evidence presented during the preliminary hearing, and the factual findings discussed above, the Court finds that Doe 4 did not have an objectively reasonable expectation that her conversations (both in the elevator and in the lobby) were "confidential

communication[s]" as defined by the statute since the factual circumstances surrounding the communications with Defendant Daleiden could reasonably be expected to be overheard or recorded.

**Doe 9**

The Court makes the following specific factual findings fatal to the element of "confidential communication" required by Penal Code section 632(a), as to Doe 9. It is clear to the Court that Doe 9 made no efforts to confine her conversation to the defendants. She made no efforts to keep the conversation confidential. Rather to the contrary, Doe 9 did not feel a confidential communication was necessary. She acknowledged that the conversation could be overheard by customers and the waitstaff. At the time of the recording (and during her preliminary hearing testimony), she did not believe the conversation was controversial or contained any questionable conduct necessitating a confidential communication.

Doe 9 met the defendants in a public restaurant, Craft in Los Angeles, California. Doe 9 did not choose the restaurant or her seat at the table. She did not have a relationship with the defendants prior to the lunch. The restaurant was crowded, loud and noisy with numerous customers, waiters and staff who walked by the table throughout the conversation with the clear ability to overhear and understand the conversation. Doe 9 and the defendants discussed tissue procurement and medical procedures related to procurement. The restaurant staff conducted their business attending to the table throughout the conversation without any change in subject, tone or volume by Doe 9 or the defendants. Doe 9 did not ask the defendants to move tables, to lower their voices, or change topics at any point; nor did Doe 9 vet the restaurant, the restaurant staff, the defendants or BioMax prior to the lunch. She did not obtain a non-disclosure agreement prior to the lunch; nor did she tell the defendants not to record the conversation or share it with others.

There is no evidence in the record that Doe 9 took any steps to ensure the confidentiality of the conversation such as that in *Safari Club*. Based on the evidence presented during the preliminary hearing, and the factual findings discussed above, the Court finds that Doe 9 did not have an objectively reasonable expectation that her lunch meeting was a "confidential communication" as defined by the statute since the factual circumstances surrounding the meeting with the defendants could reasonably be expected to be overheard or recorded.

**Does 12, 13 & 14**

The Court makes the following specific factual findings fatal to the element of "confidential communication" required by Penal Code section 632(a) as to Does 12, 13, and 14. Doe 12 is the CEO of StemExpress, a biotech company that specializes in providing stem cells for medical research and clinical trials to academic universities. Does 13 and 14 work with and for StemExpress.

On May 22, 2015, Does 12, 13 and 14 met for dinner with the defendants at Bistro 33, a public restaurant located in El Dorado Hills, California. The Does met with the defendants to discuss a possible partnership with the defendant's fictitious biotech company, BioMax. The Does did not vet the restaurant, the restaurant staff or have the restaurant sign a non-disclosure agreement prior to the dinner with the defendants.

The restaurant reservation was made by Defendant Daleiden under the name of Susan Tennebaum, the aka for Defendant Merritt. The defendants met Doe 14 outside the restaurant but entered the restaurant prior to Does 12, 13, or 14 coming into the restaurant. The defendants were directed by the host to a table which was in the main part of the restaurant, although a few steps elevated from the main floor of the restaurant. The defendants sat down at the booth before the Does entered the restaurant. The restaurant had a small number of

customers but continued to fill up during the 2 ½ hour meeting, including customers who sat in the booth directly next to the defendants and Does. The booths were close enough that one of the customers inadvertently bumped Doe 13's elbow causing Defendant Merritt to ask Does 12 and 13 if she was talking too loud in which they responded no. The defendants and the Does continued their conversation while waitstaff attended to the booth directly behind them.

Throughout the dinner meeting, the restaurant staff attended to the table. At times, the Does would stop their conversation but at other times would continue to talk about the same topics (fetal tissue procurement and donation), and in the same tone and volume of voice. In addition, there was a wait station a few feet from the booth occupied by the defendants and the Does. Throughout the dinner, waiters and staff were around the table during the conversation. The Does spoke clearly as to be heard by the defendants.

Doe 12 testified that she believed the meeting was private and confidential in part based on a mutual non-disclosure agreement. Doe 12 testified that she often uses mutual non-disclosure agreements in her business including meetings like the one with the defendants. She uses these non-disclosure agreements because the discussions often concern confidential information, partnerships, or financials. She testified that it was her understanding that a mutual non-disclosure agreement (People's Exhibit 6) was sent to the defendants prior to the meeting. She also believed the non-disclosure agreement had been executed prior to the meeting. She based that belief upon prior experience with Doe 13, StemExpress' attorney; however, she had no personal knowledge of an agreement prior to the dinner.

More importantly, People's Exhibit 6, the executed mutual non-disclosure agreement is dated June 22, 2015, a month after the dinner meeting. Doe 12 was not aware of any executed non-disclosure agreement prior to the May 22, 2015 dinner meeting. The Court has credibility concerns with Doe 12's testimony to the extent that she was told by Doe 13 immediately after

the dinner that there was a mutual executed non-disclosure agreement on May 22, 2015. There does not appear to have been any reason to have had that conversation as the video of the dinner conversation was not released to the public until well after the date of the dinner. In addition, if it were understood that there was a non-disclosure agreement as of May 22, 2015, there would have been no reason to send the one that was executed on June 22, 2015. Furthermore, Doe 12 testified at a previous deposition in a civil matter that the June 22, 2015 non-disclosure form was executed in relationship to documents that had been requested by Defendant Daleiden after the May 22, 2015 dinner meeting. The Court finds that there is no credible evidence in the record to establish a non-disclosure agreement between the defendants (Biomax) and Does 12, 13, and 14 (StemExpress) prior to the dinner meeting on May 22, 2015.

There is no evidence in the record that Does 12, 13 and 14 took reasonable steps to ensure the confidentiality of the conversation such as that in *Safari Club*. Doe 12 knew that unauthorized tapings of conversations occurred in the abortion community; yet StemExpress took no steps to ensure the confidentiality of this particular dinner meeting. Based on the factual circumstances of the dinner, the lack of any non-disclosure agreement between the parties prior to the dinner, and the factual findings discussed above, the Court finds that Does 12, 13, and 14 did not have an objectively reasonable expectation that the dinner meeting was a "confidential communication" as defined by the statute since the factual circumstances surrounding the meeting with the defendants could reasonably be expected to be overheard or recorded.

**1. *Safari Club* is Distinguishable.**

The Attorney General relies upon *Safari Club International v. Rudolph* (9th Cir. 2017) 862 F.3d 1113 to support a holding on Does 9, 12, 13 and 14. As noted above, *Safari* sets forth the correct standard that just because a communication takes place in public does not mean as a

matter of law that it cannot be a "confidential communication" as defined under the statute. (*Id.* at p. 1122-1126.) However, *Safari* is an anti-SLAPP case where the Ninth Circuit concluded that the district court correctly determined that the plaintiff had set forth a prima facie case to overcome dismissal of the case. (*Id.* at p. 1123.) The *Safari* court found that the plaintiff had set forth allegations in its declaration sufficient to overcome the anti-SLAPP motion. (*Id.* at p. 1127-1129.) The district court did not weigh these facts or make credibility determinations regarding the declarations. In fact, the declarations were, as expected, competing. (*Id.* at p. 1118.) The Ninth Circuit determined that the trier of fact should resolve these competing allegations. (*Id.* at p. 1129.) Here, the Court has made significant factual and credibility findings as the trier of fact after weighing the evidence on the issue of whether the conversations constituted "confidential communications" as defined by the statute.

Besides the legal standard, the facts in *Safari* are notably different. In *Safari*, the parties were long-time close friends (even after the commencement of the litigation), they overly sought to keep the conversation quiet, and they sat in a location outside the earshot of other patrons. (*Id.*) In our case, the Court has made factual findings based on the evidence presented at the preliminary hearing that the discharged Does did not know the defendants prior to the restaurant meetings, did not keep their conversations low, did not adjust volume, tone or topic when either patrons or staff came within earshot of the conversations, and made no other significant efforts to maintain confidentiality of the conversations while in public areas or public restaurants. This is not to say that no conversation in a public area or restaurant can be confidential under the statute (as noted in relationship to Does 10 and 11). It is to say that the conversations as to Does 9, 12, 13 and 14, based on the evidence presented during the preliminary hearing, did not establish an objective reasonable expectation of privacy in a confidential communication as defined by the statute.

**C. Previously dismissed Counts and Motions to Strike**

On September 13, 2019, the Court dismissed Count 8 at the People's request. It should also be noted that FNND0569_20140725124533 was struck from Count 9 of the Amended Complaint on the same date.

**D. Defense Motion to Consolidate**

The defendants urge the Court to consolidate any remaining counts that the Court intends to hold them over on. They argue that any remaining counts amount to a single overarching scheme and should be consolidated under *People v. Bailey* (1961) 55 Cal.2d 514. The Court finds that the remaining counts constitute separate and distinct acts of recording confidential communications of different victims in violation of section 632(a). Therefore, the motion to consolidate the charges is denied. (See *People v. Whitmer* (2014) 59 Cal.4th 733, 741.)

**E. Motion to Reduce Charges to Misdemeanors**

The defense motion to reduce the remaining charges pursuant to Penal Code section 17(b) is denied.

**IV. Motion to Seal the Video Evidence after Hearing**

Prior to the commencement of the preliminary hearing, the Attorney General moved to have certain exhibits (the video evidence) admitted during the preliminary hearing placed under seal after the hearing. On February 14, 2019, the Court conditionally granted the motion to seal. (See February 14, 2019 Court Order "Preliminary Hearing Rulings".) Subsequent to the preliminary hearing, the Attorney General renews its motion to have the following items sealed: (1) the exhibits lodged with the court but not admitted; (2) exhibits ruled inadmissible during the preliminary hearing; (3) Exhibits 3, 4, 5, 5A-5H, C, E, F, G, H, J, K, M, O, CC, JJ,

NN, OO, PP, QQ & RR; and (4) that all personal identifying information be removed from the transcripts.

**A. Exhibits Lodged but not Admitted.**

The motion to seal the exhibits lodged with the Court (Exhibits 7, 8, 8-B, 8-C, 8-E, 8-G, 9, AA, BB, I, WW) but not admitted into evidence at the preliminary hearing is denied. These exhibits were already in the public domain, including scientific journals and public websites, and are not subject to any protective order of this Court or any other court. The fact that either the defendants or the Attorney General attempted to use them in some fashion during the preliminary hearing but then choose not to admit them into evidence does not provide a justification for sealing them when the exhibits were already part of the public domain and not subject to any protective order.

**B. Exhibits Ruled Inadmissible**

The motion to seal the exhibits ruled inadmissible (Exhibits P, R, S, U, V, W, Y, EE, FF, GG, SS, TT, UU, VV) at the preliminary hearing is denied. These exhibits were already in the public domain and are not subject to any protective order by this Court or any other court. The fact that the Court ruled them inadmissible at the preliminary hearing does not in and of itself provide a justification for sealing them where the exhibits were already part of the public domain and not subject to any protective order.

**C. Exhibits Admitted at the Preliminary Hearing**

The motion to seal the exhibits admitted by the Court during the preliminary hearing is granted in part and denied in part.

**1. Non-NAF Injunction Exhibits**

The motion to seal the non-NAF injunction exhibits (Exhibits 5, 5D, 5E, 5F, 5G, J, K, M, O, CC, JJ, OO, QQ, and RR) is denied. These exhibits have been in the public domain prior

to the preliminary hearing and remain in the public domain and are not subject to any protective order of this Court or any other court.

**2. NAF Injunction Exhibits**

The motion to seal Exhibits 3, 4, 5, 5A, 5B, 5C, C, E, F, G, H, NN, PP is granted without prejudice to changed circumstances.

California Rules of Court, Rules 2.550(d) and 2.551(a) set forth the grounds for sealing documents. California Rules of Court, Rule 2.551(a) states:

> (a) Court approval required
> A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.

California Rules of Court, Rule 2.551(b) states:

> (b) Motion or application to seal a record
> (1) Motion or application required
> A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.

California Rules of Court, Rule 2.550(d) states:

> (d) Express factual findings required to seal records
> The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.

As to the exhibits being placed under seal by the Court (Exhibits 3, 4, 5, 5A, 5B, 5C, C, E, F, G, H, NN, PP), the Court finds that the Attorney General has made an application to seal these exhibits under California Rules of Court, Rule 2.551(a). The application is supported by the declarations attached to the Motion to Seal and the declarations attached to the Intervening Parties' Motion to Intervene. (See Cal. Rules of Court, Rule 2.551(a).) The application is

further supported by the documents from the federal preliminary injunction attached to the Intervening Parties' Request for Judicial Notice. The application is also supported by the testimony and evidence introduced during the preliminary hearing.

Under California Rules of Court, Rule 2.550(d), the Court finds that the privacy interest of the Does outweighs the right of the public to access the videos marked as Exhibits 3, 4, 5, 5A, 5B, 5C, C, E, F, G, H, NN, PP and admitted as evidence during the preliminary hearing. The Court recognizes that several of these videos contain third party unrelated attendees at these conferences that were closed to the public. These attendees are not listed as Does and maintain their own privacy interests that must be considered. Due to the nature of these videos, the content of the communications, the historical and volatile complexity of the issues surrounding abortion, stem cell research, fetal tissue donation, the attacks on pro-life and pro-choice advocates, the federal preliminary injunction, the alleged threat to Doe 12 during her preliminary hearing testimony, and the other testimony and evidence introduced during the preliminary hearing, the Court finds that it is in the public interest, and more importantly, in the interest of the defendants and the People, not to display these videos more than absolutely necessary to ensure a fair trial for both sides.

The Court finds that these privacy interests: (1) support the sealing of the videos and the transcripts of the videos; (2) present a substantial probability that the interests will be prejudiced if the videos and/or the transcripts of the videos are not sealed; (3) that the Court orders only the sealing of the videos and the transcripts of the videos, and not any testimony related to the videos as a narrowly tailored compromise;[5] and (4) that there are no less

[5] The parties are, however, advised of the limitations outlined by Business and Professions Code section 69954(d) regarding the dissemination of the preliminary hearing transcript.

restrictive means of protecting the privacy interests of the Does, the privacy interests of those not listed as victims or witnesses but appear in the videos, and the constitutional rights of the defendants to a fair trial. The Court finds no prejudice to the defendants with the sealing of the videos and the transcripts of the videos in this manner. (See Cal. Rules of Court, Rule 2.550(d).)

The sealing of the videos and the transcripts of the videos after the preliminary hearing does not curtail nor has the Court curtailed defense counsel from publicly speaking on behalf of their clients. Defense counsel are not prohibited from commenting on the testimony and evidence in this case, except as otherwise prohibited by this Court's December 6, 2017 Protective Order and the federal preliminary injunction issued by Judge Orrick.[6]

The motion to seal the video evidence marked as Exhibits 3, 4, 5, 5A, 5B, 5C, C, E, F, G, H, NN, PP is granted without prejudice to changed circumstances.

**D. Personal and all personal identifying information be removed from the transcripts.**

The Court grants the motion to seal any and all personal identifying information from the preliminary hearing transcripts as defined by California Rules of Court, Rule 8.83 to the extent that any exist. The Court denies the Attorney General's motion to seal certain requested individual names and organizations from the record of the proceedings as these do not constitute personal identifying information subject to redaction. The Court orders the redaction

[6] Judge Orrick has also not limited the defendants' ability to comment on the evidence stating, "Defendants may hold as many press conferences as they care to (unless restricted by Judge Hite)." (Order, November 7, 2018, *Nat'l Abortion Fed'n v. Ctr. For Med. Progress*, N.C. Cal., No. 15-cv-03522-WHO, at p. 17.)

of any and all identifying information including, but not limited to, the address and telephone information of Doe 9 from Exhibit Y.

**E. The Continued Use of the Term "Doe"**

The defense moves to discontinue the use of the term Doe. For the reasons set forth in the Court's Preliminary Hearing Rulings order, dated February 14, 2019, the motion is denied without prejudice to changed circumstances.

**V. Exhibits**

The Court is going to admit defense Exhibits AA and BB, which were previously under submission. The Court orders that all exhibits remain with the Court for potential review by other courts and until further order of this Court.

**VI. Superior Court**

The defendants are ordered to appear in the Superior Court, Department 23, for instruction and arraignment on the Information on January 30, 2020, at 9:00 a.m. Bail will remain as previously set.

**IT IS HEREBY ORDERED.**

Dated: December 6, 2019

The Honorable CHRISTOPHER C. HITE
JUDGE OF THE SUPERIOR COURT