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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

HEARTBEAT INTERNATIONAL, INC., AND REALOPTIONS, INC.,

Defendants.

Case No.: 23CV044940

Memorandum of Points & Authorities in Support of Heartbeat's Demurrer to Complaint

Judge:	Hon. Noël Wise
Dept:	21
Date:	March 26, 2024
Time:	1:30 p.m.
Res. ID:	184761316799
Action filed:	September 21, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes & Rules

Other Authorities

I. INTRODUCTION

As explained in Heartbeat's concurrently filed motion to quash service of summons for lack of personal jurisdiction, Attorney General Rob Bonta has absolutely no justification for haling an Ohio-based nonprofit into California. The real motivation for this action is simply a new political effort to shut down Abortion Pill Reversal ("APR"). AG Bonta knows that if the legislature passes a statute prohibiting it, it would quickly be enjoined. (See *Bella Health and Wellness v. Weiser* (D. Colo., Oct. 21, 2023, No. 1:23-cv-939) 2023 WL 6996860.) So he has to try another tack. As more and more studies confirm APR's efficacy, this lawsuit is a last ditch effort to stop it before it becomes even more mainstream in the scientific community.

As explained below, even absent the oddity of haling Heartbeat 2,400 miles from its home to California, AG Bonta's complaint is fatally defective under both California and U.S. Supreme Court precedent. Under the Free Speech guarantees of the First Amendment, Heartbeat has absolutely every right to advocate for, and help women connect with practitioners of, Abortion Pill Reversal. This Court should grant Heartbeat's motion to quash service of summons, but the code expressly contemplates that "[a] defendant or cross-defendant may make a motion [to quash] under this section and simultaneously answer, demur, or move to strike the complaint or cross-complaint." (Code Civ. Proc., § 418.10, subd. (e).) Thus, in the alternative, Heartbeat now files this demurrer to AG Bonta's complaint.[1]

II. FACTUAL & PROCEDURAL HISTORY

A. Pleaded Allegations

Heartbeat International, Inc., is a trade organization for life-affirming pregnancy help organizations. Heartbeat "is a 501(c)(3) charitable organization that" provides trade organization representation for "the 'most expansive network' of 'pro-life pregnancy resource centers' and has 'over 3,000 affiliated pregnancy help locations,' including over 2,000 locations throughout the

[1] Throughout the present briefing, both Heartbeat and RealOptions have endeavored to efficiently incorporate by reference arguments made by the other to avoid duplicative briefing. This was done solely to present the material in the most efficient manner. In an analogous context, the appellate rules of court recognize that avoiding duplicative briefing through incorporation by reference is often appropriate. (See Cal. Rules of Court, rule 8.200, subd. (a)(5) ["[A]s part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."].)

United States." (Compl., ¶10.) Like any trade organization, Heartbeat creates and maintains resources, including but not limited to model policies and procedures for use by its members. Heartbeat "owns and operates the Abortion Pill Rescue Network ('APRN') as well as the Abortion Pill Reversal ('APR') hotline." (Compl., ¶10.)

The Complaint pleads that, by discussing Abortion Pill Reversal, Heartbeat has violated the False or Misleading Advertising Law ("FAL"), Bus. & Prof. Code, § 17500 (see Compl., ¶¶96-98), and the Unlawful, Unfair, and Fraudulent Business Competition Law ("UCL"), Bus. & Prof. Code, § 17200 (see Compl., ¶¶99-101). The Complaint pleads that Heartbeat has made misrepresentations regarding Abortion Pill Reversal on its websites (Compl., ¶¶52-67), over the livechat feature and telephone hotline listed on the websites (Compl., ¶¶68-70), in the model material provided to APR practitioners (the APR protocol, model FAQs, and model informed consent forms) (Compl., ¶¶71-81), and in two podcast appearances. (Compl., ¶¶82-86.) In ruling on a demurrer, "it is essential that we evaluate the complaint by reference to the[] documents" that "form the basis of the allegations in the complaint." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn.3.) Thus, all of these documents have been submitted with a request for judicial notice as Exhibits 1-6.

B. Procedural History

In response to *Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. 215, Attorney General Rob Bonta began taking actions to disfavor alternatives to abortion in California. On June 1, 2022, he issued a "consumer alert" advising Californians of the existence of pregnancy centers which "do not provide abortion." (Mot. Jud. Not., Ex.25.) Then, in Autumn 2022, he issued another press release announcing the formation of a "Reproductive Rights Task Force" to "ensure that every corner of California is safe for those seeking reproductive care." (Ex.26.) In September 2022, AG Bonta issued investigative subpoenas to pregnancy centers across the state, as well as Heartbeat. Those subpoenas requested both documents and responses to investigative interrogatories. (See Gov. Code, § 11180.) Here, Heartbeat fully responded to those subpoenas and produced verified interrogatory responses and hundreds of pages in documents. On September 21,

2023, Attorney General Rob Bonta filed the present action. (See Ex.27.)[2] It appears to be the first lawsuit filed by his new Reproductive Rights Task Force. (See Ex.28.)

III. LEGAL STANDARD

"A demurrer tests the legal sufficiency of the complaint." (*Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 568; quoting *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480.) The court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law" (*id.*), and "consider[s] matters which may be judicially noticed." (*Id.*) "[W]here the allegations in the body of the complaint are contrary to documents incorporated by reference in it, we treat the documents as controlling over their characterization in the pleading." (*Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499.) "If the allegations in the complaint conflict with the facts included in exhibits attached to or referenced in the complaint, we rely on and accept as true the contents of the exhibits." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1173, quotation marks omitted.)

"Where the complaint's allegations … reveal the existence of an affirmative defense, the plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action." (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 566 [Communications Decency Act, 47 U.S.C. § 230], quotation marks omitted; accord *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 460 [Legislative Immunity, Gov. Code, § 818.2].) A demurrer is a favored remedy when constitutional rights are involved because the "'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights'." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 460 [denying leave to amend]; quoting *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685.)

As a general proposition, a demurrer can only be directed towards the *entire* cause of action. But "courts handling *complex litigation* have broad powers to fashion suitable methods to manage the litigation. A court may be able to use such power to rule on critical issues raised by a motion for

[2] (See also Cal. DOJ, *AG Bonta Announces Legal Action to Protect Reproductive Freedom and Transparency*, YouTube (Sep. 21, 2023), https://www.youtube.com/watch?v=_kOyqRQ9EtU.)

judgment on the pleadings [or a demurrer] challenging either or both grounds for plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶7:295; citing *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452.) Separately, "when a substantive defect is clear from the face of a complaint, such as a violation of the applicable statute of limitations or a purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to strike." (*Moran v. Prime Healthcare Management, Inc.* (2023) 94 Cal.App.5th 166, 174; quoting *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.) "[C]ourts can and do sustain demurrers on [UCL and FAL] claims when the facts alleged fail as a matter of law to show [a] likelihood [of deception]." (*Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 237, fn.11; quoting *Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 877.)

IV. ARGUMENT

The Complaint pleads that Heartbeat has violated the FAL and UCL by stating: (1) that APR can "reverse" a chemical abortion; (2) that APR is "effective" and "has been shown to increase the chances of allowing the pregnancy to continue"; (3) that APR has a 64-68% success rate and no increase in birth defects; (4) that APR may work more than 72 hours after ingesting mifepristone, or after taking misoprostol or methotrexate; and (5) that "thousands of lives" have been saved via APR. (*Id.*) In addition, the Complaint pleads that (6) any discussion of APR is misleading if it "omit[s] that APR can cause severe, life-threatening bleeding." (Compl., ¶¶97, 100.) Nos. (1), (4), and (6) are addressed in RealOptions' demurrer, and the arguments directly apply to Heartbeat as well. Thus, to avoid duplicative briefing, Heartbeat generally incorporates those arguments by reference and only addresses minor differences in the last section below.

Below, Heartbeat first addresses the four legal doctrines that are most applicable to its defenses: (§ IV.A.1.) the Free Speech guarantees of the First Amendment; (§ IV.A.2) the Common Interest and Scientific Debate privileges which, in turn, flow from those guarantees; (§ IV.A.3) the Equitable Abstention doctrine unique to the FAL and UCL; and (§ IV.A.4) the immunity provision of the Reproductive Privacy Act. Heartbeat then applies these doctrines to: (§ IV.B.1) the Complaint's assertion that it is misleading to claim that APR has been "shown" to be "effective;" (§ IV.B.2) the Complaint's assertion that it is misleading to claim a 64-68% success rate for APR;

(§ IV.B.3) the Complaint's quibble with the statement that "statistics show that thousands of lives have been saved;" and (§ IV.B.4) the issues concurrently briefed in RealOptions' demurrer.

As stated above, in complex litigation, the Court has discretion to sustain a demurrer as to part of a cause of action or, alternatively, to strike that portion of the cause of action. (See, e.g., *Fire Ins. Exchange*, *supra*, 116 Cal.App.4th at 452; *Moran*, *supra*, 94 Cal.App.5th at 174.) Here, in light of the long litany of factual claims pleaded as only two claims, Heartbeat respectfully requests that the Court sustain its demurrer as to specific factual claims that are not tenable, or treat the demurrer as a motion to strike, and strike the factual claims that are not tenable.

A. Legal Background on the Relevant Legal Doctrines

1. Legal Background on the First Amendment and Commercial Speech

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." (*NIFLA v. Becerra* (2018) 138 S.Ct. 2361, 2371.) "As a general matter, such laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" (*Id.*) But "our precedents have applied more deferential review to *some* laws that require professionals to disclose *factual*, *noncontroversial* information in their 'commercial speech.'" (*Id.*, italics added.)

Under this doctrine, "[c]ommercial speech is 'usually defined as speech that *does no more* than propose a commercial transaction.'" (*Bernardo v. PPFA* (2004) 115 Cal.App.4th 322, 343, italics added ["*PPFA*"].) "The existence of 'commercial activity, *in itself*, is no justification for narrowing the protection of expression secured by the First Amendment.'" (*Bigelow v. Virginia* (1975) 421 U.S. 809, 818, italics added.) "[C]ategorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 683-684.) Thus, the commercial speech exception requires: "(1) a commercial speaker, (2) an intended commercial audience, and (3) representations of fact of a commercial nature." (*PPFA*, *supra*, 115 Cal.App.4th. at 347-348.)

Importantly, speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." (*Riley v. National Federation of the Blind of*

North Carolina, Inc. (1988) 487 U.S. 781, 796.) Thus, as a general rule, the doctrine does not apply in the context of speech about "abortion," which is "anything but an 'uncontroversial' topic." (*NIFLA v. Becerra*, *supra*, 138 S.Ct. at 2372), but one of "public interest" and "value to a diverse audience," and of "constitutional" magnitude. (See *Bigelow*, *supra*, 421 U.S. at 822; accord *Evergreen Assn., Inc. v. City of New York* (2d Cir. 2014) 740 F.3d 233, 245, fn.6 [ordinance creating mandatory disclosures for pro-life pregnancy centers could not be considered regulating "commercial speech" because the topic of abortion is not "uncontroversial"].)

For example, in *NIFLA v. Becerra*, *NIFLA v. Raoul*, and *PPFA*, courts addressed the commercial speech exception in the context of reproductive rights—on either side of the ideological spectrum. Like Heartbeat, NIFLA is a trade organization for pro-life pregnancy centers. On behalf of its members, it challenged a California law requiring such centers to inform their pro bono clients that California offers free contraception and abortion to low-income women. (*NIFLA v. Becerra*, *supra*, 138 S.Ct. at 2369.) The Supreme Court quickly dismissed application of the commercial speech doctrine in the "[]controversial" fight over abortion. (*Id.* at 2372.)

Similarly, in *NIFLA v. Raoul*, the court enjoined a new statute that penalized fraudulent or misleading statements made by pro-life pregnancy centers. (*NIFLA v. Raoul* (N.D. Ill., Aug. 4, 2023, No. 23-cv-50279) 2023 WL 5367336, at *2-3, permanent injunction entered, 2023 WL 9325644.) In easily dismissing the commercial speech argument, the court stated: "[M]ost importantly, there is no economic motivation for the speech. Centers are not compensated by the individuals they speak to, provide pregnancy tests for, or give baby supplies to. The same is true for sidewalk counselors. There is no renumeration [sic] of any kind and there is no economic motivation of any kind." (*Id.* at *9.) "Simply put, there is … no precedent for converting a noncommercial speaker into a commercial speaker in the absence of any direct interest in the product or service being sold." (*Stewart*, *supra*, 181 Cal.App.4th at 689.)

As a final example, PPFA is the parent organization for the largest chain of abortion providers in the country. A group of activists had sued PPFA and its local San Diego affiliate under the FAL and UCL, stating that their websites violated those statutes by denying the link between abortion and breast cancer. (*PPFA*, *supra*, 115 Cal.App.4th at 331.) The Court rejected application

of the commercial speech doctrine, stating that none of the webpages "proposed a commercial transaction in its contents." (*Id.* at 344.) The Court disregarded the arguments that, for PPFA, "[v]irtually every web page" provided visitors with "the locations of affiliated health centers," and for the local affiliate, the "[w]eb pages provided visitors with an opportunity to obtain payment information and clinic locations and to make an appointment." (*Id.* at 345.) And lastly, in weighing any "economic motivation" that PPFA may have had, the Court held that any such motivation was "insufficient by itself to turn the statements into commercial speech." (*Id.* at 346.)

2. Legal Background on the Common Interest and Scientific Debate Privileges

Courts across the country recognize that it is not appropriate to litigate the merits of scientific studies in the judicial system. The court system is a particularly inappropriate forum for rebutting a scientific journal article. Thus, the California Supreme Court has held that the Common Interest Privilege of Civ. Code, § 47, subd. (c),[3] precludes liability in tort that flows from scholarly activity, including published scientific papers. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 721.) This includes statements made in scholarly journal articles, professional conferences, and academic lectures. (*Harkonen v. Fleming* (N.D. Cal. 2012) 880 F.Supp.2d 1071, 1079.) The privilege continues even when the material is re-published "on the internet" (*id.* at 1077), and can only be overcome by a showing of malice. (*Id.* at 1079-1080.) Like the litigation privilege, the common interest privilege most often arises in the context of defamation, but applies to all "liability in tort." (*Coastal Abstract Service, Inc. v. First American Title Ins. Co.* (9th Cir. 1999) 173 F.3d 725, 735 & fn.8 [Lanham Act case; collecting non-defamation cases].)

Analogously, federal courts apply a Scientific Debate Privilege emanating from the First Amendment. (See *ONY v. Cornerstone Therapeutics* (2d Cir. 2013) 720 F.3d 490.) So long as the study was not "fabricated" or "falsified" (*id.* at 497), the author of the study cannot liable in tort for publishing it (*id.* at 498), nor can the author (or anybody else) be liable in tort for repeating it in advertising. (*Id.* at 499.) The reasoning undergirding this principle flows from the fact/opinion dichotomy of the Free Speech clause. Matters of "scientific debate" are matters of "opinion," and

[3] (See *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 962 [there is no "authority for an exception to [Civ. Code, § 47] for enforcement actions brought by governmental entities under the UCL"].)

the First Amendment precludes penalizing statements of opinion. (See *PPFA*, *supra*, 115 Cal.App.4th at 348-349; accord *In re GNC Corp.* (4th Cir. 2015) 789 F.3d 505, 515 [dismissing Bus. & Prof. Code, §§ 17200, 17500 claims due to "reasonable difference of scientific opinion"].)[4]

3. Legal Background on the Equitable Abstention Doctrine

Because of the breadth of the FAL and UCL, California courts apply a doctrine of "equitable abstention" to such claims. (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 794-796; citing *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 595-597 [dis. opn. of Brown, J.]; see also *id.* at 587, fn. 2 [collecting cases].) This doctrine has its foundational origin in separation of powers (*Stop Youth Addiction*, *supra*, 17 Cal.4th at 597 [dis. opn. of Brown, J.]; citing Cal. Const., art. III, § 3), and the general rule that courts have wide discretion when applying equitable remedies. (*Desert Healthcare Dist.*, *supra*, 94 Cal.App.4th at 795.)

There are two main situations where abstention is proper. "Under the abstention doctrine, a trial court may abstain from adjudicating a suit that seeks equitable remedies if granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency." (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 147; citing *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 496, cleaned up.) "Abstention may also be appropriate if the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency, or if granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress." (*Id.*; citing *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1258; see also *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 642.)

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[4] During meet and confer, Plaintiff identified *Guardant Health, Inc. v. Natera, Inc.* (N.D. Cal. 2022) 580 F.Supp.3d 691. There, the court noted that the federal courts have split, with the Second Circuit extending the privilege even in the context of commercial speech, and the Fifth Circuit refusing to extend the privilege to at least the most obvious examples of purely commercial speech. Here, where Defendant's speech cannot conceivably be construed as anything more than *minimally* commercial, this split is more academic than useful to note. (See *Eastman Chemical Co. v. Plastipure, Inc.* (5th Cir. 2014) 775 F.3d 230, 237 ["[T]he different results in *ONY* and in this case reflect the difference between presenting an article's conclusions and 'transform[ing] snippets of ... a paper which never mentions Tritan or Eastman by name ... into commercial advertisements claiming Tritan is harmful.'"], original ellipses.)

Abstention is a cousin of preemption, and is based on the same policy rationales. Thus, abstention is generally appropriate where deferring to another governmental entity would be "more orderly, more effectual, [and] less burdensome to the affected interests" (*Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 599 [employing undocumented immigrants]), than "*ad hoc* decisions of the courts." (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 218 [bank fees].) This is especially the case when applying the FAL or UCL would potentially infringe on the authority of the federal government. (*People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523 [advertising by Indian Tribe in alleged violation of federal Highway Beautification Act].)

Thus, one court rejected class certification on the basis of abstention reasoning, stating that it would not allow "Plaintiffs [to] use the Court as a forum to challenge and to second-guess the FDA's prior approval of Paxil's safety and efficacy, with the significant claim that a jury must be the final arbiter of Paxil's safety." (*In re Paxil Litigation* (C.D. Cal. 2003) 218 F.R.D. 242, 248.) Rather, in this context, equitable abstention is appropriate. (See *Aaronson v. Vital Pharmaceuticals, Inc.* (S.D. Cal., Feb. 17, 2010, No. 09-cv-1333) 2010 WL 625337, at *3.) Defendants could find no case applying the UCL to the practice of medicine. And, in the context of "novel reproductive techniques," the California Supreme Court has explained that "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 100-101.)

4. Legal Background on Reproductive Privacy Immunity

The Reproductive Privacy Act provides "that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, *which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care*, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care." (Health & Saf. Code, § 123462, italics added.) It further provides that "[e]very pregnant individual or individual who may become pregnant has *the fundamental right to choose to bear a child* or to choose to have … an abortion…." (*Id.* at subd. (b), italics added.)

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In addition to these statements of fundamental rights, the Reproductive Privacy Act includes strong substantive protections. The Act makes clear that "[t]he state shall not deny or interfere with the fundamental right of a pregnant individual or an individual who may become pregnant to choose to bear a child … except as specifically permitted by this article." (*Id.* at subd. (c).) Thus, "*[n]otwithstanding any other law*, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights under this article, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome…." (Health & Saf. Code, § 123467, subd. (a), italics added.) And "[a] person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights, based solely on their actions to aid or assist a pregnant person in exercising their rights under this article with the pregnant person's voluntary consent." (*Id.* at subd. (b).)

As explained in the legislative history, "the prohibition of 'civil and criminal penalties for people's actual, potential, or alleged pregnancy outcomes' is critical to making reproductive justice a reality for all Californians." (*Carpenter v. Superior Court* (2023) 93 Cal.App.5th 1279, 1301.) This includes a strong immunity provision because "[t]he threat of criminal prosecutions or civil penalties on pregnant people … has a harmful effect on individual and public health … and endangers the relationship between providers and patients." (*Id.* at 1302-1303.) And that relationship between provider and patient necessarily includes communication about the availability and means of pregnancy treatment options. As stated in the Assembly Floor Analysis, "there is no public policy rationale for granting absolute immunity to prosecutors for a decision to prosecute a pregnant woman … in direct violation of a legislative directive not to do so. Although filing … charges is an exercise of prosecutorial discretion, where the law clearly prohibits .. charges, there is no discretion to file charges." (Assem. Floor Analysis, Analysis of Assem. Bill No. 2223 (2021-2022 Reg. Sess.) Aug. 25, 2022, p.4.)[5] Thus, even beyond the immunity conferred in Section 123467, a state actor who violates the Reproductive Privacy Act is subject to countersuit for actual damages, civil penalties, injunctive relief, and attorneys' fees. (Health & Saf. Code, § 123469.)

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[5] https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2223.

B. Application of the Above Legal Principles

Despite contending that Heartbeat's claims are unsupported, the Complaint concedes that Heartbeat relies on at least two scientific studies in promoting APR. (Compare Compl., ¶¶26-30 [citing 2012 and 2018 Delgado studies]; with Mot. Jud Not., Ex.4, APR Provider Kit, p.51 [listing other studies].) But the existence of the many studies relied upon by Heartbeat, not just the two studies cited in the Complaint, is judicially noticeable to satisfy the *ONY* defense—especially when those studies are listed in material deemed wrongful by the complaint. (See *Biolase, Inc. v. Fotona Proizvodnja Optoelektronskih Naprav D. D.* (C.D. Cal., June 4, 2014, No. SACV 14-0248) 2014 WL 12579802, at *2-4.) Thus, Heartbeat has submitted all of the studies, and other anecdotal evidence, as Exhibits 10-19.

1. Judicially Noticeable Material, Cited in Documents Referenced in the Complaint, Makes Clear that APR Has Been "Shown" to Be "Effective"

As stated above, the Complaint pleads that it is misleading for Heartbeat to state that APR has been "shown" to be "effective" *because* "no credible scientific evidence supports these claims." (Compl., ¶¶97(a), 100(b)(i).) Even with respect to the word "effective," the Complaint does not plead that APR does not work—merely that it is misleading to claim it does in the absence of supporting scientific studies. (See Compl., ¶55.) As pleaded in the Complaint (*id.*), this language comes from the APR website (Ex.1, pp.5, 12), although it is also repeated on the livechat or hotline (see Ex.3, p.27), and is repeated in the model FAQs made available for affiliates. (Ex.4, p.15.)

Here, the Court can take judicial notice of the fact that a *half-dozen studies* have reviewed APR, and all of them concluded that it "increase[s] the chances of allowing the pregnancy to continue." (Compl., ¶¶97(a), 100(b)(i); see Mot. Jud. Not., Exs.10-12, 14-16.) The Complaint cites to what it views as the "only" credible study—aimed at discrediting APR—without disclosing that *the study's data suggests that APR works!* (See Compl., ¶46; Ex.16.) Other than that, the Complaint only cites to comments, articles, and reviews criticizing the rigor of the existing studies (Compl., ¶¶41-44), and position statements by some professional organizations (Compl., ¶45)—no actual study that discredits APR.

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At most, the Complaint's allegations and the judicially noticeable evidence show that whether APR is "effective" or "has been shown to increase the chances of allowing the pregnancy to continue," is a matter of legitimate scientific debate and differing opinion. And especially since the statements are not made in the context of proposing a commercial transaction—in any of the forums (see Ex.1, pp.5, 12; Ex.3, p.27; Ex.4, p.15), they are absolutely protected by the First Amendment (*PPFA*, *supra*, 115 Cal.App.4th at 348-349; *GNC Corp.*, *supra*, 789 F.3d at 515) and the Common Interest and Scientific Debate privileges. (See *Harkonen*, *supra*, 880 F.Supp.2d at 1079; *ONY*, *supra*, 720 F.3d at 499.) Moreover, Heartbeat could find no case factually analogous to this one. Applying the FAL and UCL as part of a political campaign over abortion rights is improper, warranting abstention of the issue and deference to the legislature. (*Hambrick*, *supra*, 238 Cal.App.4th at 147; *Johnson*, *supra*, 5 Cal.4th at 100-101.)

Finally, the existence of these studies shows that the alleged wrongdoing here was clearly undertaken as part of Heartbeat's immunized "aid[ing] or assist[ing]" women in pursuing their rights to "make and effectuate decisions about all matters relating to pregnancy" under the Reproductive Privacy Act. (Health & Saf. Code, §§ 123462, 123467, subd. (b).) And Plaintiff's Complaint, and his recent statements against pregnancy centers, lay bare his intent to interfere with and shut down Defendants' provision of that protected "aid" and "assistance." (See Exs.25-28.)

2. Repeating the Conclusions of the 2018 Delgado Study that APR Has a 64-68% Success Rate and No Increase in Birth Defects Is Nonactionable

The Complaint next pleads that Heartbeat has violated the FAL and UCL by repeating the claims from the 2018 Delgado study that APR had a 64-68% success rate and no increase in birth defects. (See Compl., ¶¶97(a), (c), 100(b)(i), (iii).) This success rate has been repeated by Heartbeat **(1)** in a podcast appearance (Compl., ¶85, Ex.6, p.9), and both the success rate and birth defect rate **(2)** have been repeated on the Heartbeat website (Compl., ¶64, Ex.2, p.4), in its model FAQs (Compl., ¶75, Ex.4, p.15), in its model consent forms (Compl., ¶79, Ex.4, pp.19-20), and **(3)** on the APR website (Compl., ¶55, Ex.1, pp.12, 20) and corresponding online livechat and telephone hotline. (Compl., ¶69, Ex.3, pp.26-27.)

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First, a review of Mr. Godsey's appearance on the "Help Her Be Brave" podcast makes absolutely clear that it is not a commercial solicitation. (See Compl., ¶85, Ex.6.) It is absolutely nothing more than speech completely protected by the First Amendment. Thus, his repetition of the success rate of the 2018 Delgado study in that context is nonactionable.

Second, with respect to Heartbeat's website (Compl., ¶64, Ex.2, p.4), and its model FAQs and model consent forms (Compl., ¶¶75, 79, Ex.4, pp.15, 19-20), again, nothing in them reveals "(1) a commercial speaker, (2) an intended commercial audience, and (3) representations of fact of a commercial nature." (*PPFA*, *supra*, 115 Cal.App.4th. at 347-348.) Via its website, model FAQs and consent forms, Heartbeat is not selling anything to anybody—the documents are "educational and/or informative in nature"—not "commercial." (*Id.* at 350.) But even if they were somhow "commercial," where the speech is *primarily* noncommercial, having *some* "economic motivation" is insufficient. Thus, in *PPFA*, the court held that "any 'economic motivation' Planned Parenthood may have had in publishing the Web site speech that Bernardo challenges in this case *would be insufficient* by itself to turn the statements into commercial speech actionable under the UCL and FAL." (*PPFA*, *supra*, 115 Cal.App.4th at 346.) And as a matter of law, speech loses "its commercial character when it is inextricably intertwined with otherwise fully protected speech." (*Riley*, *supra*, 487 U.S. at 796.)

Third, the APR website, and corresponding online livechat and telephone hotline (Compl., ¶55, Ex.1, pp.12, 20; Compl., ¶69, Ex.3, pp.26-27), are also primarily educational in nature. Nothing in the Complaint (or the documents themselves) indicates that Heartbeat is "selling" APR to women. To be sure—unlike the other forums—the APR website, livechat, and hotline are intended to connect women with APR practitioners. But as the Court in *NIFLA v. Raoul* stated, "there is no economic motivation for the speech." (*NIFLA v. Raoul*, *supra*, 2023 WL 5367336, at *9.) But even if there were, the common interest and scientific debate privileges immunize Heartbeat from repeating the conclusions of the 2018 Delgado study (see *Harkonen*, *supra*, 880 F.Supp.2d at 1079; *ONY*, *supra*, 720 F.3d at 499),[6] and the Reproductive Privacy Act immunizes Heartbeat for aiding women by providing them with APR information. (Health & Saf. Code, § 123467, subd. (b).)

[6] As stated above, *ONY* provides an exception for "falsified" or "fabricated" data. (*ONY*, *supra*,

3. The Claim that "Thousands of Lives Have Been Saved" is Protected by the First Amendment and Scientific Debate Privilege

Next, the Complaint criticizes Heartbeat's oft-repeated statement that "[s]tatistics show that thousands of lives have been saved (and counting) through the abortion pill reversal protocol!" (See Ex.2, pp.1, 2; Compl., ¶¶3, 67, 97(d), 100(b)(iv).) As pleaded in the Complaint, this statement appears on Heartbeat's main webpage (see *id.*), and was repeated by Heartbeat personnel in two podcast appearances. (See Compl., ¶84, Ex.5, p.2; Compl., ¶86, Ex.6, p.9.) The Complaint correctly does not plead that the statement appears on the APR website, or the manual for the livechat and hotline, or the model FAQs or informed consent forms.

The Complaint then pleads that Heartbeat's reference to "statistics" is based on its combining (1) those that Heartbeat "can confirm remained pregnant," and (2) those who "started APR," but whose result was not confirmed, multiplied by a 64% success rate. (Compl., ¶67.) The Complaint pleads that the statistic is unreliable because the 64% success rate comes from the 2018 Delgado study, which Plaintiff views as unreliable. (Compl., ¶67.) But—again—nothing in the Heartbeat website or the podcast appearances is commercial; even if they were commercial, they are privileged because the statistic is derived from a scientific study; and Heartbeat is immunized under the Reproductive Privacy Act for sharing information about APR.

4. As Stated in RealOptions' Demurrer, the Term "Reversal" Is Appropriate, It Always "May Not Be Too Late," and APR Is Not "Life Threatening."

As stated above, RealOptions' concurrently filed demurrer addresses the issues: (1) that APR can "reverse" a chemical abortion; (4) that APR may work more than 72 hours after ingesting mifepristone, or after taking misoprostol or methotrexate; and (6) whether any discussion of APR is misleading if it "omit[s] that APR can cause severe, life-threatening bleeding." That briefing is

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720 F.3d at 497.) The Complaint fails to plead anything to meet this exception. The Complaint pleads that the study is "weak" (Compl., ¶31) and has "design flaws" (Compl., ¶32), thus essentially characterizing it as junk science. (See Compl., ¶33, 39.) But the exception asks whether the data was "fabricated"—not merely "weak." If merely criticizing a study's methods were enough, the exception would swallow the rule. (*ONY*, *supra*, 720 F.3d at 494-495 [discussing but rejecting long list of alleged flaws in study, including conflicts of interest, criticisms of methodology, ignoring studies with contrary conclusions, among others].)

expressly incorporated by reference and only minor differences are noted below regarding issues (1) and (4).

First, with respect to the term "reversal," RealOptions' briefing makes clear that the term is substantively accurate, and therefore not misleading in any way. But, here, the Complaint specifically criticizes Heartbeat for using the term in its podcast appearances. (See Compl., ¶¶83, 85.) But as is clear from those podcasts, that was not commercial speech. (See Exs.5-6.)

Second, RealOptions' briefing only addresses the issue of whether it is misleading to advise women to still call even if 72 hours had passed since they took mifepristone. The briefing argues that because RealOptions never contends that APR after 72 hours has been studied, the Complaint is fatally defective for accusing RealOptions for doing so. The same is true for APR after misoprostol or methotrexate. The Complaint pleads that Heartbeat's model forms include a standard form protocol for attempting to preserve a pregnancy after a woman has taken those drugs. (Compl., ¶¶72-73; see also *id.*, ¶¶5, 25, 70, 97(e), 100(b)(v).) As with the post-72-hour statement, the Complaint pleads that this is problematic because "[t]here are no studies suggesting APR is effective or safe in those situations." (Compl., ¶5.) But the protocols nowhere claim they have been the subject of scientific study, instead *disclosing forthrightly* that there have been "no studies." (See Mot. Jud. Not. Ex. 3, pp.10, 23-24 [methotrexate] pp.10, 27-28 [misoprostol].)

V. CONCLUSION

For the foregoing reasons, this Court should sustain Heartbeat's demurrer in full.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: February 6, 2024 By: _____

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

HEARTBEAT INTERNATIONAL, INC., AND REALOPTIONS, INC.,

Defendants.

Case No.: 23CV044940

Memorandum of Points & Authorities in Support of Defendant RealOptions, Inc.'s Demurrer to Complaint

Judge:	Hon. Noël Wise
Dept:	21
Date:	March 26, 2024
Time:	1:30 p.m.
Res. ID:	036749498734
Action filed:	September 21, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Statutes & Rules

TABLE OF AUTHORITIES

Statutes & Rules

Other Authorities

I. INTRODUCTION

The premises of the Abortion Pill and Abortion Pill Reversal ("APR") are quite simple. During pregnancy, every woman's body produces progesterone—a natural hormone needed to maintain a pregnancy. Progesterone is so key to maintaining a healthy pregnancy that supplemental progesterone is prescribed for 12% of all pregnancies. Mifepristone, the first pill of the Abortion Pill regimen, acts as an antiprogesterone to induce miscarriage. Abortion Pill Reversal means providing a woman with supplemental progesterone to counteract the effects of that mifepristone.[1] Despite the simplicity and obviousness of this treatment, and the constitutional guarantee that "[t]he state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions" (Cal. Const., art. I, § 1.1), California seeks to shut it down.

The Complaint does *not* plead that bad-faith doctors are profiting by Abortion Pill Reversal. RealOptions, Inc. makes absolutely no money from APR. To the contrary, it provides progesterone for free to needy women—indeed, RealOptions knows of no APR provider who charges women. Nor does the Complaint begin with an assertion that dozens of women (or even one woman) have been harmed by Abortion Pill Reversal treatment. Again, RealOptions is unaware of any woman who has been harmed by APR, and is not aware of any medical malpractice actions against APR practitioners. To be sure, the Complaint asserts that one study found some "risk" (see Compl., ¶47) (as explained *infra*, there is a reason why the Complaint did not link to the study, as it does not help the Attorney General), but even that "risk" does not appear to be the driving force behind this litigation.

All the Attorney General can muster is the statement that only "[a] small percentage of [women] … may reconsider their decision while in the midst of a medication abortion." (Compl., ¶2.) But this basic "method of analysis" is flawed. "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects…, not the group for whom the law is irrelevant." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 345 ["*Lungren*"],

[1] The historical development of the Abortion Pill (mifepristone and misoprostol) and Abortion Pill Reversal (progesterone) is briefed in Defendant Heartbeat International's earlier filed Motion to Quash Service of Summons for Lack of Personal Jurisdiction, which cites material referenced in the complaint or properly the subject of judicial notice. To avoid redundancy, that briefing is not repeated here but incorporated by reference. (Cf. Cal. Rules of Court, rule 8.200, subd. (a)(5).)

quotations and brackets omitted.) To date, APR has allowed an estimated 5,500 women to exercise their constitutional right to continue their pregnancies. For them and their babies, it is absolutely irrelevant that a larger percentage of women choose to complete their abortions.[2]

Suppose a woman who has either willingly, or unwillingly (see Mot. Jud. Not., Ex.19), ingested mifepristone and later decides that she wants to keep her baby. She looks online and discovers that thousands of women have been able to maintain their pregnancies by taking progesterone, to reverse the abortion-inducing effects of mifepristone. The success rate is not 100%, and it is still very possible that she will lose her child. But she wants to try. The Attorney General says no. However, over fifty years ago the California Supreme Court declared a fundamental right to "procreation" and "whether to bear children." (*People v. Belous* (1969) 71 Cal.2d 954, 963.) As explained below, when constitutional rights are at a stake, the "speedy resolution" of cases makes a demurrer a favored remedy. Thus, for the reasons outlined below, Attorney General Bonta's complaint in this action is fatally defective and RealOptions' demurrer should be sustained without leave to amend.

II. PLEADED ALLEGATIONS

RealOptions, Inc. "is a 501(c)(3) non-profit organization that is incorporated in California, has a principal place of business in San Jose, and operates five clinics in California. RealOptions operates the clinics under the name 'RealOptions Obria Medical Clinics.' Two of RealOptions' clinics are located in San Jose; one clinic is located in Union City; one clinic is located in Oakland; and one clinic is located in Redwood City." (Compl., ¶11.) "RealOptions advertises APR as a service available at all five of its clinics." (Compl., ¶11.) The Complaint alleges that only limited human studies of Abortion Pill Reversal have been performed. (Compl., ¶27 [2012 Delgado], ¶32 [2018 Delgado], ¶46 [2020

[2] The actual number of women who change their mind is irrelevant—the right of procreative choice belongs to each woman, individually. But AG Bonta's reference to 0.004% is misleading. The actual percentage of women who change their minds is unknown. The study cited in the complaint states that the percentage was obtained via a "personal communication" with "Danco Laboratories." (See Compl., p.1, fn.4.) Guidance from the National Abortion Federation, equally biased as Danco Laboratories, *estimates* that the number is closer to 0.27%—while admitting that "[i]n most clinical trials of early medication abortion, the number of subjects taking mifepristone without misoprostol is not reported." (See Alice Mark et al., *When Patients Change Their Minds After Starting an Abortion* (2020) 101(5) Contraception 283-285.)

Creinin].) In this respect, the Complaint misleadingly omits any reference to a recent scoping review, or animal studies, or the ethical concerns with giving a placebo to a woman who wishes to save her pregnancy, or the chemistry and biology underlying the theory of Abortion Pill Reversal. (See Mot. for Jud. Notice, Exs. 10-19 [scientific studies].)[3]

The Complaint pleads that, by offering Abortion Pill Reversal, RealOptions has violated the False or Misleading Advertising Law ("FAL"), Bus. & Prof. Code, § 17500 (see Compl., ¶¶96-98), and the Unlawful, Unfair, and Fraudulent Business Competition Law ("UCL"), Bus. & Prof. Code, § 17200 (see Compl., ¶¶99-101). As the factual predicate for these assertions, the Complaint points to RealOptions' website—which has two pages on APR—and the standard informed consent forms that it uses. (Compl., ¶¶87-95.) In ruling on a demurrer, "it is essential that we evaluate the complaint by reference to the[] documents" that "form the basis of the allegations in the complaint." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn.3.) Thus, those documents have been submitted with a request for judicial notice as Exhibits 7, 8, and 9. Pointing to those documents, the Complaint pleads three allegedly wrongful representations.

First, with respect to RealOptions' website, the Complaint pleads that it states "that APR can 'reverse' medication abortions, is an 'effective' process that 'has been shown to increase the chances of allowing the pregnancy to continue,' and that APR has a 64-68% success rate, even though no credible scientific evidence supports these claims." (Compl., ¶100(b)(1) [UCL claim]; see also Compl., ¶97(a) [FAL claim]; Compl., ¶91 [factual allegations]; quoting Mot. Jud. Not., Ex.7 [referencing "reverse," "effective," and studies]; see also Ex.8 [referencing only reversal].)

Although these claims are grouped in a single paragraph, earlier paragraphs make clear that there are three distinct sub-points here: **(A)** the Complaint pleads that the terms "reverse" and "reversal" are inherently misleading (Compl., ¶21); **(B)** the Complaint pleads that it is misleading to claim that APR "has been shown" (via study) to be "effective" or "to increase the chances of allowing the pregnancy to continue" (Compl., ¶¶30-45); and **(C)** the Complaint pleads that it is misleading to claim that APR has as 64-68% success rate. (Compl., ¶¶32.)

[3] Those studies are discussed in Heartbeat's concurrently filed motion to quash service of summons for lack of personal jurisdiction, and are properly subject to judicial notice. Therefore Heartbeat's discussion of them is incorporated by reference.

Second, the Complaint next pleads that RealOptions "implies that APR is effective for continuing a pregnancy after a 72-hour window following mifepristone administration. In response to two different FAQs about timing for APR, RealOptions states that potential patients should nevertheless call because '[i]t may not be too late'…" (Compl., ¶92 [factual allegations]; Compl., ¶97(b) [FAL claim] Compl., ¶100(b)(ii) [UCL claim]; quoting Mot. Jud. Not. Ex.7.)

Third, the Complaint finally turns to RealOptions' informed consent forms provided to individual women. The Complaint pleads that "[i]n its form to obtain consent for what it calls 'pregnancy sustaining progesterone therapy,' RealOptions misleadingly omits that APR patients may experience severe bleeding as a result of undergoing the process, even though the 2019 U.C. Davis study found that there was a risk of that outcome." (Compl., ¶94 [factual allegations]; Compl., ¶97(f) [FAL claim]; Compl., ¶100(b)(vi) [UCL claim]; see Mot. for Jud. Not. Ex.9.)[4]

III. LEGAL STANDARD

"A demurrer tests the legal sufficiency of the complaint." (*Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 568; quoting *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480.) The court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law" (*id.*), and "consider[s] matters which may be judicially noticed." (*Id.*) "[W]here the allegations in the body of the complaint are contrary to documents incorporated by reference in it, we treat the documents as controlling over their characterization in the pleading." (*Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499.) "If the allegations in the complaint conflict with the facts included in exhibits attached to or referenced in the complaint, we rely on and accept as true the contents of the exhibits." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1173, quotation marks omitted.)

"Where the complaint's allegations … reveal the existence of an affirmative defense, the plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of

[4] Similar to how it is appropriate to take judicial notice of the documents upon the defendant's which liability is based, it is appropriate to take judicial notice of the scientific studies upon which the *plaintiff* relies. (See *Bermudez v. Colgate-Palmolive Company* (S.D.N.Y., Mar. 31, 2023, No. 1:21-cv-10988) 2023 WL 2751044, at *8.) Thus, RealOptions has submitted the cited 2019 U.C. Davis study with a request for judicial notice as Exhibit 16.

action." (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 566 [Communications Decency Act, 47 U.S.C. § 230], quotation marks omitted; accord *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 460 [Legislative Immunity, Gov. Code, § 818.2].) A demurrer is a favored remedy when constitutional rights are involved to avoid "a chilling effect" upon the exercise of such rights. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 460 [denying leave to amend]; quoting *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685.)

IV. ARGUMENT

As stated above, the Complaint pleads that RealOptions has violated the FAL and UCL in offering supplemental progesterone to women who have taken mifepristone because: (1) its APR practitioners represent to women that it actually *reverses* the abortion pill; (2) that it has been *shown* to be *effective*; (3) that it has a *64-68% success rate*; (4) that it may be effective even *72-hours* after a woman has taken mifepristone; and (5) that Real Options does *not* tell women that it may cause "life threatening" bleeding. Thus, the Complaint essentially contends that RealOptions must tell women that have taken mifepristone that they *can* take supplemental progesterone, but that it won't actually reverse the abortion pill, is ineffective, unstudied, and may kill them.

In the face of such claims, the most obvious defense is every California woman's statutory and constitutional rights to procreative choice, and the testing of those rights against the facts supporting Plaintiff's allegations. If the allegations were true, RealOptions would arguably need to inform women that APR simply does not work. But the allegations are not supported by *Plaintiff's own* studies. In addition, as explained in Heartbeat's concurrently filed demurrer, the First Amendment, the Common Interest and Scientific Debate privileges, and the Equitable Abstention doctrine also bar Plaintiff's claims. Below, RealOptions explains those legal doctrines (see § IV.A), before applying them to: (§ IV.B.1) the claim that APR is "life threatening"; (§ IV.B.2) the claim that the term "reverse" is misleading; (§ IV.B.3) the claim that requesting clients call even after 72 hours is improper; and (§ IV.B.4) the issues concurrently briefed in Heartbeat's demurrer.[5]

[5] Similar to Heartbeat's demurrer, in light of the litany of factual claims pleaded as only two causes of action, RealOptions requests that the Court exercise its inherent authority to sustain a demurrer as to part of a cause of action or, alternatively, strike that portion of the cause of action. (See *Fire*

A. Legal Background on the Relevant Legal Doctrines

1. Legal Background on the Right to Procreative Choice

In 1969, the California Supreme Court recognized a fundamental constitutional right to procreate. "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." (*People v. Belous* (1969) 71 Cal.2d 954, 963.)[6]

In 1972, Californians then amended their constitution to expressly encompass "privacy": "All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." (Cal. Const., art. I, § 1 [originally added on Nov. 7, 1972 by Prop. 11; amended on Nov. 5, 1974 by Prop. 7].) As explained by the California Supreme Court, under this provision, "all women in this state—rich and poor alike—possess a fundamental constitutional right to choose whether or not to bear a child." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262 ["*Myers*"].) The California Constitution provides a right to "procreative choice." (*Id.* at 258.) As explained:

> Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature as a population control measure, for example funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, *the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.*

(*Id.* at 256, italics added.) In line with this, the Legislature repealed the Therapeutic Abortion Act in 2002 and replaced it with the Reproductive Privacy Act. (Stats. 2002, ch. 385, § 8; creating Health & Saf. Code, § 123460, et seq.) As stated therein, "[e]very woman has the fundamental

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Ins. Exchange v. Superior Court (2004) 116 Cal.App.4th 446, 452; *Moran v. Prime Healthcare Management, Inc.* (2023) 94 Cal.App.5th 166, 174.)

[6] (Accord *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453 ["If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."]; see *Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. 215, 295 ["It is hard to see how we could be clearer" that *Dobbs* does not "cast doubt" on *Eisenstadt*].)

right to choose to bear a child" and "[t]he state shall not deny or interfere with a woman's fundamental right to choose to bear a child." (*Id.*) Every woman has the right to consent to an abortion, and the right to refuse (or withdraw) consent to an abortion. (See *id.*)

Recently, Californians reiterated their commitment to "procreative choice," amending the California Constitution to explicitly state: "The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions…." (Cal. Const., art. I, § 1.1 [added Nov. 8, 2022 by Prop. 1].) The Legislature further amended the Reproductive Privacy Act to state "that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care." (Stats. 2022, ch. 629, § 5 [amending Health & Saf. Code, § 123462].)

As stated unequivocally by the California Supreme Court, "the constitutional rights at issue here are clearly among the *most intimate and fundamental* of all constitutional rights." (*Myers*, *supra*, 29 Cal.3d at 275, italics added.) Thus, in California, restrictions upon the fundamental right of procreative choice must satisfy strict scrutiny. (*Lungren*, *supra*, 16 Cal.4th at 340-341; *Myers*, *supra*, 29 Cal.3d at 276, fn.22; accord *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 164 ["*Valerie N.*"] [attempt to protect procreative choice in one fashion was not narrowly tailored because it limited procreative choice in another way].)[7]

The right to "procreative choice" cannot meaningfully be exercised alone. Thus, it includes the "right to decide independently, *with the advice of [her] physician*, to acquire and to use needed medication." (*Whalen v. Roe* (1977) 429 U.S. 589, 603, italics added.) The government cannot restrict

[7] A woman's right to "procreative choice" was a close cousin of—indeed flowed from—her right to make decisions regarding "her personal health," her right to "retain personal control over her own body," and "her right to decide for herself whether to parent a child." (*Myers*, *supra*, 29 Cal.3d at 274-275; citing *Belous*, *supra*, 71 Cal.2d at 963.) "This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny" (*id.* at 275)—it "encompasses …the individual's right to determine the course of his or her future life." (*Valerie N.*, *supra*, 40 Cal.3d at 162.) These rights are similarly found in the U.S. Constitution, which protects the right to refuse "unwanted medical treatment" (*Cruzan v. Missouri Dept. of Health* (1990) 497 U.S. 261, 278), and the right "to bodily integrity." (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720; citing *Rochin v. California* (1952) 342 U.S. 165.)

procreative choice by directing its action towards the "physician's role" (*Griswold v. Connecticut* (1965) 381 U.S. 479, 482), by interfering with "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it." (*Doe v. Bolton* (1973) 410 U.S. 179, 197; accord *Belous*, *supra*, 71 Cal.2d at 963, fn.5 ["Dr. Belous' standing to raise this right is unchallenged."].) And 2023 amendments to the Reproductive Privacy Act go beyond the California Constitution, wholly immunizing those who aid and assist pregnant women in exercising their reproductive rights: "A person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights, based solely on their actions to aid or assist a pregnant person in exercising their rights under this article with the pregnant person's voluntary consent." (Health & Saf. Code, § 123467, subd. (b).)

2. Legal Background on Other Relevant Doctrines

As explained more fully in Heartbeat's concurrently filed demurrer, the First Amendment, the Common Interest and Scientific Debate privileges, and the Equitable Abstention doctrine all apply here. Under the First Amendment, RealOptions' speech is fully protected unless it "*does no more* than propose a commercial transaction.'" (*Bernardo v. PPFA* (2004) 115 Cal.App.4th 322, 343, italics added.) Under the Common Interest and Scientific Debate privileges, RealOptions is protected from tort liability for merely repeating the conclusions of published scientific papers. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 721; *ONY v. Cornerstone Therapeutics* (2d Cir. 2013) 720 F.3d 490, 499.) And under the Equitable Abstention doctrine, courts refuse to apply the FAL and UCL when it touches on areas best left to an administrative agency of the California legislature. (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 794-796.) In this respect, the California Supreme Court has explained that "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 100-101.)

B. Application of the Above Legal Principles

As stated above, "[w]here the complaint's allegations … reveal the existence of an affirmative defense, the plaintiff must 'plead around' the defense, by alleging specific facts that

would avoid the apparent defense." (*Doe II*, *supra*, 175 Cal.App.4th at 566.) Here, the Complaint facially seeks to restrict the right of procreative choice by inserting government bureaucrats between women and their physicians—which the Reproductive Privacy Act flatly prohibits. (See Compl., ¶¶87-95.) And the California Constitution requires that the Complaint plead facts showing that restricting RealOptions' medical practice satisfies strict scrutiny, i.e., facts showing "a 'compelling' state interest which justifies the intrusion and which cannot be served by alternative means less intrusive on fundamental rights." (*Lungren*, *supra*, 16 Cal.4th at 340-341, brackets omitted.) Even more, the nature of the claims—inserting a UCL and FAL claim between a patient and her physician—is a particularly novel application of the UCL and FAL in a context where they simply do not belong, warranting equitable abstention.

1. The 2019 U.C. Davis Study, published by Dr. Mitchell Creinin in 2020, Does Not Warrant Telling Women that APR May Be Life Threatening

Perhaps the most gallingly disingenuous allegation in the Complaint is that, when RealOptions' medical practitioners counsel women seeking supplemental progesterone to save their pregnancies, they "misleadingly omit[] that APR patients may experience severe bleeding as a result of undergoing the process, even though the 2019 U.C. Davis study found that there was a risk of that outcome." (Compl., ¶94.) The Complaint continues: "The failure to include the possibility of severe bleeding makes this statement materially misleading, in that patients are likely to believe that the side effects from APR are minor, when in fact they could be *life threatening.*" (Compl., ¶94, italics added.)

As stated above, the right to procreative choice includes the "right to receive medical care in accordance with her licensed physician's best judgment." (*Bolton*, *supra*, 410 U.S. at 197.) Limitations on this right must *at least* satisfy strict scrutiny (*Lungren*, *supra*, 16 Cal.4th at 340-341), but a newer code provision even creates an absolute immunity for physicians. (Health & Saf. Code, § 123467, subd. (b).) And, under equitable abstention principles, "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so." (*Johnson*, *supra*, 5 Cal.4th at 100-101.)

RealOptions believes Section 123467(b) is dispositive but, at the very least, the Court should take judicial notice of the referenced 2019 U.C. Davis study (see *Bermudez*, *supra*, 2023 WL

2751044), and analyze whether requiring physician to tell women that APR may be "life threatening" is supported by "a 'compelling' state interest which justifies the intrusion and which cannot be served by alternative means less intrusive on fundamental rights." (*Lungren*, *supra*, 16 Cal.4th at 340-341, brackets omitted.)

That study was performed by Dr. Mitchell Creinin in 2019, published in 2020, and concerned twelve pregnant women who were scheduled for abortions. (See Mot. Jud. Not., Ex.16.) All twelve women took mifepristone, and then half received progesterone and half received a placebo. Dr. Creinin was attempting to determine the rate at which progesterone improves the chances of the pregnancy remaining viable. The study then states that one woman who received progesterone had "severe bleeding." Yet, although she was transported by ambulance to a hospital, ultimately "no intervention was needed." (*Id.* at p.160.) In contrast, two women who received mifepristone and only a placebo had severe bleeding, with one of the two requiring a blood transfusion. (*Id.* at pp.160-161.) Thus, Dr. Creinin's study stands for the proposition that "severe bleeding" is a potential consequence of *mifepristone*, and if a woman chooses to not take misoprostol, supplemental progesterone is needed to prevent it—nothing else. Any enhanced risk to a woman in this situation would arise from *not* receiving APR treatment. This is borne out by the FDA's required warning labels, the truthfulness of which this Court can take judicial notice. Mifepristone can cause severe bleeding; progesterone does not. (See Mot. Jud. Not., Exs. 20-21.) Indeed, a recent scoping review examined all of the literature on APR safety, including Dr. Creinin's study, and found no evidence of that APR was unsafe. (Ex.17, p.8.)

The Court should hold that, under the FAL and UCL, it is not a misleading omission to not refer to "life threatening" bleeding when providing APR, for the simple reason that there is no evidence that APR causes life threatening bleeding. But, at the very least, Dr. Creinin's study fails to establish that the Attorney General has a compelling need of the highest order to force Defendants to deliver a (false and misleading) message to pregnant women that using supplemental progesterone (i.e., APR) may kill them. (*Bella Health and Wellness v. Weiser* (D. Colo., Apr. 15, 2023, No. 1:23-cv-939) 2023 WL 2978108, at *2 [enjoining statute prohibiting APR: "[T]his treatment does not appear to pose severe health risks to patients who receive it"].) The Attorney

General's demands thus also gravely violate of the rights of women to manage their pregnancies—and Defendants' rights to aid and assist them—under Reproductive Privacy Act.

2. Abortion Pill "Reverse" and "Reversal" Are the Most Accurate Terms to Refer to Supplemental Progesterone Following Mifepristone

Next, the Complaint pleads that RealOptions' use of the terms "Abortion Pill Reversal" (see Exs.7-8, Website pages) or "medical abortion reversal" (Ex.9, Informed Consent forms) is inherently misleading for two reasons: (1) "because there is no credible scientific evidence showing that APR 'reverses' medication abortions;" and (2) "because 'reverse' and 'reversal' do not accurately convey even the theory underlying APR." (Compl., ¶¶54.) During meet and confer, Plaintiff explained that this assertion was based on the conclusions of two district court opinions: *American Medical Association v. Stenehjem* (D.N.D. 2019) 412 F.Supp.3d 1134, terminated, 2023 WL 8866596 ["*Stenehjem*"], and *Planned Parenthood of Tennessee and North Mississippi v. Slatery* (M.D. Tenn. 2021) 523 F.Supp.3d 985, terminated, ECF No. 119 ["*Slatery*"].[8]

Like above, the main issue here is whether prohibiting use of the terms "reverse" or "reversal" by RealOptions' medical practitioners is barred by the Reproductive Privacy Act (Health & Saf. Code, § 123467, subd. (b)), or fails strict scrutiny under the California Constitution (*Lungren*, *supra*, 16 Cal.4th at 340-341), or is equitably inappropriate for the judiciary to intervene in via the UCL (see *Johnson*, *supra*, 5 Cal.4th at 100-101)—especially in light of the evidence that this case is a mere political prosecution brought in response to *Dobbs*. (See Exs.26-29.) Moreover, the Common Interest and Scientific Debate privileges preclude liability in the absence of malice, because "Abortion Pill Reversal" is the term used throughout the scientific literature (see Exs.10-19), and "reversal" is the scientific term for the biochemical process. (Exs.36-37.) And the strict scrutiny standard cannot be avoided by attempting to restrict what practitioners can say in public, versus in private consultation with patients. (*Bigelow v. Virginia* (1975) 421 U.S. 809, 822-826 [striking down conviction of advertising for abortion because "a State cannot foreclose the exercise of constitutional rights by mere labels"]; accord *People v. Orser* (1973) 31 Cal.App.3d 528, 537 [state

[8] In both cases, the issue before the Court was whether to preliminarily enjoin a state requirement that doctors inform patients receiving mifepristone that it can be reversed. Those cases became moot following *Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. 215.

could not prohibit advertising for abortion].)

Plaintiff's ***first*** point comes from both *Stenehjem* and *Slatery.* In *Stenehjem*, the district court quoted an expert for the proposition that: "The term 'abortion reversal' is somewhat misleading in that an abortion is not reversed but rather, abortion is prevented from occurring." (*Stenehjem*, *supra*, 412 F.Supp.3d at 1149.) The district court in *Slatery* then repeated this observation, stating that there is no "treatment that may undo or negate her abortion," for "patients whose pregnancies had already terminated after taking mifepristone alone." (*Slatery*, *supra*, 523 F.Supp.3d at 1002-1003.) The ***second*** point comes from *Slatery* alone, where the district court concluded that "the term 'reverse' does not accurately describe the theory underlying Dr. Delgado's progesterone therapy," because "the word 'reverse' suggests … that supplemental progesterone acts as a kind of anecdote [sic] to mifepristone." (*Id.*)

The question raised by the first issue—addressed in both *Stenehjem* and *Slatery*—is whether a reasonable consumer would be misled by the term "Abortion Pill Reversal" to understand that a pregnancy can continue once the fetus is deceased. Stated differently, the issue is whether a reasonable consumer would be misled into believing that *every* time the abortion pill is taken, its effects can be reversed—even when taking the abortion pill has already resulted in a completed abortion. Stated differently, would a reasonable consumer see that there is a difference between the phrases "Abortion Pill Reversal" and "Abortion Reversal," that the word "reversal" is modifying different things in the different phrases?

This Court can and should hold, "as a matter of law," that a reasonable consumer would not be misled. (See *Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 878; *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307.) However, at the very least, the complaint "alleges no *facts* showing that reasonable consumers expect" Abortion Pill Reversal to reverse the effects of the abortion pill in all instances, even when the abortion is completed. (*Rubenstein*, *supra*, 14 Cal.App.5th at 878; citing *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1275.) Without pleaded facts showing that reasonable consumers would expect "Abortion Pill Reversal" to resurrect dead children in utero or be 100% effective in every circumstance, there is no justification to compel a change in the phrase to "Abortion Pill Sometimes Reversal." This is

especially the case where, at the same time that RealOptions uses the term "Abortion Pill Reversal" it states that it has a 64-68% success rate. (See Mot. Jud. Not., Ex.7, p.2.)

The question raised by the second issue is whether the term "reverse" accurately describes the mechanism by which supplemental progesterone works. (*Slatery*, *supra*, 523 F.Supp.3d at 1002-1003.) As stated in both *Slatery* and the Complaint, "APR cannot truly 'reverse' mifepristone, such as by acting as an antidote." (Compl., ¶21.) This argument misunderstands the definition of the word "reverse" and the context in which it is used by RealOptions.

To "reverse" is defined as "turned back: opposite or contrary to one another or to a thing specified," or "acting or operating in opposite or contrary fashion esp. to what is usual," or "effecting reverse movement or operation." (Mot. for Jud. Not. Ex.33; see also Exs.34-35.) Thus, when progesterone is characterized as "reversing" the Abortion Pill, it is accurate. The intended result of the Abortion Pill is an abortion; the opposite is a continued pregnancy. The result that a woman who chooses Abortion Pill Reversal intends is a continued pregnancy; the opposite is an abortion. When one "reverses course," that does not mean that one literally goes back in time. In myriad contexts, a "reversal" does not mean whatever happened before is undone. It means something occurred that counters what had been going on or was expected.

To illustrate, as stated above, the Complaint contends that the use of the term "reverse" is misleading: that it implies that progesterone acts as an "antidote" to mifepristone. An "antidote" is "a remedy to counteract the effects of poison" or "something that relieves, prevents or counteracts." (Mot. for Jud. Not. Ex.33; see also Exs.34-35.) Under these definitions, progesterone is an "antidote" to mifepristone, and this Court can and should hold that the Complaint fails to plead facts that would likely deceive a reasonable consumer, as a matter of law.

Perhaps most importantly, RealOptions cannot think of a more accurate term to describe "Abortion Pill Reversal"—the term "reversal" is directly accurate. Under the linguistic parsing that Plaintiff proposes, there would be no accurate way to describe Abortion Pill Reversal, making APR less accessible and understandable to women seeking to continue their pregnancies. In light of the constitutional and absolute statutory right to procreative choice, this cannot be.

///

3. The 72-Hours Statement Is Not Actionable Because It Does Not Claim to be Based on Scientific Studies

The Complaint next pleads that it is misleading to ask patients to still call when more than 72 hours have passed since taking mifepristone, "*because* there is no evidence supporting this statement" (Compl., ¶92, italics added), or "[t]here are no studies suggesting APR is effective or safe in [that] situation[]." (Compl., ¶5, bolding omitted; see *id.*, ¶¶97(b), 100(b)(ii).)

With respect to the 72-hour window, the FAQ on the RealOptions' website, which is taken verbatim from Heartbeat's model FAQs, says:

> **Is it too late to reverse the abortion pill?**
> Time is of the essence. For those seeking to reverse the effects of the abortion pill (also known as a chemical abortion or a medical abortion), the goal is to start the protocol within 24 hours of taking the first abortion pill, mifepristone, or RU-486. However, there have been many successful reversals when treatment was started within 72 hours of taking the first abortion pill.
> Even if 72 hours have passed, call our helpline 877.558.0333. We are here to help. It may not be too late.

(Mot. Jud. Not., Ex.7.) Oddly, the Complaint does *not* challenge the factual accuracy of the statement that "there have been many successful reversals when treatment was started within 72 hours of taking the first abortion pill." (See Compl., ¶¶76, 92.) It merely states that there is "no credible scientific evidence" supports it. (Compl., ¶¶97(b), 100(b)(ii).)

The defect here is simply that the above statement does not *claim* to be based on "studies." (Compl., ¶5.) When a statement *claims* to be "proven" or "studied," civil prosecutors may generally demand production of the study and prosecute a Bus. & Prof. Code, § 17508 action if the evidence is lacking. But even then "*prosecuting authorities* bear the burden of proving the advertising claims to be false or misleading." (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1344, italics added.)

Here, the Court can and should judicially notice that mifepristone alone does *not* have 100% effectiveness in terminating pregnancy. (See Mot. Jud. Not., Ex. 20, p.14.) Thus, until fetal demise is confirmed, it always "may not be too late." Further, the FAQ's key language is "Even if 72 hours have passed, call…. We are here to help." (Ex. 7.) As stated above, "severe bleeding" is a potential

consequence of mifepristone, so if a woman has chosen to not take misoprostol, she needs help. Even if saving the pregnancy is off the table, she should seek medical advice (See § IV.B.1.)

Again, Plaintiff must plead facts establishing why a reasonable consumer would view this statement as implying the existence of scientific studies. Otherwise, "[w]e cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone within the meaning of the UCL." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 838.) Since the statement does not claim to be based on "scientific evidence," the Court should hold as a matter of law that it is not misleading for (allegedly) not being based on "scientific evidence."

4. As Stated in Heartbeat's Demurrer, Judicially Noticeable Material, Cited in Documents Referenced in the Complaint, Makes Clear that APR Has Been "Shown" to Be "Effective" and Has a 64-68% Succes Rate

Lastly, the Complaint pleads that RealOptions' website is misleading in representing that APR has been "shown to increase the chances of allowing the pregnancy to continue," is "effective," and "has a 64-68% success rate." (Compl., ¶91; citing Ex.7.) The contents of this webpage are taken nearly verbatim from Heartbeat's model FAQs—and the specific offending language is taken verbatim from Heartbeat's model information.

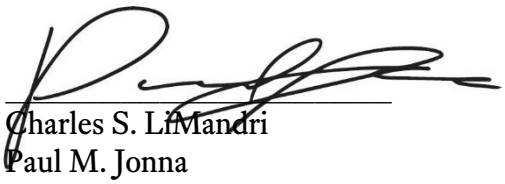
Thus, this issue is primarily briefed in Heartbeat's demurrer. As explained therein, the First Amendment absolutely bars liability for RealOptions' purely noncommercial speech—even if it were misleading. (See *NIFLA v. Raoul* (N.D. Ill., Aug. 4, 2023, No. 23-cv-50279) 2023 WL 5367336, at *9 ["[M]ost importantly, there is no economic motivation for the speech."].) But, in any event, the speech is not misleading. The statement that APR has been "shown" to be "effective" is based on a half-dozen studies, and the 64-68% success rate comes from a specific study published by Dr. George Delgado in 2018. The Court can and should take judicial notice of these studies, whose existence precludes liability for repeating their conclusions. (See *In re GNC Corp.* (4th Cir. 2015) 789 F.3d 505, 515; *Harkonen v. Fleming* (N.D. Cal. 2012) 880 F.Supp.2d 1071, 1079.)

V. CONCLUSION

For the foregoing reasons, the Court should sustain RealOptions' demurrer in full.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: February 6, 2024 By: 

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

HEARTBEAT INTERNATIONAL, INC., AND REALOPTIONS, INC.,

Defendants.

Case No.: 23CV044940

Memorandum of Points & Authorities in Support of Defendant Heartbeat International Inc.'s Motion to Quash Service of Summons, in Part or in Full, for Lack of Personal Jurisdiction

(By Special Appearance)

Judge:	Hon. Noël Wise
Dept:	21
Date:	March 26, 2024
Time:	1:30 p.m.
Res. ID:	857872172887
Action filed:	September 21, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

I. INTRODUCTION

California Attorney General Rob Bonta has decided to target Defendants for helping women who have changed their minds about their abortions. In a flagrant constitutional overreach, AG Bonta seeks to prohibit doctors, nurses, or advocacy organizations from helping these women by forbidding Defendants from telling them about a safe and effective treatment that is lawfully available across the country and around the world—"Abortion Pill Reversal."

During a healthy pregnancy, a woman's body naturally produces a hormone called progesterone. One way to cause an abortion is to block the body's natural supply of progesterone, most commonly through a drug called mifepristone, and to induce miscarriage, typically through the use of misoprostol administered 24-48 hours after mifepristone. The decision to end a pregnancy is often stressful and complicated and, unsurprisingly, some women initially choose to take mifepristone, but later decide that they wish to remain pregnant. Other women seek medical help because they were forced or deceived into taking mifepristone. Upon seeking medical help to stop a mifepristone-induced abortion, experienced medical providers will prescribe supplemental progesterone to maintain the woman's pregnancy. AG Bonta now seeks to stop this practice.

Heartbeat International, Inc. is an Ohio-based trade association for life-affirming pregnancy help organizations. Like any trade association, it maintains a website where it offers a bevy of online resources, including but not limited to model policies, forms, and procedures which are available to affiliates around the world. As a separate and distinct project, it operates a 100% free hotline and referral service for a woman seeking Abortion Pill Reversal. At the Complaint's core, AG Bonta alleges that Heartbeat's model policies and hotline include the misrepresentation that Abortion Pill Reversal, *i.e.*, supplemental progesterone, is "safe and effective." (Compl., ¶7.) But even then, Attorney General Bonta has to hedge. Instead of pleading outright that Abortion Pill Reversal does not work, AG Bonta pleads simply that there is inadequate "credible scientific support" to claim that it does. (Compl., ¶97.)

Setting aside the merits of the Complaint, there is no excuse to hale an Ohio-based nonprofit into California. None of the three categories of Heartbeat's "wrongful" activity pleaded in the Complaint arose in California or were directed at California. (See Compl., ¶¶49-86.) Thus, this Court should grant Heartbeat's motion to quash service of summons for lack of personal jurisdiction.

II. FACTUAL & PROCEDURAL HISTORY

A. Background on Mifepristone, the "Abortion Pill"

When a woman becomes pregnant, the corpus luteum is formed within her ovary to secrete progesterone. "Progesterone is needed for the pregnancy to continue; it prepares and maintains the uterine lining and stimulates the production of nutrients." (Ex.31,[1] *Alliance for Hippocratic Medicine v. FDA* (5th Cir. 2023) 78 F.4th 210, 224 ["*Alliance IV*"]; cert. granted, 2023 WL 8605744[2].) In the 1980's, Roussel Uclaf—a French pharmaceutical firm—developed a drug named RU-486 which acts as an antiprogesterone by occupying a pregnant woman's progesterone receptors and thus preventing progesterone from binding to those receptors. It "blocks the hormone progesterone, halts nutrition, and ultimately starves the unborn human until death." (Ex.29, *Alliance for Hippocratic Medicine v. FDA* (N.D. Tex., Apr. 7, 2023, No. 2:22-cv-223) 2023 WL 2825871, at *1 ["*Alliance I*"], affd. in part, vacated in part on statute of limitations grounds, *Alliance IV*, *supra*, 78 F.4th 210.)

In the mid-1990's the Clinton administration worked with Roussel Uclaf to bring RU-486 to the American market. (*Alliance I*, *supra*, 2023 WL 2825871, at *27.) It negotiated the donation of RU-486 by Roussel Uclaf to a nonprofit called "the Population Council" (*Alliance IV*, *supra*, 78 F.4th at 224, fn.1), so that the latter could sponsor it as a new drug for approval by the FDA—under the generic name mifepristone and the brand name Mifeprex. (*Id.* at 223-224.) Ultimately, "the Population Council applied for FDA to approve mifepristone as a new drug, as part of a two-drug regimen designed to cause abortion." (*Id.* at 223.)

"Mifepristone alone, however, is not fully effective in aborting an embryo," with a scientific "dispute as to just how effective mifepristone is alone." (Ex.32, *Bella Health and Wellness v. Weiser* (D. Colo., Oct. 21, 2023, No. 1:23-cv-939) 2023 WL 6996860, at *2 ["*Bella II*"].) "This is why patients also take the second drug—misoprostol—within a day or two of taking mifepristone to complete a medication abortion. Misoprostol dilates the cervix and induces muscle contractions, clearing the uterus of the embryo." (*Id.*) "The full, two-drug regimen is highly effective at ending a pregnancy, causing 97% of early-term pregnancies to terminate." (*Id.*)

[1] Exhibits 1-37 are attached to the Appendix of Judicial Notice Exhibits.

[2] Neither the granting of review, nor the granting of an emergency stay, is a pre-judgment of the merits. (See *Smith v. Smith* (1941) 18 Cal.2d 462, 464-465.)

In 2000, mifepristone was approved by the FDA for abortions up to seven weeks gestation (49 days), with misoprostol taken 48 hours after mifepristone. In 2016, the regimen was altered, allowing abortions up to ten weeks gestation (70 days), and misoprostol taken between 24-48 hours after mifepristone, among other changes. (See *Alliance I*, *supra*, 2023 WL 2825871, at *10.) Once approved, the NDA ("New Drug Application") was assigned to Danco Laboratories, LLC—an entity whose sole purpose is to hold that NDA. (*Alliance I*, *supra*, 2023 WL 2825871, at *3.)[3] Notably, the FDA never added termination of pregnancy to the misoprostol label, meaning that the use of misoprostol in this context is an "off-label" use.[4]

"[S]ome women regret their decision to start the medication abortion regimen after taking the first pill but before taking the second. And others may have been coerced to start the regimen against their will." (*Bella II*, *supra*, 2023 WL 6996860, at *2.) Some "doctors and medical professionals, however, have investigated whether treatment with progesterone can reverse the effects of mifepristone, the first abortion pill, better than just watchful waiting and avoiding use of the second abortion pill. This is commonly called 'abortion pill reversal' or 'medication abortion reversal.'" (*Id.*) Supplemental progesterone itself is incredibly safe, and is classified as a "Category B" drug for pregnant women. This is the same category as Tylenol, the most commonly used pain reliever during pregnancy.[5] Thus "[r]esearchers have estimated that providers employ the use of progesterone in 5-12% of all pregnancies for a variety of reasons." (*Bella II*, *supra*, 2023 WL 6996860, at *2.)

The first known attempt to reverse the effects of mifepristone using progesterone occurred in 2006. In that year, Dr. Matthew Harrison, MD, was approached by a woman who had taken Mifepristone and wanted to reverse the effects of it. He treated her with Progesterone, and she went on to deliver a healthy baby. (Compl., ¶¶26, 71; discussing Ex.4, APR Healthcare Provider Kit, p.6.) Based on his own experience, a few years later, Dr. George Delgado, MD, "devised the APR Protocol for reversing the effects of Mifepristone and began to advise doctors on the APR Protocol." (Ex.4, APR Kit, p.6.) And in May 2012, Dr. Delgado set up a website and hotline to connect women who seek to

[3] (See also Fiona Rutherford, *Why you've never heard of the company behind the abortion pill*, Los Angeles Times (Apr. 13, 2023), https://lat.ms/3u9m7fd.)

[4] (See Ex.21, FDA, Misoprostol Label; Ex.23, *Misoprostol*, in StatPearls (2023).)

[5] (See Ex.22, FDA, Progesterone Label, p.19; Ex.24, Emily Oster, Expecting Better (2016) p.169 [discussing Tylenol use during pregnancy].)

reverse the effects of mifepristone with a medical professional. (Compl., ¶29.)

By 2022, "[a]t least twelve states that regulate chemical abortion require[d] physicians to inform their patients about the established medical process of reversing [mifepristone] with administration of natural progesterone." (Clarke D. Forsythe & Donna Harrison, *State Regulation of Chemical Abortion After Dobbs* (2022) 16 Liberty U. L. Rev. 377, 406-408.)[6] Contrarily, Colorado passed a statute prohibiting advertisement for and performance of Abortion Pill Reversal, but enforcement of the statute has been enjoined. (*Bella II*, *supra*, 2023 WL 6996860.)

B. Background on the Use of Supplemental Progesterone in the Presence of Mifepristone, "Abortion Pill Reversal"

As stated above, the basic premise of Abortion Pill Reversal is to counteract the effects of an antiprogesterone (mifepristone) with supplemental progesterone. Mifepristone is a progesterone receptor antagonist that binds twice as aggressively to the progesterone receptors in the uterus than progesterone, but not permanently.[7] The basic biochemical premise of Abortion Pill Reversal is that the effect of a competitive receptor *antagonist* may be "reversed" by increasing the amount of the receptor *agonist*.[8] Stated differently, the effect of competitive inhibitors (*e.g.*, mifepristone) that block substrates (*e.g.*, progesterone) can be thwarted by adding more substrate.[9] Abortion Pill Reversal is modeled on these basic principles of biochemistry.

The argument against Abortion Pill Reversal, as stated in the Complaint, is not that it is necessarily ineffective but, that there is "no evidence"—presumably beyond basic biochemistry—"that it increases the likelihood of continuing pregnancy, compared to expectant management alone." (Compl., ¶45(d).) This statement, however, is false. To begin, in 1989, Japanese researchers studied "the role of progesterone in the maintenance of pregnancy" using a population of pregnant rats. After four days, only 33.3% of the rats who received mifepristone remained pregnant—but 100% of the rats

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[6] Some of these statues were preliminarily enjoined (Compl., ¶47), but those injunctions were then superseded by statute. (See Ind. Code, § 16-34-2-1, subd. (a) ["Abortion shall in all instances be a criminal act…"]; accord Tenn. Code, § 39-15-213, subd. (b); N.D. Cent. Code, § 12.1-19.1-02.)

[7] (See Ex.15, George Delgado, et al., *A Case Series Detailing the Successful Reversal of the Effects of Mifepristone Using Progesterone* (2018) 33 Issues L. Med. 21, pp.4-5.)

[8] (See Ex. 36, Barbara J. Pleuvry, *Receptors, agonists and antagonists* (2004) 5 Neurosurgical Anaesthesia and Intensive Care, Pharmacology 350.)

[9] (See Ex. 37, John W. Pelley, Elsevier's Integrated Review Biochemistry (2d ed. 2011) 33-34.)

who were given progesterone simultaneously with mifepristone remained pregnant. The Yamabe study therefore indicated that progesterone can counteract the effects of mifepristone in blocking progesterone receptors. (Ex.10.)

Another animal study (Camilleri & Sammut) published in July 2023 supported that same conclusion. In follow up to the Yamabe study, researchers evaluated the "non-simultaneous, subsequent administration" of progesterone following mifepristone in rats. No rats who received mifepristone alone during the equivalent of human first-trimester time period remained pregnant, while 81.3% of rats who received mifepristone followed by progesterone at the same stage remained pregnant. The study concluded that "[t]he administration and actions of the national agonist, progesterone, in the presence of the antagonist, mifepristone, appears to be in concordance with the literature and our understanding of the pharmacological functioning of reversible competitive antagonism, where sufficient levels of the agonist can override a given concentration of an antagonist." (Ex.11.)

In 2012 and 2017, two small human case studies were published. In 2012, Dr. George Delgado and Dr. Mary Davenport published a small case series that followed seven women who had taken mifepristone and then received progesterone therapy after seeking medical assistance to maintain their pregnancies. Four of the six women (66%) who completed the study carried their pregnancies to term and delivered live infants. No birth defects were observed. (Ex.12.) Then, in 2017, a similar small case series out of Australia (Garratt & Turner) was published. In that series, two out of three women (66%) who received progesterone therapy after ingesting mifepristone carried their pregnancies to term and delivered healthy live infants. (Ex.14.)

In 2018, Dr. George Delgado and six co-authors published a much more fulsome case series. Relying on a prior 2017 literature review by Dr. Mary Davenport (Ex.13), the study estimated that mifepristone alone could, at absolute most, result in a 25% embryo survival rate (*overestimating* from literature consistently showing a lower 10%-23.3% range).[10] The 2018 study then analyzed the charts of 547 women who had ingested mifepristone within the last 72 hours and then received progesterone

[10] This 2017 literature review was important because it established the rate at which mifepristone fails *and* pregnancy continues. Other studies reported a higher rate for failure of mifepristone which included incomplete abortions—i.e., where the fetus is deceased but was not expelled and instead required surgical evacuation. (See Ex.13.)

therapy. (207 women from the initial 754 were excluded for control purposes.) The study found an overall fetal survival rate of 48%. The study showed even higher survival rates when the patients were divided into treatment subgroups. The subgroup that received progesterone intramuscularly showed fetal survival rates of 64%, and the subgroup that received a high dose of oral progesterone followed by daily oral progesterone until the end of the first trimester had survival rates of 68%. (Ex.15.)

The 2018 Delgado study also found no increased risk of birth defects after progesterone therapy, consistent with other studies that have found no increased incidence in birth defects in infants born after exposure to mifepristone in the first trimester, and consistent with the FDA. (See Ex.20, FDA, Mifepristone Label, p.9.) The study also found that the rate of preterm delivery among women who received progesterone was 2.7%, compared with a 10% average in the general population. (Ex.15.)

The Attorney General pressed another human study in his Complaint, published by Dr. Mitchell Creinin in 2020. Creinin attempted to perform a double-blind study. All women were to take mifepristone, with some women then taking supplemental progesterone and some taking a placebo, but he halted his study due to hemorrhaging in the placebo group. He enrolled only twelve patients—six in each group. One per group voluntarily exited the study for "subjective symptoms." In the progesterone group, 80% (4/5) had ongoing pregnancies at the conclusion of the study, compared to 40% (2/5) in the placebo group. (Ex.16.) A scoping review was also published in July 2023, which reviewed the existing scientific literature and concluded that there was "no increased maternal or fetal risk from using bioidentical progesterone in early pregnancy," and that "mifepristone antagonization with progesterone is a safe and effective treatment." (Ex.17.)

Finally, media reports show some general acceptance of Abortion Pill Reversal in the medical community. Dr. Harvey Kliman, the director of the reproductive and placental research unit at the Yale School of Medicine, told the New York Times that using progesterone to reverse the effects of mifepristone "makes biological sense." Dr. Kliman further stated that "if one of his daughters came to him and said she had somehow accidentally taken mifepristone during pregnancy … he would tell her to take 200 milligrams of progesterone three times a day for several days, just long enough for the mifepristone to leave her system: 'I bet you it would work.'" (Ex.18.)

An instructive, though tragic, example occurred in Nevada in 2019. A CVS pharmacy in Nevada

engaged in a series of errors leading to the mistaken dispensing of misoprostol to a woman who was supposed to receive progesterone to support her IVF implantation attempt. After she began suffering cramping, she searched online and discovered that she had been given the wrong drug. She called CVS which "told her" that "she needed to take progesterone injections"—concurring with the recommendation of "a hotline for abortion pill reversal"—and "[t]he next day, CVS had a technician hand-deliver the injections to her residence." Unfortunately, she lost her pregnancy, but CVS knew exactly what to do to give her a chance at continuing her pregnancy. (Ex. 19.)

In light of the biochemistry and the above studies, Abortion Pill Reversal has been endorsed by the American Association of Pro-Life Obstetricians & Gynecologists, the Catholic Medical Association, and Canadian Physicians for Life. (Ex.4, APR Provider Kit, App. 2, pp.6-19.)

C. Facts Relevant to Personal Jurisdiction

Heartbeat International, Inc., is a trade organization for life-affirming pregnancy help organizations. (Godsey Decl., ¶2.) Heartbeat "is a 501(c)(3) charitable organization that" provides trade organization representation for "the 'most expansive network' of 'pro-life pregnancy resource centers' and has 'over 3,000 affiliated pregnancy help locations,' including over 2,000 locations throughout the United States." (Compl., ¶10.) Heartbeat is "incorporated and has its principal place of business in Columbus, Ohio." (Compl., ¶10.) "Since 2008, defendant [Heartbeat] has been registered with the California Secretary of State as doing business in the state." (Compl., ¶17.)

Heartbeat itself neither owns nor operates any affiliated pregnancy help organizations. Rather, like any trade organization, Heartbeat creates and maintains resources, including but not limited to model policies and procedures for use by its members. To obtain access to Heartbeat's resources, affiliates pay a $300 membership fee every two years. (Godsey Decl., ¶3.) To better assist its affiliates, Heartbeat also started "Option Line," which is a contact center for women seeking pregnancy-related help. Heartbeat also developed "Next Level CMS," a management software program for Pregnancy Centers, that is a paid subscription-based service, not part of regular membership. (Godsey Decl., ¶¶4-5.)

Heartbeat also "owns and operates the Abortion Pill Rescue Network ('APRN') as well as the Abortion Pill Reversal ('APR') hotline" (Compl., ¶10) which, as stated above, were founded by Dr. Delgado in 2012. Heartbeat acquired the "Abortion Pill Reversal Network" from Dr. Delgado in April

2018. (Godsey Decl., ¶6.) The APR Network maintains a listing of physicians or other medical providers who are willing to assist a woman who wishes to try reversing the effects of mifepristone. (Godsey Decl., ¶¶7-10.) The APR Network is *independent* of Heartbeat's affiliate membership and includes many medical professionals who are not associated with any Pregnancy Center—whether an affiliated clinic or not. (Godsey Decl., ¶¶10-11.)

Heartbeat receives no kickback or other payment for referring a woman to a physician in the APR Network. Referral of APR patients is not a "benefit" of affiliate membership; any Pregnancy Center could cease being a dues-paying affiliate and remain part of the APR Network. (Godsey Decl., ¶11.) Contrary to the allegations in the complaint, Heartbeat does not sell any "kits" relating to Abortion Pill Reversal. (Godsey Decl., ¶12; see Compl., ¶¶71, 101.) Those kits are made available for free to any medical professional (whether affiliated with a Pregnancy Center or not) who joins the APR Network. No payment is made to or from Heartbeat when a medical professional joins the APR Network. (Godsey Decl., ¶12; Hill Decl., ¶4.)

D. The Pleaded Allegedly Wrongful Conduct

The Complaint pleads that, by advocating for Abortion Pill Reversal, Heartbeat has violated the False or Misleading Advertising Law ("FAL"), Bus. & Prof. Code, § 17500 (see Compl., ¶¶96-98), and the Unlawful, Unfair, and Fraudulent Business Competition Law ("UCL"), Bus. & Prof. Code, § 17200 (see Compl., ¶¶99-101). With respect to the UCL, the Complaint alleges two distinct violations: (1) that Heartbeat has engaged in misleading advertising to the public (Compl., ¶100(a)), and (2) that Heartbeat has been "[f]raudulently representing"—to individual women—that APR is safe and effective. (Compl., ¶100(b).)

For purposes of this motion, the substance of the six distinct alleged misrepresentations is not directly relevant. (See Compl., ¶¶97, 100.) Rather, the Complaint contains nine pages describing the context in which the allegedly misleading or fraudulent representations were made by Heartbeat. (See Compl., ¶¶49-86.) First, the Complaint alleges that Heartbeat operates a passive APR website, which also includes a livechat feature and a hotline phone number. (*Id.*, ¶¶53-61; citing Ex.1[11].) Next, the Complaint alleges that Heartbeat operates a single webpage on its main website, that refers to APR (and

[11] www.abortionpillreversal.com.

links to the APR website). (*Id.*, ¶¶62-67; citing Ex.2[12].) The Complaint next describes Heartbeat's "policies and procedures manual" to explain the alleged misrepresentations that individuals who participate in the APR livechat or hotline are likely to hear. (*Id.*, ¶¶68-70; citing Ex.3.)

The Complaint next describes the "APR Healthcare Professional Kit" that Heartbeat makes available to practitioners in its APR network. (*Id.*, ¶¶71-81; citing Ex.4.) The Complaint then discusses "media appearances" by Heartbeat personnel, on the Ohio Right to Life Podcast (*id.*, ¶¶83-84; citing Ex.5[13]), and the Texas-based Help Her Be Brave Podcast. (*Id.*, ¶¶85-86; citing Ex.6[14].) None of the allegations in these paragraphs assert that Heartbeat is directing the contents of these websites or documents to California (nor does anything in the websites or documents intimate as much).

III. LEGAL STANDARD

A defendant has a "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'" (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471-472; quoting *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 319.) In light of this, a California court may only exercise personal jurisdiction consistent with both the California Constitution and the U.S. Constitution. (Code Civ. Proc., § 410.10; *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) 582 U.S. 255, 261 & fn.1 ["*BMS*"].)

Where a defendant—whether an individual or corporation—"is fairly regarded as at home," that state has "general" or "all-purpose" personal jurisdiction over the defendant. (*BMS*, *supra*, 582 U.S. at 262.) But if the defendant is a nonresident, then the state may only exercise "specific," "limited," or "case-linked" jurisdiction over it. (*Id.*) In order for a state court to exercise personal jurisdiction in this manner, "there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (*Id.*, quotation marks and brackets omitted.)[15]

Under specific personal jurisdiction, three elements must be satisfied. "First, the defendant

[12] www.heartbeatinternational.org/our-work/apr.
[13] https://soundcloud.com/ohio-rtl/pro-life-ohio-podcast-the-push.
[14] https://www.youtube.com/watch?v=4ifSrVHK9q4.
[15] The "designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction." (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1095.)

must have purposefully availed itself of the privilege of conducting activities in this state, thus invoking the benefits and protections of our laws. Second, the underlying dispute must be substantially connected to or arise out of the defendant's contacts with this state. Third, the court must be satisfied that an exercise of jurisdiction would be reasonable and fair, consistent with notions of fair play and substantial justice." (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 115 ["*Automobile Antitrust Cases*"].)

For purposes of the personal jurisdiction analysis, the complaint "defines the cause of action, the nature of which has some bearing upon the decision whether it is fair and reasonable to require the nonresident parties to appear and defend in this state." (*Lundgren v. Superior Court* (1980) 111 Cal.App.3d 477, 485.) Then, the personal jurisdiction analysis proceeds with respect to each claim for relief. (See *BMS*, *supra*, 582 U.S. at 258.) "A court can have specific jurisdiction over a defendant for some claims but might not have general or specific jurisdiction over a defendant for other claims even if they are between the same parties." (*VHS Liquidating Trust v. Blue Cross of California* (Cal. Super. Ct., Alameda Cnty., Sep. 15, 2022, No. RG21-106600) 2022 WL 4445330, at *3 [Grillo, J.].)

"For this purpose it is useful to distinguish between the legal theories of recovery and the underlying 'tortious act' or 'transaction' that is the 'controversy.' A 'controversy' for purposes of specific jurisdiction is similar to a 'cause of action' for purposes of claim preclusion (res judicata) in that both are defined by the relevant facts and circumstances." (*Id*., citations and footnotes omitted.) The specific jurisdiction inquiry "require[s] an analysis that is focused on the 'controversy.' This means that when a complaint includes causes of action against several defendants arising out of several controversies … that the court must address and consider special jurisdiction for each controversy separately." (*Id*. at *5; citing *LG Chem, Ltd. v. Superior Court* (2022) 80 Cal.App.5th 348.)

Further, "[w]hen assessing minimum contacts for jurisdictional purposes, each defendant's contacts with the forum state must be assessed individually." (*People v. Cole* (2003) 7 Cal.Rptr.3d 333, 363; see also *Automobile Antitrust Cases*, *supra*, 135 Cal.App.4th at 118.)[16] "[A] defendant's relationship

[16] In *People v. Cole*, the trial court quashed service of summons and the Court of Appeal affirmed. The California Supreme Court then granted review to address an issue other than personal jurisdiction (*People v. Cole* (Cal. 2004) 10 Cal.Rptr.3d 535), and affirmed. (*People v. Cole* (2006) 38 Cal.4th 964.) Because the California Supreme Court did not address the personal jurisdiction analysis, let alone repudiate it, it remains citeable. (Cal. Rules of Court, rule 8.115, subd. (e)(2).)

with a … third party, standing alone, is an insufficient basis for jurisdiction." (*BMS*, *supra*, 582 U.S. at 268.) "California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party." (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1760.) "The plaintiff must 'present facts demonstrating that the conduct of defendants *related to [each of] the pleaded causes* is such as to constitute constitutionally cognizable "minimum contacts."'" (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090-1091; quoting *Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710.)

When personal jurisdiction is lacking, "[a] defendant … may serve and file a notice of motion … [t]o quash service of summons on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc., § 418.10, subd. (a)(1); *Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 796-797.) In response to such a motion, the plaintiff has the burden to establish, by a preponderance of the evidence, "that minimum contacts exist between the defendant and the forum state to justify imposition of personal jurisdiction." (*Greenwell v. Auto-Owners Ins. Co.* (2015) 233 Cal.App.4th 783, 789, citation omitted.)

IV. ARGUMENT

As stated above, the propriety of a court exercising personal jurisdiction turns on answering three questions, with respect to each set of facts (a "controversy") alleged in the complaint.

> First, the defendant must have purposefully availed itself of the privilege of conducting activities in this state, thus invoking the benefits and protections of our laws. Second, the underlying dispute must be substantially connected to or arise out of the defendant's contacts with this state. Third, the court must be satisfied that an exercise of jurisdiction would be reasonable and fair, consistent with notions of fair play and substantial justice.

(*Automobile Antitrust Cases*, *supra*, 135 Cal.App.4th at 115.)

Regarding the first question of "purposefully availed," the general requirement is "satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, *by virtue of the benefit he receives*, to be subject to the court's jurisdiction based on his contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269, italics added, quotation marks omitted.) However, for "intentional torts, including business torts," California courts apply the "effects test." Under this test, a plaintiff must demonstrate both (1) "intentional conduct expressly aimed at or targeting the forum state" and (2) "defendant's knowledge that his

intentional conduct would cause harm in the forum." (*Id.* at 270-271.) Specific knowledge is required; reasonable foreseeability is insufficient. (*Id.* at 271, fn.1.)

Here, there are three distinct controversies for which Attorney General Bonta must establish personal jurisdiction over Heartbeat. These are alleged misrepresentations: (1) on Heartbeat's websites, and follow-up hotline and live chat; (2) in Heartbeat's media appearances; and (3) in Heartbeat's APR Healthcare Professional Kit. Thus, Heartbeat moves to quash each of these separately, but the Court should grant its motion to quash in full, as to all three.

A. The Websites, Hotline, & Live Chat Do Not Arise in California & Are Not Directed to California

First, as stated above, the Complaint references Heartbeat's websites, which in turn direct women to its hotline and livechat. (Compl., ¶¶52-70.) Both the text of the Complaint and the websites themselves make clear that Heartbeat's two websites are passive, national, websites. They are directed towards a national audience—not a California audience. (See Ex.1, Printout of APR website; Ex.2; Printout of Heartbeat website.) Thus, it is generally not fair to contend that Heartbeat's websites constitute "purposeful availment" of the privilege of conducting activities in California. (*Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254, 1260.)

The personal jurisdiction analysis regarding websites uses a "sliding scale analysis." (*Pavlovich*, *supra*, 29 Cal.4th at 274.) On one end, "[i]f the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper." (*Id.*) At the other end of the sale, "[a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." (*Id.*, brackets omitted.) "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." (*Id.*)

Based on this, courts have held that maintaining a passive website, with a phone number to call to purchase goods, is not sufficient to establish personal jurisdiction in California. (*Shisler*, *supra*, 146 Cal.App.4th at 1261 [no personal jurisdiction over Florida auto dealership with passive website saying it

will ship "worldwide," in suit over sale of vehicle to California resident]; *Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1058 [defamatory articles posted on passive website not sufficient for personal jurisdiction]; *Pebble Beach Co. v. Caddy* (9th Cir. 2006) 453 F.3d 1151, 1157 [owner of foreign bed and breakfast not subject to personal jurisdiction for trademark infringement action in California based on passive website that could not accept payment].) As indicated in *Shisler*, the fact that the website includes a telephone number, and thereby creates a means for further contact by anybody worldwide, is not sufficient to establish purposeful availment of the California market. In that context, California is reaching out to Ohio—not vice versa.

Indeed, the only function that the website, livechat, and hotline perform is to provide a referral to a California physician. But the mere out-of-state "referral of a patient to a California doctor" is not a sufficient basis for personal jurisdiction. In that context, the controversy does not arise in California, and the traditional notions of fair play and substantial justice do not warrant exercising personal jurisdiction. (See *Spokane Eye Clinic, Inc., v. Superior Court* (1976) 63 Cal.App.3d 548, 551-555.) If the out-of-state referring doctor is receiving ongoing kickbacks, that may change the analysis. But where the referrer received "no economic benefit from the referral," which was made solely "for the patient's benefit," it is inequitable and unfair to hale the referrer into California. (See *id.* at 552-553.)

Here, as stated above, Heartbeat maintains a passive website with a referral service. (Godsey Decl., ¶8.) Any woman in need of help, nationally or internationally, may call and seek a referral. That service is provided free of charge—made possible entirely by Heartbeat's charitable benefactors. (Godsey Decl., ¶¶9-11.) Heartbeat receives no benefit, and causes no harm. (*Bella Health and Wellness v. Weiser* (D. Colo., Apr. 15, 2023, No. 1:23-cv-939) 2023 WL 2978108, at *2 ["*Bella I*"] ["[T]his treatment does not appear to pose severe health risks to patients who receive it"].) In that context, there is no personal jurisdiction over Heartbeat in California.

B. The Ohio and Texas Podcasts Did Not Arise in California & Were Not Directed at California

The Complaint next discusses two appearances by Heartbeat personnel on Podcasts. (Compl., ¶¶82-86.) In the first, the interviewer (Ohio Right to Life) was located in Ohio and the interviewees (Heartbeat) were located in Indiana and Ohio. (Godsey Decl., ¶22.) In the second, the interviewer

(Help Her Be Brave) was located in Texas and Heartbeat was located in Ohio. (Godsey Decl., ¶23.) The podcasts did not "arise" in California. Moreover, there is nothing in the Complaint, or the podcasts themselves, that create any indication that they were directed at California. (Ex.5, Transcript of Ohio Right to Life Podcast; Ex.6, Transcript of Help Her Be Brave Podcast.) Thus, by appearing on these podcasts, it cannot be asserted that Heartbeat "purposefully availed" itself of the California market, or intentionally caused an effect that would be felt in California. (*Sipple v. Des Moines Register & Tribune Co.* (1978) 82 Cal.App.3d 143, 151-152 [quashing invasion of privacy suit against Iowa newspaper for publishing article]; *Cenegenics LLC v. Gaines* (D. Nev., June 12, 2020, No. 2:19-cv-1797) 2020 WL 3128574, at *4 [no personal jurisdiction in business disparagement claim regarding podcast, where podcast was not recorded in forum state].)

C. The APR Healthcare Professional Kit Is Not Directed Towards California

Lastly, the Complaint discusses the APR Healthcare Professional Kit provided as a resource to practitioners who have joined Heartbeat's APR network. (Compl., ¶¶71-81.) As stated above, the allegation that Heartbeat "sells" this kit is false. (See Ex.4, APR Healthcare Professional Kit.) The Kit provides general background information about the abortion pill and Abortion Pill Reversal, and includes generic informed consent forms. On its face, the Kit makes clear that it is a guidance document: "APR Clients referred to you from the Hotline Rescue Team will have some general information about the APR Protocol. However, please be aware that <u>you are assuming their care from this point forward</u>." (Ex.4, APR Kit, p.7, original emphasis; see also *id.* at p.7 ["Ultrasounds every 1-2 weeks until the end of the 12th week or *as necessary per your judgment*."], emphasis added; *id.* at p.9 ["*Providers should use their own professional judgement* based on experience prescribing progesterone."], emphasis added.)

Here, Heartbeat's APR Healthcare Professional Kit is not presented to patients specifically or the public generally. (Godsey Decl., ¶13.) It is not public facing, and therefore cannot form the basis of a "misleading advertising" claim. (See Bus. & Prof. Code, § 17500 ["It is unlawful for any person, firm, corporation or association … with intent … to perform services … to make or disseminate or cause to be made or disseminated before the public in this state … any statement, concerning … those services … which is untrue or misleading"].) The relevance, therefore, of the APR Kit can only be to the

"fraudulent" prong of the UCL claim. (See Compl., ¶100(b).)[17] In that respect, Heartbeat does not *use* the APR Kit—whether in California or elsewhere—it only makes it available for use by APR medical professionals. (Godsey Decl., ¶12.) Thus, the Complaint pleads that "each training kit *sold* to affiliates … constitutes an unlawful, unfair, and/or fraudulent business practice." (Compl., ¶101, emphasis added.)

This is the Complaint's necessarily alleged jurisdictional hook—that Heartbeat is engaged in the business of selling a product into California: its APR Healthcare Professional Kit. (See *Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 549 [with respect to charitable acts of providing "temporary housing" or "driving her to the airport": "Even if these acts and omissions were [technically] wrongful, and even if they were done 'fraudulently,' they simply were not such as would permit a California court to exercise jurisdiction over nonresident defendants."]; *Kulko v. Superior Court of California* (1978) 436 U.S. 84, 93-94 [no personal jurisdiction over parent who sent child to live with other parent in California, because out-of-state parent received no "financial benefit" from sending child to California].) But that fact is just categorically wrong. (Godsey Decl., ¶12.) "[T]he plaintiff cannot demand that we judge the question of jurisdiction in the light of a claim he apparently does not have." (See *J.M. Sahlein Music Co. v. Nippon Gakki Co., Ltd.* (1987) 197 Cal.App.3d 539, 545, quotation marks omitted.)

V. CONCLUSION

For the foregoing reasons, Heartbeat respectfully requests that the Court grant its motion to quash service of summons, in full or in part.

[17] When analyzing personal jurisdiction, the merits of a claim are minimally relevant because "when in personam jurisdiction is claimed on the basis of a foreign defendant's alleged forum-related activities in connection with the cause of action pleaded, facts relevant to the question of jurisdiction often bear upon the basic merits of the complaint." (*Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430, 1441.) Thus, for example, when describing facts relating to a group of defendants, to establish personal jurisdiction, the plaintiff is "required to produce evidence that the actions of [the defendants] were of the type that could result in personal liability to show that personal jurisdiction was proper against the individual defendants." (*People v. Cole* (2003) 7 Cal.Rptr.3d 333, 366.)

Respectfully submitted,

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