

**J.P. TURNBULL, et al., Plaintiffs, v. AMERICAN BROADCASTING
COMPANIES, et al., Defendants.**

NO. CV 03-3554 SJO (FMOx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

2004 U.S. Dist. LEXIS 24351; 32 Media L. Rep. 2442

August 19, 2004, Decided
August 19, 2004, Filed

DISPOSITION: Defendants' motions for summary judgment granted in part and denied in part.

COUNSEL: For J P Turnbull dba Actorsite, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Robert Bruce, (RB) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Daniel Gunther, (DG) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Pasquale Chiarappa, (PC) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For John Michael Herndon, (JH) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Rick Karatas, (RK) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Andrew Rolfes, (AR) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Kevin Sateri, (KS) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson &

Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Larry Varanelli, (LV) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Sharon Johnston, (SJ) aka Jane Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Kerry Kimble, (KK) aka Jane Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy [*3] Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Gina Seiferth, (GS) aka Jane Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Linda Shing, (LS) aka Jane Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For E Laura Taylor, (ET) aka Jane Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For Larry Weissman, (LW) aka John Doe, Plaintiff: Brian Anthony Rishwain, Johnson & Rishwain, Los Angeles, CA; James Timothy Ryan, Johnson & Rishwain, Los Angeles, CA; Neville L Johnson, Johnson & Rishwain, Los Angeles, CA.

For American Broadcasting Companies Inc, Defendant: Lynn H Scaduto, Munger Tolles & Olson, Los Angeles, CA; Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, [*4] Munger Tolles & Olson, Los Angeles, CA.

For Brian Ross, Defendant: Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

For Yoruba Richen, Defendant: Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

For Jill Rackmill, Defendant: Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

For Colin Hill, Defendant: Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

For Tom Marcyes, Defendant: Randall Gerson Sommer, Munger Tolles & Olson, Los Angeles, CA; Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

JUDGES: S. JAMES OTERO, UNITED STATES DISTRICT JUDGE.

OPINION BY: S. JAMES OTERO

OPINION

ORDER RE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This case stems from the unauthorized surreptitious recording of Plaintiffs' voices and likenesses by Defendants American Broadcasting Companies, Inc., *et al.* ("ABC"). Defendants ABC broadcast portions of the recordings as part of its news program 20/20 in a segment entitled "Pay to Play." (See Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts, *hereinafter* "PRDUF," P 15.) Defendants filed two Motions for Summary Judgment. The first motion, entitled Motion for Summary Judgment as to Plaintiffs' Claims ("First Motion" or "Motion Re: Claims") addresses the following issues:

(1) Whether the recorded statements and conduct were confidential within the meaning of Cal. Penal Code § 232.

(2) Whether Defendants intruded upon a private place, conversation or other matter in a manner that is highly offensive to a reasonable person;

(3) Whether Defendants' conduct was "extreme and outrageous" as the term is understood within the context of Plaintiffs' claim for intentional infliction of emotional distress;

(4) Whether Plaintiffs' claim for trespass was vitiated by Plaintiff J.P. Turnbull's consent;

(5) Whether summary judgment is warranted on Plaintiffs' claims for invasion of privacy under Cal. Civ. Code 1708.8; and

(6) Whether it is appropriate for the court to enter an injunction against Defendants barring the use of hidden cameras as a "news gathering tool." (Defendants' First Motion, pp. 1-2.)

[*6] The second motion filed by Defendants is styled "Motion . . . For Summary Judgment As To Plaintiffs' Claims For Publication Damages, Disgorgement, and Punitive Damages" ("Second Motion" or "Motion Re: Damages.") Defendants' Second Motion argues:

(1) The First Amendment precludes recovery of publication damages in the absence of proof that the publication at issue contained a false statement.

(2) Defendants also claim the report is privileged under Cal. Civ. Code § 47(d).

Moreover, Defendants argue

(3) That disgorgement would be an improper remedy because the report was not "commercial" as that term is understood in connection with the First Amendment; and

(4) Plaintiffs' claims for punitive damages must fail because there is inadequate evidence of malice, oppression, or fraud. (Defendants' Second Motion, pp. 1-2.)

The matter came before the court for a hearing on Monday April 26, 2004. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the court finds this matter appropriate for decision without oral argument. Having carefully weighed the facts and arguments presented by counsel for both sides, Defendants' Motions for Summary Judgment are hereby DENIED in part and GRANTED in part.

I. BACKGROUND

Defendants ABC surreptitiously recorded the voices and images of Plaintiffs in connection with a television program that aired November 8, 2002 entitled 20/20 "Pay to Play" (the "show" or the "program"). The program opens with a shot of a man posing as a news anchor, reciting "the old cliché" about actors who "sleep their way to the top" in Hollywood. (Yoruba Decl. Ex. A, Tape of Program.) Now, the anchor explains, "there is another way" to succeed in Hollywood. (*Id.*) He recounts that in the days of Lana Turner, actresses would trade sexual favors in exchange for a part in a movie. (*Id.*) According to the program, "the casting couch is being replaced" by a new system -- "buy your way in." (*Id.*) Aspiring actors and actresses, the anchor tells us, now pay to meet casting directors instead of trading sexual favors on the infamous "casting couch." (*Id.*) The program states that the price tag for meeting a casting director in Hollywood is usually twenty-five to forty-five dollars. ¹ (*Id.*) Introducing the "undercover" portion of the story, the anchor informs the audience that these transactions take part in a distinctly "unglamorous part of Los Angeles." (*Id.*)

----- Footnotes -----

¹ The price of admission for one of the sessions was ninety-five dollars. (Perry Decl., Ex. 6.)

----- End Footnotes -----

Plaintiffs complain Defendants invaded their privacy by secretly recording conversations and other activities in order to produce hidden camera footage for a sensationalist news story about casting workshops. Plaintiffs contend the program made them look like "whores," or desperate losers on the fringe of the acting community in Los Angeles. (*See e.g.* Opp. to Motion Re: Damages, at p. 3.) However, Plaintiffs' claims do not rest solely on what was aired during the program. Plaintiffs focus on the alleged intrusion of privacy rather than the broadcast of the program. There is no claim for defamation. Plaintiffs aver

(1) violation of Cal. Penal Code § 632; (2) common law intrusion; (3) intentional infliction of emotional distress; (4) trespass; (5) violation of Cal. Civ. Code § 1708.8(a)&(b); and (6) violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* (Second Amended Complaint (*hereinafter* "SAC"), pp. 9-15).

A. Undisputed Facts

On January 22, 2002, California's Division of Labor Standards Enforcement ("DLSE") sent a letter to Mr. Billy Damota. (Perry Decl., Ex. 2; *see also* PRDUF, P 1.) The letter responds to a complaint filed by Mr. Damota regarding casting director workshops described in the show ("workshops"). (*See id.*) Mr. Damota is featured in the 20/20 episode. (Yoruba Decl. Ex. A, Tape of Program.) He is described as the individual responsible for spearheading a campaign against the businesses profiled in the program. (*See id.*) The DLSE letter to Mr. Damota states that the workshops' business practices, as described by Mr. Damota, violate Sections 450 and 451 of the California Labor Code. (Perry Decl., Ex. 2.) According to the letter, the statutory "language . . . broadly prohibits employers . . . from exacting any payment from an applicant or employees as a condition to his or her obtaining or continuing employment. As you [Mr. Damota] describe the process, the fee paid by actor participants of these workshops, is for an interview and/or audition before the particular casting director, and has little to do with the improvement of the actor's craft." (*Id.*)

On February 21, 2002, the DLSE issued a cease and desist letter to fourteen workshops. (Perry Decl. Ex. 3; *see also* PRDUF, P 3.) The letter states that "in response to an inquiry concerning the legality of the practice of certain persons and entities in Southern California who conduct so called "Casting Director Cold Reading Workshops, the primary and overriding purpose of which is to extract fees from veteran and aspiring actors for the opportunity to audition before casting directors in the entertainment industry . . . this practice . . . constitutes a clear violation of the provisions of section 450 of the California Labor Code." (Perry Decl., Ex. 1.)

ABC conducted hidden camera taping at some of the casting workshops in March 2002. (Johnson Decl., Ex. 19, Rackmill Dep. at 47:5-10.) To the disappointment of Mr. Damota, ABC decided to wait until November and broadcast the show during the fall "sweeps period." (Johnson Decl. Exs. 37 & 38.) In the months between Defendants' surreptitious taping of Plaintiffs' activity and the November airing of the show, the DLSE announced new regulations requiring, *inter alia*, the announcement of a disclaimer at the start of each class regarding the educational nature of the workshops. (See e.g. Perry Decl. Exs. 3,4 & 5.) The DLSE and the workshops subsequently came to an agreement over the continued operation of the workshops. (*See id.*) Defendants did not cover the public hearings related to the DLSE action. (*See e.g.* Ex. A.; *and* Johnson Decl., Ex. 22, Richen Dep. at 51:25-52:20.) In the November broadcast of the program, Defendants did not include any mention the DLSE acquiescence to continued operation of the workshops under the new guidelines. (*Id.*) Plaintiffs claim that the program does not really qualify as investigative journalism due to ABC's failure to cover the DLSE investigation, their alleged inability to abide by standard journalistic ethics and ABC's failure to follow their

own guidelines. (PRDUF, PP 254-83.)

----- Footnotes -----

² Defendants recorded John Michael Herndon reading a lengthy disclaimer prior to the start of a workshop on March 11, 2002. (Johnson Decl., P 43, Lodged Footage Ex. D.) The disclaimer provided, *inter alia*, "this is not an employment situation. As an evening with a Casting Director, assistant or associate, or anyone from a casting office -- it is a learning experience . . . the presence of a casting individual is not a guarantee of employment, audition, . . . or even getting a smile-on a Monday night." (*Id.*; PRDUF P 287.)

----- End Footnotes-----

The program includes excerpts of interviews with: (1) workshop representatives; (2) actors who supported the workshops; (3) a casting director who had been a vocal critic of the workshops; and (4) a board member of the Screen Actors Guild who was supportive of the DLSE's efforts to reform the workshops' practices. (PRDUF P 16; Richen Decl., Ex. A.) The program also includes undercover footage shot by Yoruba Richen, an ABC producer with an acting background. (PRDUF, P 17; Richen Decl. P 5 & Ex. A.) She attended workshops in Los Angeles as part of ABC's "investigation." (*Id.*)

Ms. Richen paid the admission fee for each workshop she attended, like her fellow workshop participants. (*Id.* P 20; Richen Decl. P 6; Perry Decl. Ex. 6, sign-in sheets for March 7 & 9.) Plaintiff Larry Weissman and the majority of Co-Plaintiffs attended the workshops as well. (*See e.g.* Perry Decl., Ex. 26; *and* Neville Decl. Ex. 10, Dep. of Larry Weissman.) Mr. Weissman stated that part of the reason why he attended the workshops was:

because when you . . . go to the workshops, you get to learn about the different offices and how their procedures and policies work. Each office is different, and some offices when you audition, they may film you so you need to know that before you go in, it's best if maybe you powder your forehead or your nose if you're shiny . . . And . . . you don't wear orange or white. . . . You find out what offices may partner you up when you go in so you know you could have a little more free range, free emotional range with a partner whereas if you're working with a casting director, they don't want . . . you to come within their personal space. (Perry Decl. Ex. 26, Weissman Dep., pp. 19-20.)

When asked whether he attended the workshops to become better known, Mr. Weissman answered "I wouldn't say better known. It's a hope that you're remembered when your agent submits you for a role and something about the picture strikes them. It may not be clear to them oh, yeah, I met this person five months ago, but the picture may stand out because there's some familiarity with that." (Perry Decl., Ex. 26; *and* Neville Decl., Ex. 10, Dep. of Larry Weissman, pp. 20-21.)

The basic activities at the workshops included a casting director giving a talk, questions and answers between the actors and the casting director, and "doing scenes." (Perry Decl.,

Ex. 21, Gunther Dep. 32:1-23.) Richen recorded the performances actors made in front of the casting director and class; conversations between actors while they were waiting for performances to begin (Richen Decl., P 10); personal conversations between workshop participants to which Richen was not a party; as well as instruction and feedback casting directors gave to the actors. (Johnson Decl., P 41; Notice of Lodging "B," "C," & "D.") Richen did not tell anyone at the workshops that she was wearing a hidden camera or planned to wear a hidden camera. (Johnson Decl., Ex. 22, Richen Dep. at 10:2-22 & 137:2-5)

A wide variety of interactions were secretly recorded by ABC. (Notice of Lodging "B," "C," & "D.") Richen even filmed a journey into the womens' lavatory. (Notice of Lodging "B.") Viewing the tapes, some conversations are overheard from across the room as two people talk in a corner, or while their backs are turned to Ms. Richen, apparently unaware that an ABC News reporter is recording their every word. Richen is directly privy to some of the conversations. Plaintiff Karatas, for example, is recorded directly in front of the camera explaining that he is too tired at night to write down his goals. (*See id.*) Plaintiffs object to the very fact that their presence at the workshops was recorded. (PRDUF, P 297.)

Plaintiff Kevin Sateri was recorded while performing a bit where he pretended to squawk like a chicken. (Richen Decl., Ex. A; PRDUF P 74.) Sateri's chicken performance became part of the program aired in November 2002. (Richen Decl., Ex. A) Most of the conversations and activity recorded by Defendants, however, did not make it into the program. Approximately 2 minutes and 53 seconds of hidden camera footage were incorporated the program. (Richen Decl., Ex. A.) The entire program is approximately 10 minutes and 10 seconds long. (*Id.*)

The sign-in sheet for "actorsite.com," dated March 11, 2002, included the following acknowledgment: "I am here to practice my acting in a professional atmosphere and sharpen my craft, I am here to hone my audition techniques." (Perry Decl. Ex. 6, p. 29.) Ms. Richen signed that sheet and attended the related workshop on March 11, 2002. (*See id.*) The sign-in sheets for the other workshops attended by Ms. Richen did not contain a similar acknowledgment. (*See id.*) Ms. Richen's primary purpose in attending the workshops was to do a story on the workshops, not to practice her acting. (Johnson Decl., Ex. 22, Richen Dep. at 20:17-20.)

Defendants captured a number of private conversations on tape, including a conversation between Plaintiff Larry Weissman and Rick Karatas. (Johnson Decl, Ex. 6, Karatas Dep. at 34-38; Weissman Dep. at 53-55; *and* Notice of Lodging "B.") Mr. Karatas was recorded during that conversation making an offensive and overtly sexual comment to Mr. Weissman. (*Id.*; PRDUF P 299.) Plaintiff Kevin Sateri feels that ABC obtained information about his sexual orientation that he prefers to remain private. (*See Sateri Dep. at 64-65.*) Plaintiff E. Laura Taylor kept the fact that she attended the workshops to herself. (Johnson Decl., Ex. 14, Taylor Dep. at 31:12-22.)

ABC captured a private conversation Taylor had with a fellow actor regarding private

financial matters. (Johnson Decl., Ex. 14, Taylor Dep. at 64-65; Notice of Lodging "B.") Plaintiff Pasquale Chiarappa was recorded talking about an experience at a "producers' session" for a television program. (Perry Decl. Ex. 8, Answers to Interrogatories, at 2.) Mr. Chiarappa explained that there were more people present at the session than he expected and, he said, "I let it freak me out." (*Id.*) Ms. Johnston was recorded making the following comments:

The parts I was playing were trailer trash . . . It took me forever to figure that out. Here I am trying to squeeze into ingenue for years going "It's not flying." . . . I call this my workshop uniform. But they don't have to know that. Everybody sees me in a different way than they do. But I actually was going through my t-shirts today. . . . There's the top shelf t-shirts which I don't wear too much but I like them. There's the middle shelf, which I can get dirty because I get very dirty doing everything I do. And there's the bottom which is already painted in them or dyed my hair in them. It's like there's different levels of bad. That's pretty much my wardrobe. I don't even wear this around the house because I have 11 animals. (Perry Decl., Ex. 16, Answer to Interrogatories at 2-3; Johnson Decl., Ex. 11, Notice of Lodging "B"; Johnston Dep. at 35:8-36:19, 38:4-39:22.)

Other conversations and comments were recorded by ABC. But the conversations and events are too numerous to recount here.

Brian Ross is the Chief Investigative Correspondent at ABC News. (Johnson Decl. Ex. 23, Ross Dep. at 155-156:4.) He is one of the individuals who decided to do the story and decided to use hidden cameras for the program. (*See e.g.*, Johnson Decl., Ex. 23, Ross Dep. at 188:10-189:2.) Ross never believed hidden camera footage was integral to the story, but thought using hidden cameras "was the most effective way to tell the story." (*Id.* at 63:25-64:7.) Ross would not have scrapped the story if he could not have used hidden cameras. (*Id.* at 64:19-22.)

ABC's practices and procedures manual requires someone to submit a detailed proposal for prior approval if that person intends to use a hidden camera for a story. (PRDUF P 209; Johnson Decl., Ex. 23.) In the instant case, the proposal was submitted orally. (Johnson Decl., Ross Dep. at 178:17:21.) David Sloan is the executive produce of 20/20. (Johnson Decl., Ex. 18, Sloan Dep. at 11:12-21.) Mr. Sloan approved of the program and the use of hidden cameras. (*Id.* at pp. 12-17.) Mr. Sloan understands that the use of hidden cameras can cause people captured on tape to be completely humiliated. (*Id.* at 33:19-34:9.) According to Mr. Sloan, the use of hidden cameras does not make for good fact-finding and there are better ways to tell a story. (*Id.* at 23:25-24:5.)

Kerry Marash is the Senior Vice-President of Editorial Quality for ABC News. (Johnson Decl., Ex. 15, Marash Dep. at 44:17-23.) She makes the final decision as to whether to use a hidden camera for a story. (*Id.* at 57 & 98; *see also* Ex. 18, Sloan Dep. p.16; *and* Ex. 23.) Marash does not recall any specific details of her conversations with Sloan or other individuals about the program. (*Id.* at 17, 67:21-68:3, 72:23-73:2.) Marash is aware that one of the risks in using hidden cameras is that it might lead to litigation. (*Id.* at 30:7-11.) But she apparently did not keep any records pertaining to the program or her decision to approve the use of hidden cameras for the story. (*Id.* at 18.) Marash discussed the program with ABC lawyers. (*Id.* at 57.) According to her deposition testimony,

Marash does not remember much about the program at issue in the instant case or the approval process for the use of hidden cameras. (*See id.*)

ABC Defendants decided the workshops were a public space. (Johnson Decl. Ex. 19, Rackmill Dep. at 159:21-25; Ex. 23, Ross Dep. at 63:25-64:7) Ross believes that the workshops were public spaces because the workshops were advertised in acting newspapers and trade papers. (Johnson Decl, Ex. 23, Ross Dep. at 71-72.) ABC Defendants received information from Billy DaMota about how to access the workshops from websites that were password protected. (Johnson Decl., Ex. 19 Rackmill Dep. at 159; Exs. 24, 25, 26 & 27.)

II. LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for granting a motion for summary judgment. It states in part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c) (2003).

This standard has been explained by the Supreme Court of the United States in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

When the moving party bears the burden of persuasion on the issue at trial, its showing must sustain that burden as well as demonstrate the absence of a genuine dispute. *See Celotex Corp., supra*, 477 U.S. at 331-32. When the moving party does not bear the burden of proof at trial, it must point out to the district court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325. In *Anderson*, the Court set out the requisites needed to show there is no genuine issue as to a material fact. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson*, 477 U.S. at 248. The Court also held that "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.*

Regarding the existence of a genuine issue of material fact, the Court held that, summary judgment is not appropriate if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* However, the Court also noted that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. The nonmoving party has the burden of producing operative facts, and the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury

could reasonably find for the plaintiff." *Id.* at 252. If the operative facts are not presented, summary judgment is appropriate.

Once the moving party has met its burden under Rule 56(c), the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. However, any inferences from the underlying facts must be viewed in light most favorable to the non-moving party. *Id.* at 587.

In *Celotex*, the Court explained that the non-moving party must designate specific facts showing a genuine issue for trial. Summary judgment is appropriate if a party, after adequate time for discovery, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The moving party is not required to prove the absence of a genuine issue of fact, even with respect to an issue on which the non-moving party bears the burden of proof. *Id.* at 325. "Instead . . . the burden on the moving party may be discharged by showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* The *Celotex* Court also stated that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses", *id.* at 323-24, and that the summary judgment procedure should not be regarded as a "disfavored procedural shortcut" but should be viewed as an "integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id.* at 327.

"It is not [the task] of the district court, to scour the record in search of a genuine issue of triable fact. [The courts] rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). *See also Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) ["The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found."]

III. DISCUSSION

A. Confidentiality of Recorded Statements Within the Meaning of California Penal Code Section 632

Plaintiffs' first cause of action is for violation of Cal. Penal Code § 632 and they seek damages under Cal. Penal Code § 637.2³. (SAC, p. 9.) Section 632 provides, *inter alia*: Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$ 2,500), or imprisonment in the county jail not exceeding one year. Cal. Penal Code § 632(a).

----- Footnotes -----

3 Section 637.2 provides:

(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

(1) Five thousand dollars(\$ 5,000).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

----- End Footnotes-----

The term "confidential communication" is defined as follows:

The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. Cal. Penal Code § 632(c).

Defendants argue that the recorded conversations were not confidential because they could be overheard by Richen. (P.&A. Motion Re: Claims, p. 5:3-6.) Similarly, they argue that the performances at the workshops were not confidential. (*Id.* at p. 4.) If the court were to accept Defendants' argument, it would vitiate the statute. *See* Cal. Penal Code § 632. Defendants are arguing, in effect, that anything that can be overheard is not confidential. (*See* P.&A. Motion Re: Claims, pp. 4-5.) However, in order for a conversation to be recorded, it must be overheard -- in this case by a sensitive recording device. (*See* Johnson Decl. Ex. 5, Herdon Dep. at 145:13--147:14; Notice of Lodging "D.")

The lead cases on this issue are *Flanagan v. Flanagan*, 27 Cal. 4th 766, 117 Cal. Rptr. 2d 574, 41 P.3d 575 (2002), *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (1988); and *Coulter v. Bank of America*, 28 Cal. App. 4th 923, 929, 33 Cal. Rptr. 2d

766 (1994). See e.g. *Shulman v. Group W Productions Inc.*, 18 Cal. 4th 200, 234-35, 74 Cal. Rptr. 2d 843, 955 P.2d 469 (1998); see also *Wilkins v. National Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066, 1080, 84 Cal. Rptr. 2d 329 (1999). The test used to determine the confidentiality of any given communication is an objective one. *Coulter, supra*, 28 Cal. App. 4th at 929. "A conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan, supra*, 27 Cal. 4th 766, 768 (2002)(citing *Frio, supra*, 203 Cal. App. 3d 1480; *Coulter v. Bank of America*, 28 Cal. App. 4th 923, 33 Cal. Rptr. 2d 766 (1994); and over-ruling *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 248, 273 Cal. Rptr. 674 (1990)). "Under section 632 confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is listening in' or overhearing the conversation." *Frio, supra*, 203 Cal. App. 3d at 1490. "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." *Coulter*, 28 Cal. App. 4th at 929 (quoting *Ribas v. Clark*, 38 Cal. 3d 355, 360-361, 212 Cal. Rptr. 143, 696 P.2d 637 (1985).) "The Privacy Act has long been held to prevent one party to a conversation from recording it without the other's consent." *Ribas, supra*, 38 Cal. 3d at 360 (citing *People v. Wyrick*, 77 Cal. App. 3d 903, 909, 144 Cal. Rptr. 38 (1978); and *Forest E. Olson, Inc. v. Superior Court*, 63 Cal. App. 3d 188, 191, 133 Cal. Rptr. 573(1976)).

In *Wilkins v. National Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066, 1079-80, 84 Cal. Rptr. 2d 329⁴ (1999), a case cited by Defendants, a California appellate court ruled that a recorded conversation was not "confidential" within the meaning of § 632 because deposition testimony revealed that one of the plaintiffs did not expect his part of the conversation to be kept secret. *Wilkins, supra*, 71 Cal. App. 4th at 1080. The party who recorded the conversation could have brought as many people to the meeting as that party wanted. *Id.* There were "virtual strangers" present at the meeting. Moreover, the conversation took place in a highly public place -- a crowded restaurant patio within earshot of others, including the waiters. *Id.*

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⁴ The court in *Wilkins* simultaneously applied the O'Laskey test and the *Coulter test* *Wilkins*, 71 Cal. App. 4th at 1080. The *O'Laskey* test examines whether the plaintiff "reasonably expected, under the circumstances of the . . . [conversation or call], that the conversation would not be divulged to anyone else." *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 248, 273 Cal. Rptr. 674 (1990). That test was discarded by the California Supreme Court in *Flanagan*, 27 Cal. 4th at 773. The proper test is the *Frio* test: "the existence of a reasonable expectation by one of the parties that no one is listening in' or overhearing the conversation" is all that is required. *Flanagan*, 27 Cal. 4th at pp. 772-73.

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In another case cited by Defendants, *Evens v. The Superior Court of Los Angeles County*, 77 Cal. App. 4th 320, 325, 91 Cal. Rptr. 2d 497 (1999), a California appellate court found that a teacher had no reasonable expectation of privacy because students "will, and usually do, discuss a teacher's communications and activities with parents and other students." *Evens, supra*, 77 Cal. App. 4th at 324. The Evens court was apparently applying the *O'Laskey* test-examining whether the plaintiff "reasonably expected, under the circumstances of the . . . [conversation or call], that the conversation would not be divulged to anyone else." *O'Laskey, supra*, 224 Cal. App. 3d at 248. Because the *O'Laskey* test was expressly repudiated by the California Supreme Court in *Flanagan*, 27 Cal. 4th at pp. 772-73, but used by the court in Evens, it appears that Evens is, at best, questionable precedent. The Evens court should have asked whether any of the parties to the conversation reasonably expected that no one was listening-in, not whether "either party reasonably expects the communication to be confined to the parties." *Flanagan*, 27 Cal. 4th at pp. 772-73; *see also Frio*, 203 Cal. App. 3d at 1488.

In the instant case, Richen recorded several conversations by Plaintiffs to which she was not a party and the participants in the conversation probably expected their communications would be confined to themselves. For example, while Msrs. Karatas and Weissman had their back turned to her, Richen recorded Mr. Karatas' overtly sexual comment to Mr. Weissman. (PRDUF P 299; Notice of Lodging "B.") Richen was standing across the room at the time. (*Id.*) The comment probably was not for Ms. Richen's benefit and it is unclear if the comment would have been audible to the unaided ear. Moreover, it is clear from the following passage that Plaintiff Johnston did not want her conversation disseminated outside of the intended audience:

The parts I was playing were trailer trash . . . It took me forever to figure that out. Here I am trying to squeeze into ingenue for years going "It's not flying." . . . *I call this my workshop uniform. But they don't have to know that. Everybody sees me in a different way than they do.* But I actually was going through my t-shirts today. . . . There's the top shelf t-shirts which I don't wear too much but I like them. There's the middle shelf, which I can get dirty because I get very dirty doing everything I do. And there's the bottom which is already painted in them or dyed my hair in them. It's like there's different levels of bad. That's pretty much my wardrobe. I don't even wear this around the house because I have 11 animals. (Perry Decl., Ex. 16, Answer to Interrogatories at 2-3; Johnson Decl., Ex. 11, Notice of Lodging "B"; Johnston Dep. at 35:8-36:19, 38:4-39:22, *emphasis added.*)

By stating "they don't have to know that," Johnston was signaling her expectation of privacy. Viewing the conversation in its context as recorded (Notice of Lodging "B."), it is apparent that Johnston had a reasonable expectation of privacy. Therefore, by recording the conversation, Richen violated section 632.

The workshops were small, consisting of 10 to 20 people, and private. The tapes (See Notice of Lodging "B" & "C."), show Richen recorded many of the conversations when there were only two or three people in a room, sometimes chatting amongst themselves in a corner, apparently oblivious to Richen's surveillance. The court finds that there is a triable issue of fact as to whether the workshop participants had a reasonable expectation

of privacy regarding communications within that small group during the workshop. It is not difficult to imagine a litany of classroom or workshop settings where the students might reasonably expect privacy.

By way of example, a recovering alcoholic in an "AA" meeting, or a participant in an anger management class, might reasonably expect her communications to other class members to be kept private. Customarily, in law school and undergraduate university lectures, students must ask for the instructor's permission prior to recording university lectures. Closer to the point, if a group of aspiring authors decided to attend a seminar with a writer in residence at a local university in order to obtain feedback and criticism regarding unfinished work, it would probably be reasonable for them to assume their activities, readings, and the instructor's comments, were not being overheard by a person who was not similarly situated; let alone being recorded by a journalist. Similarly, if a company executive or attorney attended night classes in graphic design with a mind to switch careers at a later date, she might reasonably expect her attendance was not being photographically memorialized or beamed to the living room of every house in America. Moreover, an aspiring artist or graphic designer might expect that any experimental work produced purely for commentary, or as an assignment for class, would not be recorded or disseminated beyond the seminar; let alone broadcast on national television. Otherwise, the student probably would not produce the work for critique.

Similarly, Mr. Sateri could not have expected that his imitation of a chicken would be digitally recorded and broadcast to the entire nation. *See Ribas, supra*, 38 Cal. 3d at 360-61 (recognizing the distinction between the risk of someone betraying a confidence and the simultaneous mechanical dissemination or recording of a communication.) In other words, the California courts recognize a distinction between someone risking a comment outside of class, for example, about "some guy who did a chicken scene in my acting class the other day" and the simultaneous covert recording of the same class. *See id*; see also *Coulter*, 28 Cal. App. 4th at 929. Accordingly, the court hereby finds that Defendants have not carried their burden of showing that the recorded conversations were not confidential within the meaning of section 632. ⁵ Summary judgment is hereby DENIED on Plaintiffs' first cause of action.

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⁵ The inference underlying much of Defendants' argument for summary judgment is that because Plaintiffs were attending an acting class, they must want to be famous, and therefore anything they said in private while waiting for the class to begin, or on stage during the class itself, is fair game for clandestine recording and national broadcast. Aspiring actors, however, do not have a lower threshold of privacy rights.

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B. Intrusion upon a Private Place, Conversation or Other Matter in a Manner That Is Highly Offensive to a Reasonable Person

Plaintiffs' second cause of action is for common law intrusion. (SAC, p. 10.) "Of the four privacy torts identified by Prosser ⁶, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an invasion of privacy. "' *Shulman, supra*, 18 Cal. 4th at 230. "It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. *Id.* at 230-31 (*citing* Rest.2d Torts, § 652B, com. b. pp. 378-79.)

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⁶ There are four distinct torts that fall under the rubric of the broader category of invasion of the right to privacy: (1) intrusion upon a plaintiffs seclusion or solitude, or into the plaintiffs private affairs; (2) public disclosure of embarrassing facts about the plaintiff; (3) publicity which places plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, *Privacy* (1960) 48 Cal. L. Rev 381; *Kapellas v Kofman*, 1 Cal. 3d 20, 35 n.16, 81 Cal. Rptr. 360, 459 P.2d 912 (1969); and *Shulman v. Group W Productions, Inc.* 18 Cal. 4th 200, 214, 74 Cal. Rptr. 2d 843, 955 P.2d 469 (1998).

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[*37] There are two elements in an action for intrusion: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." *Id.* at 231 (*citing* *Miller v. National Broadcasting Co., supra*, 187 Cal. App. 3d 1463, 1468, 232 Cal. Rptr. 668 (1986)). With regard to the first element, the California high court in *Schulman* stated "we ask first whether defendants intentionally intruded, physically or otherwise, upon the solitude or seclusion of another," that is, into a place or conversation private to [plaintiffs]." *Id.* (*citing* Rest.2d Torts, § 652B; *Miller, supra*, 187 Cal. App. 3d at p. 1482.) The Court observed "there is no liability for the examination of a public record concerning the plaintiff . . . [or] for observing him or even taking his photograph while he is walking on the public highway." *Id.* To prove actionable intrusion, the *Shulman* court wrote, "the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." ⁷ *Id.* (*citing* Rest.2d Torts, § 652B; and *PETA v. Bobby Berosini, Ltd*, 111 Nev. 615, 895 P.2d 1269 (1995)).

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⁷ As an aside, it is important to note that Richen's surreptitious recording extended into the ladies washroom, where Richen, and fellow workshop members were filmed primping themselves in the mirror while the sounds of normal bathroom activity go on in the background. (Notice of Lodging "B.") It is difficult to imagine an intrusion into a more private space.

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In *Shulman*, defendants equipped a helicopter rescue team nurse with a microphone and filmed the rescue of plaintiff. When the rescue team and camera crew arrived on the scene, plaintiff was being extricated from an overturned car. *See id.* at 233. It was unclear whether onlookers and bystanders from the road above could have heard the plaintiffs conversation with her rescuers as she was removed from the car. *See id.* The *Shulman* Court held the cameraman's "mere presence at the accident scene and filming of the events . . . cannot be deemed either a physical or sensory intrusion on plaintiffs' seclusion." *Id.* at p. 232. However, the *Shulman* Court found Plaintiff "was entitled to a degree of privacy in her conversations with [the nurse] and other medical rescuers at the accident scene, and in [the nurse's] conversations conveying medical information regarding [plaintiff] to the hospital base." *Id.* at 233. The Court also found there was at least a triable issue of fact as to whether the plaintiff had a reasonable expectation of privacy in the interior of the rescue helicopter: "although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent." *Id.* at 232. The Court went on to explain that the cameraman "perhaps, did not intrude into [plaintiff's] zone of privacy merely by being present at a place where he could hear such conversations with unaided ears. But by placing a microphone on [the nurse's] person, amplifying and recording what she said [*40] and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private." *Id.*

In *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal. 4th 907, 85 Cal. Rptr. 2d 909, 978 P.2d 67 (1999) the Supreme Court of California clarified its ruling in *Shulman*, *supra*, 18 Cal. 4th 200. The Court reiterated its ruling in *Shulman*: "we . . . implied the plaintiff patient could have a reasonable expectation of privacy in her communications even if some of them may have been overheard by those involved in the rescue, but not by the general public." *Sanders, supra*, 20 Cal. 4th at 914. The *Sanders* court quoted *Shulman* and *Ribas, supra*, 38 Cal. 3d at 360-61 for the principle that "while one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination . . . [or recording]." *Sanders*, 20 Cal. 4th at 914 (*quoting Shulman*, 18 Cal. 4th at pp. 234-35.) The Court reiterated its position in *Shulman* that "such secret monitoring denies the speaker an important aspect of privacy of communication -- the right to control the nature and extent of the firsthand dissemination of his statements." *Id.* In other words, clandestine recording of a private conversation without the authorization of the parties to the conversation, is often a per se invasion of privacy, regardless of whether the conversation could have been overheard by a third party. *See id.*

In *Sanders*, the California high court rejected a narrow interpretation of privacy or seclusion: "although the intrusion tort is often defined in terms of "seclusion" . . . the seclusion referred to need not be absolute." *Id.* (citations omitted.) The concept of privacy

is relative. *Id.* "The mere fact that person can be seen by someone" the Court explained, "does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." *Id.* The *Sanders* Court cited *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971) for the principle that a person has a reasonable expectation of privacy in his home office. *Id.* The *Sanders* Court went on to cite a string of other cases, including *Stessman v. Am. Black Hawk Broadcasting*, 416 N.W.2d 685, 687 (Iowa 1987)⁸, and found a complete expectation of privacy is unnecessary to recover on a claim for intrusion because such interpretation is "inconsistent with case law as with the common understanding of privacy." 20 Cal. 4th at 917-18.

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⁸ Defendants erroneously claim (P.&A. Motion Re: Claims, at p. 8:11-15) that "no reported decision in the past 25 years holds that customers who have entered a commercial establishment . . . carry with them a zone of privacy." In *Stessman, supra*, 416 N.W.2d at 687-cited with approval by the California Supreme Court in *Sanders*, 20 Cal. 4th at 917 -- the Court found that the filming of a person in a private dining room of a restaurant might be intrusion on the patron's privacy, despite a lack of complete seclusion. The *Sanders* Court also pointed to *Doe by Doe v. B.P.S. Guard Services, Inc.* 945 F.2d 1422 (8th Cir. 1991) as an example of a case where there was limited, but by no means exclusive privacy. *Sanders*, 20 Cal. 4th at 916. In *Doe by Doe*, a group of models sued for intrusion into a curtained area they used for changing. While the area was accessible to the show's director, assistant and others, the models retained an expectation of privacy. *Id.* (citing *Doe by Doe*, 945 F.2d at 1427.) In view of these decisions, it is apparent the Supreme Court of California is taking a common sense approach to its analysis of whether an individual has an expectation of privacy. This court will take the same approach.

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"Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Id.* In *Sanders*, the California high court found that a worker does not necessarily lose all reasonable expectation of privacy against covert media videotaping if the worker's interactions and conversations were witnessed by coworkers. 20 Cal. 4th at 919.

ABC was also the defendant in *Sanders*.⁹ ABC sent a "reporter" to obtain employment at a "telepsychic's" offices. *Id.* at 921. The reporter worked at the office for a few days. The *Sanders* court commented that while the reporter "may have functioned as an employee of [the telepsychic] when she took phone calls as a telepsychic she acted solely as an agent of ABC when she talked with and secretly recorded the other psychics." *Id.* at 921. The *Sanders* Court squarely held "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation. *Id.* at 923. The same principle is applicable in the instant case.

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9 Defendants insist *Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995) is more applicable than *Sanders*. However, Defendants ignore key factual differences between *Desnick*, the instant case and *Sanders*. In *Desnick*, defendants sent "testers" into a medical clinic to record conversations with clinic personnel. Distinguishing *Dietemann, supra*. 449 F.2d 245, 246 (9th Cir. 1971), the *Desnick* court found that there was no actionable intrusion because (a) no private conversations were recorded -- only "physicians engaged in professional, not personal, communications with strangers (the testers themselves);" (b) no conversations with co-workers were recorded; and (c) the offices in *Desnick* were open to anyone. *Desnick, supra*, 44 F.3d 1345, 1352-1354 (7th Cir. 1995). In the instant case, by contrast, the workshops were closed to the general public. To gain entry, a prospective participant had to audition, pay an entry fee and check-in. Moreover, most of the conversations recorded in the instant case were private, personal, and Ms. Richen, the covert intruder, was not a party to most of the recorded conversations. Another case cited by Defendants, *Medical Laboratory Management Consultants v. ABC*, 306 F.3d 806, 816-17 (9th Cir. 2002) is similar to *Desnick* and distinguishable on the same grounds. *Vo. v. City of Garden Grove*, 115 Cal. App. 4th 425, 9 Cal. Rptr. 3d 257 (2004), involving a challenge to a local ordinance mandating video monitoring of public internet cafe's, is similarly inapposite.

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Even though some of their conversations could have been overheard by other students, in view of the holding in *Sanders*, this court has no choice but to conclude that Plaintiffs in the instant case had a reasonable expectation that their conversations were not being recorded by ABC. *See id.* Plaintiffs in the instant case were not in a public place -- admittance was limited to a relatively small number of people. Workshop enrollment was not open to the general public. Participants had to audition (Johnson Decl., Ex. 1, Turnbull Dep. at p. 81:11-82; Ex. 5, Herndon Dep. at 16:15-17:4) and then pay a fee to gain entry to a workshop. Casting directors who attend the workshops understand that it is a private place. (Johnson Decl., Ex. 14, Taylor Dep. at 55:8-19.) The workshops took place in a private room of a private building few actors know about. (Johnson Decl. Ex. 14, Taylor Dep. at 64:10-16; Turnbull Decl., P 3.) There is no sign outside the buildings indicating that workshops are held inside, or that it is a certain type of establishment. (*Id.*) In *Sanders*, the Court explained "the reasonableness of a privacy expectation must be assessed in reference to the identity of the intruder and the nature of the claimed intrusion, the proper question for the jury to decide was, indeed, whether plaintiff could reasonably expect he would not be secretly videotaped in his internal workplace interaction by a representative of the mass media." *Sanders*, 20 Cal. 4th at 926. Plaintiffs in the instant case could not have expected, as they talked amongst themselves in the corners or against the wall of the classroom, in their chairs awaiting class to begin, much less the ladies room, that a reporter was covertly recording their conversations. Accordingly, summary judgment is DENIED on the question of whether Defendants intruded onto a private conversation or other matter.

C. Highly Offensive to a Reasonable Person

"While what is "highly offensive to a reasonable person" suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of "offensiveness" which must be made by the court in discerning the existence of a cause of action for intrusion; a court determining the existence of "offensiveness" would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion, the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Wilkins v. National Broadcasting Co.*, 71 Cal. App. 4th 1066, 1076, 84 Cal. Rptr. 2d 329 (1999) (citing *Miller v. National Broadcasting Co.* (1986), 187 Cal. App. 3d 1463, 1483-1484, 232 Cal. Rptr. 668.) Determining the offensiveness of a given intrusion requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder's "motives and objectives." *Shulman*, 18 Cal. 4th at 236 (citing *Miller*, 187 Cal. App. 3d at pp. 1483-84.) The mere fact that an intruder is in pursuit of a "story" does not generally justify an otherwise invasive intrusion. *Id.* at p. 237. "At one extreme," the California high court wrote, there are routine reporting techniques "such as asking questions of people with information." *Id.* These routine techniques could rarely, if ever, be deemed an actionable intrusion. *Id.* (citing *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519, 223 Cal. Rptr. 58 (1986)). "At the other extreme, violation of well-established legal areas of physical or sensory privacy -- trespass into a home or tapping a personal telephone line, for example -- could rarely, if ever, be justified by a reporter's need to get the story." *Id.* "Such acts would be deemed highly offensive even if the information sought was of weighty public concern." *Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 115 L. Ed. 2d 586, 111 S. Ct. 2513 (1991); and *Dietemann*, *supra*, 449 F.2d at p. 249.)

In the instant case, ABC reported the story long after it first broke and roughly eight months after they were ready to go to air. Defendants did not cover much of the DLSE investigation and did not cover the public hearings on the issue. (Johnson Decl. Ex. 23, Ross Dep. at pp. 274-75.) By the time the story aired, the DLSE and the workshops were very close to resolving the issue. As a result, it is unclear whether there was really a tremendous public interest in reporting the story. Turning to Defendants' motives, Ross pushed for the use of hidden cameras because he felt that "that was the only way to get a true reading of what was happening in the workshops." (Johnson Decl. Ex. 23, Ross Dep. at 61:24-62:7.) He never believed hidden camera footage was integral to the story, but thought using hidden cameras "was the most effective way to tell the story." (*Id.* at 63:25-64:7.) Ross would not have scrapped the story if he could not have used hidden cameras. (*Id.* at 64:19-22.) But he would do the story again and has no regrets. (Johnson Decl., Ex. 23, Ross Dep. at 250-51.) In *Shulman*, the California Supreme Court looked to the reporter's motive for employing intrusive recording devices, finding that "[a] reasonable jury could conclude the producers' desire to get footage that would convey the "feel" of the event -- the real sights and sounds of the rescue -- did not justify either placing a microphone on Nurse Carnahan or filming inside the rescue helicopter." *Shulman*, 18 Cal. 4th at 238. As in *Shulman*, the primary motive appears to be an aesthetic one in the instant case, and the use of hidden camera footage, Ross admits, was

unnecessary. (*See* Johnson Decl. Ex. 23, Ross Dep. at 64.) Executive producer David Sloan recognized that the utilization of hidden cameras does not constitute good fact finding and "there are better ways to tell a story." (Johnson Decl., Ex. 18, Sloan Dep. at p. 24:14-25:3.) In view of these facts, it is apparent that ABC had little justification in using hidden camera footage.

ABC's practices and procedures manual requires someone intending to use a hidden camera to submit a detailed proposal to get approval. (PRDUF P 209; Johnson Decl., Ex. 23.) However, the proposal for use of a hidden camera in the instant case was submitted orally (Johnson Decl., Ross Dep. at 178:17-21) David Sloan is the executive producer of 20/20. (Johnson Decl., Ex. 18, Sloan Dep. at 11:12-21.) Mr. Sloan approved of the program and the use of hidden cameras. (*Id.* at pp. 12-17.) Mr. Sloan understands that the use of hidden cameras can cause people captured on tape to be completely humiliated. (*Id.* at pp. 33-34.) In view of these facts, it is apparent that there is a triable issue of fact as to whether Defendants violated Plaintiffs' privacy rights. Accordingly, Defendants' Motion for Summary Judgment on Plaintiffs' claim for intrusion is hereby DENIED.

D. Intentional Infliction of Emotional Distress

On June 9, 2004, the parties filed with the court a stipulation to dismiss Plaintiffs' claim for intentional infliction of emotional distress. Accordingly, the claim is dismissed and not addressed by the court.

E. Trespass

Defendants argue that Plaintiffs' claim for trespass was vitiated by Plaintiff J.P. Turnbull's consent to Richen's presence at the workshops. (P.&A. Motion Re: Claims, at p. 15.) Even if consent was fraudulently induced, Defendants argue, Plaintiffs have no claim for trespass if consent was nonetheless given. (*Id.*; *citing Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993)). According to 5 Witkin Summary of California Law § 607, consent is defense of privilege. But contrary to Defendants' assertion, if the scope of consent is exceeded, the privilege is lost and the tort is committed. 5 Witkin Summary of California Law § 607; *citing Western Corp. v. Zila Industries*, 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915 (1977); *see also Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827 (*holding* that a trespass may occur if a party entering land by limited consent exceeds those limits by divergent conduct.) In the instant case, on at least one of the sign-up sheets (Perry Decl. Ex. 6), there was a header stating "by signing below, I agree that: -- I am here to practice my acting . . . and sharpen my craft, -- I am here to hone my audition techniques and learn from industry guests . . . , -- I am here to develop relationships with those industry guests, -- The presence of an industry guest is not a promise or guarantee of employment." (Perry Decl. Ex. 6 at 29.) If someone from ABC asked Turnbull, the owner of one of the workshops, if they could come in and film the workshop, Turnbull would have said "no." (Johnson Decl., Ex. 1, Turnbull Dep. at 98:23-99:2, 109:7-9.) Video cameras and tape recorders are not allowed at the workshops. (Johnson Decl., Ex.2, Bruce Dep., at 26-27; Ex. 1, Turnbull Dep. at 98-100.) In view of these facts, there is at least a triable issue of fact as to whether Richen

exceeded the scope of Turnbull's consent to invite her to the workshops. Accordingly, Defendants' Motion for Summary Judgment on the issue of trespass is hereby DENIED.

F. California Civil Code Section 1708.8

Plaintiffs' fifth cause of action is for physical and constructive invasion of privacy pursuant to section 1708.8 of the California Civil Code. Section § 1708.8 of the California Civil Code provides, in pertinent part:

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used. Cal. Civ. Code § 1708.8. ¹⁰

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¹⁰ The statute also provides for damages: "(c) A person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages. Cal. Civ. Code § 1708.8 (c).

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Citing the statute and *Shulman*, Defendants argue that summary judgment is appropriate on Plaintiff's fifth cause of action because: (1) they did not record personal activity; or (2) act in a manner that was offensive to a reasonable person; and (3) did not commit trespass. However, the court has already determined Defendants: (1) may have committed trespass; (2) recorded personal conversations and other matters without permission; and (3) did so in a manner that was offensive to a reasonable person. Accordingly, summary judgement is hereby DENIED as to section 1708.8.

G. The Proposed Injunction is Overly Broad

Plaintiffs ask this court to enjoin Defendants from using hidden cameras to gather news in California. (SAC, pp. 15-16.) The court finds the proposed injunction is overly broad.

There is a place for the lawful use of hidden cameras. *See Shulman*, 18 Cal. 4th at 237. The court also questions whether Plaintiffs have standing to sue on behalf of such a broad class of individuals for the requested injunction. Plaintiffs are, in effect, asking for prospective relief on behalf of a very large group of individuals who probably do not share a common factual nexus with Plaintiffs in the instant case. *See e.g. Plant v. Does*, 19 F. Supp.2d 1316, 1321 n.2 (S.D. Fla. 1998); and *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 66, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Plaintiffs must assert their own rights and not rest on the legal rights or interests of third parties; (2) Plaintiffs' injury must not be "shared in equal measure by all or a large class of citizens" so as to represent only a "generalized grievance"; and (3) Plaintiffs' interest must arguably fall within the zone of interests intended to be protected by the statute at issue. *MAI Sys. Corp. v. UIPS*, 856 F. Supp. 538, 540 (N.D. Cal. 1994) (*holding* that Cal. Bus. & Prof. Code § 17203 does not confer standing to plaintiffs in federal court.) In the instant case, Plaintiffs are resting on the legal rights and interests of third parties in their request for an injunction. *See id.* As a result, summary judgment is appropriate as to Plaintiff's sixth cause of action and is hereby GRANTED.

IV. DEFENDANTS' SECOND MOTION

A. Defamation Type Damages

Defendants point out that Plaintiffs have not alleged defamation or any related cause of action stemming from the actual broadcast of the program in November 2002. (P.&A. Motion Re: Damages, at pp. 2-3.) As a result, it is somewhat odd that Defendants are moving for summary judgment on a non-existent defamation claim. Defendants argue that summary judgment should be granted on Plaintiffs' claims for injuries arising out of the content of the ABC News broadcast. (*Id.*) Defendants assert that the program contained no false statement and therefore, Defendants argue, damages stemming from the broadcast of the program should be barred. (*Id.*)

As a preliminary matter, it is unclear what Defendants really mean by "Defamation Type Damages." Defendants fail to adequately describe what claim or issue they are contesting when they refer to "Defamation Type Damages." Defendants fail to cite what claim or argument would be foreclosed if summary judgment were granted. (*See id.*) As a result, even if summary judgment were granted on this point, it is unclear what the effect would be. Cases cited by Defendants touch on a wide variety of torts and claims. (*See e.g. P.&A. Motion Re: Damages*, at pp. 4-6.) Defendants' argument is vague and convoluted. (*See id.*) However, it appears Defendants are trying to establish a novel defense based on the First Amendment for the use of hidden cameras by media defendants. (*See id.*)

Rule 56 of the Federal Rules of Civil Procedure states "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move . . . for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. Rule 56(c). Rule 56 (a) and (b) establish that the party moving for summary judgment must come forward with an initial showing that it is entitled to

judgment. *See id.* In the instant case, however, Defendants have failed to adequately identify what issue or claim is at stake. Accordingly, the motion is procedurally defective.

Nonetheless, Plaintiffs respond to Defendants' argument by stating this is not the first time ABC tried to formulate a defense for the use of hidden cameras under the First Amendment and Defendants claim the issue was settled by, *inter alia*, *Cohen v. Cowles Media*, 501 U.S. 663, 115 L. Ed. 2d 586, 111 S. Ct. 2513 (1991). (Opp. Motion Re: Damages, p. 1.) In *Cohen*, a newspaper breached its agreement with an informant by publishing his name. *Cohen, supra*, 501 U.S. at 665-66. The informant sued for breach of contract and misrepresentation. *Id.* The newspaper claimed First Amendment protection. The court stated "truthful information sought to be published must have been lawfully acquired." *Id.* at 669. The court made it clear that the First Amendment does not provide shelter from tortious or criminal conduct: "the press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source." *Id.* The court concluded "it is, therefore, beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.* (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33, 81 L. Ed. 953, 57 S. Ct. 650 (1937)).

It is unclear how any of the cases cited by [*59] Plaintiffs apply to the instant case. In *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988), for example, there was no allegation by plaintiff Falwell that defendant Hustler committed a tort in gathering news for the story. *See Hustler, supra*, 485 U.S. at 46-47. The issue in *Hustler* was whether the court should apply "the *New York Times* malice" ¹¹ standard to claim for intentional infliction of emotional distress brought by a public figure for a piece that ran in a periodical: "we must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." *Id.* at 50. In the instant case, there is no public figure implicated. ABC stands accused in the instant case of intentional infliction of emotional distress stemming from trespass and the clandestine recording of Defendants' voices and likenesses. In the SAC, Plaintiffs state "Defendants intended to cause emotional distress or acted in reckless disregard of the probability of causing emotional distress *by their newsgathering acts.*" (SAC, P 51.) Unlike *Hustler*, there is no allegation that the publication of a news article or program caused Plaintiffs' emotional distress. (*See id.* at P 52.) The only evidence Defendants produce suggesting that Plaintiffs are suing for defamation are a few questions taken out of context from a series of depositions. (P.&A., pp. 6-8.) ¹²

----- Footnotes -----

¹¹ The term refers to the standard adopted in *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) -- a defendant is only liable if the defendant knowingly falsifies or entertained serious doubts as to the truth of her publication,

provided the publication pertains to a public figure.

¹² Other cases cited by Defendants, including *Medical Laboratory Management v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 821 (9th Cir. 2002) are similarly inapposite. In *Medical Laboratory Management*, plaintiffs claimed that defendants intentionally interfered with contractual relations and prospective economic relations by broadcasting a story on their business. The court required plaintiffs to prove falsity of statements made in the broadcast in order to recover for intentional interference with contract. *Medical Laboratory Management, supra*, 306 F.3d at 821. Unlike *Medical Laboratory Management*, however, in the instant case Plaintiffs are claiming damages from torts committed prior to broadcast. In *Medical Laboratory Management*, on the other hand, the claimed damages were due to the broadcast itself, and its alleged falsity. *Id.* Accordingly, *Medical Laboratory Management* is not on point.

----- End Footnotes-----

Defendants, in turn, direct the court's attention to *Dietemann, supra*, 449 F.2d at 250 (Opp. Motion Re: Damages, at pp. 6-7):

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongful acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any counter-vailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men. *Dietemann*, 449 F.2d at 250. "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to *trespass*, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann*, 449 F.2d at 249. In *Miller, supra*, the court commented "intrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another, and not by the publication of such observations." 187 Cal. App. 3d at 1490. Citing the Supreme Court decision *Time, Inc. v. Hill*, 385 U.S. 374, 389, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967) the Ninth Circuit in *Dietemann* observed "the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds." *Dietemann*, 449 F.2d at 250.

In instant case, Defendants are accused of committing a calculated misdeed. Defendants knew there was a good chance Plaintiffs would be humiliated. (Johnson Decl., Ex. 18, Sloan Dep. at 33:6-12.) Ms. Marash knew there was a risk of litigation. (Johnson Decl., Ex. 15, Marash Dep. at 30:7-11.) Moreover, there is no point in according First Amendment protection in the instant case because Defendants freely admit that they would have gone ahead with the same story even if secret camera footage was

unavailable. (*See e.g.*, Johnson Decl., Ex. 23, Ross Dep. at 188:10-189:2.) Ross never believed hidden camera footage was integral to the story, but thought using hidden cameras "was the most effective way to tell the story." (*Id.* at 63:25-64:7.) Ross would not have scrapped the story if he could not have used hidden cameras. (*Id.* at 64:19-22.)

B. Claim of Privilege under California Civil Code Section 47(d)

Defendants claim "summary judgment is also warranted because the complained of portions of the ABC News report were absolutely privileged under California Law" pursuant to Cal. Civ. Code § 47(d). The only "complained of portions of the ABC News report" are (1) the fact that ABC aired Plaintiffs' images without blurring their faces (SAC, P 27); (2) the report showed hidden camera footage of Plaintiffs, filmed without Plaintiffs' permission, solely in an attempt to boost ratings; and (3) the hidden camera footage was collected illegally through covert recording and by invading Plaintiffs' privacy. (*See generally* SAC.) Defendants do not cite a case where section 47(d) shielded Defendants from liability for illegally or tortiously collecting material.

In support of their argument, Defendants cite *Colt v. Freedom Communications, Inc.*, 109 Cal. App.4th 1551, 1559-60, 1 Cal. Rptr. 3d 245 (2003) and *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (1997). *Colt, supra*, 109 Cal. App. 4th at 1558 stands for the principle that "the First Amendment and Civil Code section 47, subdivision (d) permitted defendants to publish a fair and true report' of the legal proceedings." *Colt*, 109 Cal. App. 4th at 1558. In *Colt*, Plaintiffs sued a newspaper for running a story regarding Plaintiffs agreement to enter a consent decree with the SEC. *Id.* at 1554-55. The court concluded "the publication concerning legal proceedings is privileged as long as the substance of the proceedings is described accurately." *Colt*, 109 Cal. App. 4th at 1558. In the instant case, Defendants did not cover any legal proceedings. Moreover, there is no issue as to whether Defendants published a fair and true report. The issue is whether Defendants committed any crimes or torts while gathering material for their "news" program.

In *Braun, supra*, 52 Cal. App. 4th at 1050, the court summarized section 47(d): "this statute establishes a news media privilege for publications made "by a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof" *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th at 1050 (*citing* Cal. Civ. Code § 47(d)). In the instant case, there is no allegation that Defendants ABC falsely reported any information about a judicial, legislative or other proceeding. Accordingly, the cited cases and Defendants' argument are not on point.

Flynn v. Higham, 149 Cal. App. 3d 677, 682, 197 Cal. Rptr. 145 (1983) is similarly inapposite. There is no communication subject to privilege at issue in the instant case. As the court has already stated, it is well established that there is no privilege, based on the first amendment or otherwise, protecting the media from liability for torts committed while gathering the news. ABC might as well be trying to claim privilege for theft or assault. No such privilege exists. *Dietemann*, 449 F.2d at 250. ABC must follow the law

like anybody else, regardless the First Amendment.

C. Disgorgement under Section 1708.8

Plaintiffs aver "Defendants[] acts . . . were for a commercial purpose, and, as a result, Plaintiffs seek the disgorgement of proceeds or other consideration obtained as a result of the violation of Civ. Code § 1708.8." (SAC, P 70.) Section 1708.8 of the California Civil Code provides, in pertinent part:

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

(c) A person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. *If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.* Cal. Civ. Code § 1708.8 (emphasis added).

Defendants argue "it is settled First Amendment principle that the term 'commercial' -- and the reduced constitutional protection that goes along with that classification -- does not encompass a news broadcast even if it happens to turn a profit." (P.&A. Motion Re: Damages, at pp. 3-4.) "The ABC News broadcast," Defendants argue, "is entitled to the full protection of the First Amendment and not a proper subject for disgorgement." (*Id.*)

Section 1708.8 contains its own definition of "for a commercial purpose:"

For the purposes of this section, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted. Cal. Civ. Code § 1708.8(j).

Both parties cite to the legislative history of the statute in support of their interpretations of the term "for a commercial purpose." However, this court first looks to the plain

meaning of the language contained in the statute. *See Alexander v. Sandoval*, 532 U.S. 275, 288, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001); *see also Russello v. United States*, 464 U.S. 16, 20, 78 L. Ed. 2d 17, 104 S. Ct. 296, (1983) (*instructing* that when determining the scope of a statute, courts should first look to its language.) "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Russello*, *supra*, 464 U.S. at 20 (citations and internal quotations omitted). When a legislature employs a term imbued with special meaning accumulated through legal tradition and practice, "it presumably knows and adopts the cluster of ideas that were attached" to that term, and the court will use that meaning in construing a statute unless the statute clearly indicates a different meaning was intended. *Morissette v. U.S.*, 342 U.S. 246, 250, 96 L. Ed. 288, 72 S. Ct. 240 (1952). The court finds the statutory language in subsection (j) incompatible with the meaning of the term "commercial speech" as that term is used in *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1184 (1997) and *Blatty v. New York Times Company*, 42 Cal.3d 1033, 1048, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986) (*defining* the term as "speech that does no more than propose a commercial transaction.")

The term "commercial speech" has special meaning in the First Amendment context. "Although the boundary between commercial and noncommercial speech has yet to be clearly delineated the core notion of commercial speech' is that it does no more than propose a commercial transaction.'" *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1184 (1997) (*quoting Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983)). Commercial speech is given a lower threshold of protection under the First Amendment. *Id.* For example, "false or misleading commercial speech is not protected." *Id.* In *Hoffman*, the Ninth Circuit examined the leading right of publicity¹³ cases, concluding "in all these cases, the defendant used an aspect of the celebrity's identity entirely and directly for the purpose of selling a product. Such uses do not implicate the First Amendment's protection of expressions of editorial opinion." *Id.* at 1185.¹⁴ The court finds the definition of "for commercial purpose" in Cal. Civ. Code 1708.8(j) incompatible with the special meaning of the term "commercial speech" as that term is used in the context of First Amendment jurisprudence. The court also notes that there is an important difference between the term "commercial speech," used in *Hoffman*, and the term "for commercial [*71] purpose," used in § 1708.8(j). The terms are not the same and do not carry the same meaning.

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¹³ *Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (use of pitcher's image in printed beer advertisement); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (use of imitation of singer's voice in radio snack-food commercial); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (as amended) (use of game-show hostess's "identity" in print advertisements for electronic products); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (use in television car commercial of "sound-alike" rendition of song singer had recorded)." *Hoffman, supra*, 255 F.3d at 1185.

¹⁴ In *Hoffman*, defendant Los Angeles Magazine blended the image of a celebrity, and a body-double wearing a Richard Tyler dress and Ralph Lauren shoes in a piece featuring altered interpretations of sixteen familiar scenes of movies and actors such as "Saturday Night Fever" (John Travolta), "Gone With the Wind" (Vivian Leigh and Hattie McDaniel), and "Tootsie" (plaintiff Hoffman)." *Id.* at 1183 & 1185. Elsewhere in the magazine, there was a Ralph Lauren advertisement that did not feature shoes. The Ninth Circuit held "these facts are not enough to make the "Tootsie" photograph pure commercial speech." *Id.* at 1185.

----- End Footnotes-----

Turning to § 1708.8(a) & (b), the legislature clearly enacted a statute providing liability for individuals who invade the privacy of others, by stealth or otherwise, in order "to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal . . . activity." Cal. Civ. Code § 1708.8(a). There is no First Amendment concern raised in subsection (a) or (b). The statute merely addresses the collection of visual images and sound recordings by invasive means. As this court observed, *supra*, there is no First Amendment protection for illegal or tortious news gathering. *Cohen, supra*, 501 U.S. at 665-66. Accordingly, there is a question as to whether it is even necessary to consider the meaning of the term "for commercial purpose" in its First Amendment context when the statute exclusively addresses intrusive, illegal and tortious conduct. *See* Cal. Civ. Code § 1708.8(a). The statute does not implicate the First Amendment. *See id.*

Turning to subsection (j), it is clear the legislature intended to prevent paparazzi, photographers or other journalists from invading the privacy of individuals and then selling the images unlawfully obtained by stealth. In defining the term "for commercial purpose," section 1708.8(j) clearly addresses the sale or publication of images obtained through invasive means: "'for a commercial purpose' means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted." Cal. Civ. Code § 1708.8(j). In *Hoffman*, by contrast, the court was addressing the message sent to the audience by the photograph: "the core notion of commercial speech' is that it does no more than propose a commercial transaction." *Hoffman, supra*, 255 F.3d at 1184 (citations omitted). In § 1708.8, on the other hand, the legislature is narrowly concerned with gathering photographs through means that infringe upon an individual's right to privacy. The statute speaks to gathering images by stealth; and the subsequent broadcast or re-sale of those images, as ABC has done in the instant case. Rather than defining "for commercial purpose" as "no more than a proposal for a commercial transaction," *see Hoffman*, 255 F.3d at 1184, the legislature provided an alternative definition. The statute addresses the sale or broadcast of images or recordings obtained by invading plaintiff's privacy. *See* Cal. Civ. Code § 1708.8(a),(b),(c)&(j). There is no First Amendment protection for images so obtained. *Cohen*, 501 U.S. at 669.

This conclusion is further underlined by cases cited by Defendants: *Hoffman*, 255 F.3d 1180, *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989), and *Blatty v. New York Times*, 42 Cal.3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986). None of the cases cited pertain to Cal. Civ. Code § 1708.8. In *Blatty*, for instance, plaintiff sued for, *inter alia*, trade libel and negligence, because the New York Times failed to include him on its best seller list. *Blatty, supra*, 42 Cal.3d at 1036-37. The court does not understand the link between tortious news gathering, invasion of privacy and the facts or law stated in *Blatty*.

¹⁵ In *Hoffman* and *Dworkin*, plaintiffs were concerned with the distorted presentation of their images. *Dworkin*, 867 F.2d at 1191; *Hoffman*, 255 F.3d at 1184-85. Neither case is on point, nor is *Blatty*. Defendants' Motion for Summary Judgment is therefore DENIED as it pertains to Cal. Civ. Code § 1708.8.

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¹⁵ This analysis is further reinforced by the California Supreme Court's discussion of *Blatty* in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 564, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (1998).

----- End Footnotes -----

D. Punitive Damages

Defendants claim summary judgment should be granted in their favor on the issue of punitive damages because there is no evidence of oppression, fraud, or malice, as required under Cal. Civ. Code § 3294. (P.&A. Motion Re: Damages, p. 13:10-17.) ABC maintains "the newsgathering at issue here was undertaken for the purpose of acquiring direct evidence regarding the central factual dispute in the controversy over whether the workshops were . . . paid auditions." (*Id.* at 14:5-8.) Arguing that they could not have possessed malicious intent, ABC points to the fact that Ms. Richen was a complete stranger. In support of their argument, ABC cites *Medical Laboratory Management v. ABC, Inc.*, 30 F. Supp.2d 1182, 1208-09 (D. Ariz. 1998).

Plaintiffs respond by arguing a genuine issue of fact exists as to whether Plaintiffs can establish oppression, fraud or malice by clear and convincing evidence. (Opp. Motion Re: Damages, at p. 12.) Defendants cite Cal. Civ. Code § 3294(a) & (c) for the definition of "malice" and "oppression." (*Id.*) Section 3294 provides, in its pertinent part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee . . . or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a

corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
Cal. Civ. Code § 3294(a) & (c).

Plaintiffs argue there is a factual question as to whether Defendants acted in conscious disregard of Plaintiffs' rights. (Opp. Motion Re: Damages, at p. 12.) Plaintiffs point out that Defendants failed to create a written record of how they made the decision to invade Defendants' privacy. Plaintiffs also contend that Ms. Marash spent very little time in making the decision to employ hidden cameras, and has no training or qualifications that would help her make such decisions. (*Id.* at 13-14; see also PRDUF, PP 217-54.) In view of the record produced by Defendants as to the scant time spent by Plaintiffs in contemplating the use of secret cameras; and in light of Defendants' alleged disregard of Plaintiffs' privacy interests (*See e.g.* Johnson Decl., Ex. 18 Sloan Dep. 33:6-12, 56:3-6, 23-24, 14:1-8; Ex. 23, Ross Dep. 63-64, 79, 160, 178; *and* Ex. 15, Marash Dep. at 18, 21, 25, 30 & 54), the court finds there is a triable issue of fact as to whether ABC acted in conscious disregard of Plaintiffs' privacy rights. Accordingly Defendants' Motion for Summary Judgment is hereby DENIED.

V. RULING

Defendants' Motion Re: Claims is denied in part and granted in part. Defendants' Motion for Summary Judgment as to Plaintiffs' request for an injunction under Cal. Bus. & Prof. Code § 17203 is hereby GRANTED. Defendants' Motion Re: Claims is hereby DENIED in all other respects. Defendants' other Motion for Summary Judgment, *i.e.* their Motion Re: Damages, is hereby DENIED in its entirety.

VI. OBJECTIONS TO EVIDENCE

A. Defendants' Objections

The court did not refer to the Expert Report of Mr. Lissit. As a result, Defendants' first objection is irrelevant. Defendants' other objection is also irrelevant because the court did not refer to Ms. Shapiro's declaration.

B. Plaintiffs' Objections

(1) Objection to Kerrigan Letter

The letter (Perry Decl. Ex. 1) was not admitted for the truth of the matter asserted. Rather, the letter was admitted for the purpose of showing that the DLSE and Mr. Kerrigan wrote the letter. Furthermore, the letter is clearly a business recorded and therefore falls under the exception created by Fed. R. Evid. 803(6), objection over-ruled.

(2) Steveson Letter

The letter (Perry Decl. Ex. 2) was not admitted for the truth of the matter asserted. Rather, the letter was admitted for the purpose of showing that the DLSE and Ms. Steveson wrote the letter. Furthermore, the letter is clearly a business recorded and therefore falls under the exception created by Fed. R. Evid. 803(6), objection over-ruled.

(3) Article from the Publication Backstage West Dated December 5, 2002 as Well as the Articles from the Daily Variety (Exhibits 3, 4 and 39)

The articles were not admitted for the truth of matter asserted. The articles are also taken from trade [*80] periodicals and therefore fall under Fed. R. Evid. 803(17), objection over-ruled.

(4) Exhibits 5, 33, 34 and 35 Were Not Relied upon by the Court

Objections are irrelevant.

Dated this 19th day of August, 2004.

S. JAMES OTERO

UNITED STATES DISTRICT JUDGE