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and AESTHETIC LASER CENTER

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FRESNO COUNTY SUPERIOR COURT
By: C Prendergast, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO

JANE DOE, an individual,

Plaintiff,

v.

ENRAQUITA LOPEZ, an individual;
AESTHETIC LASER CENTER, a
corporation; and SYMAR CHRYSALIS WEB
CMS, a company,

Defendants.

Case No. 14 CE CG 03646 MWS

DEFENDANTS' TRIAL BRIEF

Action Filed: August 6, 2014
Trial Date: July 24, 2017

Defendants ENRAQUITA LOPEZ, M.D., and AESTHETIC LASER CENTER hereby submit
the following Trial Brief to acquaint the Court with the factual background and legal issues in this
action.

I.

PARTIES AND REPRESENTATION

Plaintiff, JANE DOE, is represented by attorney Arvin C. Lugay with the law firm Kaspar &
Lugay, LLP in Tiburon, California.

Defendants, ENRAQUITA LOPEZ, M.D. and AESTHETIC LASER CENTER (hereinafter
referred to as "ALC") are represented by attorney Michael F. Ball with the law firm McCormick.
Barstow, Sheppard, Wayte & Carruth LLP in Fresno, California. Dr. Lopez is a licensed physician who
specializes in cosmetic surgery.

1 ///

2 II.

3 **RELEVANT PROCEDURAL HISTORY**

4 Plaintiff originally filed this verified civil action on August 6, 2014, in Alameda County. The
5 case was later transferred to Fresno County as the proper venue.

6 Plaintiff filed a verified First Amended Complaint ("FAC") on September 16, 2014. A
7 demurrer was filed and sustained, with leave to amend.

8 Thereafter, Plaintiff filed a verified Second Amended Complaint ("SAC") on February 9, 2015.
9 against Dr. LOPEZ, ALC, SYMAR – WEB DESIGN AND HOSTING ("SYMAR") and ENTICEN
10 MEDIA, LLC ("ENTICEN"). Defendants again filed a Demurrer (to the 1st, 4th and 9th Causes of
11 Action). The Demurrer was sustained *without leave to amend* as to those causes of action.

12 Dr. LOPEZ and ALC answered the SAC on June 17, 2015, denying all of the remaining claims
13 and raising various affirmative defenses.

14 Co-Defendants, SYMAR and ENTICEN were both dismissed, with prejudice, on January 18,
15 2017. Plaintiff agreed to dismiss these two defendants in exchange for zero money and an agreement
16 for Rose Simar (the owner of SYMAR and ENTICEN) to provide deposition testimony.

17 Plaintiff's claims against Dr. LOPEZ and ALC are as follows: (a) Public Disclosure of Private
18 Facts (2nd cause of action); (b) Appropriation of Name or Likeness (3rd cause of action); (c) Negligence
19 (5th cause of action); (d) Negligent Infliction of Emotional Distress (6th cause of action); (e) Breach of
20 Fiduciary Duty (7th cause of action); and, (f) Medical Malpractice/Professional Negligence (8th cause of
21 action). In short, Plaintiff is seeking monetary damages from Dr. LOPEZ and ALC for unintentionally
22 and unknowingly posting "before and after" photographs of her exposed/naked torso and breasts in a
23 manner that allowed them to come up on a "Google" image search of her name for a few weeks' time.

24 III.

25 **PLAINTIFF'S UNDERLYING PERSONAL INJURY MATTER**

26 Plaintiff was a patient of Dr. LOPEZ, who owns and operates her business, ALC. On March 28,
27 2013, Plaintiff underwent breast augmentation surgery and a "tummy-tuck" performed by Dr. LOPEZ.
28 There does not appear to be any issue with the manner in which Dr. LOPEZ actually performed the

1 surgery. There were no complications and Plaintiff is not claiming malpractice and/or damages arising
2 out of the actual March 28, 2013, surgery itself.

3 It was Dr. LOPEZ's practice to take photographs of her patients, with their express permission.
4 both "before" and "after" the surgery. In some instances, "before" and "after" photographs would be
5 posted on ALC's website. In this case, Plaintiff consented to allowing ALC to use her "before" and
6 "after" photographs.¹ There is no question that Plaintiff agreed to allow Dr. LOPEZ to use photographs
7 of Plaintiff in her marketing materials, such as ALC's website. However, this permission was extended
8 to Dr. LOPEZ with the unstated presumption by both her and the doctor that the photographs would not
9 be linked to the Plaintiff should anyone search her name or her business.

10 As such, pursuant to the authorization form, Dr. LOPEZ took photographs of Plaintiff both
11 "before" and "after" her March 28th surgery. Dr. LOPEZ then transferred the photos of Plaintiff from
12 her camera to her laptop computer. Then, Dr. LOPEZ put the photographs on a disk or thumb drive and
13 provided the disk or thumb driver to ALC's officer manager, Denise DeLiddo.

14 It was DeLiddo's responsibility to take the photos from the disk or thumb drive and save the
15 photographs on the hard drive of her work computer. In this case, DeLiddo created a file folder to
16 house the photos on her desktop work computer. DeLiddo labeled the file folder that contained the
17 photos with Plaintiff's full name.

18 Once the photos were saved on DeLiddo's computer she then uploaded Plaintiff's photos from
19 to ALC's website. DeLiddo labeled and stored the photos and/or file folder and then uploaded the
20 photos to the website in accordance with how she had been trained and/or instructed to perform this
21 task by SYMAR. The uploading of the subject images occurred on May 30th and early June of 2013.

22 On or about August 15, 2013, Plaintiff was on the phone with Mike Moritz, whom she had been
23 communicating with via an online dating service. During this phone call, Moritz stated that he had
24 searched Plaintiff's name on "Google Images", and included in the image search results were numerous
25 photos -- some of which were of her bare breasts/torso. Plaintiff did the identical search, and photos
26 of her did appear when she searched her name. Apparently, unbeknownst to Defendants, the manner in
27

28 ¹ The "Photographic Consent" form signed by Plaintiff is attached as Exhibit "A" to this Brief.

1 which DeLiddo saved and then uploaded the photos made them searchable to anyone that “Google
2 Imaged” the patient’s name. Attached as **Exhibit “B”** to this Brief are the “Screen Shots” that Plaintiff
3 has produced, which purportedly represent what Plaintiff saw when she “Google Imaged” her name on
4 August 15, 2013. Mr. Moritz is the only person that Plaintiff or anyone else is aware of that actually
5 saw the breast photographs without first being told about them.²

6 Plaintiff immediately called ALC to explain what was happening. Between August 16 and
7 August 21, 2013, efforts were made by Dr. LOPEZ and DeLiddo to get the photographs not only taken
8 down from ALC’s website but to also make sure the photos were no longer searchable. The photos
9 were in fact immediately taken down from the ALC website. An additional program was purchased to
10 ensure that the photos were no longer searchable. They were able to confirm on August 21st that the
11 photos were no longer coming up when someone searched Plaintiff’s name for images.

12 After the incident, Plaintiff continued to have a good relationship with Dr. LOPEZ and did not
13 seem overly upset, bothered or damaged by what had occurred. In fact, Plaintiff continued to ask for
14 services from Dr. LOPEZ for a number of weeks after the incident and continued to ask Dr. LOPEZ to
15 perform more services. This stopped once she retained a lawyer. See copies of numerous text
16 messages between Plaintiff and Dr. LOPEZ from August 15, 2013, to September 21, 2013 , attached as
17 **Exhibit “C.”**

18 IV.

19 PLAINTIFF’S CLAIMED DAMAGES

20 A. Special Damages

21 1. Medical Treatment and Care

22 Plaintiff claims to have suffered an injury as a result of the 2013 “publication” of her
23 photographs. Specifically, during discovery, she stated that: “Plaintiff suffered harm in the form of
24 personal humiliation, embarrassment, mental anguish, emotional distress, anxiety, lack of sleep and
25 damage to plaintiff’s personal and business reputation.”

26 _____
27 ² The others that have seen the photos are two of Plaintiff’s friends, i.e., Raylene Dewbre and Kendra McHatton, and
28 Plaintiff’s sister, Angela Stillwell. The only reason these people saw the photos was because Plaintiff complained to them
about the situation and they then “Googled” her name to confirm what Plaintiff was claiming.

1 Plaintiff claims to have received some treatment, as a result of the incident, in the form of
2 therapy and counseling from Rosemary Jalovaara, MFT, in Pacifica. She was first seen on June 23,
3 2014, which would be some ten months after the events in question. At that point in time Plaintiff was
4 “most concerned and frustrated with an unresolved relationship with her fourteen year old son who was
5 experiencing severe emotional issues due to ongoing, unresolved custody and co-parental issues.” She
6 also acknowledged having issues with low self-worth and lack of self-confidence. According to other
7 records from Ms. Jalovaara, Plaintiff had not seen her teenage son for 3 years, left Oklahoma for
8 California (leaving behind her son) to avoid the constant court battles, had a failed relationship with her
9 child’s father, etc. Ms. Jalovaara noted she had problems trusting others, was “done” with dating as
10 she did not want to get hurt, and had many unresolved issues with family causing problems with trust.

11 On the other hand, Ms. Jalovaara also indicated: “She stated a belief that her surgeon had
12 exposed her to fears, anxiety and shame having posted pre- and post- breast surgery pictures with her
13 name on the physician’s website as well as on Google. She was made aware of this problem when a
14 man she was dating found these pictures on her website by searching with her name. Mandi was having
15 anxiety attacks fearing that her son and others would view her nude body” Attached as **Exhibit “D”**
16 to this Brief is a copy of a September 29, 2015, report from Ms. Jalovaara.

17 In any event, Plaintiff did return to see Jalovaara a number of times, i.e., 136 visits, through
18 May 23, 2017, when she was released from all treatment. They would talk about all of the things that
19 were troubling Plaintiff. Ms. Jalovaara recently testified that they talked about issues related to the
20 breast surgery and the accidental posting of the photos on less than 6 of the 136 45-minute sessions.
21 The rest of the treatment was substantially related to the problems with her family, her son, her friends,
22 etc. In all likelihood, she would have sought out all of this care related to her personal issues regardless
23 of the photos. All of the therapy, 100%, has been paid for by San Mateo County Behavioral Access, at
24 a rate of \$58.00 per session. Plaintiff paid no deductible or copay. There is no lien. There is no balance
25 due.

26 2. Future Medical Care

27 There is no evidence that Plaintiff will reasonably require any future care related to this
28 incident. Ms. Jalovaara testified that she released Plaintiff from her care, and that she has never

1 referred Plaintiff to any other health care provider.

2 **3. Lost Wages**

3 Plaintiff does attribute a loss of income or earning capacity as a result of this incident. Plaintiff
4 is a photographer and runs a business selling her photographs online (about 5% of her income) and in
5 San Francisco out of a kiosk (about 95% of her sales). She never provided any details, documentation
6 or anything that would really substantiate her claims. Instead, Plaintiff claims that because of her
7 “devastation” at seeing these photos on the internet and being worried about whether prospective
8 customers who come up to her when she selling her pictures on Pier 39, Fisherman’s Wharf and/or
9 Ghirardelli Square would have seen these photos of her, that not only was this very upsetting to her but
10 had ramifications in terms of her ability to sell her pictures, because she was not as outgoing and
11 gregarious as she typically would be. This, she believes, was the situation for about five or six months.
12 so it is her estimate that during this period of time she would have lost somewhere between \$5,000.00
13 and \$6,000.00 in loss of income. Yet, Plaintiff is unable to identify any individual who saw the
14 photographs online or that she missed out on a single sale because of the publication.

15 Plaintiff has no verifiable documentation to support any wage loss and, in fact, did not timely
16 file taxes in 2011, 2012 or 2013.³ For 2012, Plaintiff claimed \$45,288 in gross receipts with expenses
17 of \$19,303 for a profit of \$25,985. In 2013, Plaintiff claimed on her taxes gross receipts/sales of
18 \$42,460 against \$27,652 in expenses for profits of \$14,808. And, in 2014 she had gross receipts of
19 \$48,256.00 but expenses of \$18,374.00 for a net profit of \$21,758.00. Again, nothing has been
20 produced that would support Plaintiff’s claim that there was in causal connection between lost profits
21 and the August 2013 publication of her photos.

22 **4. General Damages**

23 What is the value of one person, i.e., Mike Moritz, a man she possibly would date, seeing some
24 photos of her exposed breasts? This is really what this case is all about.

25 What occurred was nothing more than a random accidental publication of photos of Plaintiff’s
26 bare mid-section (along with other images that were not Plaintiff) that was quickly remedied once it

27 _____
28 ³ Plaintiff just filed her 2012 and 2013 taxes on April 18, 2017.

1 was caught. There is even a question as to whether anyone else would have believed those photos to
2 be of Plaintiff's breasts, when there are a lot of other images in the search results, many of which are
3 clearly not the Plaintiff.

4 Attached as **Exhibit "E"** to this Brief is a copy of a 2014 Facebook posting and exchange
5 among Plaintiff, her sister, and her friends, which clearly shows that Plaintiff was not emotionally
6 devastated about drawing attention to her breasts.

7 V.

8 **DEFENDANT'S POSITION ON LIABILITY**

9 Dr. LOPEZ and ALC hired SYMAR to design and create a website for the business in late 2012.
10 Both DeLiddo and Dr. LOPEZ interfaced with SYMAR. This meant speaking and/or e-mailing with
11 Rose Simar, who was the main (and only) contact person. SYMAR transferred all of the photographs
12 and content that was on ALC's old website to the new website that SYMAR had designed. By
13 approximately May 1, 2013, there was indication that the new site would be going live. However,
14 before SYMAR could completely turn over the website to ALC there had to be some training of ALC's
15 personnel, i.e., DeLiddo, regarding the use of the website.

16 Rose Simar acknowledged that SYMAR was solely responsible for training ALC personnel on
17 the use of the website. This including the saving, storing and uploading of photographs. SYMAR was
18 aware that ALC had hired the company to not only design the new website but also provide training to
19 ALC's people so they could then manage the content. Additionally, SYMAR was aware of the
20 importance of complying with HIPAA and confidentiality of information on its website.

21 DeLiddo was the only one who received any type of "training" from SYMAR. There were no
22 hand-outs, handbooks, instructions or manuals regarding provided by SYMAR regarding the new
23 website. Instead, the only training was a 10-15 minute phone call between Simar and DeLiddo that
24 occurred on or about May 15, 2013. This verbal training was the only training SYMAR ever provided
25 with respect to the saving, storing and uploading of photographs. Simar verbally explained the process
26 of uploading the photographs on the website. She was then able to look on the ALC website and note
27 that the "training" photograph was displayed on the website. During this phone call no instructions or
28 training was provided to ALC (i.e., DeLiddo) about the proper way to save images in files and whether

1 or not a patient name should be used to label a photograph that was going to be uploaded.

2 Apparently, if a photograph is saved with a patient's name in the title and then uploaded the
3 entire file name, which includes the patient's name, is essentially "embedded" into the photograph and,
4 thereby, allows it to come up as a search result of that patient's name. Obviously, no one at ALC,
5 especially DeLiddo, was aware of this prior to saving, storing and uploading Plaintiff's photographs.
6 This was something that was never discussed by SYMAR during the short training session. At no time
7 while SYMAR was providing services was this ever discussed or mentioned. This information, that
8 should have been made a part of SYMAR's training, was only learned by ALC after it started looking
9 into the complaint made by Plaintiff.

10 After learning of the incident involving Plaintiff, DeLiddo called Simar on August 16, 2013, to
11 explain what Plaintiff had reported. In response, Simar stated that there was really nothing she could do
12 to help and made it seem like it was "no big deal." Thus, SYMAR never stepped in to help remedy the
13 situation. As far as SYMAR was concerned, since they had been paid and had turned over the website,
14 their work was finished.

15 After this incident, it was obvious to Dr. LOPEZ that her staff had received poor training and
16 that the people at SYMAR were "incompetent." Within months after the incident ALC had a new web
17 design company, a new webpage and had, finally, received proper training.

18 Defendants have retained and designated a computer expert who will offer testimony regarding
19 the unreasonable way that SYMAR provided training to ALC, specifically Ms. DeLiddo. Our expert
20 has concluded that the training provided to DeLiddo of ALC was negligent and well below the
21 applicable standard of care as the training failed to specifically address the saving of photos, the
22 labeling of folders, and how to make sure photos are not searchable once uploaded. It was because of
23 the negligent training provided by SYMAR that DeLiddo was unaware of what might occur if she
24 uploaded one of Plaintiff's photographs onto ALC's website from a file folder that contained the
25 patient's name.

26 Plaintiff has elected to simply dismiss SYMAR from this litigation, and never even required the
27 Texas based business to even appear in this case. Nonetheless, there will be ample testimony from
28 Defendants' expert and DeLiddo regarding the negligent, substandard and clearly deficient "training"

1 that SYMAR provided. Pursuant to Proposition 51 the liability of each individual defendant is several
2 as to non-economic damages. (Civ. Code §1431.2.) Each tortfeasor is personally liable for an
3 indivisible injury, and the economic damages caused, if their actions were a proximate result of that
4 injury. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578,586.) The principle of
5 joint and several liability allows an injured person to obtain full recovery for their injuries, even when
6 one or more of the joint tortfeasors do not have the financial resources to pay what they owe based on
7 their liability. (*Id.* at 590.) Thus, since SYMAR is no longer a party to this litigation, if Defendants are
8 found 1% at fault then Defendants would be responsible for 100% of the special damages. But, as
9 noted in this MSC Statement, the amount of legitimate special damages is negligible. As outlined
10 above, the most substantial amount of damages seems to be Plaintiff's claimed "pain and suffering" or
11 "general damages." And, with respect to those damages, Defendants would only be responsible for the
12 actual percentage of responsibility the jury assigns to ALC and/or Dr. LOPEZ.

13 **VI.**

14 **CONCLUSION**

15
16 Defendants readily admit that the photos, which Plaintiff consented to be posted anonymously
17 on the ALC website, unintentionally and unknowingly were searchable for a short time on the Internet
18 using a Google Images search of Plaintiff's name. Defendants deny that they knew that this could
19 possibly occur. Defendants contend that they uploaded the photographs of Plaintiff consistent with
20 how they had been trained by their web design company, former Co-Defendant SYMAR, and believed
21 they would be completely anonymous.

22 The present time estimate for trial is 5 days.

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1 Dated: July 19, 2017

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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3
4 By: 

Michael F. Ball

Attorneys for Defendants,
ENRAQUITA LOPEZ, M.D.
and AESTHETIC LASER CENTER

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EXHIBIT A

FILED
FRESNO COUNTY
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF FRESNO
10

11 JANE DOE, an individual,
12 Plaintiff,
13 v.

14 ENRAQUITA LOPEZ, an individual;
AESTHETIC LASER CENTER, a corporation;
15 ENTICEN MEDIA, L.L.C., a corporation; and
SYMAR - WEB DESIGN AND HOSTING, a
16 business organization, form unknown.

17 Defendants.
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Case No.: 14CECG03646 - MWS

SECOND AMENDED VERIFIED
COMPLAINT

- 1- ~~INTRUSION INTO PRIVATE AFFAIRS~~
2. PUBLIC DISCLOSURE OF PRIVATE FACTS
3. APPROPRIATION OF NAME OR LIKENESS
- 4- ~~USE OF NAME OR LIKENESS = CALIFORNIA CIVIL CODE § 3344~~
5. NEGLIGENCE
6. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
7. BREACH OF FIDUCIARY DUTY
8. MEDICAL MALPRACTICE/NEGLIGENCE
- 9- ~~BREACH OF CONTRACT~~

COMPLAINT FILED: AUGUST 6, 2014

BY FAX

- 1 -

1 Plaintiff JANE DOE herein alleges as follows:

2 **INTRODUCTION**

3 1. PLAINTIFF, through her counsel, brings this unlimited civil action for actual damages,
4 statutory damages, attorney fees and costs against defendants ENRAQUITA LOPEZ, AESTHETIC
5 LASER CENTER, ENTICEN MEDIA, L.L.C., and SYMAR – WEB DESIGN AND HOSTING,
6 (collectively “DEFENDANTS”) for invasion of privacy, negligent infliction of emotional distress,
7 intrusion into private affairs, public disclosure of private facts, appropriation of name or likeness, use
8 of name or likeness, negligence, negligent infliction of emotional distress, breach of fiduciary duty,
9 and medical malpractice/negligence.

10 **PARTIES**

11 2. Plaintiff JANE DOE (“PLAINTIFF”) is a natural person domiciled and residing in
12 Pacifica, California.

13 3. Defendant ENRAQUITA LOPEZ (DR. LOPEZ) is a natural person domiciled and
14 residing in Fresno, California and Oakland, California.

15 4. Defendant AESTHETIC LASER CENTER (“ALC”) is a California corporation with
16 places of business in Oakland, California and Fresno, California.

17 5. Defendant ENTICEN MEDIA, L.L.C., (“ENTICEN”) is a Texas corporation with a
18 principal place of business in Orange, Texas.

19 6. Defendant SYMAR – WEB DESIGN AND HOSTING (“SYMAR”) is a website design
20 and hosting company with a principal place of business in Orange, Texas.

21 **JURISDICTION AND VENUE**

22 7. This Court has personal jurisdiction over DEFENDANT DR. LOPEZ because she
23 resides and is domiciled in California.

24 8. This Court has personal jurisdiction over DEFENDANT ALC because ALC is a
25 California corporation.

26 9. This Court has personal jurisdiction over DEFENDANTS ENTICEN and SYMAR
27 under California Code of Civil Procedure section 410.10.

10. Venue is proper in this Court pursuant to California Code of Civil Procedure sections 395(a) because Defendants DR. LOPEZ and ALC both reside in the County of Fresno.

FACTUAL ALLEGATIONS

11. DR. LOPEZ is a cosmetic surgeon who focuses her practice on cosmetic surgery and complementary medical spa services. DR. LOPEZ is the medical director of ALC and is also the lone medical doctor practicing at ALC.

12. DR. LOPEZ owns and resides in homes located in Fresno, California and in Oakland, California.

13. ALC is a California corporation that operates out of offices in Oakland, California and Fresno California. DR. LOPEZ formed ALC to host her cosmetic surgery practice. ALC's Oakland Center (the "Oakland Center") is located at 385 Grand Avenue, Oakland, California 94609. ALC's Fresno Center (the "Fresno Center") is located at 681 N. First, Suite 101, Fresno, CA 93710.

14. Denise DeLiddo ("DELIDDO") is the Patient Care Coordinator of ALC and works out of the Fresno Center.

15. ENTICEN is the parent company of SYMAR.

16. SYMAR is the primary business of parent company ENTICEN. SYMAR designs and hosts websites and specializes in building content managed websites for clients. SYMAR created and maintained the ALC website during the time period encompassing the facts alleged in this Complaint.

17. PLAINTIFF is a former patient of DR. LOPEZ and ALC.

18. PLAINTIFF is a photographer and runs a business selling her photographs. PLAINTIFF's photography business has a website with a website address, or "URL," consisting of PLAINTIFF's full name. PLAINTIFF uses her business's website to create increased exposure for her photography and to grow her business. PLAINTIFF has had a website in existence for her photography business since 2003.

19. On February 1, 2013, PLAINTIFF signed a Surgical Consent and Request Form with ALC. The form authorized DR. LOPEZ to perform the following surgical procedures on PLANTIFF:

1 (1) a tummy tuck, (2) breast implants, and (3) a vertical breast lift (the "Procedures").

2 20. On March 28, 2013, PLAINTIFF also signed a Photographic Consent form (the "Photo
3 Consent Form") with DR. LOPEZ and ALC, attached hereto as Exhibit A. The Photo Consent
4 Form states that PLAINTIFF "consent[s] that any and all photographs taken or ordered by [DR.
5 LOPEZ] of any part of [PLAINTIFF's] body, whether originals or reproductions, may be
6 utilized for such purposes she may desire in connection with her research, writing, professional
7 activities and may be used, exhibited and published through any medium whatsoever as part of
8 or in connection with her research, writing, or professional activities, even though such use may
9 be for advertising purposes or purposes of trade." See Ex. A. The Photo Consent Form also
10 states that "[t]his consent is not retractable, either by oral or written means . . ." *Id.*

11 21. The Photo Consent Form constitutes a contract between PLAINTIFF and
12 DEFENDANTS DR. LOPEZ and ALC. On March 28, 2013, DEFENDANTS DR. LOPEZ and
13 ALC proposed the terms of the contract by presenting PLAINTIFF with the Photo Consent
14 Form that contains all of the contract terms. After reviewing the contract terms proposed by
15 DR. LOPEZ and ALC in the Photo Consent Form, PLAINTIFF accepted the proposed contract
16 by signing the Photo Consent form on March 28, 2013. The terms of the Photo Consent Form
17 clearly define the terms of the contract in that they define what the parties are required to do
18 under the contract.

19 22. The contract between the parties as defined by the Photo Consent Form required
20 PLAINTIFF to authorize DR. LOPEZ and ALC to use, exhibit, and publish through any
21 medium all of the Photographs they take or order of any part of PLAINTIFF's body for
22 purposes in connection with their research, writing, professional activities, advertising purposes,
23 or purposes of trade.

24 23. In exchange for PLAINTIFF's authorization to use, exhibit, and publish the
25 Photographs of PLAINTIFF under the contract, DR. LOPEZ and ALC were required to refrain
26 from using, exhibiting, or publishing PLAINTIFF's name or likeness outside of the scope
27 explicitly defined in the Photo Consent Form. The language of the Photo Consent Form firmly
28

1 limits the scope of DR. LOPEZ's and ALC's use or disclosure of PLAINTIFF's image or likeness
2 to the Photographs they take or order of PLAINTIFF's body. Nothing in the contract
3 authorized DR. LOPEZ and ALC to use PLAINTIFF's name, voice, or protected individually
4 identifiable health information in connection with the use or disclosure of PLAINTIFF's
5 Photographs. The Photo Consent Form does not grant DR. LOPEZ and ALC consent to disclose
6 any protected individually identifiable health information that could be used identify
7 PLAINTIFF as the subject of the Photographs.

8 24. DR. LOPEZ and ALC are health care providers under the Health Insurance
9 Portability and Accountability Act of 1996 ("HIPAA") and they knew that HIPAA prohibited
10 them from disclosing PLAINTIFF's "protected health information" without a valid
11 authorization from PLAINTIFF. See 45 CFR § 164.508(a)(1). DR. LOPEZ and ALC
12 maintained the Photographs in electronic format as part of PLAINTIFF's medical records. DR.
13 LOPEZ and ALC knowingly and intentionally made the decision to designate each of the
14 electronic files for each Photograph with labels containing PLAINTIFF's real name. DR.
15 LOPEZ and ALC knew that HIPAA defines "protected health information" as information that
16 (1) is created or received by a health care provider; that (2) relates to the physical or mental
17 health of an individual or the provision of health care to an individual; that (3) identifies or can
18 be used to identify the individual; and that (4) is transmitted or maintained in electronic media
19 or in any other form or medium. See 45 CFR § 160.103. DR. LOPEZ and ALC knew or were
20 substantially certain that the Photographs constituted protected health information because (1)
21 DR. LOPEZ and ALC created the Photographs in relation to their provision of health care to
22 Plaintiff; (2) they knowingly and intentionally designated the electronic files containing each
23 Photograph with a label that contained PLAINTIFF's real name; and (3) they knowingly
24 maintained PLAINTIFF's Photographs in electronic format.

25 25. DR. LOPEZ and ALC also knew that Section 164.508 of HIPAA required them to
26 obtain a valid authorization from PLAINTIFF to disclose protected individually identifiable
27 health information, and that a valid authorization required a "description of the information to
28

1 be used or disclosed that identifies the information in a specific and meaningful fashion.” See 45
2 CFR § 164.508(c)(1)(i). DR. LOPEZ and ALC knew that their decision to include PLAINTIFF’s
3 real name in the labels for each of the Photographs would require them to draft a request for
4 authorization that notified PLAINTIFF of the fact that publication of the Photographs would
5 also result in the disclosure of PLAINTIFF’s name in connection with the Photographs.
6 PLAINTIFF would not have authorized the publication of the Photographs in the Photo Consent
7 Form if she had known that the Photographs contained individually identifiable health
8 information that identified PLAINTIFF as the subject of the Photographs. In an attempt to
9 ensure that PLAINTIFF did not refuse to consent to publication of her Photographs, DR.
10 LOPEZ and ALC knowingly and intentionally drafted the Photo Consent Form to omit the
11 material fact that the Photographs contained PLAINTIFF’s individually identifying information.

12 26. DR. LOPEZ and ALC knowingly and intentionally drafted the Photo Consent
13 Form so that it described the information to be disclosed under the requested authorization
14 merely as “any and all photographs taken or ordered by [DR. LOPEZ] of any part of
15 [PLAINTIFF’s] body. . .” See Ex. A. This description failed to identify the information disclosed
16 in a specific and meaningful fashion because it omitted the material fact that the DEFENDANTS
17 knowingly and intentionally designated the electronic files containing each of PLAINTIFF’s
18 Photographs with a label that contained PLAINTIFF’s real name. PLAINTIFF could not grant
19 a request for authorization by DR. LOPEZ and ALC to disclose PLAINTIFF’s name or
20 protected health information because DR. LOPEZ and ALC completely failed to identify this
21 information in the Photo Consent Form. Under HIPAA section 164.508(b)(2)(v), the knowing
22 and intentional omission by DR. LOPEZ and ALC of material information from the Photo
23 Consent Form rendered the Photo Consent Form’s authorization to disclose protected health
24 information defective and invalid. As a result of their intentional misrepresentation, DR.
25 LOPEZ and ALC knew or were substantially certain that the authorization to disclose protected
26 health information under the Photo Consent Form was invalidated and that the terms of the
27 Photo Consent Form did not allow for disclosure of PLAINTIFF’s individually identifiable
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1 health information.

2 27. The Photo Consent Form does not contain any language authorizing DR. LOPEZ
3 and ALC to disclose PLAINTIFF's name or any of PLAINTIFF's protected individually
4 identifiable health information. The Photographs of PLAINTIFF constitute the only form of
5 PLAINTIFF's likeness for which use or disclosure is authorized under the plain terms of the
6 Photo Consent Form. In fact, any disclosure by DR. LOPEZ and ALC of PLAINTIFF's name
7 or protected individually identifiable health information not only constitutes a breach of the
8 contract under the terms of the Photo Consent Form, but also constitutes an unlawful violation
9 of the HIPAA Privacy Rule for impermissible and unauthorized disclosures of protected health
10 information under HIPAA sections 160.103, 164.502 and 164.508. Under HIPAA Section
11 164.508, DR. LOPEZ and ALC cannot disclose PLAINTIFF's name or any other protected
12 individually identifiable health information without first obtaining a valid authorization that
13 specifically describes the exact type of protected individually identifiable health information they
14 seek to disclose. Because there is no lawful way to disclose PLAINTIFF's name or protected
15 health information without violating HIPAA, the only way that DR. LOPEZ and ALC can
16 comply with HIPAA without breaching the contract between the parties is by publishing or
17 disclosing only the Photographs specifically referred to in the Photo Consent Form without also
18 disclosing PLAINTIFF's name or other individually identifiable information.

19 28. Thus the Photo Consent form did not permit DEFENDANTS to include, attach, or
20 otherwise display PLAINTIFF's name or protected individually identifiable health information in
21 connection with PLAINTIFF's photographs when the photographs were published or otherwise
22 displayed to third parties by DEFENDANTS.

23 29. On March 28, 2013, an employee of ALC took pictures of PLAINTIFF's bare breasts
24 and torso in ALC's Fresno Center prior to undergoing her scheduled cosmetic surgery procedures with
25 DR. LOPEZ and ALC.

26 30. On March 28, 2013, PLAINTIFF underwent the tummy tuck, breast implants, and
27 vertical breast lift cosmetic surgery procedures with DR. LOPEZ and ALC.
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1 31. In April of 2013, approximately three weeks after March 28, 2013, an employee of
2 ALC took pictures of PLAINTIFF's bare breasts and torso in ALC's Oakland Center to document the
3 post-surgery results of PLAINTIFF's March 28, 2013 cosmetic procedures with DR. LOPEZ and
4 ALC.

5 32. ALC posts before and after pictures of DR. LOPEZ's cosmetic surgery patients (the
6 "Patient Photographs") on the "Gallery" pages of ALC's website for marketing purposes. Some of
7 the Patient Photographs display the naked bodies of patients.

8 33. Each Patient Photograph is a part of the medical records of one of the patients of
9 ALC and DR. LOPEZ. DEFENDANTS labeled each electronic copy of a Patient Photograph
10 taken between March 2013 and October 2013 with the name of the patient who was the subject
11 of that photograph, making each Patient Photograph individually identifiable to a specific
12 patient. The Patient Photographs from this time period thus constitute protected individually
13 identifiable health information under section 160.103 of HIPAA. HIPAA regulations require
14 valid patient authorization for the release of protected health information, which includes
15 patient photography for purposes beyond treatment, payment and healthcare operations. Under
16 section 164.508(c) of HIPAA, valid patient authorizations for use or disclosure of protected
17 health information requires that the authorization form have a "description of the information
18 to be used or disclosed that identifies the information in a specific and meaningful fashion," and
19 must place the individual patient on notice of "the individual's right to revoke the authorization
20 in writing."

21 34. As health care professionals, DR. LOPEZ and ALC knew that the individually
22 identifiable Patient Photographs constituted "protected individually identifiable health
23 information" under HIPAA. DR. LOPEZ and ALC knew that they needed to obtain valid
24 authorization from their patients in order to publish or disclose the Patient Photographs to third
25 parties. DR. LOPEZ and ALC also knew that in order to obtain valid authorization from their
26 patients, they needed to have their patients execute authorization forms that (1) contained a
27 "description of the information to be used or disclosed that identifies the information in a
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1 specific and meaningful fashion,” and (2) placed the individual patient on notice of “the
2 individual’s right to revoke the authorization in writing.”

3 35. ALC and DR. LOPEZ never obtained valid authorization from any of their
4 patients to disclose and publish personally identifiable Patient Photographs on ALC’s website for
5 marketing purposes. Section 164.508(c) of HIPAA requires valid patient authorization forms to
6 have a “description of the information to be used or disclosed that identifies the information in a
7 specific and meaningful fashion.” Although DR. LOPEZ and ALC asked their patients to sign
8 “Photographic Consent” forms identical to the one signed by PLAINTIFF, the consent forms
9 signed by PLAINTIFF and other patients did not constitute valid authorization under HIPAA
10 because they did not specifically or meaningfully identify the information that Dr. LOPEZ and
11 ALC sought to disclose. In fact, the Photographic Consent form signed by PLAINTIFF and
12 other patients contained material misstatements and omissions regarding the patient information
13 actually disclosed by DEFENDANTS. Specifically, the Photographic Consent forms signed by
14 PLAINTIFF and other patients did not inform patients that the Patient Photographs that Dr.
15 LOPEZ and ALC sought to publish contained individually identifiable information in the form
16 of the patients’ names. The consent forms failed to notify PLAINTIFF and the other patients
17 that their names would be disclosed and that patients could be identified in connection with their
18 Patient Photographs.

19 36. Instead, the statements of the Photographic Consent form misled PLAINTIFF and
20 the other patients to believe that DR. LOPEZ and ALC only intended to publish anonymous
21 photographs of patients that did not contain any individually identifiable information. The
22 Photographic Consent Form signed by PLAINTIFF and the other patients contained no mention
23 whatsoever of “individually identifiable health information” and contained no language notifying
24 PLAINTIFF and the other patients that they would be agreeing to the disclosure of individually
25 identifiable health information. There is no language in the Photographic Consent Forms that
26 authorizes DR. LOPEZ and ALC to disclose patient names or protected individually identifiable
27 health information. As a result PLAINTIFF and the rest of DR. LOPEZ’s and ALC’s patients
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1 could not have authorized publication or disclosure of the Patient Photographs because the
2 Photographic Consent forms did not notify PLAINTIFF or any of the other patients that their
3 names would be disclosed in connection with the Patient Photographs published on ALC's
4 website. PLAINTIFF would not have authorized the publication and disclosure of her naked
5 Patient Photographs if the Photographic Consent form had truthfully informed her about the
6 fact that her name and identifying information would also be disclosed to the public.

7 37. DR. LOPEZ and ALC either drafted or directed one of their employees or agents
8 to draft the Photographic Consent form that was signed by PLAINTIFF and their other patients.
9 DR. LOPEZ and ALC reviewed and approved the content of the Photographic Consent form
10 before it was put into use for obtaining the consent of PLAINTIFF and their other patients. DR.
11 LOPEZ and ALC knowingly and intentionally drafted the Photographic Consent form to omit
12 any language notifying PLAINTIFF or their other patients that DEFENDANTS' publication of
13 Patient Photographs would also result in the disclosure of other protected individually
14 identifiable patient information, such as patients' names. DR. LOPEZ and ALC knowingly and
15 intentionally omitted any notification regarding the release of protected individually identifiable
16 health information in the Photographic Consent form because they knew or were substantially
17 certain that none of their patients would consent to have their Patient Photographs published if
18 they knew their real names would also be disclosed and associated with the photographs. DR.
19 LOPEZ and ALC also knowingly and intentionally drafted the Photographic Consent forms to
20 state that the "consent is not retractable, either by oral or written means," in clear disregard of
21 the HIPAA requirement that patients be notified of their right to revoke any authorization in
22 writing. Thus DR. LOPEZ and ALC knew or were substantially certain that they never
23 presented PLAINTIFF or any other of their patients with valid HIPAA-compliant requests for
24 authorization to disclose protected individually identifiable health information. As health care
25 providers governed by HIPAA, ALC and DR. LOPEZ also knew or were substantially certain
26 that their intentional publication of unauthorized individually identifiable Patient Photographs
27 on ALC's website resulted in prohibited disclosures of protected health information under
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1 **HIPAA in violation of their patients' medical privacy rights.**

2 38. DEFENDANTS' procedures for labeling and posting naked photographs of DR.
3 LOPEZ's and ALC's patients on ALC's website did not sufficiently protect the anonymity of those
4 patients because those procedures failed to prevent the publication of personally identifiable
5 photographs of those patients on the Internet. DEFENDANTS knowingly and intentionally named
6 and labeled the electronic files containing Patient Photographs that were part of their patients'
7 private medical records with the patients' actual names.

8 39. DEFENDANTS either directly undertook or assigned at least one of their
9 employees the following tasks: (1) taking pre and post-surgery Patient Photographs, (2) naming
10 and labeling the electronic files containing the Patient Photographs, (3) saving the electronic files
11 containing Patient Photographs to the patients' medical records maintained by DEFENDANTS,
12 and (4) posting Patient Photographs to ALC's website. Either DEFENDANTS or
13 DEFENDANTS' employees, acting within the scope of their employment and under the direction
14 of DEFENDANTS, knowingly and intentionally made the decision to include patient names in
15 the names and labels they assigned to the electronic files containing Patient Photographs. Either
16 DEFENDANTS or DEFENDANTS' employees, acting within the scope of their employment and
17 under the direction of DEFENDANTS, manually entered the patients' names into the electronic
18 file names of the Patient Photographs before saving the Patient Photographs to DEFENDANTS'
19 electronic patient records. Either DEFENDANTS or DEFENDANTS' employees, acting within
20 the scope of their employment and under the direction of DEFENDANTS, then knowingly and
21 intentionally posted the Patient Photographs to ALC's website.

22 40. From March 2013 through September 2013, DEFENDANTS and their employees
23 knowingly and intentionally practiced the policy and procedure of naming or labeling each
24 electronic file containing a Patient Photograph with the name of the patient in the photograph.
25 As a result every electronic copy of a Patient Photograph that was posted by DEFENDANTS to
26 ALC's website between March 2013 and October 2013 could be individually identified with the
27 patient that was the subject of the photograph. During that time period DEFENDANTS
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1 knowingly and intentionally posted over 100 individually identifiable Patient Photographs on
2 ALC's website.

3 41. DEFENDANTS' procedures for posting supposedly anonymous marketing pictures of
4 patients' naked bodies on ALC's website also allowed the patients' names to be listed in the addresses
5 of the ALC web pages that contained their naked photographs, in addition to linking to the
6 photographs that were already labeled with the names of the patients. DEFENDANTS and their
7 employees knew that the electronic file name for each Patient Photograph contained the name of
8 the corresponding patient. DEFENDANTS and their employees knew that the Patient
9 Photographs that were labeled with their patients' names were part of their patients' medical
10 records and thus constituted "protected individually identifiable health information" under
11 section 160.103 of HIPAA. DEFENDANTS and their employees then knowingly and
12 intentionally posted the Patient Photographs on ALC's website. When DEFENDANTS posted
13 the Patient Photographs to the photo gallery pages of ALC's website, the website address for
14 each Patient Photograph would display the electronic file name of the Patient Photograph
15 containing the subject patient's name.

16 42. DEFENDANTS knew or were substantially certain that as a result of posting the
17 Patient Photographs on ALC's website, the website address for each Patient Photograph would
18 display the electronic file name of the Patient Photograph containing that patient's name.
19 DEFENDANTS knew that they had not obtained valid authorization from any of their patients
20 to release Patient Photographs that could be individually identified to those patients.
21 DEFENDANTS knew or were substantially certain that the posting and publication of the
22 Patient Photographs on ALC's website would result in the unauthorized disclosure of patients'
23 identities in violation of HIPAA. In addition, DEFENDANTS knew or were substantially certain
24 that publishing the Patient Photographs on ALC's website would allow the Patient Photographs
25 to appear as search engine results when their patients' names were entered as search terms.
26 DEFENDANTS thus intentionally posted individually identifiable Patient Photographs on ALC's
27 website for marketing purposes without obtaining valid authorization from their patients as
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1 required by HIPAA. As health care providers governed by HIPAA, ALC and DR. LOPEZ knew
2 or were substantially certain that posting unauthorized personally identifiable Patient
3 Photographs on ALC's website would constitute a prohibited disclosure of protected health
4 information under HIPAA in violation of their patients' medical privacy rights. DEFENDANTS
5 were substantially certain or knew it was highly probable that their procedures for labeling and
6 posting naked photographs of DR. LOPEZ's and ALC's patients would cause harm to their patients
7 by disclosing those patients' protected individually identifiable medical information and
8 DEFENDANTS knowingly disregarded that risk. In the alternative, DEFENDANTS failed to use
9 reasonable care in developing and implementing procedures to prevent the personally identifiable
10 naked pictures of patients from being posted on ALC's website and published on the Internet.

11 43. On or about May 30, 2013, DEFENDANTS posted the before and after photographs
12 of PLAINTIFF's March 28, 2013 cosmetic procedures (the "Photographs") on the marketing gallery
13 pages of ALC's website. The Photographs show PLAINTIFF's naked breasts and her torso.

14 44. Either DEFENDANTS or DEFENDANTS' employees, acting within the scope of
15 their employment and under the direction of DEFENDANTS, knowingly and intentionally made
16 the decision to include PLAINTIFF's name in the file name or label that they assigned to the
17 electronic files containing PLAINTIFF's Photographs. Either DEFENDANTS or
18 DEFENDANTS' employees, acting within the scope of their employment and under the direction
19 of DEFENDANTS, manually entered PLAINTIFF's name into the electronic file names of
20 PLAINTIFF's Photographs before saving the PLAINTIFF's Photographs to DEFENDANTS'
21 electronic patient records. Either DEFENDANTS or DEFENDANTS' employees, acting within
22 the scope of their employment and under the direction of DEFENDANTS, then knowingly and
23 intentionally posted the PLAINTIFF's Photographs to ALC's website.

24 45. DEFENDANTS and their employees knew that the electronic file name for each of
25 PLAINTIFF's Photographs contained the name of PLAINTIFF. DEFENDANTS and their
26 employees knew that PLAINTIFF's Photographs that were labeled with PLAINTIFF's name
27 were part of PLAINTIFF's medical records and thus constituted protected "individually
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1 identifiable health information” under section 160.103 of HIPAA. On or about May 30, 2013,
2 DEFENDANTS and their employees then knowingly and intentionally posted PLAINTIFF’s
3 Photographs on ALC’s website. When DEFENDANTS posted PLAINTIFF’s Photographs to the
4 photo gallery pages of ALC’s website, the website address for each of PLAINTIFF’s
5 Photographs would display the electronic file name of PLAINTIFF’s Photographs containing
6 PLAINTIFF’s name. In addition, the electronic files for PLAINTIFF’s Photographs containing
7 PLAINTIFF’s name could be viewed and downloaded from ALC’s website.

8 46. DEFENDANTS knew or were substantially certain that as a result of posting
9 PLAINTIFF’s Photographs on ALC’s website, the website address for each of PLAINTIFF’s
10 Photographs would display the electronic file name of the Photograph containing PLAINTIFF’s
11 name. Although DEFENDANTS made PLAINTIFF sign a Photographic Consent form,
12 DEFENDANTS intentionally drafted the consent form to omit any language notifying
13 PLAINTIFF that DEFENDANTS’ publication of PLAINTIFF’s Photographs would also result
14 in the disclosure of PLAINTIFF’s other protected individually identifiable health information,
15 such as PLAINTIFF’s name. As a result, DEFENDANTS knew or were substantially certain
16 that they had not obtained valid authorization from PLAINTIFF to release PLAINTIFF’s
17 Photographs that could be individually identified to PLAINTIFF. DEFENDANTS knew or were
18 substantially certain that the posting and publication of PLAINTIFF’s Photographs on ALC’s
19 website would result in the unauthorized disclosure of PLAINTIFF’s identifiable health
20 information in violation of HIPAA. In addition, DEFENDANTS knew or were substantially
21 certain that publishing PLAINTIFF’s Photographs on ALC’s website would allow the
22 PLAINTIFF’s Photographs to appear as search engine results when PLAINTIFF’s name was
23 entered as a search terms. DEFENDANTS thus knowingly and intentionally posted individually
24 identifiable Photographs of PLAINTIFF on ALC’s website for marketing purposes without
25 obtaining valid authorization from PLAINTIFF as required by HIPAA. As health care
26 providers governed by HIPAA, ALC and DR. LOPEZ knew or were substantially certain that
27 DEFENDANTS’ publication of PLAINTIFF’s Photographs on ALC’s website that were
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1 personally identifiable to PLAINTIFF without valid authorization would constitute a prohibited
2 disclosure of protected health information under HIPAA in violation of PLAINTIFF's medical
3 privacy rights.

4 47. Due to DEFENDANTS' knowing and intentional conduct, the website addresses,
5 or "URLs," for the ALC website gallery pages where the Photographs were posted contained
6 PLAINTIFF's name. The inclusion of PLAINTIFF's name on the URLs containing the
7 Photographs made the images of PLAINTIFF's bare breasts and her torso searchable on
8 Internet search engines such as Google, thus causing the Photographs to appear as results when
9 PLAINTIFF's name was entered as a search term. DEFENDANTS thus intentionally published
10 personally identifiable photographs of PLAINTIFF's naked breasts and torso on the Internet
11 without obtaining PLAINTIFF's authorization as required by HIPAA.

12 48. In the alternative, due to the recklessness or negligence of the DEFENDANTS, the
13 website addresses, or "URLs," for the ALC website gallery pages where the Photographs were posted
14 contained PLAINTIFF's name. The inclusion of PLAINTIFF's name on the URLs containing the
15 Photographs made the images of PLAINTIFF's bare breasts and her torso searchable on Internet search
16 engines such as Google, thus causing the Photographs to appear as results when PLAINTIFF's name
17 was entered as a search term. DEFENDANTS thus published personally identifiable photographs of
18 PLAINTIFF's naked breasts and torso on the Internet without obtaining PLAINTIFF's
19 authorization as required by HIPAA.

20 49. In the alternative, due to the negligence or recklessness of DEFENDANTS, the names
21 of the files of the Photographs themselves that were posted on the ALC website also contained
22 PLAINTIFF's name. The inclusion of PLAINTIFF's name on the files containing the posted
23 Photographs made the images of PLAINTIFF's bare breasts and her torso searchable on internet search
24 engines such as Google, thus causing the Photographs to appear as results when PLAINTIFF's name
25 was entered as a search term. DEFENDANTS thus published personally identifiable photographs of
26 PLAINTIFF's naked breasts and torso on the Internet without obtaining PLAINTIFF's
27 authorization as required by HIPAA.
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1 50. At all times herein the Photographs were part of the medical records of PLAINTIFF.

2 51. At all times herein the medical records of PLAINTIFF, including the Photographs, were
3 subject to confidentiality and privacy requirements imposed by the physician/patient relationship.

4 52. On August 16, 2013, an acquaintance of PLAINTIFF named Michael Moritz
5 ("MORITZ") informed PLAINTIFF that he performed a Google search of PLAINTIFF's name that
6 resulted in the Photographs of PLAINTIFF's naked breasts and torso that were posted on ALC's
7 website.

8 53. PLAINTIFF immediately performed a Google search of her name after MORITZ
9 informed her of his search results regarding her cosmetic surgery photographs on ALC's website.
10 PLAINTIFF's Google search of her name resulted in the Photographs that were posted on ALC's
11 website. When PLAINTIFF clicked on the pictures of her naked body, she was redirected to the page
12 on ALC's website that contained the picture. The URLs for the ALC website pages on which the
13 Photographs were posted all contained PLAINTIFF's name. As a result the Photographs were not
14 anonymous and the Photographs were personally identifiable as photographs of PLAINTIFF's naked
15 body.

16 54. PLAINTIFF's investigation of the gallery pages of ALC's website on August 16, 2013,
17 revealed that the URLs of nearly all of the other pages where naked pictures of patients were posted
18 also contained the names of those patients. Thus nearly all of ALC and DR. LOPEZ's patients who
19 had their naked pictures posted on ALC's website for marketing purposes during that time period were
20 personally identifiable.

21 55. On August 16, 2013, PLAINTIFF placed a telephone call to DR. LOPEZ that went
22 unanswered. PLAINTIFF then placed a call to ALC on August 16, 2013, at approximately 1:21 p.m.,
23 and informed DELIDDO that her Google searches of her name resulted in the Photographs that were
24 posted on ALC's website. PLAINTIFF requested that ALC take down the naked pictures of her body
25 from ALC's website immediately. DELIDDO informed PLAINTIFF that they would look into the
26 matter and take down the Photographs on ALC's website immediately. DR. LOPEZ then returned
27 PLAINTIFF's earlier telephone call and assured PLAINTIFF that the Photographs would be taken
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1 down immediately from ALC's website.

2 56. PLAINTIFF performed another Google search of her name late in the evening of
3 August 16, 2013. The Google search once again resulted in the Photographs that were posted on
4 ALC's website.

5 57. On August 16, 2013, at approximately 11:32 p.m., PLAINTIFF sent a text message to
6 DR. LOPEZ, informing DR. LOPEZ that PLAINTIFF's Google searches of her name were still
7 resulting in the Photographs that were posted on ALC's website.

8 58. On August 17, 2013, at approximately 7:33 p.m., DR. LOPEZ responded with a text
9 message stating that ALC called Google and that Google was supposed to take the Photographs down.
10 DR. LOPEZ also informed PLAINTIFF that a "techy friend" told her that search engines would no
11 longer be able to find PLAINTIFF's pictures because ALC took down the Photographs from the ALC
12 website, but that "it might take a few days" before the changes went into effect.

13 59. On August 18, 2013, PLAINTIFF performed another Google search of her name once
14 again resulted in the Photographs of PLAINTIFF that were posted on ALC's website.

15 60. On August 19, 2013, performed another Google search of her name that did not result in
16 the Photographs.

17 61. On September 17, 2013 PLAINTIFF sent an email to DELIDDO requesting written
18 confirmation that ALC and DR. LOPEZ have destroyed the Photographs and that the Photographs
19 would no longer be used. PLAINTIFF also requested a copy of her Surgical Consent and Request
20 Form and Photo Consent Form with ALC and DR. LOPEZ.

21 62. On September 19, 2013, DELIDDO sent an email to PLAINTIFF confirming that ALC
22 and DR. LOPEZ would no longer be using the Photographs for advertising purposes. DELIDDO
23 informed PLAINTIFF that ALC and DR. LOPEZ could not destroy the Photographs because they were
24 a part of PLAINTIFF's medical record. DELIDDO also told PLAINTIFF that she would change
25 PLAINTIFF's photographic consent for the Photographs to "patient's use only." In addition,
26 DELIDDO informed PLAINTIFF that ALC would no longer be using the website company that ALC
27 and DR. LOPEZ alleged was responsible for the posting of the Photographs and that they would be
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1 changing ALC's website.

2 63. The above alleged conduct by DEFENDANTS cause personally identifiable naked
3 images of PLAINTIFF that are part of PLAINTIFF's medical record to be posted on the Internet and to
4 be publicly associated with PLAINTIFF. As a result PLAINTIFF suffered and continues to suffer
5 invasion of privacy, injury in the form of personal humiliation, embarrassment, mental anguish,
6 emotional distress, anxiety, and lack of sleep.

7 64. DEFENDANTS' posting of personally identifiable naked pictures of PLAINTIFF on
8 the Internet that were easily retrieved through the use of PLAINTIFF's name as an internet search term
9 also caused irreparable damage to PLAINTIFF's personal and business reputation in the counties of
10 Alameda, San Mateo, Marin, and San Francisco because the Photographs on the internet would have
11 been seen primarily by PLAINTIFF's friends, family, clients, and prospective clients that reside in
12 those counties who conducted internet searches relating to PLAINTIFF and her business.

13 **FIRST CAUSE OF ACTION**

14 **INTRUSION INTO PRIVATE AFFAIRS**

15 65. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

16 66. DEFENDANTS violated PLAINTIFF's right to privacy.

17 67. PLAINTIFF had a reasonable expectation of privacy in personally identifiable
18 photographs of PLAINTIFF's naked breasts and torso that were taken by DEFENDANTS as part of
19 PLAINTIFF's medical records. PLAINTIFF's personally identifiable photographs (the
20 "Photographs") are part of PLAINTIFF's medical records and thus constitute "protected
21 individually identifiable health information" under section 160.103 of HIPAA. HIPAA
22 regulations require valid patient authorization for the release of protected health information,
23 which includes patient photography for purposes beyond treatment, payment and healthcare
24 operations. Under section 164.508(e) of HIPAA, valid patient authorizations for use or
25 disclosure of protected health information requires that the authorization form have a
26 "description of the information to be used or disclosed that identifies the information in a
27 specific and meaningful fashion," and must place the individual patient on notice of "the
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1 individual's right to revoke the authorization in writing." PLAINTIFF thus had a reasonable
2 expectation of privacy regarding the disclosure and publication of the Photographs.

3 68.— DEFENDANTS intentionally intruded in PLAINTIFF's reasonable expectation of
4 privacy by knowingly and intentionally publishing on the Internet personally identifiable
5 photographs of PLAINTIFF's naked breasts and torso that were taken by DEFENDANTS as part of
6 PLAINTIFF's medical records.

7 69.— DEFENDANTS knowingly and intentionally published the personally identifiable
8 photographs of PLAINTIFF's naked breasts and torso on DEFENDANT ALC's website for marketing
9 purposes without PLAINTIFF's authorization. As health care professionals, DR. LOPEZ and
10 ALC knew that the individually identifiable Photographs constituted protected "individually
11 identifiable health information" under HIPAA. DR. LOPEZ and ALC knew that they needed to
12 obtain valid authorization from PLAINTIFF in order to publish or disclose the Photographs to
13 third parties. DR. LOPEZ and ALC also knew that in order to obtain valid authorization from
14 their patients, they needed to have their patients execute authorization forms that (1) contained a
15 "description of the information to be used or disclosed that identifies the information in a
16 specific and meaningful fashion," and (2) placed the individual patient on notice of "The
17 individual's right to revoke the authorization in writing."

18 70.— DR. LOPEZ and ALC, however, failed to obtain a valid authorization from
19 PLAINTIFF to use or publish the Photographs for marketing purposes. Although DR. LOPEZ
20 and ALC made PLAINTIFF sign the "Photographic Consent" form attached hereto as Exhibit
21 A, they knew that the Photographic Consent form did not constitute a valid authorization under
22 section 164.508(c) of HIPAA. DEFENDANTS intentionally drafted the Photographic Consent
23 Form to omit any language notifying PLAINTIFF that DEFENDANTS' publication of
24 PLAINTIFF's Photographs would also result in the disclosure of PLAINTIFF's other protected
25 individually identifiable health information, such as PLAINTIFF's name. As a result,
26 DEFENDANTS knew or were substantially certain that they had not obtained valid
27 authorization from PLAINTIFF to release PLAINTIFF's Photographs that could be individually
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1 identified to PLAINTIFF.

2 71. DEFENDANTS knowingly and intentionally made the decision to include
3 PLAINTIFF's name in the file names that they assigned to the electronic files containing
4 PLAINTIFF's Photographs. DEFENDANTS then manually entered PLAINTIFF's name into
5 the electronic file names of PLAINTIFF's Photographs before saving the PLAINTIFF's
6 Photographs to DEFENDANTS' electronic patient records. DEFENDANTS then knowingly and
7 intentionally posted the PLAINTIFF's Photographs to ALC's website. The personally identifiable
8 photographs of PLAINTIFF's naked breasts and torso were easily accessible to anyone who conducted
9 an Internet search using PLAINTIFF's name as a search term.

10 72. DEFENDANTS knew that the electronic file names for each of PLAINTIFF's
11 Photographs contained the name of PLAINTIFF. DEFENDANTS then knowingly and
12 intentionally posted PLAINTIFF's Photographs on ALC's website. When DEFENDANTS
13 posted PLAINTIFF's Photographs to the photo-gallery pages of ALC's website, the website
14 address for each of PLAINTIFF's Photographs would display the electronic file name
15 PLAINTIFF's Photographs containing PLAINTIFF's name. In addition, the electronic files for
16 PLAINTIFF's Photographs containing PLAINTIFF's name could be viewed and downloaded
17 from ALC's website.

18 73. DEFENDANTS knew or were substantially certain that as a result of posting
19 PLAINTIFF's Photographs on ALC's website, the website address for each of PLAINTIFF's
20 Photographs would display the electronic file name of the Photograph containing PLAINTIFF's
21 name. DEFENDANTS knew or were substantially certain that the posting and publication of
22 PLAINTIFF's Photographs on ALC's website would result in the unauthorized disclosure of
23 PLAINTIFF's identifiable health information in violation of HIPAA. In addition,
24 DEFENDANTS knew or were substantially certain that publishing PLAINTIFF's Photographs
25 on ALC's website would allow the PLAINTIFF's Photographs to appear as search engine results
26 when PLAINTIFF's name was entered as a search terms. DEFENDANTS thus intentionally
27 posted individually identifiable PLAINTIFF's Photographs on ALC's website for marketing
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1 purposes without obtaining valid authorization from PLAINTIFF as required by HIPAA. As
2 health care providers governed by HIPAA, ALC and DR. LOPEZ knew or were substantially
3 certain that DEFENDANTS' publication of PLAINTIFF's unauthorized personally identifiable
4 Photographs on ALC's website would constitute a prohibited disclosure of protected health
5 information under HIPAA in violation of PLAINTIFF's medical privacy rights.

6 74.— Due to DEFENDANTS' intentional conduct, the website addresses, or "URLs," for
7 the ALC website gallery pages where the Photographs were posted contained PLAINTIFF's
8 name. The inclusion of PLAINTIFF's name on the URLs containing the Photographs made the
9 images of PLAINTIFF's bare breasts and her torso searchable on Internet search engines such
10 as Google, thus causing the Photographs to appear as results when PLAINTIFF's name was
11 entered as a search term. DEFENDANTS thus intentionally published personally identifiable
12 photographs of PLAINTIFF's naked breasts and torso on the Internet without obtaining
13 PLAINTIFF's authorization as required by HIPAA.

14 75.— DEFENDANTS' intrusion would be highly offensive to a reasonable person.

15 76.— PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
16 anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF's personal and business
17 reputation.

18 77.— DEFENDANTS' conduct was a substantial factor in causing the above alleged harm to
19 PLAINTIFF.

20 78.— WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
21 DEFENDANTS for the following:

- 22 a.— For actual damages past, present and future according to proof;
23 b.— For statutory damages;
24 c.— For any and all applicable statutory interest, and penalties to which Plaintiffs
25 would be entitled under statute, in an amount according to proof;
26 d.— For costs of suit herein incurred;
27 e.— For such other relief and further relief as the Court may deem proper.
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SECOND CAUSE OF ACTION

PUBLIC DISCLOSURE OF PRIVATE FACTS

79. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

80. DEFENDANTS violated PLAINTIFF's right to privacy.

81. DEFENDANTS publicized private information on the Internet concerning PLAINTIFF in the form of personally identifiable photographs of PLAINTIFF's naked breasts and torso that were also part of PLAINTIFF's private medical records.

82. A reasonable person in PLAINTIFF's position would consider the publicity of personally identifiable photographs of PLAINTIFF's naked breasts and torso that were also part of PLAINTIFF's medical records to be highly offensive.

83. The DEFENDANTS knew, or acted with reckless disregard of the fact, that a reasonable person in PLAINTIFF's position would consider the publicity of personally identifiable photographs of PLAINTIFF's naked breasts and torso that were also part of PLAINTIFF's medical records to be highly offensive.

84. PLAINTIFF never consented to have personally identifiable photographs of PLAINTIFF's naked breasts and torso published on the Internet.

85. By publishing personally identifiable photographs of PLAINTIFF's naked breasts and torso published on the Internet that could be easily retrieved through the use of PLAINTIFF's name as an Internet search term, the personally identifiable photographs of PLAINTIFF's naked body were substantially certain to become public knowledge.

86. PLAINTIFF's private information in the form of personally identifiable photographs of PLAINTIFF's naked breasts and torso that were also part of PLAINTIFF's medical records was not of legitimate public concern.

87. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF's personal and business reputation.

88. DEFENDANTS' conduct was a substantial factor in causing the above-alleged harm to

1 PLAINTIFF.

2 89. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
3 DEFENDANTS for the following:

- 4 a. For actual damages past, present and future according to proof;
5 b. For statutory damages;
6 c. For any and all applicable statutory interest, and penalties to which Plaintiffs
7 would be entitled under statute, in an amount according to proof;
8 d. For costs of suit herein incurred;
9 e. For such other relief and further relief as the Court may deem proper.

10 **THIRD CAUSE OF ACTION**

11 **APPROPRIATION OF NAME OR LIKENESS**

12 90. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

13 91. DEFENDANTS violated PLAINTIFF's right to privacy.

14 92. DEFENDANTS used PLAINTIFF's name, likeness, and identity without her
15 permission.

16 93. DEFENDANTS gained a commercial benefit by using PLAINTIFF's name, likeness,
17 and identity.

18 94. DEFENDANTS posted personally identifiable pictures of PLAINTIFF's naked breasts
19 and torso on ALC's website for marketing purposes.

20 95. PLAINTIFF never consented to have personally identifiable pictures of her naked body
21 posted on DR. LOPEZ's and ALC's website for marketing purposes.

22 96. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
23 anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF's personal and business
24 reputation.

25 97. DEFENDANTS' conduct was a substantial factor in causing the above-alleged harm to
26 PLAINTIFF.

27 98. The privacy interests of PLAINTIFF outweigh the public interest served by
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1 DEFENDANTS' use of her name, likeness, and identity.

2 99. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
3 DEFENDANTS for the following:

- 4 a. For actual damages past, present and future according to proof;
5 b. For statutory damages;
6 c. For any and all applicable statutory interest, and penalties to which Plaintiffs
7 would be entitled under statute, in an amount according to proof;
8 d. For costs of suit herein incurred;
9 e. For such other relief and further relief as the Court may deem proper.

10 **FOURTH CAUSE OF ACTION**

11 **USE OF NAME OR LIKENESS = CALIFORNIA CIVIL CODE § 3344**

12 100.— PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

13 101.— DEFENDANTS violated PLAINTIFF's right to privacy.

14 102.— DEFENDANTS knowingly and intentionally used PLAINTIFF's name, likeness, and
15 identity for advertising and marketing purposes on DEFENDANTS' website without PLAINTIFF's
16 permission.

17 103.— DEFENDANTS' use of PLAINTIFF's name, likeness, and identity not occur in
18 connection with news, public affairs, or sports broadcast or account, or with a political campaign.

19 104.— DEFENDANTS did not have PLAINTIFF's consent to use her name, likeness, or
20 identity. PLAINTIFF's personally identifiable photographs (the "Photographs") are part of
21 PLAINTIFF's medical records and thus constitute protected "individually identifiable health
22 information" under section 160.103 of HIPAA. HIPAA regulations require valid patient
23 authorization for the release of protected health information, which includes patient
24 photography for purposes beyond treatment, payment and healthcare operations. DR. LOPEZ
25 and ALC also knew that in order to obtain valid authorization from their patients, they needed
26 to have their patients execute authorization forms that (1) contained a "description of the
27 information to be used or disclosed that identifies the information in a specific and meaningful
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1 fashion," and (2) placed the individual patient on notice of "the individual's right to revoke the
2 authorization in writing." DR. LOPEZ and ALC, however, failed to obtain a valid
3 authorization from PLAINTIFF to use or publish the Photographs for marketing purposes.
4 Although DR. LOPEZ and ALC made PLAINTIFF sign the "Photographic Consent" form that
5 informed PLAINTIFF that DEFENDANTS intended to use the Photographs for advertising
6 purposes, they knew that the Photographic Consent form did not constitute a valid authorization
7 under section 164.508(e) of HIPAA. DEFENDANTS intentionally drafted the consent form to
8 (1) omit any language notifying PLAINTIFF that DEFENDANTS' publication of PLAINTIFF's
9 Photographs would also result in the disclosure of PLAINTIFF's other protected individually
10 identifiable health information, such as PLAINTIFF's name and (2) materially mislead
11 PLAINTIFF by erroneously stating that she did not have a right to revoke her consent. As a
12 result, DEFENDANTS knew or were substantially certain that they had not obtained valid
13 authorization from PLAINTIFF to release PLAINTIFF's Photographs that could be individually
14 identified to PLAINTIFF. PLAINTIFF never authorized DEFENDANTS to disclose her name,
15 protected health information, or personally identifiable photographs.

16 105.— DEFENDANTS' use of PLAINTIFF's name, likeness, and identity was directly
17 connected to DEFENDANTS' commercial purpose of advertising and marketing on their website.
18 DEFENDANTS knowingly and intentionally posted personally identifiable pictures of PLAINTIFF's
19 naked breasts and torso on ALC's website for marketing purposes.

20 106.— DEFENDANTS informed PLAINTIFF in the Photographic Consent Form,
21 attached hereto as Exhibit A, that they intended to use PLAINTIFF's photographs for
22 advertising, trade, and marketing purposes.

23 107.— DEFENDANTS knowingly and intentionally made the decision to include
24 PLAINTIFF's name in the file names that they assigned to the electronic files containing
25 PLAINTIFF's Photographs. DEFENDANTS then manually entered PLAINTIFF's name into
26 the electronic file names of PLAINTIFF's Photographs before saving the PLAINTIFF's
27 Photographs to DEFENDANTS' electronic patient records. DEFENDANTS knew that the
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1 electronic file names for each of PLAINTIFF's Photographs contained the name of PLAINTIFF.
2 DEFENDANTS then knowingly and intentionally posted PLAINTIFF's Photographs on ALC's
3 website. When DEFENDANTS posted PLAINTIFF's Photographs to the photo gallery pages of
4 ALC's website, the website address for each of PLAINTIFF's Photographs would display the
5 electronic file name PLAINTIFF's Photographs containing PLAINTIFF's name. In addition,
6 the electronic files for PLAINTIFF's Photographs containing PLAINTIFF's name could be
7 viewed and downloaded from ALC's website.

8 108. DEFENDANTS knew or were substantially certain that as a result of posting
9 PLAINTIFF's Photographs on ALC's website, the website address for each of PLAINTIFF's
10 Photographs would display the electronic file name of the Photograph containing PLAINTIFF's
11 name. DEFENDANTS knew or were substantially certain that the posting and publication of
12 PLAINTIFF's personally identifiable Photographs on ALC's website would result in the
13 unauthorized disclosure of PLAINTIFF's identifiable health information in violation of HIPAA.
14 In addition, DEFENDANTS knew or were substantially certain that publishing PLAINTIFF's
15 Photographs on ALC's website would allow the PLAINTIFF's Photographs to appear as search
16 engine results when PLAINTIFF's name was entered as a search terms. DEFENDANTS thus
17 knowingly and intentionally posted individually identifiable Photographs of PLAINTIFF on
18 ALC's website for marketing purposes without obtaining valid authorization from PLAINTIFF
19 as required by HIPAA. DEFENDANTS knew or were substantially certain that they were using
20 PLAINTIFF's real name, likeness, and identity as a result of their intentional publication of
21 PLAINTIFF's personally identifiable Photographs for marketing purposes on ALC's website
22 gallery page.

23 109. PLAINTIFF never consented to have personally identifiable pictures of her naked body
24 posted on DR. LOPEZ's and ALC's website for marketing purposes.

25 110. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
26 anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF's personal and business
27 reputation.
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111. ~~DEFENDANTS' conduct was a substantial factor in causing the above alleged harm to~~
PLAINTIFF.

~~112. The privacy interests of PLAINTIFF outweigh the public interest served by DEFENDANTS' use of her name, likeness, and identity.~~

~~113. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the DEFENDANTS for the following:~~

~~a. For actual damages past, present and future according to proof;~~

~~b. For punitive damages;~~

~~c. For statutory damages;~~

~~d. For any and all applicable statutory interest, penalties, reasonable attorneys' fees and/or costs to which Plaintiffs would be entitled under statute, in an amount according to proof;~~

~~e. For costs of suit herein incurred;~~

~~f. For such other relief and further relief as the Court may deem proper.~~

FIFTH CAUSE OF ACTION

NEGLIGENCE

114. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

115. PLAINTIFF was harmed by DEFENDANTS' negligence.

116. DEFENDANTS were negligent in allowing personally identifiable photographs of PLAINTIFF's naked breasts and torso from PLAINTIFF's medical records to be posted on DEFENDANTS' website and published on the Internet.

117. DEFENDANTS failed to use reasonable care in developing and implementing procedures to prevent the personally identifiable naked pictures of PLAINTIFF and other patients of ALC from being posted on ALC's website and published on the Internet.

118. PLAINTIFF suffered harm in the form of **personal humiliation, embarrassment, mental anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF's personal and business reputation.**

1 119. DEFENDANTS' negligence was a substantial factor in causing the above-alleged harm
2 to PLAINTIFF.

3 120. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
4 DEFENDANTS for the following:

- 5 a. For actual damages past, present and future according to proof;
6 b. For statutory damages;
7 c. For any and all applicable statutory interest, and penalties to which Plaintiffs
8 would be entitled under statute, in an amount according to proof;
9 d. For costs of suit herein incurred;
10 e. For such other relief and further relief as the Court may deem proper.

11 **SIXTH CAUSE OF ACTION**

12 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

13 121. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

14 122. DEFENDANTS caused PLAINTIFF to suffer serious emotional distress.

15 123. DEFENDANTS were negligent in allowing personally identifiable photographs of
16 PLAINTIFF's naked breasts and torso from PLAINTIFF's medical records to be posted on
17 DEFENDANTS' website and published on the Internet.

18 124. DEFENDANTS failed to use reasonable care in developing and implementing
19 procedures to prevent the personally identifiable naked pictures of PLAINTIFF and other patients of
20 ALC from being posted on ALC's website and published on the Internet.

21 125. PLAINTIFF suffered serious emotional distress in the form of suffering, anguish, fright,
22 horror, nervousness, anxiety, worry, shock, humiliation, shame, and embarrassment.

23 126. DEFENDANTS' conduct was a substantial factor in causing PLAINTIFF's serious
24 emotional distress.

25 127. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
26 DEFENDANTS for the following:

- 27 a. For actual damages past, present and future according to proof;
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- 1 b. For statutory damages;
2 c. For any and all applicable statutory interest, and penalties to which Plaintiffs would
3 be entitled under statute, in an amount according to proof;
4 d. For costs of suit herein incurred;
5 e. For such other relief and further relief as the Court may deem proper.
6

7 **SEVENTH CAUSE OF ACTION**

8 **BREACH OF FIDUCIARY DUTY – DEFENDANTS DR. LOPEZ AND ALC**

9 128. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above

10 129. At all pertinent times, DR. LOPEZ and ALC were PLAINTIFF's physicians and as a
11 result DR. LOPEZ and ALC owe a fiduciary duty to their patient, PLAINTIFF. DR. LOPEZ and ALC
12 thus had a fiduciary duty to act with the utmost good faith in the best interests of PLAINTIFF.

13 130. DR. LOPEZ and ALC failed to meet the standard of care for preventing the negligent
14 release of PLAINTIFF's private medical information. The negligence of DR. LOPEZ and ALC caused
15 personally identifiable naked photographs of PLAINTIFF's breasts and torso, which were part of
16 PLAINTIFF's private medical records, to be published on the Internet. DR. LOPEZ and ALC thus
17 failed to act as a reasonably careful physician would have acted in safeguarding the privacy and
18 confidentiality of PLAINTIFF's medical records.

19 131. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
20 anguish, emotional distress, anxiety, lack of sleep, damage to PLAINTIFF's personal and business
21 reputation.

22 132. DR. LOPEZ and ALC's negligence was a substantial factor in causing the above-
23 alleged harm to PLAINTIFF.

24 133. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
25 DEFENDANTS Dr. LOPEZ and ALC for the following:

- 26 a. For actual damages past, present and future according to proof;
27 b. For statutory damages;
28 c. For any and all applicable statutory interest, and penalties to which Plaintiffs

1 would be entitled under statute, in an amount according to proof;

2 d. For costs of suit herein incurred;

3 e. For such other relief and further relief as the Court may deem proper.

4 **EIGHTH CAUSE OF ACTION**

5 **MEDICAL MALPRACTICE/NEGLIGENCE – DEFENDANTS DR. LOPEZ AND ALC**

6 134. PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.

7 135. PLAINTIFF was harmed by the negligence of DEFENDANTS DR. LOPEZ and ALC.

8 136. DR. LOPEZ and ALC were negligent because they failed to use the skill, knowledge,
9 and care that other reasonably careful cosmetic surgeons would use in the same or similar
10 circumstances, otherwise known as the “standard of care.”

11 137. DR. LOPEZ and ALC failed to meet the standard of care for preventing the negligent
12 release of PLAINTIFF’s private medical information. The negligence of DR. LOPEZ and ALC caused
13 personally identifiable naked photographs of PLAINTIFF’s breasts and torso, which were part of
14 PLAINTIFF’s private medical records, to be published on the Internet.

15 138. DR. LOPEZ and ALC were negligent and failed to meet the standard of care for
16 developing and implementing procedures to prevent the personally identifiable naked pictures of
17 PLAINTIFF and other patients of ALC from being posted on ALC’s website and published on the
18 Internet.

19 139. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
20 anguish, emotional distress, anxiety, lack of sleep, and damage to PLAINTIFF’s personal and business
21 reputation.

22 140. DR. LOPEZ’s and ALC’s negligence was a substantial factor in causing the above-
23 alleged harm to PLAINTIFF

24 141. WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
25 DEFENDANTS Dr. LOPEZ and ALC for the following:

26 a. For actual damages past, present and future according to proof;

27 b. For statutory damages;

- 1 c. For any and all applicable statutory interest, and penalties to which Plaintiffs
2 would be entitled under statute, in an amount according to proof;
3
4 d. For costs of suit herein incurred;
5
6 e. For such other relief and further relief as the Court may deem proper.

7 **NINTH CAUSE OF ACTION**

8 **BREACH OF CONTRACT - DEFENDANTS DR. LOPEZ AND ALC**

9 142. ~~PLAINTIFF hereby incorporates by reference paragraphs 1-64 above.~~

10 143. ~~The Photographic Consent Form attached hereto as Exhibit A constitutes a~~
11 ~~contract between PLAINTIFF and DEFENDANTS DR. LOPEZ and ALC. On March 28, 2013,~~
12 ~~DEFENDANTS DR. LOPEZ and ALC proposed the terms of the contract by presenting~~
13 ~~PLAINTIFF with the Photographic Consent Form that contains all of the contract terms. After~~
14 ~~reviewing the contract terms proposed by DR. LOPEZ and ALC in the Photographic Consent~~
15 ~~Form, PLAINTIFF accepted the proposed contract by signing the Photographic Consent form~~
16 ~~on March 28, 2013. The terms of the Photographic Consent Form clearly define the terms of the~~
17 ~~contract in that they define what the parties are required to do under the contract.~~

18 144. ~~The contract between the parties as defined by the Photographic Consent Form~~
19 ~~required PLAINTIFF to authorize DR. LOPEZ and ALC to use, exhibit, and publish through~~
20 ~~any medium all of the Photographs they take or order of any part of PLAINTIFF's body for~~
21 ~~purposes in connection with their research, writing, professional activities, advertising purposes,~~
22 ~~or purposes of trade.~~

23 145. ~~In exchange for PLAINTIFF's authorization to use, exhibit, and publish the~~
24 ~~Photographs of PLAINTIFF under the contract, DR. LOPEZ and ALC were required to refrain~~
25 ~~from using, exhibiting, or publishing PLAINTIFF's name or likeness outside of the scope~~
26 ~~explicitly defined in the Photographic Consent Form. The language of the Photographic Consent~~
27 ~~Form firmly limits the scope of DR. LOPEZ's and ALC's use or disclosure of PLAINTIFF's~~
28 ~~image or likeness to the Photographs they take or order of PLAINTIFF's body. Nothing in the~~
~~contract authorized DR. LOPEZ and ALC to use PLAINTIFF's name, voice, or individually~~

1 identifiable health information in connection with the use or disclosure of PLAINTIFF's
2 Photographs. The Photographic Consent Form does not grant DR. LOPEZ and ALC consent to
3 disclose any of PLAINTIFF's protected individually identifiable health information that could be
4 used to identify PLAINTIFF as the subject of the Photographs.

5 146. The Photographic Consent Form does not contain any language authorizing DR.
6 LOPEZ and ALC to disclose PLAINTIFF's name or any of PLAINTIFF's protected individually
7 identifiable health information. The Photographs of PLAINTIFF constitute the only form of
8 PLAINTIFF's likeness for which use or disclosure is authorized under the plain terms of the
9 Photo Consent Form. Any disclosure by DR. LOPEZ and ALC of PLAINTIFF's name or
10 protected individually identifiable health information not only constitutes a breach of the
11 contract under the terms of the Photographic Consent Form, but it also constitutes an unlawful
12 violation of the HIPAA Privacy Rule for impermissible and unauthorized disclosures of
13 protected health information under HIPAA sections 160.103, 164.502 and 164.508. Under
14 HIPAA Section 164.508, DR. LOPEZ and ALC cannot disclose PLAINTIFF's name or any other
15 protected individually identifiable health information without first obtaining a valid
16 authorization that specifically describes the exact type of protected individually identifiable
17 health information they seek to disclose. Because there is no lawful way to disclose
18 PLAINTIFF's name or protected health information without violating HIPAA, the only way that
19 DR. LOPEZ and ALC can publish the Photographs without violating HIPAA or breaching the
20 contract between the parties is by publishing or disclosing only the Photographs specifically
21 referred to in the Photographic Consent Form without also disclosing PLAINTIFF's name or
22 other protected individually identifiable health information.

23 147. On or about May 30, 2013, DEFENDANTS published PLAINTIFF's Photographs
24 on ALC's website gallery page for commercial, marketing, and advertising purposes. When
25 DEFENDANTS posted PLAINTIFF's Photographs to the photo gallery pages of ALC's website,
26 the website address for each of PLAINTIFF's Photographs would display the electronic file
27 name PLAINTIFF's Photographs containing PLAINTIFF's name. In addition, the electronic
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1 files for PLAINTIFF's Photographs containing PLAINTIFF's name could be viewed and
2 downloaded from ALC's website.

3 148.— The terms of the contract under the Photo Consent form do not authorize the May
4 30, 2013, disclosure by DR. LOPEZ and ALC of PLAINTIFF's name and PLAINTIFF's
5 protected individually identifiable health information. This unauthorized disclosure constitutes
6 a breach of the contract under the terms of the Photo Consent Form.

7 149.— Due to DEFENDANTS' breach of the contract, the website addresses, or "URLs,"
8 for the ALC website gallery pages where the Photographs were posted contained PLAINTIFF's
9 name. The inclusion of PLAINTIFF's name on the URLs containing the Photographs made the
10 images of PLAINTIFF's bare breasts and her torso searchable on Internet search engines such
11 as Google, thus causing the Photographs to appear as results when PLAINTIFF's name was
12 entered as a search term.

13 150.— DEFENDANTS DR. LOPEZ and ALC breached the Contract when they published
14 personally identifiable photographs of PLAINTIFF's naked breasts and torso on the Internet, which
15 was prohibited under the Contract.

16 151.— PLAINTIFF was harmed by the breach of the Contract by DEFENDANTS DR. LOPEZ
17 and ALC. PLAINTIFF suffered harm in the form of personal humiliation, embarrassment, mental
18 anguish, emotional distress, anxiety, lack of sleep, damage to PLAINTIFF's personal and business
19 reputation, and loss of profits for PLAINTIFF's business.

20 152.— WHEREFORE, PLAINTIFF respectfully prays that judgment be entered against the
21 DEFENDANTS DR. LOPEZ and ALC for the following:

- 22 a. For actual damages past, present and future according to proof;
23 b. For special and general damages, past, present and future according to proof;
24 c. For loss of profits
25 d. For any and all applicable statutory interest, and penalties to which Plaintiffs
26 would be entitled under statute, in an amount according to proof;
27 e. For costs of suit herein incurred,
28

1 ~~f. For such other relief and further relief as the Court may deem proper.~~

2
3 **PRAYER FOR RELIEF**

4 Plaintiffs pray for the following relief:

- 5 1. For actual damages past, present and future according to proof;
- 6 2. For special and general damages, past, present and future according to proof;
- 7 3. For loss of profits;
- 8 4. For punitive damages;
- 9 5. For statutory damages;
- 10 6. For any and all applicable statutory interest, penalties, reasonable attorneys' fees and/or
- 11 costs to which Plaintiffs would be entitled under statute, in an amount according to
- 12 proof;
- 13 7. For costs of suit herein incurred;
- 14 8. For such other relief and further relief as the Court may deem proper.

15
16 **DEMAND FOR JURY TRIAL**

17 — Plaintiff hereby demands a trial by jury in this action. —

18
19 DATED: February 9, 2015

20 KASPAR LAW

21
22 By 

23 ARVIN C. LUGAY
24 Attorneys for Plaintiff JANE DOE

VERIFICATION

The undersigned, for herself declares:

I am the Plaintiff in the above-titled action. I have read the foregoing complaint and know the contents thereof. With respect to the causes of action alleged by me, the same is true by my own knowledge, except as to those matters, which are therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Date: 2.8.15

Jane Doe
JANE DOE

Quita Lopez, M.D.

Aesthetic Laser Center
6081 N. First Street, Suite 101
Fresno, CA 93710
Tel. 559-440-9024
Fax. 559-440-9027

9/19/13 @ 1:01 PM
mailed a copy
of revised form
to pt. (initials)

Photographic Consent

I hereby consent that any and all photographs taken or ordered by Quita Lopez, M.D. of any part of my body, whether originals or reproductions, may be utilized for such purposes she may desire in connection with her research, writing, professional activities, and may be used, exhibited and published through any medium whatsoever as part of or in connection with her research, writing and professional activities, even though such use may be for advertising purposes or purposes of trade. This consent is not retractable, either by oral or written means and stands for all time until the end of the world. I certify that I have read and understand the aforementioned and sign my name below giving consent to the foregoing.

Patient's Signature

Date

Address

Witnessed by

Date

Revised 9/19/13 @ 1:01 PM

* for patient's use only
No Advertisement

per patient request not to use photos any more.

(initials) Patient Coordinator

iMessage
2013-08-15 16:32:00 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Wait. I can't be there until about 10-1030

iMessage
2013-08-15 16:34:08 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Ok

iMessage
[1] 2013-08-15 16:34:11 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Ok that is fine

iMessage
2013-08-16 22:32:32 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Hey you. The before and after pics are still up there when you google my name

iMessage
[1] 2013-08-17 06:33:53 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

We called google and they are suppose to take them down. A techy friends says that since we took your pictures down from the web site the search engine will not find them and they won't come up. It might take a few days. I am soo sorry about this.

iMessage
2013-08-17 06:38:56 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

It's ok

SMS
[1] 2013-08-19 15:52:49 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Most of your pictures are off. Denise went on webmaster and the last picture should be off soon. We are working as hard as we can. Glad you understand. The web hosting people took no responsibility!!

iMessage
2013-08-19 16:49:04 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Of course he didn't cuz he's a shit fuck! Did you fire him or hey your money back? I need to get Botox this weekend

iMessage
[1] 2013-08-19 18:46:09 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

I will fire him when I find some one else to host and redo it. You can come in and I will not charge you I feel so bad.

iMessage

2013-08-19 18:46:24 (PST) [1]

Sender: Mandi Stillwell ((415) 471-5177)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

No way? Really?? Thank you!

iMessage

2013-08-19 18:48:32 (PST) [1]

Sender: Mandi Stillwell ((415) 471-5177)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

I'm happy it was me. Did you guys get the rest of the people situated?

iMessage

[1] 2013-08-19 18:49:09 (PST)

Sender: Self ((559) 259-7252)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Yes really. You did me a big favor and you were a good sport about what happened. I owe you a big thank you that I was able to catch this and correct it.

iMessage

[1] 2013-08-19 18:52:43 (PST)

Sender: Self ((559) 259-7252)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

We are working on it. Google is hard to deal with and I have a guy who does Internet marketing helping me. We are trying to hurry up the process as much as we can. It is kind of complicated and technical.

iMessage

2013-08-19 18:52:48 (PST) [1]

Sender: Mandi Stillwell ((415) 471-5177)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

I get YOIRE stresses

iMessage

2013-08-19 18:52:48 (PST) [1]

Sender: Mandi Stillwell ((415) 471-5177)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

You're stressed

iMessage

[1] 2013-08-19 19:03:02 (PST)

Sender: Self ((559) 259-7252)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Yes to say the least.

iMessage

2013-08-19 19:03:14 (PST) [1]

Sender: Mandi Stillwell ((415) 471-5177)

Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

:(I'm sorry :(

iMessage
2013-08-19 19:03:28 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

I was driving I meant I BET you're stressed.

iMessage
2013-08-20 10:48:32 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Hey, I wanted to ask you for a favor before any of this happened so PLEASE don't think I'm taking advantage of the situation cuz I'm really not. I completely understand if you aren't comfortable with this, so in no way feel badly if you aren't interested. SOOO I'm going to Oklahoma in two weeks BOOOO! And I am wondering if you would be willing to do some lipo in my big ass and let me pay you when I get my student loans at the end of the month or beginning of October? I will absolutely pay you and was going to do lipo when I got my loans, but this trip came up and I REALLY want to look better when I go to a place I haven't been to in almost 3 years and being 60 pounds lighter. Again, it's a lot to ask and I TOTALLY understand if you aren't comfortable, but I WILL pay you and would never screw you over. Let me know what you think, please?

iMessage
[1] 2013-08-21 17:32:06 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Lets talk about it this weekend.

iMessage
2013-08-22 07:14:36 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Hey, I can't come in this weekend I'm going to a friends art show in Nevada city. Next Friday?

SMS
[1] 2013-08-22 08:29:26 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Ok. Well see you then.

iMessage
[1] 2013-08-30 07:22:41 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Do you want to come in this weekend . Still owe you Dysport for your crow's feet. It is like Botox.

iMessage
2013-08-30 10:20:01 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Ima have to wait until after okieville. I have ZERO saved for my trip and have to work early and late. :(I guess those Okies will have to deal with my crows feet :)

iMessage
[1] 2013-08-30 10:50:59 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

This weekend is bad because if the bay bridge closure. Let me know when you want to come. The treatment is on me.

iMessage
2013-08-30 10:51:30 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Oh yeah! Damn bay bridge!

SMS
[1] 2013-09-21 07:22:58 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Hi Mandy
Hope you are doing well. I just want to remind you you can come in any weekend and I will do your
crows feet at no cost . Hope your trip to Oklahoma went well.

iMessage
2013-09-21 08:47:50 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Yay!! I'm going to Mexico in October. Let you know :)

SMS
[1] 2013-09-21 09:42:41 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Come in this weekend or next.

iMessage
2013-09-21 11:03:28 (PST) [1]
Sender: Mandi Stillwell ((415) 471-5177)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

I think I'll wait a few weeks. I have a few shows I'm doing the next few weekends

SMS
[1] 2013-09-21 11:17:47 (PST)
Sender: Self ((559) 259-7252)
Participants: Mandi Stillwell ((415) 471-5177), Self ((559) 259-7252)

Let me know when you want to come in.

Notes

- | | |
|-------------------|--|
| [1] Source Device | Quita Lopez's iPhone/Quita Lopez's iPhone |
| [1] Source File | /mobile/Library/SMS/sms.db |
| [2] | /mobile/Library/SMS/Attachments/db/11/D09B0CCE-9323-47EB-8DD4-A0C2B94504BB/IMG_3236.jpeg |
| [3] | /mobile/Library/SMS/Attachments/9d/13/44373331-23CE-47E1-A480-54C7056E8F85/IMG_3237.jpeg |
| [4] | /mobile/Library/SMS/Attachments/79/09/583839ED-270C-492A-8EA5-4B0C2412A01A/IMG_0230.jpeg |

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF FRESNO

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Fresno, State of California. My business address is 7647 North Fresno
Street, Fresno, CA 93720.

5 On July 19, 2017, I served true copies of the following document(s) described as
6 **DEFENDANTS' TRIAL BRIEF** on the interested parties in this action as follows:

7 Brent K. Kaspar, Esq. Counsel for Plaintiff
8 Arvin C. Lugay, Esq.
9 KASPAR LAW
10 1606 Juanita Lane, Suite B
Tiburon, CA 94920
Telephone: (415) 789-5881
Fax: (415) 366-1899

11 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
12 persons at the addresses listed in the Service List and placed the envelope for collection and mailing,
13 following our ordinary business practices. I am readily familiar with this business's practice for
collecting and processing correspondence for mailing. On the same day that the correspondence is
placed for collection and mailing, it is deposited in the ordinary course of business with the United
States Postal Service, in a sealed envelope with postage fully prepaid.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing is
15 true and correct.

16 Executed on July 19, 2017, at Fresno, California.

17 
18 Pamela J. Johnson