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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Kimberly R. Sweidy,

No. CV-21-08013-PHX-SPL

9 Plaintiff,

ORDER

10 vs.

11 Spring Ridge Academy, et al.,

12 Defendants.
13
14

15 Before the Court are two Motions for Summary Judgment, filed by the various
16 Defendants in this action. First, Defendant Veronica Borges moves for summary judgment
17 on all claims asserted against her by Plaintiff Kimberly R. Sweidy (“Plaintiff”). (Doc. 113).
18 Second, Defendants Spring Ridge Academy (“SRA”), Jean Courtney, Suzanne Courtney,
19 Brandon Courtney, Erin Smith, Leslie Filsinger, Justin Zych, and Kate Deily move for
20 summary judgment in their favor on all claims asserted against them. (Doc. 115). The
21 Motions are fully briefed and ready for review.¹ (Docs. 113, 154, & 160; 115, 152, & 161).
22 The Court’s ruling is as follows.²

23
24 ¹ Because it would not assist in resolution of the instant issues, the Court finds the
25 pending Motions suitable for decision without oral argument. See LRCiv. 7.2(f); Fed. R.
Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

26 ² The Court understands that it previously struck Plaintiff’s Statements of Fact (Doc.
27 151). However, upon review of the parties’ briefing and in the interest of justice, the Court
28 has taken into consideration the exhibits attached to those Statements of Fact, despite
Defendants’ request to the contrary.

1 **I. BACKGROUND**

2 Plaintiff brings this suit against SRA and eight of its individual employees. (See
3 Doc. 1 at 1). Her claims arise out of her Daughter’s (“Plaintiff’s Daughter”) enrollment at
4 SRA, a therapeutic³ boarding school for girls in Mayer, Arizona. (Doc. 155 at 2).
5 According to the Complaint, Defendant Jean Courtney and her then-husband David
6 Gilcrease founded SRA in 1996. (Doc. 1 at 4–5). Defendant Suzanne Courtney is the
7 Executive Director for SRA and “the SRA go-between that monitors communication
8 between parents and their children who are enrolled at SRA.” (*Id.* at 7–8). Suzanne
9 Courtney is married to Defendant Brandon Courtney, who is SRA’s President/CEO and
10 Program Director, and Jean Courtney’s son. (*Id.* at 8). Defendant Erin Smith “has the title
11 of Director of Operational Excellence at SRA” and has a background in education. (*Id.*).
12 Defendant Leslie Filsinger is the Clinical Director for SRA. (*Id.* at 9). As the lead member
13 of all therapeutic teams, Filsinger oversees, authorizes, and approves all SRA treatment
14 plans and therapeutic decision-making. (*Id.*). Filsinger has been a Licensed Professional
15 Counselor in Arizona since 2014. (*Id.*). Defendant Justin Zych has served as SRA’s
16 Principal since approximately June 2019. (*Id.* at 9–10). Defendant Kate Deily is the
17 Admissions Director for SRA. (*Id.* at 10). Finally, Defendant Veronica Borges is listed as
18 a Therapist with SRA, despite the fact that she is not licensed as a therapist by Arizona’s
19 Board of Behavioral Health Examiners. (*Id.*).

20 Plaintiff’s Daughter was enrolled at SRA on December 12, 2019, approximately
21 two years after the divorce of her parents, Plaintiff and Mr. Raymond Stata. (Docs. 153 at
22 2 & 155 at 2–3). As part of the enrollment process, Plaintiff signed the “Enrollment Terms
23 and Agreement” (the “Enrollment Agreement”) (Doc. 1 at 127–38) and received the
24 “Parent Manual” (Doc. 1 at 140–72), documents that together comprise the parties’
25 contract for purposes of this action. Between January 22–24, 2020, Plaintiff attended the
26 Parent Challenge, a three-day workshop where she alleges that she was introduced to the

27 ³ The Court notes Plaintiff’s contention that SRA is merely *advertised* as a
28 therapeutic boarding school. (Doc. 155 at 2).

1 “controversial methods” used at SRA. (*Id.* at 14–15). Following the Parent Challenge,
2 Defendant Borges sent Plaintiff the “Master Treatment Plan” that had been developed for
3 her Daughter. (*Id.* at 23). On January 25, 2020, Plaintiff and her Daughter were allowed to
4 leave the SRA campus for approximately 24 hours. (*Id.* at 25). Over dinner, Plaintiff alleges
5 that she and her Daughter were finally able to “speak freely” and that her Daughter
6 described to Plaintiff “a series of disturbing events that had occurred since her enrollment
7 at SRA.” (*Id.*). This included, among other things, Plaintiff’s Daughter’s severe illness that
8 caused her to miss two weeks of school and which Plaintiff had never been informed of.
9 (*Id.* at 26). On January 26, 2020, Plaintiff’s Daughter was returned to SRA and Plaintiff
10 returned home to California where she began looking into the SRA program and the Master
11 Treatment Plan. (*Id.* at 30). Over the following week, Plaintiff corresponded with
12 Defendants and inquired into the SRA program. (*Id.* at 30–36).

13 On February 3, 2020, Plaintiff—who had growing concerns over what her Daughter
14 was experiencing at SRA—returned to SRA, accompanied by two Yavapai County
15 Sheriffs, and removed her Daughter from the campus. (*Id.* at 35–36). Over the following
16 nine days, Plaintiff alleges that SRA and Mr. Stata sought to force the return of Plaintiff’s
17 Daughter to SRA. (*Id.* at 36–39). On February 12, 2020, Plaintiff’s Daughter was ordered
18 by a California Family Law Judge—who had been petitioned by Mr. Stata—to return to
19 SRA. (*Id.* at 39). On February 25, 2020, Plaintiff received a letter from SRA outlining new
20 protocols in light of her temporary removal of her Daughter. (*Id.* at 40–41). The letter
21 stated, among other things, that SRA would no longer provide therapeutic services
22 involving Plaintiff and that she would only be allowed to communicate with her Daughter
23 via SRA-monitored writing and telephone communications. (*Id.*). Over the following five
24 months, Plaintiff’s contact with her Daughter was limited. (*See id.* at 42–69). Plaintiff also
25 alleges that her requests that her Daughter be allowed to return home due to the COVID-
26 19 pandemic were denied. (*Id.* at 41–42). Plaintiff’s concerns over the therapeutic and
27 educational services her Daughter was receiving increased. (*See id.* at 42–69). On June 25,
28 2020, Plaintiff asked the Family Law Court to order the return of her Daughter to

1 California. (*Id.* at 68). To address any concerns over parental conflict—given Mr. Stata’s
 2 consistent position that their Daughter remain at SRA—Plaintiff offered to give up all legal
 3 and physical custodial rights so long as her Daughter be ordered to return home to live with
 4 Mr. Stata. (*Id.* at 68–69). Plaintiff’s so-called “Hail Mary Play” worked, and her Daughter
 5 was ordered to leave SRA and return to California on June 28, 2020. (*Id.* at 69).

6 On January 21, 2021, Plaintiff filed the present action. According to the Complaint,
 7 Plaintiff alleges that SRA uses a variety of seminars, workshops, and residential living
 8 conditions to take advantage of a vulnerable population—*i.e.*, divorced parents and their
 9 children—and make money. (*Id.* at 14). Plaintiff alleges that SRA does this by using tactics
 10 such as public shaming, manipulation and coercion, fear, yelling and violence, disclosure
 11 of confidential information, drugs, isolation, and food deprivation. (*Id.*). Such tactics “are
 12 designed to destroy the student’s faith and relationship [with] the parents and to destroy
 13 the parent’s faith in themselves, such that the school and its owners, with no credentials
 14 whatsoever, have unbridled access and ability to imprison students for an arbitrary and
 15 uncertain time period for money.” (*Id.* at 14). Plaintiff alleges eight distinct causes of
 16 action, each against all named Defendants: (i) actual and constructive fraud; (ii) consumer
 17 fraud; (iii) breach of contract/breach of warranty; (iv) breach of the covenant of good faith
 18 and fair dealing; (v) violations of the Racketeer Influenced and Corrupt Organization
 19 (“RICO”) Act, 18 U.S.C. § 1961, *et seq.*; (vi) negligence *per se*; (vii) intentional infliction
 20 of emotional distress (“IIED”); and (viii) conversion. (Doc. 1 at 95–123). On January 13,
 21 2023, Defendants filed their Motions for Summary Judgment (Docs. 113 & 115), which
 22 are now presently before the Court.

23 **II. LEGAL STANDARD**

24 A court must grant summary judgment “if the movant shows that there is no genuine
 25 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 26 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).
 27 Material facts are those facts “that might affect the outcome of the suit under the governing
 28 law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of

1 material fact arises if “the evidence is such that a reasonable jury could return a verdict for
2 the nonmoving party.” *Id.*

3 The party moving for summary judgment bears the initial responsibility of
4 presenting the basis for its motion and identifying those portions of the record, together
5 with affidavits, which it believes demonstrate the absence of a genuine issue of material
6 fact. *Celotex*, 477 U.S. at 323. If the movant fails to carry its initial burden of production,
7 the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*
8 *Co., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But if the movant meets its initial
9 responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual
10 dispute and that the fact in contention is material. *Anderson*, 477 U.S. at 250. In other
11 words, the nonmovant “must do more than simply show that there is some metaphysical
12 doubt as to the material facts,” and, instead, must “come forward with ‘specific facts
13 showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio*
14 *Corp.*, 475 U.S. 574, 586-87 (1986).

15 When considering a motion for summary judgment, the judge’s function is not to
16 weigh the evidence and determine the truth but to determine whether there is a genuine
17 issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must view the factual
18 record and draw all reasonable inferences in the nonmovant’s favor. *Leisek v. Brightwood*
19 *Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). The court need consider only the cited materials,
20 but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

21 **III. DISCUSSION**

22 **A. Fraud Claims – Actual, Constructive, and Consumer**

23 To establish a claim for actual fraud under Arizona law, a plaintiff must prove nine
24 separate elements: “(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's
25 knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that the information
26 should be acted upon by the hearer and in a manner reasonably contemplated, (6) the
27 hearer's ignorance of the information's falsity, (7) the hearer's reliance on its truth, (8) the
28 hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury.” *Taegeer*

1 v. *Cath. Fam. & Cmty. Servs.*, 196 Ariz. 285, 294 (Ct. App. 1999). “Constructive fraud, as
 2 contrasted to actual fraud, is a breach of legal or equitable duty which, irrespective of the
 3 moral guilt or intent of the party charged, the law declares fraudulent because of its
 4 tendency to deceive others, to violate public or private confidence, or to injure public
 5 interests.” *Rhoads v. Harvey Publ’ns, Inc.*, 145 Ariz. 142, 148 (Ct. App. 1984).
 6 “Dishonesty of purpose and intent to deceive are not essential elements of constructive
 7 fraud.” *Id.* (citation omitted). “Where a relation of trust and confidence exists between two
 8 parties so that one of them places peculiar reliance in the trustworthiness of another, the
 9 latter is under a duty to make a full and truthful disclosure of all material facts and is liable
 10 for misrepresentation or concealment.” *Id.* at 148–49. “The breach of this duty gives rise
 11 to an action in constructive fraud.” *Id.* at 149 (citation omitted).

12 “The Arizona Consumer Fraud Act (“ACFA”) broadly prohibits fraudulent,
 13 deceptive, or misleading conduct in connection with the sale or advertisement of consumer
 14 goods and services.” *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 825 (D. Ariz. 2016)
 15 (citing A.R.S. § 44-1522(A)). “Arizona courts construe the ACFA to provide a right of
 16 action on any person damaged by a violation of the Act.” *Id.* (citing *Sellinger v. Freeway*
 17 *Mobile Home Sales, Inc.*, 110 Ariz. 573 (1974)). “To prevail, a plaintiff must establish that
 18 (1) the defendant made a misrepresentation in violation of the Act, and (2) defendant’s
 19 conduct proximately caused plaintiff to suffer damages.” *Id.* (citing *Parks v. Macro-*
 20 *Dynamics, Inc.*, 121 Ariz. 517, 520 (Ct. App. 1979)). “It is not necessary for the plaintiff
 21 to show that the defendant made an affirmative misstatement.” *Id.* “Material omissions are
 22 also actionable.” *Id.* (citation omitted). “A misrepresentation causes injury where the
 23 consumer actually relies on it, but ‘unlike common law fraud, this reliance need not be
 24 reasonable.’” *Id.* at 825–26 (quoting *Parks*, 121 Ariz. at 520).

25 As an initial matter, the Court will grant Defendant Borges’ request for summary
 26 judgment on the fraud claims. Plaintiff’s fraud claims are broadly based on her allegation
 27 that Defendants fraudulently induced Plaintiff into enrolling her daughter at SRA by
 28 concealing and otherwise misrepresenting the true nature of the SRA program. However,

1 Defendant Borges argues that Plaintiff “admits that she did not meet or even speak to
2 Borges until after [her daughter] was enrolled at SRA” and that Plaintiff therefore cannot
3 show that Defendant made any fraudulent representations that Plaintiff relied upon in
4 enrolling her daughter at SRA. (Doc. 113 at 6–7). Plaintiff does not dispute this in her
5 Response, but rather contends that her fraud claims against Defendant Borges are based on
6 a different theory—that Defendant Borges “concealed essential information regarding
7 [Plaintiff’s Daughter’s] health and welfare,” a misrepresentation which Plaintiff alleges
8 that she relied upon in deciding to keep her Daughter enrolled after she had already begun
9 attending SRA. (Doc. 154 at 3–5).

10 The Court finds that Plaintiff’s alternative theory of fraud does not fit within
11 Arizona’s framework for the common law tort of fraud because it does not directly involve
12 a pecuniary or economic loss. “Arizona follows the Restatement (Second) of Torts.”
13 *Tavilla v. Cephalon, Inc.*, 870 F. Supp. 2d 759, 774 (D. Ariz. 2012). The Restatement
14 provides that “[o]ne who fraudulently makes a misrepresentation . . . is subject to liability
15 to the other in deceit *for pecuniary loss* caused to him by his justifiable reliance upon the
16 misrepresentation.” Restatement (Second) of Torts § 525 (1977) (emphasis added). The
17 alleged harm underlying Plaintiff’s theory against Defendant Borges appears to be
18 emotional distress caused to Plaintiff as a result of her being misled into leaving her
19 Daughter enrolled at SRA. The parties do not cite to—and this Court’s own research has
20 failed to turn up—any cases in which an Arizona court has permitted solely non-pecuniary,
21 emotional damages in a common law fraud claim. Comment (h) of § 525 of the Restatement
22 recognizes *physical* harm that may result from a misrepresentation, but even then only
23 considers economic loss that derives from that physical harm. *See* Restatement (Second)
24 of Torts § 525, comment (h) (1977) (“This Section [] covers pecuniary loss resulting from
25 a fraudulent misrepresentation, and not physical harm resulting from the misrepresentation.
26 As to the latter, see § 557A, which also covers the economic loss deriving from the physical
27 harm. This type of economic loss is not intended to be included in the term, pecuniary loss,
28 as used in this chapter.”).

1 Plaintiff's ACFA claim against Defendant Borges fails for the same reason. The
2 ACFA prohibits "[t]he act, use or employment . . . of any deception, deceptive or unfair
3 act or practice, fraud, false pretense, false promise, misrepresentation, or concealment,
4 suppression or omission of any material fact . . . *in connection with the sale or*
5 *advertisement of any merchandise.*" A.R.S. § 44-1522(A) (emphasis added). Plaintiff's
6 theory of consumer fraud against Defendant Borges has no connection with the sale or
7 advertisement of any product or service. Plaintiff had already purchased the service—that
8 is, enrolled her daughter at SRA—by the time she met or spoke with Defendant Borges for
9 the first time. Thus, even assuming the truth of Plaintiff's allegation that Defendant Borges
10 concealed from Plaintiff material facts related to her Daughter's health and welfare post-
11 enrollment, Plaintiff has not shown any evidence that such concealment of facts was related
12 to the "sale or advertisement of any merchandise" and her ACFA claim must be dismissed.

13 Turning to the remaining Defendants, the Court first grants summary judgment on
14 Plaintiff's fraud claims in favor of Defendants Jean Courtney, Suzanne Courtney, Brandon
15 Courtney, Erin Smith, Leslie Filsinger, and Justin Zych. Plaintiff's Response does not
16 contend that any of these Defendants—in their individual capacities—made any
17 misrepresentation or concealment of information prior to Plaintiff's enrollment of her
18 Daughter at SRA. Rather, Plaintiff's Response argues that she relied on pre-enrollment
19 false representations from Defendants SRA and Kate Deily, and that her fraud theory
20 against the *other* Defendants is based on her allegation that they "committed grave
21 omission during the early weeks of her daughter's enrollment by failing to inform
22 [Plaintiff] that her daughter was attending Lifespring-based seminars and that she was
23 emotionally upset, ill and missing class." (Doc. 152 at 7). As discussed above with respect
24 to Defendant Borges, such allegations of misrepresentation and concealment cannot
25 support a claim for fraud under common law or the ACFA because they had nothing to do
26 with Plaintiff's decision to enroll her Daughter at SRA in the first place, *i.e.*, the actionable
27 conduct at issue in this fraud claim. The Court dismisses Plaintiff's claims for common law
28 fraud and for violation of the ACFA against Defendants Jean Courtney, Suzanne Courtney,

1 Brandon Courtney, Erin Smith, Leslie Filsinger, and Justin Zych.

2 Second, with respect to Defendants SRA and Kate Deily, the Court finds that a
 3 material factual dispute exists as it relates to whether the written materials and express
 4 statements that were provided to Plaintiff prior to her Daughter's enrollment contained
 5 actionable misrepresentations or concealments of information. Although Defendants argue
 6 that the documentation provided to Plaintiff "clearly differentiated between the experiential
 7 activities [] and therapy services that SRA provided," (see Doc. 115 at 10), Plaintiff's
 8 position is that Defendants SRA and Kate Deily misrepresented *numerous* aspects of the
 9 SRA program. (See Doc. 152 at 3–7). More importantly, Plaintiff has evidence to support
 10 her position, including her own testimony as alleged in her Verified Complaint,⁴ the
 11 documents at issue (namely, the Parent Manual and the Enrollment Terms and Agreement),
 12 and the testimony of three experts who opine to issues such as the problems associated with
 13 Large Group Awareness Training, what constitutes evidence-based therapy and whether
 14 the four therapy modalities used at SRA fell under that category, and whether—in the
 15 expert's opinion—the methodologies used at SRA were effective or appropriate. The Court
 16 is unpersuaded by Defendants' argument that Plaintiff's fraud claims must be dismissed
 17 merely because—in Defendants' view—the documents provided to Plaintiff clearly
 18 differentiated SRA's non-therapeutic activities from its therapeutic modalities.⁵

19
 20 ⁴ As Defendants note in their Reply, (see Doc. 161 at 2), a verified complaint *may*
 21 be treated as an opposing affidavit, so long as the allegations used are "based on personal
 22 knowledge and set[] forth facts admissible in evidence." *McElyea v. Babbitt*, 833 F.2d 196,
 23 198 n.1 (9th Cir. 1987) (citation omitted). Here, the Court finds that Plaintiff could
 reasonably testify as to her personal knowledge about what she was told or otherwise
 informed of prior to enrolling her daughter as it relates to the services SRA provides.

24 ⁵ The Court notes that Defendants' Motion arguably fails to even meet Defendants'
 25 initial burden to identify those portions of the record which it believes demonstrate the
 26 absence of a genuine issue of material fact. "In order to carry its burden of production, the
 27 moving party must either produce evidence negating an essential element of the nonmoving
 28 party's claim [] or show that the nonmoving party does not have enough evidence of an
 essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire*, 210 F.3d
 at 1102. Here, Defendants' Motion does not specifically identify the element of fraud that

1 In the Reply, Defendants argue for the first time that Plaintiff’s fraud claims should
 2 instead be considered a claim for lack of informed consent. (Doc. 161 at 3). Defendants
 3 then argue that Plaintiff fails to offer any expert testimony relating to Defendants’ duty to
 4 disclose information and to the applicable standard of care, and that the absence of such
 5 expert testimony requires dismissal of her informed consent claim. (*Id.*). The Court is
 6 unpersuaded. First, Defendants made no mention of this argument in their initial Motion
 7 and cannot raise a new argument in the Reply. *See Surowiec v. Cap. Title Agency, Inc.*, 790
 8 F. Supp. 2d 997, 1002 (D. Ariz. 2011) (quotation marks and citations omitted) (“[C]ourts
 9 will not consider new arguments raised for the first time in a reply brief.”). In contrast,
 10 Defendants make a similar argument with respect to Plaintiff’s contract claims—arguing
 11 that they are better characterized as tort claims—but do so in their Motion rather than
 12 waiting until the Reply to make the argument. (*See* Doc. 115 at 11). Second, even if
 13 Defendants’ informed consent argument is considered to be a permissible response to
 14 Plaintiff’s Response arguments, the Court must keep its summary judgment analysis within
 15 the scope of the claims Plaintiff seeks to bring to trial. Here, Plaintiff did not assert an
 16 informed consent claim; rather, she asserted fraud claims. The Court will not speculate as
 17 to whether Plaintiff’s fraud claims would be more accurately characterized as informed
 18 consent claims, nor will it speculate as to whether Plaintiff has sufficient evidence to
 19 support an informed consent claim. The remainder of Defendants’ Reply arguments
 20 generally demonstrate the factual dispute that remains between the parties as it relates to
 21 Plaintiff’s fraud claims. (*See* Doc. 160 at 3–5). The Court will not dismiss Plaintiff’s
 22 common law or ACFA fraud claims against Defendants SRA and Kate Deily.

23 In sum, the Court grants summary judgment to all individual Defendants except for
 24 Defendant Kate Deily with respect to Plaintiff’s fraud claims under the common law and
 25

26 Plaintiff cannot prove at trial. Rather, Defendants make the conclusory assertion that
 27 Plaintiff cannot prove *all nine elements* merely because, in Defendants’ view, the pre-
 28 enrollment documents provided to Plaintiff “clearly differentiated” between the non-
 therapeutic activities and the therapeutic modalities. (Doc. 115 at 10 (emphasis added)).

1 the ACFA. Counts I and II are dismissed against these Defendants. The Court denies
 2 summary judgment with respect to Plaintiff's fraud claims under the common law and the
 3 ACFA against Defendants SRA and Kate Deily.

4 **B. Breach of Contract, Warranty, and Implied Covenant Claims**

5 As an initial matter, the Court will grant summary judgment to the individual
 6 Defendants on Plaintiff's contract-related claims because the individual Defendants lacked
 7 privity to the contract at issue. "Privity is that connection or relationship which exists
 8 between two or more contracting parties. It arises from the mere fact of entering into a
 9 contract. Generally, privity of contract must exist before one may seek to enforce or defeat
 10 the contract." *Mardian Equip. Co. v. St. Paul Fire & Marine Ins. Co.*, No. CV-05-2729-
 11 PHX-DGC, 2006 WL 2456214, at *2 (D. Ariz. Aug. 22, 2006) (quotation marks omitted)
 12 (citing *Samsel v. Allstate Ins. Co.*, 199 Ariz. 480, 484 (Ct. App. 2001)); *see also Hayden*
 13 *Bus. Ctr. Condos. Ass'n v. Pegasus Dev. Corp.*, 209 Ariz. 511, 514 (Ct. App. 2005) ("Time
 14 after time, however, Arizona courts have insisted on privity for breach of contract
 15 claims."); *Treadway v. W. Cotton Oil & Ginning Co.*, 40 Ariz. 125, 138 (1932) ("[A]s a
 16 general rule only the parties and privies to a contract may enforce it.").

17 Here, the contract at issue is the Enrollment Agreement signed by Plaintiff in
 18 December 2019. (See Doc. 114-1 at 2–6). The first page identifies the "Sponsors" as the
 19 parents of Plaintiff's daughter, *i.e.*, Raymond P. Stata and Plaintiff. (Doc. 114-1 at 2). The
 20 same page then expressly states that "[t]his Enrollment Agreement, *by and between Spring*
 21 *Ridge Academy [] and the Sponsor(s)* is made under the following agreements." (*Id.*
 22 (emphasis added)). The Enrollment Agreement makes no explicit mention of the individual
 23 Defendants in this case—Veronica Borges, Jean Courtney, Suzanne Courtney, Brandon
 24 Courtney, Erin Smith, Leslie Filsinger, Justin Zych, and Kate Deily. Thus, these individual
 25 Defendants were not parties to the contract and cannot be sued for breaching it.

26 In support of her claim for breach of the implied covenant of good faith and fair
 27 dealing, Plaintiff points to a provision from the Enrollment Agreement stating that "SRA
 28 and its staff operate in [sic] behalf of, and as agents for, the Sponsor(s)." (Doc. 1 at 127).

1 Plaintiff argues that this provision formed an agency relationship and thereby created “an
 2 implied contract with [P]laintiff obligating each of [the individual Defendants] to deal with
 3 [Plaintiff] in good faith.” (Docs. 154 at 7 & 152 at 8). Plaintiff further contends that the
 4 individual Defendants’ roles as family therapists for Plaintiff created a “special
 5 relationship” as a matter of public policy. Given these fiduciary and/or special
 6 relationships, Plaintiff argues that “[t]he proper inquiry is whether a sufficient relationship
 7 exists between the parties to make it reasonable, as a matter of public policy, to impose a
 8 duty.” (Doc. 152 at 8). Plaintiff’s position appears to be that the individual Defendants can
 9 be held liable in contract for breach of the implied covenant of good faith and fair dealing
 10 because they failed to act in accordance with the duties arising from their fiduciary and/or
 11 special relationship with Plaintiff.

12 Plaintiff’s argument misses the point. The covenant of good faith and fair dealing
 13 arises from a valid contract, *not* from the parties’ relationship. *Rawlings v. Apodaca*, 151
 14 Ariz. 149, 153–54 (1986) (citations omitted) (emphasis added) (“The law implies a
 15 covenant of good faith and fair dealing in every contract. *The duty arises by virtue of a*
 16 *contractual relationship*. The essence of that duty is that neither party will act to impair the
 17 right of the other to receive the benefits which flow from their agreement or contractual
 18 relationship.”) Even *assuming* that an agency and/or special relationship existed between
 19 the individual Defendants and Plaintiff,⁶ a breach of the implied covenant nonetheless

20 ⁶ The Court notes that assuming the existence of an agency relationship is no small
 21 assumption. “Agency is the fiduciary relationship that arises when one person (a
 22 ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the
 23 principal’s behalf and subject to the principal’s control, and the agent manifests assent or
 24 otherwise consents so to act.” *Goodman v. Physical Res. Eng’g, Inc.*, 229 Ariz. 25, 29 (Ct.
 25 App. 2011) (quoting Restatement (Third) of Agency § 1.01 (2006)). In determining
 26 whether an agency relationship existed, courts consider the relation of the parties to one
 27 another and to the subject matter, as well as their acts and pattern of conduct. *Phx. W.*
 28 *Holding Corp. v. Gleeson*, 500 P.2d 320, 325–26 (Ct. App. 1972).

The Court therefore puts little weight into the labels assigned by the Enrollment
 Agreement in this case—that is, just because the Enrollment Agreement states that the
 individual Defendants, as SRA staff members, “operate . . . as agents for” Plaintiff does
 not necessarily mean an agency relationship existed without any consideration of all the

1 requires the existence of a valid contract. *See Johnson Int'l, Inc. v. City of Phx.*, 192 Ariz.
 2 466, 473–74 (Ct. App. 1998) (finding that obligation under implied covenant of good faith
 3 and fair dealing “presumes the existence of a valid contract”); *Price v. Town of Dewey-*
 4 *Humboldt*, No. CV-12-8086-PCT-FJM, 2012 WL 2415206, at *3 (D. Ariz. June 26, 2012)
 5 (noting that covenants of good faith and fair dealing “presume the existence of a valid
 6 contract” and finding that plaintiff failed to state claim for breach of those covenants when
 7 he failed to allege existence of a valid contract). Here, the fact of the matter is that the
 8 Enrollment Agreement was a contract solely between SRA and Plaintiff; the individual
 9 Defendants were simply not parties to that contract.

10 The fact that Plaintiff may bring her implied covenant claim against the individual
 11 Defendants in tort rather than in contract changes nothing. To be sure—and unlike with an
 12 implied covenant claim sounding in contract—the existence of a “special relationship” is
 13 an important consideration in analyzing a tortious implied covenant claim. *See Wells Fargo*
 14 *Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund*, 201
 15 Ariz. 474, 490 (2002) (citation omitted) (“A party may bring an action in tort claiming
 16 damages for breach of the implied covenant of good faith, but only where there is a ‘special
 17 relationship between the parties arising from elements of public interest, adhesion, and
 18 fiduciary responsibility.’”). However, Plaintiff fails to cite to any cases in which a claim
 19 for tortious breach of the implied covenant of good faith and fair dealing was sustained
 20 despite the absence of a valid contract in the first place. This Court’s own review of the
 21 caselaw fails to turn up such a case either. Rather, the caselaw demonstrates that a valid
 22 contract is required *regardless* of whether the implied covenant claim is brought in contract
 23 or in tort. *See id.* at 490–91 (noting that “[t]here is a difference . . . in the proof required,
 24 depending on whether the claim sounds in tort or in contract,” but recognizing that duties
 25 associated with implied covenant nonetheless “exist[] by virtue of a contract relationship”);
 26 *Rawlings*, 151 Ariz. at 158 (citation omitted) (emphasis added) (“[A] tort action for breach

27 _____
 28 other circumstances surrounding the parties’ relationship. The parties do not meaningfully
 discuss the agency issue, and the Court will not consider it any further either.

1 of the implied covenant is more often recognized where *the contract* creates a relationship
2 in which the law implies special duties not imposed on other contractual relationships.
3 These relationships are ‘characterized by elements of public interest, adhesion, and
4 fiduciary relationship.’”); *McAlister v. Citibank*, 171 Ariz. 207, 212–13 (Ct. App. 1992)
5 (citations and alterations omitted) (emphasis added) (“The law implies a covenant of good
6 faith and fair dealing *in every contract*. . . . While the remedy for breach of this implied
7 covenant is ordinarily by action on contract, in certain circumstances ‘the breach may
8 provide the basis for imposing tort damages.’”).

9 In essence, Plaintiff’s argument seems to conflate her implied covenant claim with
10 a breach of fiduciary duty claim. It may be true that the individual Defendants had a
11 fiduciary relationship with Plaintiff and that they breached that fiduciary duty. Had Plaintiff
12 brought a breach of fiduciary duty claim, this Court’s conclusion might be different
13 because the existence of a contract is irrelevant to a breach of fiduciary duty claim sounding
14 in tort. *See Marquette Venture Partners II, L.P. v. Leonesio*, No. 1 CA–CV 09–0166, 2011
15 WL 1867517, at *9 (Ct. App. Ariz. May 3, 2011) (citing Restatement (Third) of Agency
16 § 1.01 cmt. e, d (2006)) (“[T]he agency relationship creates the agent’s fiduciary
17 obligation as a matter of law.’ And, a breach of fiduciary duty is not dependent on a
18 contract.”). However, Plaintiff’s Complaint does not assert a claim for breach of fiduciary
19 duty. The claim at issue is for breach of the implied covenant of good faith and fair dealing.
20 That claim must be dismissed to the extent it is asserted against the individual Defendants
21 because they were not parties to the Enrollment Agreement. The Court grants summary
22 judgment in favor of the individual Defendants with respect to Plaintiff’s contract claims,
23 including her claim for breach of the implied covenant.

24 In contrast with the individual Defendants, it is undisputed that Defendant SRA was
25 a party to the Enrollment Agreement and thus the requirement of contractual privity is not
26 in question. Instead, Defendant SRA contends that Plaintiff’s claims against Defendant
27 SRA sound in tort rather than in contract. (Doc. 115 at 11). Defendant SRA argues that
28 Plaintiff cannot maintain simultaneous tort and contract claims against Defendants under

1 Arizona law, and that dismissal of her contract claims is appropriate. (*Id.* at 12–13).

2 In *Collins*, the Arizona Court of Appeals summed up the holdings from *Lewin* and
3 *Barmat*—two relevant cases relied upon by Defendant SRA—as follows:

4 We recognize that *Lewin* and *Barmat* are not precisely on point
5 since they were concerned with distinguishing between
6 contract and tort in the context of the statutory provision for
7 attorneys' fees in actions arising out of contract. Nevertheless,
8 they are persuasively instructive on the basic question of
9 whether an action in contract can even be maintained in a
10 malpractice setting. Essentially they teach that *even where*
11 *there is an express contract between the professional and the*
12 *client, an action for breach of that contract cannot be*
13 *maintained if the contract merely requires generally that the*
14 *professional render services*. Only if there is a specific promise
15 contained in the contract can the action sound in contract, and
16 then only to the extent the claim is premised on the
17 nonperformance of that promise.

13 *Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 395 (Ct. App. 1996) (citations omitted)
14 (emphasis added).⁷ Having fully reviewed the parties' contract in this case, the Court finds
15 that it merely requires that SRA renders therapeutic and academic services.⁸ The terms of

17 ⁷ In *Lewin*, the Arizona Court of Appeals held that:

18 [W]here there is a contract for services which places the parties
19 in such a relationship to each other that, in attempting to
20 perform the promised service, a duty imposed by law as a result
21 of the contractual relationship between the parties is violated
22 through an act which incidentally prevents the performance of
the contract, then the gravamen of the action is a breach of the
legal duty, and not of the contract itself.

23 *Lewin v. Miller Wagner & Co., Ltd.*, 151 Ariz. 29, 36 (Ct. App. 1986) (citation omitted).
24 In *Barmat*, the Arizona Supreme Court approved *Lewin*'s rationale in holding that "[a]bsent
25 some special contractual agreement or undertaking between those in the professional
26 relationship . . . a professional malpractice action does not 'arise' from contract, but rather
from tort." *Barmat v. John & Jane Doe Partners A–D*, 155 Ariz. 519, 524 (1987).

27 ⁸ For purposes of this analysis, the Court has considered the parties' "contract" to
28 include not only the Enrollment Agreement, but also the Parent Manual that was provided
to Plaintiff prior to enrollment.

1 the Enrollment Agreement are primarily a series of disclosures intended to inform the
2 parents and students “of the inherent risks and voluntary participation in the activities of
3 SRA.” (Doc. 1 at 127). It contains few, if any, express promises by SRA that could serve
4 as the basis for a contract claim. Likewise, the Parent Manual provides the parents of
5 prospective students with more specific information as it relates to SRA’s philosophy,
6 purpose, vision, belief statements, and general policies and procedures, as well as an
7 overview of the program’s therapy, workshop, and academic services. (See Doc. 1 at 174–
8 215). Like the Enrollment Agreement, the Parent Manual lacks specific promises that could
9 support a claim sounding in contract. The parties’ contract “is nothing more than a general
10 promise which encompasses the basic duty imposed by law to provide reasonably
11 competent [therapeutic] services” and “clearly lacks the specificity required for a breach
12 of contract action.” *Collins*, 189 Ariz. at 395; see also *Towns v. Frey*, 149 Ariz. 599, 601
13 (Ct. App. 1986) (“[T]he contract relied upon must itself contain an undertaking to do the
14 thing for the nonperformance of which the action is brought.”).

15 It follows that the gravamen of Plaintiff’s contract-related allegations is *not* that
16 Defendant SRA failed to perform a “special contractual agreement or undertaking,” see
17 *Barmat*, 155 Ariz. at 524, but rather that Defendant SRA generally failed to provide
18 Plaintiff and her Daughter with the therapy and academic services that were promised.
19 Plaintiff contends that Defendant SRA failed to satisfy its duties under the parties’ contract
20 in numerous ways. For example, Plaintiff alleges that Defendant SRA publicly disclosed
21 certain confidential information; subjected Plaintiff and her Daughter to public ridicule,
22 shaming, violence, yelling, and abuse; denied Plaintiff’s participation in family therapy;
23 cut off or otherwise impeded Plaintiff’s ability to communicate with her Daughter; denied
24 medical care to Plaintiff’s Daughter; impeded the educational progress of Plaintiff’s
25 Daughter; staffed its program with unqualified and uncertified therapists; provided services
26 that failed to comply with Arizona law; and otherwise failed to provide “good quality child
27 care, schooling, family therapy and education, boarding services in a safe, nurturing
28 environment, [and] evidence-based family therapy and a college prep curriculum.” (Doc.

1 1 at 109–14). None of these allegations relate to a specific contractual promise made by
 2 SRA. As Defendant SRA puts it, Plaintiff simply asserts violations of professional and
 3 legal standards that are “based upon the obligations that behavioral health and educational
 4 professionals owe generally to a class or the public at large as a result of their professional
 5 standing and *not* solely because of a contractual duty.” (Doc. 115 at 12–13 (emphasis
 6 added)). Likewise, neither Plaintiff’s Complaint nor her summary judgment briefing
 7 identify a specific contractual provision that was violated.

8 Rather than bolstering her contract claims, Plaintiff’s Response brief seems to lean
 9 into the idea that her claims sound in tort. Plaintiff discusses certain duties and standards
 10 of care that were imposed on Defendant SRA by virtue of the parties’ “special” and/or
 11 “fiduciary” relationship, as well as duties and standards of care arising from statute and
 12 caselaw. (See Doc. 152 at 7–12). This includes a general duty of care, a duty to comply
 13 with certain professional standards, a duty to protect the confidentiality of therapy
 14 participants, and a duty to refrain from custodial interference. (*Id.*). None of these duties
 15 expressly arise from the parties’ contract. At times, Plaintiff’s apparent adoption of a tort
 16 theory is even more conspicuous. For example, Plaintiff asserts that her claim for breach
 17 of the implied covenant of good faith and fair dealing is both a contract claim *and* a tort
 18 claim, with its basis in tort being founded on the parties’ “special relationship.” (*Id.* at 7–
 19 8). Later, Plaintiff asserts that her “claims against [Defendants] for fraud and breach of
 20 confidentiality necessarily triggers a finding pursuant to statute that the conduct of
 21 [Defendants] is unprofessional and a violation of a duty *giving rise to tort claims* for
 22 constructive fraud and breach of the covenant of good faith and fair dealing, *beyond that*
 23 *associated with the written contract* and negligence.” (*Id.* at 9–10 (emphasis added)).

24 In sum, the Court agrees with Defendant SRA that Plaintiff has failed to demonstrate
 25 a basis for her breach of contract and breach of warranty claims, as well as her breach of
 26 the implied covenant claim to the extent it is brought under a contract theory. Under the
 27 parties’ contract, Defendant SRA promised only to provide certain therapeutic and
 28 academic services to Plaintiff and her Daughter, a promise that it fulfilled. “That [SRA]

1 may have done so in a negligent manner, in violation of the duty imposed on [it] by law [to
2 provide services] in accordance with the applicable standard of care, does not change the
3 gravamen of the action from tort to contract.” *Collins*, 189 Ariz. at 395. The Court grants
4 summary judgment to Defendant SRA on Plaintiff’s contract claims.

5 As a final note, Plaintiff’s Complaint does not specify whether her breach of the
6 implied covenant claim is based in tort or contract. (Doc. 1 at 112–14). As this Court just
7 found above, this claim is dismissed to the extent it is based in contract. That said, Plaintiff
8 argues in her Response that the claim should survive summary judgment as a tort claim. In
9 *McAlister*, the Arizona Court of Appeals explained covenant of good faith and fair dealing
10 and when a breach of that covenant may provide the basis for tort damages:

11 The law implies a covenant of good faith and fair dealing in
12 every contract. This implied covenant prevents either party
13 from acting ‘to impair the right of the other to receive the
14 benefits which flow from their agreement.’ While the remedy
15 for breach of this implied covenant is ordinarily by action on
16 contract, in certain circumstances ‘the beach may provide the
17 basis for imposing tort damages.’ However, *a ‘special
18 relationship’ must exist in order to support a tortious breach
19 of the implied covenant of good faith and fair dealing.* Such a
20 relationship is characterized either by a fiduciary relationship,
21 elements of public interest (*e.g.*, unequal bargaining positions),
22 or adhesion.

23 *McAlister*, 171 Ariz. at 213 (citations and alterations omitted). Here, Plaintiff asserts that a
24 special relationship existed by virtue of Defendant SRA’s role as a therapy and residential
25 behavioral health provider. Defendant SRA does not dispute the existence of a special
26 relationship, and the Court will proceed under the assumption that it exists.

27 Defendant SRA instead argues that Plaintiff has failed to provide evidence—
28 namely, expert witness testimony—demonstrating that Defendant SRA failed to meet the
applicable standard of care and caused some injury to Plaintiff. (Doc. 115 at 11–12). As
noted above, Plaintiff’s tort theory is based on her allegation that Defendant SRA failed to
provide the therapeutic and academic services that complied with Arizona law and that
were promised to her by the documents provided and discussions she had with SRA

1 representatives prior to enrolling her Daughter. Defendant is correct that expert testimony
2 is generally required to evidence “the accepted conduct of the profession and the
3 defendant’s deviation from that standard.” *Valencia v. United States*, 819 F. Supp. 1446,
4 1463 (D. Ariz. 1993) (citing *Peacock v. Samaritan Health Serv.*, 159 Ariz. 123 (Ct. App.
5 1988)). The only exception is where “the negligence is so grossly apparent that a layman
6 would have no difficulty in recognizing it.” *Id.* (citing *Peacock*, 159 Ariz. at 123).

7 In response to Defendant’s argument, Plaintiff asserts that her “claims against
8 [Defendants] for fraud and breach of confidentiality necessarily triggers [sic] a finding
9 pursuant to statute that the conduct of [Defendants] is unprofessional and a violation of a
10 duty giving rise to tort claims for constructive fraud and breach of the covenant of good
11 faith and fair dealing, beyond that associated with the written contract and negligence, *and*
12 *require no expert testimony.*” (Doc. 152 at 9–10 (emphasis added)). Plaintiff does not
13 support this assertion with any caselaw or other legal authority, and this Court’s own
14 review of the relevant law did not reveal such an exception to the requirement that a
15 plaintiff provide expert testimony. Rather, the only exception is where the negligence is
16 “so grossly apparent” that a layman could recognize it. *See Valencia*, 819 F. Supp. at 1463.
17 Plaintiff does not meaningfully demonstrate how the present case fits within this exception,
18 and instead makes the conclusory assertions that SRA’s conduct “is so egregious and
19 unethical that the guidance of an expert is superfluous” and that “[t]he alleged negligence
20 is so ‘grossly apparent’ that a layman would have no difficulty recognizing it.” (*Id.* at 10).

21 Aside from arguing these two exceptions, Plaintiff makes no other efforts to respond
22 to Defendant’s argument that Plaintiff lacks the necessary expert testimony to support her
23 tort claim. Plaintiff apparently has three experts to support her claims, but one would not
24 know that from reading her Response as it fails to even mention these experts, let alone
25 point the Court to a place in their reports where the experts opine as to the standard of care,
26 whether and how Defendant SRA breached that standard, or how such a breach caused the
27 harm to Plaintiff. It is not this Court’s job to sort through hundreds of pages of expert
28 reports in search of the evidence supporting Plaintiff’s claim. *See Keenan v. Allan*, 91 F.3d

1 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th
 2 Cir. 1995)) (“It is not our task, or that of the district court, to scour the record in search of
 3 a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable
 4 particularity the evidence that precludes summary judgment.”). Moreover, Plaintiff did not
 5 even include the export reports in the exhibits she submitted to the Court. (See Docs. 127
 6 & 142). Instead, the Court was only able to review the expert reports by referring to the
 7 exhibits submitted by Defendants. (Docs. 116-3, 116-4, & 116-5). All told, Plaintiff has
 8 not made any meaningful demonstration that she would be able to offer expert evidence at
 9 trial concerning the relevant standard of care, whether Defendant SRA breached that
 10 standard, and how such a breach caused her harm. The Court grants summary judgment to
 11 Defendant SRA on Plaintiff’s implied covenant claim to the extent it is brought as a tort.

12 Aside from Plaintiff’s claim for negligence *per se*—which is discussed below—the
 13 Court need not consider whether Plaintiff has demonstrated sufficient evidence to support
 14 any additional tort claims against Defendant SRA, such as a malpractice or general
 15 negligence claim, because Plaintiff’s Complaint does not contain any other tort claims.
 16 Although Plaintiff appears to argue for such additional tort liability in her briefing, “[i]t is
 17 impermissible to add a new claim at the summary judgment stage.” *Buckhorn v. Hettinger*,
 18 800 Fed. Appx. 542, 543 (9th Cir. 2020). In sum, the Court grants summary judgment in
 19 all Defendants’ favor with respect to Plaintiff’s claims for breach of contract, breach of
 20 warranty, and contractual and tortious breach of the implied covenant of good faith and fair
 21 dealing. These claims are dismissed.

22 **C. RICO Claim**

23 “To prevail on a civil RICO claim the plaintiffs must show, among other elements,
 24 a ‘pattern of racketeering activity.’” *All Direct Travel Servs., Inc. v. Delta Air Lines, Inc.*,
 25 120 Fed. Appx. 673, 675 (9th Cir. 2005) (quoting 18 U.S.C. § 1962). “‘Racketeering
 26 activity’ is any act indictable under several provisions of Title 18 of the United States
 27 Code.” *Rothman v. Vedder Park Mgmt.*, 912 F.2d 315 (9th Cir. 1990) (citing 18 U.S.C.
 28 § 1961). This includes the four predicate acts alleged by Plaintiff in this case: wire fraud,

1 illegal monetary transactions from unlawful activity, witness tampering, and witness
2 retaliation. *See* § 1961(1)(B).

3 Defendants—including Defendant Borges—argue that Plaintiff has failed to
4 develop any evidence to support any of these four predicate acts. (*See* Doc. 113 at 10
5 (“Plaintiff’s RICO claim fails because she has not developed any admissible evidence to
6 establish that Borges personally engaged in any of the federal crimes upon which the RICO
7 claim is based.”); Doc. 115 at 13 (“None of [Plaintiff]’s disclosed experts support any of
8 those claims. Nor has Plaintiff produced any evidence or made any specific allegations that
9 would meet the threshold requirements for any of these four categories of criminal activity
10 by any of the Defendants.”)). In her Responses, Plaintiff entirely fails to put forth *any*
11 evidence that any of the Defendants committed wire fraud, illegal monetary transactions,
12 witness tampering, or witness retaliation.⁹ Plaintiff fails to even point the Court in the
13 direction of such evidence in the record. Rather, the *entirety* of Plaintiff’s responsive
14 argument on the “pattern of racketeering” element is as follows:

15 The RICO cause of action arises from conduct related to wire
16 fraud, (18 U.S.C. § 1343), illegal monetary transactions from
17 unlawful activity (18 U.S.C. § 1957), witness tampering (18
18 U.S.C. § 1512) and retaliation against a witness (18 U.S.C.
19 § 1513). As alleged in her Complaint, had defendants not been
20 so misleading, Ms. Sweidy would never have had to invest in
21 attorneys’ fees to defeat their attempts to abuse the court
process to keep her daughter confined and mentally abused.
She would never have had to hire experts to consult and learn
what really went on inside SRA and would not have had to give
up all rights to her child and child support in a “Hail Mary”

22 ⁹ In her Response to Defendant Borges’ Motion, Plaintiff begins by asserting that
23 Defendant Borges failed to meet her burden of production because she provided no support
24 for her argument against Plaintiff’s RICO claim. (Doc. 154 at 11). Thus, Plaintiff contends
25 that the burden of production remains with Defendant Borges. (*Id.*). The Court is
26 unpersuaded. “[T]o carry its burden of production, the moving party must either produce
27 evidence negating an essential element of the nonmoving party’s claim . . . or *show that*
28 *the nonmoving party does not have enough evidence of an essential element* to carry its
ultimate burden of persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102 (emphasis added).
Here, Defendants did the latter by identifying an essential element (the “pattern of
racketeering activity” element) and showing that Plaintiff lacked evidence to support it.

1 legal maneuver to get her child out of SRA and back in
2 California.

3 (Docs. 152 at 12–13 & 154 at 12). In both Responses, Plaintiff immediately shifts focus to
4 the “damage to business or property” element. (See Docs. 152 at 13 & 154 at 12–13).

5 Plaintiff’s responsive argument does little to assist the Court in identifying whether
6 she has sufficient evidence to support the “pattern of racketeering” element of her RICO
7 claim. The evidence submitted by the parties in this case spans hundreds if not thousands
8 of pages; Plaintiff’s Responses alone are supported by 133 separate exhibits. This Court
9 does not have the time nor the resources to parse through such an extensive factual record
10 and piece together the evidence Plaintiff has to support her claims. *See Keenan*, 91 F.3d at
11 1279 (quoting *Richards*, 55 F.3d at 251) (“It is not our task, or that of the district court, to
12 scour the record in search of a genuine issue of triable fact. We rely on the nonmoving
13 party to identify with reasonable particularity the evidence that precludes summary
14 judgment.”); *see also Marceau v. Int’l Brotherhood of Elec. Workers*, 618 F. Supp. 2d
15 1127, 1140 (D. Ariz. 2009) (“A district court is not required to probe the record in search
16 of a genuine issue of triable fact.”); *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 405
17 (6th Cir. 1992) (“[The nonmoving party’s] burden to respond is really an opportunity to
18 assist the court in understanding the facts. But if the nonmoving party fails to discharge
19 that burden—for example, by remaining silent—its opportunity is waived and its case
20 wagered.”). Given Plaintiff’s failure to adequately respond with meaningful evidence to
21 support her RICO claim at this summary judgment stage, the Court must grant summary
22 judgment to Defendants on this claim.

23 **D. Negligence *Per Se* Claim**

24 “A person who violates a statute enacted for the protection and safety of the public
25 is guilty of negligence *per se*.” *Alaface v. Nat’l Invest. Co.*, 181 Ariz. 586, 596 (Ct. App.
26 1994) (citations omitted). Here, Plaintiff alleges a negligence *per se* claim based on
27 Defendants’ purported violations of (i) A.R.S. § 13-1302(A)(1) and (ii) the Arizona
28 Administrative Code. (Doc. 1 at 118–19).

1 First, the Court grants summary judgment in Defendants' favor on Plaintiff's
 2 negligence *per se* claim to the extent it is based on violations of the Arizona Administrative
 3 Code. The law is clear that in order for a statute or regulation to serve as the basis for a
 4 negligence *per se* claim, it "must proscribe certain or specific acts." *Hutto v. Francisco*,
 5 210 Ariz. 88, 91 (Ct. App. 2005) (citation and quotation marks omitted). "Therefore, if a
 6 statute defines only a general standard of care, negligence *per se* is inappropriate." *Id.*
 7 (citation and quotation marks omitted). Most of the provisions of the Arizona
 8 Administrative Code referred to by Plaintiff are intended to define a general standard of
 9 care for healthcare providers. Although some could plausibly be considered to "proscribe
 10 certain or specific acts"—*e.g.*, A.R.S. § 32-3283, which proscribes a licensee from
 11 "divulg[ing] information that is received by reason of the confidential nature of the
 12 behavioral health professional-client relationship," (see Doc. 154 at 8)—it is not clear that
 13 these provisions are also intended to protect the public. For example, the confidentiality
 14 privilege provided under § 32-3283 was not enacted for the protection and safety of the
 15 public, but rather to encourage clients "to be candid with his or her mental health
 16 professional." *In re MH2019-004895*, 249 Ariz. 283, 288 (Ct. App. 2020). This case is now
 17 at the summary judgment stage and Plaintiff's Response needed to do more than premise
 18 her negligence *per se* claim on a vague, generalized assertion that Defendants violated
 19 numerous provisions of the Arizona Administrative Code. Plaintiff failed to demonstrate
 20 that her negligence *per se* claim is based on a violation of a *specific* provision(s) of statute
 21 or regulation that both proscribes certain or specific acts *and* is intended to protect the
 22 safety of the public.

23 Second, the Court will also grant summary judgment to Defendants on Plaintiff's
 24 negligence *per se* claim to the extent it is premised on a violation of § 13-1302(A)(1).
 25 Section 13-1302(A)(1), which is part of the criminal code, provides that:

26 A person commits custodial interference if, knowing or having
 27 reason to know that the person has no legal right to do so, the
 28 person . . . [t]akes, entices or keeps from lawful custody any
 child . . . who is entrusted by authority of law to the custody of

another person or institution.

Plaintiff alleges that Defendants committed custodial interference by denying her access to her Daughter by monitoring their mail and phone calls, limiting their in-person visits, and otherwise cutting off all contact between them. (Doc. 1 at 118–19). In seeking summary judgment, Defendant Borges argues that § 13-1302(A)(1) was not enacted for public safety purposes, but rather “to stem the flood of child-stealing acts often attendant to domestic relations cases.” (Doc. 113 at 13 (quoting *State v. McLaughlin*, 125 Ariz. 505, 507 (1980))). The remaining Defendants join in Defendant Borges’ argument. (Doc. 115 at 14). In her Response, Plaintiff argues that § 13-1302(A)(1) is intended to protect children, which she asserts “is a public safety issue [] rooted in safeguarding the interests of those who have their best interest at heart, their parents.” (Doc. 154 at 14).

The Court is unpersuaded by Plaintiff’s argument. First, Plaintiff fails to cite any caselaw or other legal authority to support her interpretation of the purpose underlying § 13-1302.¹⁰ Second, this Court’s own review of relevant caselaw reveals that § 13-1302 is not concerned with public safety in the manner that is necessary for the statute to serve as the basis of a negligence *per se* claim. Rather, the statute is intimately tied up with issues of domestic relations and custodial arrangements, concerns that have no direct effect on the safety of the general public. *See McLaughlin*, 125 Ariz. at 507 (“The purpose of the charging statute was to stem the flood of child-stealing acts often attendant to domestic relations cases.”); *State v. Wilhite*, 160 Ariz. 228, 230 (Ct. App. 1989) (“The essential concern of § 13-1302 . . . is [] to discourage interference with custodial arrangements established by law.”). The Court grants Defendants’ request for summary judgment on Plaintiff’s negligence *per se* claim.

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¹⁰ *Troxel*, the only case cited by Plaintiff, does not deal with § 13-1302. Although that case discusses the interest that parents have in the care, custody, and control of their children—recognizing it as a “fundamental liberty interest”—the case says nothing about whether a statute concerning custodial interference is intended to protect public safety. *See Troxel v. Granville*, 530 U.S. 57 (2000).

1 **E. IIED Claim**

2 “As to a claim for [IIED], a plaintiff must establish (1) the conduct of defendant was
3 ‘extreme’ and ‘outrageous,’ (2) defendant intended to cause emotional distress or
4 recklessly disregarded the near certainty that such conduct would result from his conduct,
5 and (3) severe emotional distress did occur as a result of defendant’s conduct.” *Day v. LSI*
6 *Corp.*, 174 F. Supp. 3d 1130, 1158 (D. Ariz. 2016) (citing *Citizen Publ’g Co. v. Miller*,
7 210 Ariz. 513, 517 (2005)). Defendant Borges argues that Plaintiff lacks sufficient
8 evidence to create a dispute of material fact with respect to any of these elements. (Doc.
9 113 at 14–17). The remaining Defendants argue that Plaintiff lacks sufficient evidence to
10 satisfy the first and third elements. (Doc. 115 at 14–15).

11 With respect to the third element specifically, Defendants—including Defendant
12 Borges—point out Plaintiff’s previous assertions that Defendants’ alleged acts caused her
13 to suffer only “garden variety” emotional harm. (Docs. 113 at 16 & 115 at 15). Indeed, in
14 the parties’ October 27, 2022 Joint Motion for Discovery Dispute Resolution, Plaintiff
15 stated that “[r]egarding [her] claims for . . . pain, suffering, humiliation, etc. (list not
16 exhaustive) damages, these are ‘garden variety’ damages, stemming directly from
17 Defendants’ actions.” (Doc. 78 at 5). On December 6, 2022, in opposing Defendants’
18 Motion for an Order Compelling Plaintiff to Undergo a Rule 35 Psychological
19 Examination, Plaintiff asserted the following:

20 Plaintiff has no mental condition in controversy. No good
21 cause exists for a psychological examination. Plaintiff leads a
22 productive, healthy and fulfilling life. She is fortunate to be
23 free of physical and/or psychological ailment. She is highly
24 educated, and her circumstances allow her to devote countless
25 hours to pro bono, charitable and philanthropic causes. She
26 enjoys rewarding relationships with friends and family. She
27 enjoys hobbies including hiking, sewing, playing the piano and
28 writing music and poetry. On Saturday mornings, she is at
 Zumba classes given by the City of Palo Alto. Plaintiff is on no
 medication. Plaintiff does not drink alcohol, smoke marijuana
 or take illegal drugs. After a recent root canal, Plaintiff took
 200 mg (one tablet, over the counter) of Ibuprofen per day for
 three days.

1 (Doc. 93 at 8–9). Later in the same response, Plaintiff stated that she “claims pain,
 2 suffering, humiliation and inconvenience” and that “[t]hese are ‘garden variety’ damages
 3 that anyone would suffer in the same situation.” (*Id.* at 10).

4 Courts have consistently recognized that assertions of “garden variety” emotional
 5 damages are inconsistent with a claim for IIED. *See, e.g., Hupp v. San Diego Cnty.*, No.
 6 12cv0492 GPC(RBB), 2013 WL 5408644, at *7 (S.D. Cal. Sept. 25, 2013) (emphasis
 7 added) (“By alleging a claim for [IIED] and seeking damages for mental and emotional
 8 injuries, Hupp is seeking *more than* garden-variety emotional distress damages.”); *Lira v.*
 9 *Chipotle Mexican Grill, Inc.*, No. 17-cv-02588-JSW (KAW), 2018 WL 2128707, at *3
 10 (N.D. Cal. May 9, 2018) (emphasis added) (“In turn, ‘garden-variety’ emotional distress
 11 has been defined as ‘ordinary or commonplace emotional distress’ or that which is ‘simple
 12 or usual.’ . . . Emotional distress that is *not* garden-variety ‘may be complex, such as that
 13 resulting in a specific psychiatric disorder,’ or *where there is a claim for [IIED]*.”); *Spector*
 14 *v. Bd. of Trs. of Cmty.-Tech. Colls.*, No. 3:06cv129 (JCH), 2007 WL 9753111, at *3 (D.
 15 Conn. June 28, 2007) (“A plaintiff making a claim for [IIED] must prove more than ‘garden
 16 variety’ emotional distress. In fact, in order to sustain these claims, plaintiffs must prove
 17 that they suffered severe emotional distress.”).

18 In this case, Plaintiff cannot have it both ways. She cannot assert “garden variety”
 19 emotional damages in order to avoid a psychological examination during discovery, only
 20 to turn around and assert *severe* emotional distress sufficient to support a claim for IIED at
 21 the summary judgment stage. Moreover, Plaintiff’s Responses do not address the third
 22 element at all. Instead, she focuses *solely* on the first element by citing cases in which
 23 courts—none of which are courts from Arizona or the Ninth Circuit—found “that the
 24 unilateral separation of a child from its parent *can* be extreme and outrageous conduct.”
 25 (Docs. 152 at 15–16 & 154 at 14–15). Thus, even if the Court were to overlook Plaintiff’s
 26 inconsistency on this issue over the course of this litigation, summary judgment in
 27 Defendants favor on this claim would nonetheless be appropriate as a result of Plaintiff’s
 28 failure to respond. *See Garcia v. Salt River Project Agric. Improvement & Power Dist.*,

618 F. Supp. 2d 1092, 1099 (D. Ariz. 2007) (citing LRCiv. 7.2(i)) (“Generally, a party’s failure to respond to arguments in a motion ‘may be deemed consent to the denial or granting of the motion and the Court may dispose of the motion summarily.’”). The Court grants summary judgment in Defendants’ favor on Plaintiff’s IIED claim.

F. Conversion of Property Claim

“Arizona has adopted the following definition of conversion, which is in the Restatement (Second) of Torts § 222A(1) (1965): ‘Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.’” *Miller v. Hehlen*, 209 Ariz. 462, 472 (Ct. App. 2005). “If those elements are shown, a court must then consider the seriousness of the interference and whether the offending party must pay full value.” *Id.* (citing Restatement (Second) of Torts § 222A(2)). In this case, Plaintiff’s conversion claim is based on her allegation that SRA failed to return certain personal property to Plaintiff after her Daughter was removed from SRA. (*See* Doc. 1 at 123). The property had been delivered by Plaintiff to SRA for use by her Daughter. (*Id.*). Plaintiff asserts that Defendants are liable for the value of the unreturned property. (*Id.*).

The Court will first grant summary judgment to Defendant Borges on the conversion claim. In her separate Motion, Defendant Borges argues, in part, that she never personally exercised control or dominion over the personal property at issue and that Plaintiff has failed to provide any evidence demonstrating otherwise. (Doc. 113 at 17–18). In her Response to Defendant Borges’ Motion, Plaintiff offers the same, two-paragraph conversion argument that she uses in her Response to the other Defendants’ Motion. (*Compare* Doc. 154 at 15–16 (Plaintiff’s Response to Defendant Borges) *with* Doc. 152 at 16 (Plaintiff’s Response to other Defendants)). The argument contains no reference to Defendant Borges specifically, let alone any evidence that she *personally* exercised intentional dominion or control over the personal property at issue at any time. The Court grants summary judgment to Defendant Borges as to Plaintiff’s conversion claim.

The remaining Defendants argue that “Plaintiff cannot make a claim that the

1 Defendants ‘seriously interfered’ with her right to control [her Daughter’s] personal
2 belongings or even that she is the rightful owner of those belongings.” (Doc. 115 at 15).
3 Defendants explain that Plaintiff “testified in deposition that she did not know if [her
4 Daughter] received the property shipped to her from SRA, would *not* ask her Daughter
5 what she received, and it is “none of your business” whether [Plaintiff] would have
6 forwarded the property to her Daughter if Defendants had instead [] shipped [the property]
7 to her address.” (*Id.*). Indeed, when asked at the deposition about the property subject to
8 her conversion claim, Plaintiff stated that the property did not get sent to her house and
9 “that’s what I know.” (Doc. 116-10 at 3). When asked whether her Daughter received the
10 property at her father’s house, Plaintiff responded “I don’t know. Ask [my Daughter].”
11 (*Id.*). Later during the deposition, the parties returned to the topic:

12 Q: [D]o you know where the property went?

13 A: I know it did not go to me. I’m assuming that it went to Mr.
14 Stata, but I have no necessarily direct evidence.

15 Q: Do you know if it went with [your Daughter]?

16 A: Do I know if it went with [my Daughter]?

17 Q: Yes. Do you know?

18 A: Do I—do I know for a fact? Was I there? No, I was not a
19 recipient [sic] witness to whether it went with [my Daughter].
20 But I can say this. It was boxes and boxes, and there’s no way
21 they packed up all that, gave it to [my Daughter], and [my
22 Daughter] then schlepped it home during COVID on the plane
23 on Sunday, the 28th when she flew home in June. I don’t
24 believe—

25 Q: I don’t—I’m not saying she surfeited it back on her own
26 back. Obviously, that’s not what I meant, ma’am. Don’t be
27 deliberately—

28 A: No, that’s not obviously. I’m not deliberately anything. You
asked me did it go with [my Daughter]. Well, going with [my
Daughter] sounds like [my Daughter]’s leaving and the stuff’s
going with her.

Q: Do you—did you—have you asked [your Daughter]?

1 A: I'm not getting in a conversation with [my Daughter] about
 2 those belongings. . . . And I'm not going to bring up things that
 3 create nothing [but] animosity and problems thanks to Spring
 4 Ridge Academy.

5 (*Id.* at 6–7). Later during the deposition, Plaintiff expressly acknowledges that SRA did
 6 not maintain dominion or control over the disputed property but rather that SRA sent the
 7 property to her Daughter:

8 What is relevant is that [SRA] sent my belongings to
 9 somewhere other than to me. No, I don't agree that . . . minors'
 10 belongings belong to the minor and that nor is that something
 11 that [SRA] gets to assert. I don't agree with either of those. And
 12 you're never going to get me to agree with it.

13 And if I feel that [the property] belongs to [my Daughter], it's
 14 my place to give that to [her], not for [SRA] to preempt me and
 15 decide that they know better what possessions my daughter
 16 should have than I do. That's exactly what got us into this
 17 lawsuit, overstepping boundaries and not fulfilling their
 18 contractual obligations to behave in an ethical and appropriate
 19 manner vis-à-vis the sponsors . . . and the student.

20 . . .

21 [The property] should have been returned to me as I requested,
 22 documented, and asked. Should not have been sent anywhere
 23 else, and that would have been the end of that. And that's my
 24 position.

25 (*Id.* at 8, 11).

26 Plaintiff's Response does not offer any evidence—or otherwise refer the Court to
 27 some evidence in the record—that supports her conversion claim. Rather, she simply
 28 repeats her Complaint allegations that she “never received the property that was under the
 dominion and control of the Defendants,” that she had “demanded its return,” that
 Defendants denied her “the opportunity to physically retrieve the property herself,” and
 that “[n]o evidence has been provided by the Defendants as to what happened to the items.”
 (Doc. 152 at 16). This response from Plaintiff is entirely deficient and does nothing to
 meaningfully support her conversion claim with evidence. The above-excerpted deposition
 testimony from Plaintiff—which appears to be the *only* evidence that has been provided to

1 this Court on this issue—indicates an agreement by all parties that SRA did *not* exercise
2 dominion or control over the property in a manner that seriously interfered with Plaintiff’s
3 right to the property. Rather, SRA appears to have reasonably sent the property with and/or
4 to Plaintiff’s Daughter when she left SRA for her father’s house. On the evidence before
5 this Court, it appears that Plaintiff is merely frustrated that SRA did not comply with or
6 even acknowledge her request that the property be sent to her. Such a grievance does not
7 amount to an actionable conversion claim, and Plaintiff does not offer any meaningful
8 argument or legal support to the contrary. The Court grants summary judgment to
9 Defendants on Plaintiff’s conversion claim.

10 **G. Punitive and Special Damages**

11 Defendants request that the Court deny Plaintiff’s request for punitive damages.
12 Defendants correctly assert that, under Arizona law, “[s]omething more than the mere
13 commission of a tort is always required for punitive damages” and that such damages
14 should only be available where “the defendant’s wrongful conduct was guided by evil
15 motives.” *Rawlings*, 151 Ariz. at 162 (citation omitted). “The evil mind which will justify
16 the imposition of punitive damages may be manifested in either of two ways. It may be
17 found where defendant intended to injure the plaintiff. It may also be found where,
18 although not intending to cause injury, defendant consciously pursued a course of conduct
19 knowing that it created a substantial risk of significant harm to others.” *Id.* Defendants also
20 request that the Court deny Plaintiff’s request for certain special damages, arguing that the
21 special damages claims lack a cognizable legal basis, that Plaintiff lacks standing, and that
22 the claims lack sufficient evidentiary support. (Doc. 115 at 17).

23 Given the Court’s denial of summary judgment on Defendants SRA and Kate
24 Deily’s potential liability for the fraud claims, the Court declines to rule on punitive or
25 special damages at this time. In the event that Plaintiff is entitled to damages, the parties
26 will have the opportunity to assert their positions and provide supporting argument.

27 ///

28 ///

IV. CONCLUSION

IT IS ORDERED that Defendants' requests for Joinder (Docs. 118, 119, 162, & 163) are **granted**.

IT IS FURTHER ORDERED that Defendants Spring Ridge Academy, Jean Courtney, Suzanne Courtney, Brandon Courtney, Erin Smith, Leslie Filsinger, Justin Zych, and Kate Deily's Motion for Summary Judgment (Doc. 115) is **granted in part**. All claims against Defendants Jean Courtney, Suzanne Courtney, Brandon Courtney, Erin Smith, Leslie Filsinger, and Justin Zych are **dismissed with prejudice**. Defendants SRA and Kate Deily's request for summary judgment is **denied** with respect to Plaintiff's actual, constructive, and consumer fraud claims, but **granted** with respect to all other claims. Thus, only Defendants SRA and Kate Deily remain, and the only remaining claims are Plaintiff's fraud claims (Counts I and II).


Honorable Steven P. Logan
United States District Judge