

Re: *Planned Parenthood, et al., v. Ctr. For Med. Prog. et al.*, Case No. 3:16-cv-0236-WHO

Dear Judge Ryu:

The parties submit the following issue for resolution by the Court. The parties have met and conferred on this issue. There is no trial date, nor any discovery cut-off dates.

Issue: Defendants seek an order compelling four Plaintiffs to respond to interrogatories concerning their compliance with federal law related to fetal tissue.

Defendants' position: Defendant CMP/BioMax propounded requests for admission (RFAs) to Plaintiffs PPMM, PPNC, PPLA and PPPSW. The RFAs narrowly targeted these four plaintiffs' involvement in fetal tissue procurement, as prior discovery has confirmed that all four received payments for procuring fetal tissue. The four plaintiffs all denied, in response to an RFA, that the payments they received exceeded the combined cost of specified legally allowable expenses. CMP propounded a single follow-up interrogatory to each, asking each to state all facts upon which it based this denial, identify all witnesses with knowledge of those facts, and identify all documents supporting the response. All four plaintiffs have objected, *inter alia*, that the information sought is not relevant to any claim or defense, and refused to answer on that ground.

The requested information is relevant to claims, alleged damages, and defenses in this case. The First Amended Complaint repeatedly asserts that Plaintiffs were harmed because Defendants misleadingly stated or implied that they "*violated federal law* related to fetal tissue donation." *See, e.g.*, Dkt. 59, ¶124 (emphasis added); *also* ¶7 ("Defendants then went public with a vicious online video smear campaign, releasing a series of YouTube videos purporting to show that Planned Parenthood *violated federal law* related to tissue donation.") (emphasis added); ¶8 ("Nonetheless, the deceptive videos did their intended damage. Millions of people who viewed the manipulated videos and inflammatory accusations were made to believe that Planned Parenthood *had violated the law* and acted improperly.") (emphasis added); ¶141 ("Defendants posted a deceptively edited short-form video along with a press release by Defendants accusing Planned Parenthood *of breaking the law.*") (emphasis added).

Federal law relating to fetal tissue procurement makes it a crime to "acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.... The term 'valuable consideration' does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. §289g-2. Discovery has established that the four plaintiff affiliates received money for fetal tissue on a per-specimen basis. Discovery has also established that the affiliates kept no contemporaneous accounting of any costs associated with the transportation, implantation, processing, preservation, quality control, or storage of the tissue. However, in response to RFAs, Plaintiffs denied that they received more in payments than they expended in these allowable costs. The reasons, witnesses, and documents underlying those denials are of central relevance to Plaintiffs' claim, as set forth above, that they were harmed by Defendants' allegedly false statements that Planned Parenthood was violating the law regarding fetal tissue donation. If Plaintiffs were indeed violating federal law, Plaintiffs' claim of damage collapses, which directly impacts numerous causes of action.

Further, the requested information is relevant to various affirmative defenses, including the defense, well established in contract law, that contracts to suppress evidence of illegal activities

are unenforceable. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 696 (1972); *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1376-77 n.9 (Fed. Cir. 2001); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972).

Plaintiffs assert that they should not have to provide responses to this interrogatory because other documents they produced “clearly demonstrate the falsity of CMP’s video smear campaign” by showing that these four affiliates “*accepted reasonable payments to reimburse for the costs incurred*” to facilitate procurement. But Plaintiffs have not produced documents establishing what their costs were, much less that the costs were of the type allowable under the law. The precise point of these interrogatories is to identify such costs and documents, if any.

While asserting their right of to be masters of their complaint, Plaintiffs are running away from the allegations in their complaint. They brush aside, as “a few sentences in an 80-page [sic] complaint,” their repeated allegations that they were harmed by Defendants’ “smear videos” accusing them of *violating the law* regarding fetal tissue. Instead, they want to focus attention on statements in CMP’s press releases, including one press release issued almost six months after the first video release.

Even their preferred statement of the case, based on a sentence in a press release, can’t help Plaintiffs evade the fact that these affiliates’ compliance with federal law (including whether payments exceeded costs for fetal tissue) is highly relevant. Plaintiffs claim they were harmed by allegations in a press release of a “criminal conspiracy to make money off of aborted baby parts.” If their payments exceeded the allowable costs, Plaintiffs were 1) engaged in criminal conduct and 2) making a profit off selling aborted baby parts. The subject interrogatories, one to each of the four relevant affiliates, are pinpointed precisely at the issue Plaintiffs admit is central.

Plaintiffs are trying to evade this point by claiming that it is irrelevant if the four affiliates violated the law and turned a profit because the amounts involved were insignificant.¹ Until Plaintiffs comply with this discovery on the issue of their costs, Defendants have no way of knowing how much profit there was. As to whether the amounts are insignificant, Plaintiffs’ argument is akin to that of a millionaire accused of being a “common pickpocket,” who sues to recover publication damages on the grounds that, even if he did pick pockets, he was harmed by being classed with other thieves who steal because they are motivated by a need for money. Like Plaintiffs here, the millionaire, while asserting his innocence, would argue that whether he was guilty of theft was irrelevant to his theory of the case and thus refuse to respond to an interrogatory asking how a stranger’s wallet came into his possession. As with the millionaire’s objections, Plaintiffs’ objections should be overruled and they should be ordered to respond.

Notably, the fees these Plaintiffs received, from \$45 to \$60 per specimen, were more than double those reported as the national average for health clinics that charged any fees for providing fetal tissue to researchers in 2000. GAO, “Human Fetal Tissue: Acquisition for Federally Funded

¹ Plaintiffs’ argument that the amounts were insignificant relies on taking the revenue from fetal tissue sales as a percentage of the total revenues of each affiliates. The more relevant comparison would be between fetal tissue revenue as a percentage of the affiliate’s net income or loss, or of the contributions received. For example, in FY 2011, PPPSW lost over \$1.5 million, but it took in over \$80,000 from fetal tissue procurement company ABR, shrinking its deficit that year by over 5%. PPMM lost \$1.6 million in FY 2012. Without the \$21,000 it raised from selling fetal tissue that fiscal year, that deficit would have been 1.3% higher. Notably, PPMM’s newsletters celebrate the fundraising efforts of volunteers bringing a few hundreds or thousands of dollars, suggesting these contributions to its work are not insignificant.

Bioethical Research” (October 4, 2000) at 5, located at <https://www.gao.gov/products/164170> (“fees per sample ranged from \$2 to \$75, with an average of \$22”). Even more significantly, more than 80% of health clinics did not charge any fees for providing aborted tissue, quite possibly because, as Congress found with regard to these Plaintiffs, the costs to the clinics of facilitating the patients’ donation of tissue were negligible or not allowed under law.

Plaintiffs also assert that these interrogatories cannot be relevant to any affirmative defense that Defendants were uncovering criminal activity, because this Court already rejected that argument. In granting a preliminary injunction in the related case, the Court found only that the particular videos at issue in the preliminary injunction hearing did not contain evidence of unlawful activity (a finding contradicted by the report of the House Select Panel investigation, which pointed to evidence of illegal activity found in those videos.) The Court also was remarking on whether the contents of the NAF videos specifically had been brought to the attention of law enforcement or public officials. Its finding did not apply more generally to all of the defendants’ investigative work and videos, which were not at issue in that hearing.

Finally, Plaintiffs’ concern that Defendants might publicize their responses is strange. They brought this lawsuit based on alleged harms from Defendants “smear campaign.” They should be eager to have their version of the facts about their fetal tissue program become public.

Defendants’ final position: Plaintiffs PPM, PPNC, PPLA, and PPPSW should be compelled to respond to the interrogatories.

Plaintiffs’ position: Relying on a few sentences in an 80-page complaint, CMP contends that Plaintiffs’ damage-causation theory rises or falls on whether, in fact, these four affiliates “received more in payments than they expended in [] allowable costs.” That is a misrepresentation of both CMP’s videos and Plaintiffs’ damages claims. While Plaintiffs complied at all times with all relevant laws, CMP’s video smear campaign was not designed to—and indeed did not—go viral on a claim that 4 out of 59 Planned Parenthood affiliates “received more in payments than they expended in [] allowable costs.” What caused Defendants’ videos to catch fire was the lurid story of Planned Parenthood purportedly engaging in “a criminal conspiracy to make money off of aborted fetal parts.” FAC ¶ 125. It is *that* claim that harmed Plaintiffs and that claim that Plaintiffs have put at issue in this lawsuit (along with all of Defendants’ other wrongful conduct). *Monfore v. U.S.*, 47 F.3d 1175 (9th Cir. 1995) (plaintiffs are masters of their complaints, and may choose which claims to bring).

The discovery at issue has zero bearing on the “truth” of that claim and thus is not relevant to damages, causation or any other claim or defense. Accordingly, the Court should deny CMP’s motion. Rule 26(b); *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029 (N.D. Cal. 2016) (court may deny requests that “are not narrowly tailored, request confidential information and appear to be a broad ‘fishing expedition’ for irrelevant information.”); *Macklin v. Mendenhall*, 257 F.R.D. 596, 604-605 (E.D. Cal. 2009) (granting protective order to prevent defendants from inquiring into irrelevant issues of plaintiff’s sexual history).

Allegations: Daleiden and his co-defendants engaged in a fraudulent scheme involving numerous wrongful acts—creating a fake company, creating fake government IDs, misrepresenting who they were and their purpose to Planned Parenthood staff, engaging staff in conversations about donation of fetal tissue, secretly recording those conversations and then using the footage to launch a smear campaign. In the videos and accompanying press

statements, CMP claimed to have uncovered a criminal conspiracy at Planned Parenthood to harvest the body parts of aborted fetuses to profit from their sale. In Daleiden’s words, “Planned Parenthood’s criminal conspiracy to make money off of aborted baby parts **reached to the very highest levels of their organization.**” FAC ¶ 125; *id.* ¶ 128 (“video was deceptively edited to make it look as if Dr. Nucatola and Planned Parenthood were ‘selling’ fetal tissue for profit”); *see also* CMP press release dated 8/14/15 (Planned Parenthood has a “system-wide conspiracy to evade the law and make money off aborted fetal tissue”); CMP press release 1/6/16 (money “poured into [Planned Parenthood] affiliates”).

Damages: Plaintiffs allege that Defendants’ infiltration damaged Plaintiffs by requiring Plaintiffs to increase security at conferences and health centers to ensure staff security and confidence. In addition, Plaintiffs allege that Defendants’ inflammatory videos and accompanying public statements were designed to and did result in an enormous spike in threats—not just against those featured in the videos, but against Planned Parenthood offices and clinics that forced Plaintiffs to expend resources on security and IT services and caused property damage and diversion of resources. FAC ¶¶ 161, 174, 188, 209.

Plaintiffs’ Discovery Responses: Plaintiffs have produced documents that clearly demonstrate the falsity of CMP’s video smear campaign. At the time CMP released its videos attacking Planned Parenthood, a small handful of Planned Parenthood affiliates (4 of 59) facilitated their patients’ donation of fetal tissue for research and accepted reasonable payments to reimburse for the costs incurred to facilitate such donations. (A fifth affiliate also donated fetal tissue for research but forewent any reimbursement for expenses.) These programs were miniscule. The payments that these affiliates received for facilitating their patients’ fetal tissue donation amounted to less than one-tenth of one percent of those affiliates’ operating revenues.² It defies logic and common sense to assert that these very modest reimbursements motivated affiliates to facilitate fetal tissue donation out of a desire to “profit.”

Plaintiffs have produced documents that reflect these facts. Specifically, Plaintiffs have produced invoices for fetal tissue reimbursement for all four affiliates from 2011 through 2015, fetal tissue procurement contracts and audited financials to substantiate the total revenues for those affiliates. Plaintiffs have also produced PPFA’s policies relating to fetal tissue from 2011 to 2015. In addition, Plaintiffs have provided information through written discovery identifying the affiliates who have offered patients the option of donating fetal tissue and the period of time in which each affiliate did so. The discovery provided satisfies Plaintiffs’ discovery obligations with respect to the issue that is actually relevant: whether CMP falsely claimed that Planned Parenthood was engaged in “a criminal conspiracy to make money off of aborted baby parts.”³

² In FY 2015, PPLA’s cost reimbursements to facilitate patients’ fetal tissue donation represented .027% of PPLA’s total revenue. Reimbursements at PPMM for FY 2015 represented less than .021% of that affiliate’s total revenue. At PPNorCal, cost reimbursements amounted to less than .003% of that affiliate’s total revenue for FY 2015. At PPPSW, cost reimbursements amounted to .034% of total revenues for FY 2015. Moreover, from 2011 to 2015, none of the four California affiliates that received reimbursement for facilitating donation of fetal tissue received reimbursements of more than \$60 per specimen, 25% less than the average \$80 per specimen the GAO found was paid in 1999, a figure that would be higher if adjusted for inflation. GAO, “Human Fetal Tissue: Acquisition for Federally Funded Bioethical Research” (October 4, 2000), located at <https://www.gao.gov/products/164170>. CMP contends that Court should compare reimbursement totals to net income, but the point remains that the amounts received in cost reimbursements were very modest.

³ After meet and confer, to avoid a discovery dispute, Plaintiffs PPMM, PPNC, PPLA, and PPPSW provided responses to CMP’s RFAs *without waiving their express relevance objection.*

CMP, whose founder, Daleiden, “willfully violated” the Court’s injunction by publishing confidential material he wrongfully obtained,⁴ seeks to use this case—about Defendants’ wrongdoing—to gain access to Plaintiffs’ confidential financial and other records, quite likely for uses outside of this case.⁵ At a minimum, CMP seeks to turn this case into a forensic accounting trial over how the relatively miniscule costs associated with fetal tissue donation are calculated. Not only would this create a complete (and extremely burdensome) sideshow featuring dueling accounting experts, it would also serve no purpose whatsoever. The question of whether any of the four relevant affiliates complied with a technical law about permissible reimbursement was not what the CMP’s videos were about.

The requests are also burdensome and designed to harass. While this letter is about certain interrogatories, CMP’s motion must be considered in context with the document requests CMP is simultaneously pursuing. This is far from the only information CMP claims it needs to prove the “truth” of the CMP videos. It also seeks scores of documents and emails about such irrelevant issues as Planned Parenthood health centers’ compliance with the ban on so-called partial birth abortions and whether Plaintiffs properly obtained consent of patients to donate fetal tissue.⁶

Not only do Defendants’ excessive discovery requests fail to relate to Plaintiffs’ claims, they also are not relevant to any defense. CMP asserts that this discovery is relevant to proving that confidentiality agreements Defendants signed are unenforceable because they purportedly suppress evidence of illegal activity. This Court already rejected that precise argument in granting a preliminary injunction in the NAF case. NAF Case, Dkt 354 at 34-35 (emphasis added) (“I have reviewed those transcripts and recordings and find *no evidence of actual criminal wrongdoing*. That defendants did not promptly turn over those recordings to law enforcement likewise belies their claim that they uncovered criminal wrongdoing.”).

Plaintiffs’ final position: Defendants motion to compel further responses should be denied.

FREEDOM OF CONSCIENCE
DEFENSE FUND

/s/ Paul M. Jonna
Paul M. Jonna
Counsel for Def. CMP

LIFE LEGAL DEFENSE
FOUNDATION

/s/ Catherine W. Short
Catherine W. Short
Counsel for Def. Daleiden

ARNOLD & PORTER
KAYE SCHOLER, LLP

/s/ Amy Bomse
Amy Bomse
Counsel for Plaintiffs

⁴ National Abortion Federation (“NAF”) Case, Order of Civil Contempt, Dkt 482 at 1.

⁵ CMP operates a website whose central purpose is to uncover and publicize information about Planned Parenthood. See CMP Document Vault, <http://www.centerformedicalprogress.org/human-capital/document-vault/> (claiming to contain “primary source documents relating to Planned Parenthood’s participation in the sale of aborted fetal tissue” and promising that it “will continue to be updated with more files from our investigation as they are indexed and made available.”). The Court may consider this context in evaluating whether CMP seeks material relevant to this case. *In the Matter of the Application of O2CNI, Ltd.*, 2013 WL 5826730, at *16 (N.D. Cal. Oct. 29, 2013) (denying discovery seemingly sought for improper extrajudicial commercial advantage).

⁶ Much of the discovery CMP seeks is the very type of material that Daleiden attempted to obtain by sneaking into Plaintiffs’ conferences. For example, CMP claims that a presentation by PPFA legal counsel at a PPFA National Conference, a presentation that Daleiden unsuccessfully attempted to secretly record while infiltrating the conference, is a “critical document” that it needs for this litigation. Rebuffed at first, Daleiden is now trying to use the discovery process to gain access to the very same material.