

July 2, 2018

VIA ECF

Hon. Cathy L. Waldor
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: Jionni Conforti v. St. Joseph's Healthcare System, Inc., et al.
No. 2:17-cv-00050
Motion Returnable on July 16, 2018

Christopher S. Mayer
Partner
T. 973-848-5393
F. 973-297-3895
cmayer@mccarter.com

Dear Judge Waldor:

This firm represents Defendants St. Joseph's Healthcare System, Inc., St. Joseph's Hospital and Medical Center d/b/a/ St. Joseph's Regional Medical Center (the "Hospital" or "St. Joseph's"), and Father Martin D. Rooney (collectively, "Defendants") in the above-referenced matter. Please accept this letter in lieu of a more formal brief in opposition to Plaintiff Jionni Conforti's Motion to Compel Discovery.

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102-4056
T. 973.622.4444
F. 973.624.7070
www.mccarter.com

BOSTON

HARTFORD

STAMFORD

NEW YORK

NEWARK

EAST BRUNSWICK

PHILADELPHIA

WILMINGTON

WASHINGTON, DC

As the Court is aware, Plaintiff – a transgender person who transitioned from female to male – seeks monetary damages and injunctive relief against Defendants for refusing in June of 2015 to perform what Plaintiff described as “a total hysterectomy to remove all female parts” in furtherance of Plaintiff's gender transition. This decision was not motivated by discrimination against Plaintiff because of gender identity. Defendants maintain that the requested sterilization procedure could not be performed at a Catholic hospital, such as St. Joseph's, because it would have violated the Ethical and Religious Directives for Catholic

July 2, 2018
Page 2

Healthcare Services (the “ERDs”) promulgated by the U.S. Conference of Catholic Bishops. Thus, at the heart of this case is a fundamental constitutional question: whether the First Amendment’s Free Exercise clause permits a Court to order a Catholic hospital and a Catholic priest to perform a sterilization procedure that would violate tenets of the Catholic faith and the ERDs.

Plaintiff’s Motion seeks to compel Defendants to conduct, for the third time, a search of its email servers. Plaintiff now requests that Defendants search, using almost three dozen search terms, email for all of the members of a “Caring for the Transgender Patient Subcommittee” (the “Subcommittee”) that was not even formed until *months after* Plaintiff sought a sterilization procedure at the Hospital.¹

Defendants do not seek to deny Plaintiff necessary discovery. Indeed, Defendants have already incurred substantial expenses in producing 12,347 pages of documents in this matter. Defendants simply believe that the additional custodian searches demanded by Plaintiff is not proportional to the needs of the case as it is cumulative, unnecessary, and imposes an undue burden on Defendants.

I. Relevant Factual Background.

The Subcommittee was created in or around October of 2015 as an informal subcommittee of the Hospital’s Ethics Committee. Father Martin Rooney, the

¹ Plaintiff’s assertion (Plaintiff’s letter brief at pp. 1-2) that St. Joseph’s denied the procedure “on the day the hysterectomy was scheduled” is incorrect and misleading. Discovery shows that Plaintiff had not received positive assurance that the procedure would be performed at St. Joseph’s, but rather as of June 9, 2015 he was seeking “a written response/denial” which he was “fully prepared to fight” after seeking legal advice. Conforti 0000126.

July 2, 2018
Page 3

Catholic priest who has been individually sued in this case for merely acting in accordance with the U.S. Conference of Catholic Bishops' directives, was the informal Chair of the Subcommittee.

Sister Noreen Neary, who was the Chair of the Hospital's Ethics Committee when the Subcommittee was formed, was deposed by Plaintiff's counsel on June 27, 2018.² Sister Neary testified that Father Rooney agreed "to take on the responsibility of calling the [Subcommittee] group together" to look at issues associated with the treatment of transgender patients at the Hospital. Sister Pat Mennor served on the Subcommittee. Seven doctors and one social worker also agreed to be part of the original Subcommittee.

The Subcommittee was formed approximately four months after Plaintiff was informed that the Hospital could not perform the requested procedure on him because the Hospital complies with the ERDs applicable to all Catholic hospitals operating in the United States. Sister Neary testified that the Subcommittee had no reason to discuss, and did not discuss, the treatment of Plaintiff or any other patient. No policies or practices were adopted as a result of any actions of the Subcommittee. Furthermore, no decisions related to the care or treatment of transgender patients were made by the Subcommittee. Sister Neary explained that the Subcommittee was focused on educating itself and the Ethics Committee on the

² The transcript of the deposition of Sister Neary is still in rough form, but Defendants will submit a final transcript to the Court, once it is completed, if the Court wishes to review it.

July 2, 2018
Page 4

“needs of transgender patients and then how we can best treat a transgender patient that comes to us with dignity and respect.”

Sister Neary’s recollection was that the Subcommittee met on occasion but stopped meeting in or about December 2016. A new Subcommittee was thereafter formed, led by legal counsel, by late 2017 or early 2018, which was well after Mr. Conforti commenced this lawsuit.

II. Pertinent Discovery Conducted by the Parties.

Defendants have twice previously conducted electronic searches of St. Joseph’s email servers pursuant to an agreement reached with Plaintiff’s counsel as to the custodians to be searched and the keywords to be used by Defendants. The first search began in the summer of 2017 and included capturing the email files of seven Hospital employees, including Father Rooney and Sr. Mennor, who were two members of the original Subcommittee. Prior to Defendants’ review, by agreement of the parties reached during a call amongst counsel on July 24, 2017, the email files were narrowed by agreed-upon date restrictions and 19 broad search terms intended to capture all responsive documents. Defendants then reviewed over 16,000 documents for responsiveness and privilege, and produced 1,979 documents -- totaling 10,580 pages -- to Plaintiff on September 22, 2017, in the electronic format requested by Plaintiff.

After the parties exchanged a number of letters and met and conferred – which, for the sake of brevity, will not be summarized here – Defendants agreed to

July 2, 2018
Page 5

search the original 7 custodian files for an additional 12 search terms, as well as 4 new custodian accounts for the original 19 search terms and the 12 new search terms. Defendants also conducted a search of the Hospital's document servers for all 31 search terms subject to the agreed-upon date restriction. On May 14, 2018, Defendants produced an additional 962 pages of responsive documents in the electronic format requested by Plaintiff.

The cost incurred by Defendants due to the two electronic searches has been significant and burdensome. St. Joseph's is a relatively small, urban hospital that does not enjoy unlimited resources or vast staffing in its internal IT department. The Hospital's IT department has already spent a significant amount of time capturing and uploading email and other documents from its servers to storage devices for access by counsel. This process was undertaken at a time when the Hospital's IT department is already stretched thin as it transitions to a new document management system, Cerner Millennium.

Once emails and documents are captured by St. Joseph's, Defendants' counsel then uses a third party ediscovery service (Epiq) to process and enable term searching of the data. Just for the nine-month period of August 2017 through May 2018, the ediscovery service has charged Defendants \$18,176.93 in processing and monthly storage charges. Epiq has billed Defendants an additional \$4,800 for time spent by its on-site personnel to assist with the processing and production of the email and other documents from the searches. These costs will only increase if Defendants are forced to capture multiple additional custodians and

July 2, 2018
Page 6

then conduct additional, unnecessary email searches, all without even accounting for the significant attorney review time for responsiveness, privilege, etc.

III. Plaintiff's Motion to Compel Should Be Denied.

When addressing the scope of discovery under Rule 26(b)(1), the Court must consider whether the sought-after matter is relevant and proportional to the needs of the case, taking into account: (1) the importance of the issues at stake in this action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed.R.Civ.P. 26(b)(1). Discovery requests may still be curtailed to protect a person from whom discovery is sought from "annoyance, embarrassment, oppression, or undue burden or expense." Id. Courts determine the proportionality of discovery on a case-by-case basis with the aforementioned factors, and "no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional." Employers Ins. Co. v. Daybreak Express, Inc., Civ. No. 16-4269 (JLL/SCM), 2017 U.S. Dist. LEXIS 86224, at *5 (D.N.J. June 5, 2017).

As a threshold matter, Plaintiff's rationale for this fishing expedition is his speculation that the Subcommittee members may have communicated about the Hospital's "ability to treat transgender patients as it relates to the ERDs and Catholic doctrine" (Plaintiff's brief at p. 3) months after Defendants declined Plaintiff's

July 2, 2018
Page 7

sterilization request. Putting aside the fact (as discussed below) that email searches have already been conducted of the accounts of the Subcommittee's chair and another member, the communications that Plaintiff speculates might exist would ultimately be irrelevant because this Court is not permitted to become entangled in interpreting Catholic doctrine and the U.S. Bishops' ERDs, such as by considering any subcommittee member's personal opinions about or interpretations of Church doctrine and teachings.

In addition, Defendants contend that the third, fourth, fifth, and sixth factors also support denial of Plaintiff's motion. The third factor – the parties' access to relevant information – supports denial as there is likely nothing to be gained by searching additional email custodians. As discussed above, Sister Neary at her deposition testified that the Subcommittee met only occasionally for a limited period, did not discuss the treatment of Conforti or any other transgender patients, and did not keep minutes. Moreover, as mentioned above, documentation from the email accounts of the leaders of the Subcommittee – Father Rooney and Sister Mennor – has already been produced in discovery, and Plaintiff's counsel intends to take the depositions of these two individuals in the near future. There is simply nothing to be gained from forcing Defendants to collect emails from other members of the Subcommittee and conduct almost three dozen searches on each.

Under the closely related fourth (the parties' resources) and sixth factors (whether the burden or expense of the proposed discovery outweighs its likely benefit), Defendants have detailed above that its resources have already been

July 2, 2018
Page 8

stretched thin by this litigation, and it will incur significant ongoing ediscovery fees from storage of the voluminous files captured and examined to date. Defendants must incur substantial processing and storage costs from their ediscovery vendor each time they are forced to capture another custodian file.

Lastly, the fifth factor (the importance of the discovery in resolving the issues) also favors denial of Plaintiff's motion. The Subcommittee was not even formed until four months after Plaintiff sought and was denied a procedure at the Hospital based on the ERDs. As such, the Subcommittee's after-the-fact actions – which as stated above were minimal – cannot affect Plaintiff's claims.

IV. Conclusion.

Defendants respectfully request that the Court deny Plaintiff's Motion to Compel Discovery for the foregoing reasons.

Respectfully submitted,

/s/ Christopher S. Mayer

cc: Tom Barnes, Esq. (via ECF)
Omar Gonzalez-Pagan, Esq. (via ECF)
Thomas F. Doherty, Esq. (via ECF)