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*\*Pro Hac Vice motion pending*  
*Attorney for Defendant Ken Paxton*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

WHOLE WOMAN’S HEALTH; et al.,  
Plaintiffs,

vs.

KEN PAXTON, Attorney General of  
Texas; et al,  
Defendants.

MC Case No. 1:17-mc-00303

[Case No. 1:17-CV-00690-LY,  
Pending in the Western District of  
Texas Austin Division]

TRIAL DATE: None Set

**DEFENDANT KEN PAXTON’S RESPONSE TO NONPARTY JANE DOE’S MOTION  
TO QUASH DEPOSITION SUBPOENA**

Respondent Ken Paxton (“Respondent”) respectfully requests that the Court deny Movant Jane Doe, M.D.’s Motion to Quash Deposition Subpoena based on the following:

## I. BACKGROUND

Respondent is a defendant in the lawsuit *Whole Woman's Health, et. al v. Ken Paxton, et. al*, Cause No. A-17-CV-690-LY, in the United States District Court, Western District of Texas. This lawsuit was filed by several abortion providers, including Planned Parenthood affiliates in Texas, challenging the constitutionality of Senate Bill 8 ("SB 8"), a recently enacted abortion law in Texas. SB 8 requires abortion providers to cause fetal demise prior to performing an abortion procedure known as dilation and evacuation ("D&E"). Plaintiff providers challenge the constitutionality of the law by alleging that the law has the effect of placing a substantial obstacle in the path of a woman who seeks an abortion before the fetus attains viability. The Defendants counter that requiring physicians performing a D&E to cause fetal demise before starting the evacuating phase of the D&E does not impose any significant health risks or burdens on a woman. Defendants contend that one of the three safe and effective methods to induce fetal demise is by administering digoxin. Plaintiff providers allege that using digoxin imposes risks with no medical benefits to the patient, is untested, carries risk, and is not sufficiently effective.

Dr. Doe<sup>1</sup> is an abortion provider and the Medical Director in Hawaii at Planned Parenthood of the Great Northwest and Hawaiian Islands, and is the former Director of Clinical Services for Planned Parenthood Federation of America. Respondent issued a Subpoena to Testify at a Deposition in a Civil Action ("Subpoena") to Dr. Doe on September 20, 2017, for her deposition on October 6, 2017. After several weeks of negotiation with Dr. Doe's legal counsel regarding the deposition with no progress, and with the expedited trial date rapidly approaching, Respondent reissued a subpoena for October 26, 2017, a date Dr. Doe's counsel previously

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<sup>1</sup> Attorney General Paxton does not concede that Dr. Doe is entitled to proceed in this or the matter before the Texas District Court under a pseudonym.

represented was available for her deposition.<sup>2</sup>

## II. ARGUMENT

### A. The Subpoena Provided a Reasonable Opportunity to Comply.

Respondent has fully explained the reasonableness of the timing of the Subpoena in his Response to the Court's Order Regarding Reasonableness of Deposition Subpoena, ECF No. 8, and fully incorporates that response herein without repeating it per the Court's instruction.

### B. The Subpoena Does Not Subject Dr. Doe to an Undue Burden.

Dr. Doe alleges that she will be subjected to an undue burden if she is deposed because she possesses no factual evidence relevant to the underlying litigation, Respondent could obtain the same information from the plaintiff providers or other non-parties that have been subpoenaed, and because compliance with the Subpoena will impose tremendous hardship. *See* Memorandum, at 18-16. The testimony that Respondent seeks from Dr. Doe is not only highly relevant, but is also information that can only be obtained from Dr. Doe.

Respondent seeks to take the deposition of Dr. Doe because she was the Senior Director of Clinical Services for Planned Parenthood Federation of America ("PPFA") from 2009 until the end of 2016. Information obtained during discovery indicates that Dr. Doe was responsible for creating PPFA's protocol found in their Medical Standards & Guidelines regarding the use of digoxin to cause fetal demise prior to second-trimester abortions. *See, e.g.*, Ex. 1, at 11.<sup>3</sup> PPFA's Medical Standards & Guidelines must be followed by every Planned Parenthood affiliate, including the affiliates in the State of Texas which are plaintiffs in the lawsuit pending in the

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<sup>2</sup> A full recitation of the timeline of these negotiations and Respondent's repeated attempts to obtain the cooperation of Dr. Doe in complying with the Subpoena is supplied in Respondent's Response to Court's Order Regarding Reasonableness of Deposition Subpoena, ECF No. 8.

<sup>3</sup> As these documents have been designated confidential, Respondent does not attach them here. Respondent will seek leave by way of separate motion to file the exhibits referenced under seal.

Western District of Texas. The development and enforcement of this protocol is highly relevant to Plaintiffs' current claims that digoxin is not safe or effective for inducing fetal demise, since it appears that digoxin was widely used for several years by most PPFA affiliates. Moreover, Defendant has obtained documents in discovery which show that Dr. Doe was responsible for approving waivers—or deviations from the standard PPFA protocol—regarding fetal demise, and for monitoring reports of affiliates using digoxin regarding complications or failures. *See* Ex. 2. As such, the testimony that Respondent seeks from Dr. Doe cannot be obtained from a plaintiff provider based on Dr. Doe's specific factual knowledge.

Moreover, Dr. Doe is familiar with the use of digoxin due to her own medical practice and extensive research on it while she was employed by Planned Parenthood of Los Angeles as Associate Medical Director for Research and Quality Assurance from 2008-2015 (which was concurrent with the time she was also PPFA Senior Director of Clinical Services), and she can testify to facts regarding her own use of digoxin and the use of digoxin at this affiliate. *See* Ex. 3. Plaintiffs have also put at issue whether doctors can be trained to administer digoxin. One of the abortion providers employed by a Plaintiff affiliate testified in her deposition that she was trained in the use of digoxin by Dr. Doe and her staff. *See* Ex. 4 (Depo. Excerpts of Amna Dermish, 31:11-12; 25:1-10). Thus, Dr. Doe also possesses relevant factual information about the training of doctors in the use of digoxin.

Under Federal Rule of Civil Procedure 45, the "undue burden" language is limited to harm inflicted by complying with the Subpoena. *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 428 (9th Cir. 2012). Respondent has not issued the Subpoena to testify as a form of harassment or to endanger the safety of Dr. Doe and her family as she alleges. Respondent only seeks to authenticate the documents obtained in discovery that were developed and/or approved by Dr. Doe, as well as

obtain factual information regarding the development and enforcement of the digoxin protocols and practice of PPFA affiliates. Dr. Doe has not filed a Motion for Protective Order; nor is one warranted for her deposition. Here, Dr. Doe has not identified any harm from compliance with the Subpoena. Mere speculation is not sufficient to establish that Dr. Doe's interest in non-disclosure outweighs Respondent's need for the discovery. The Court should find that there is no undue burden in requiring Dr. Doe to testify via Subpoena. Accordingly, the Court should overrule Dr. Doe's undue burden objection and deny her Motion to Quash.

**C. The Subpoena Does Not Seek Unretained Expert Testimony from Dr. Doe.**

Dr. Doe's argument that the Subpoena should be quashed because Respondent is seeking unpaid expert testimony is meritless. *See* Memorandum, at 22. As stated above, Respondent seeks only factual testimony from Dr. Doe—facts she knows as a result of her own positions with PPFA and PPLA. Respondent does not aim to seek any general opinions from Dr. Doe based on her knowledge, skill, and experience. As there is a clear factual basis for Dr. Doe's testimony, concerns about improperly sought unpaid expert opinions are more properly raised in the context of specific questions during the deposition and do not provide a basis to quash.<sup>4</sup>

**III. CONCLUSION**

Based on the foregoing, Respondent Paxton respectfully requests that the Court deny Dr. Doe's Motion to Quash and order Dr. Doe to appear for a deposition as scheduled on October 26, 2017.

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<sup>4</sup> Plaintiffs have similarly attempted to argue unsuccessfully in other depositions in this lawsuit that Defendant is seeking unretained expert testimony. The Special Master has overruled this specific objection and compelled the deponent to testify to the questions presented. *See* Ex. 5 (Depo. Excerpts of Sherwood Lynn, 86:9-18; 88:3-21; 89:13-24).

DATED this 25th day of October, 2017.

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CERTIFICATE OF SERVICE

## CERTIFICATE OF SERVICE

I certify that a copy of *Defendant Ken Paxton's Response to Non-Party Jane Doe, M.D.'s Motion to Quash Deposition Subpoena* was served by the Court's electronic filing system and by email on the 25th day of October 2017, upon the following individuals:

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DATED: Honolulu, Hawaii, October 25, 2017

/s/James Hochberg

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