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May 11, 2021

The Honorable Virginia K. DeMarchi
United States Magistrate Judge
United States District Court
Northern District of California
280 South First Street
San José, California 95113

Re: *Calvary Chapel San Jose, et al. v. Gavin Newsom, et al.*
Case No. 20-CV-03794 BLF

Dear Judge DeMarchi:

Defendant County of Santa Clara (“the County”) and Plaintiffs Calvary Chapel San Jose and Mike McClure (collectively, “Calvary”) are engaged in litigation regarding State and County public health orders issued to slow the spread of COVID-19, which Calvary has disobeyed and which it contends are unconstitutional.¹ The parties submit this joint discovery dispute letter regarding Calvary’s instruction(s) to a witness not to answer questions regarding financial matters at a deposition. While this discovery dispute pertains to instructions given at one deposition, the Parties believe that guidance from the Court regarding the County’s entitlement to discovery on Calvary’s finances will help them avoid future discovery disputes related to the same issue(s).

i. Statement of the Dispute Requiring Resolution.

On April 30, 2021, the County took the deposition of Deedy Walker, a Calvary employee who handles financial matters. Calvary’s counsel instructed Ms. Walker not to answer questions regarding financial matters, including questions about Calvary’s revenue and budgets and whether it received a Paycheck Protection Program loan. Calvary’s counsel asserted that such

¹ As referenced below, the deposition at issue was noticed in a state court enforcement action in which the County has brought claims against Calvary for public nuisance and for violating the public health orders, and in which Calvary has twice been held in contempt (Santa Clara Superior Court, Case No. 20CV372285). However, the parties have agreed that the depositions in that case may be used in this pending federal case, and vice versa.

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information was protected by the First Amendment, the California Constitution, and other privileges. The County disagrees that such information is privileged and seeks financial information because it is relevant to Calvary's claims, including for damages, and likely to lead to the discovery of admissible evidence.

ii. **Positions of the Parties.**

(1) **Calvary's Position.**

(a) **The County's Discovery Requests Are Unconstitutional.**

The County seeks discovery of Calvary's sources of revenue, loans, and budgets. Contrary to the arguments forwarded by the County here, the County really desires unfettered access to the church's financial information. During the deposition of Deedy Walker, defense counsel Melissa Kinyalocots made clear that the County is seeking disclosure of the Church's financial information to establish that Pastor McClure violated the health orders to profit off the pandemic. Not only is this far-fetched conspiracy unfounded, producing financial information to support this theory would clearly be outside the scope of this litigation. Beyond the irrelevance of the documents sought, the County is precluded from obtaining the financial records based upon well settled principles of constitutional law.

Federal courts generally recognize a constitutionally based right of privacy that may be asserted in response to discovery requests. *Johnson ex rel. Johnson v. Thompson*, 971 F.2d 1487, 1497 (9th Cir.1992). The right to privacy is subject to a balancing test that requires courts to balance the need for privacy against the need for disclosure in litigation. *Ragge v. MCA Universal Studios*, 165 F.R.D. 601, 604 (C.D.Cal.1995). The County has no "need" for disclosure beyond their desire to weigh their excessive and burdensome fines against what they deem to be Calvary's "profits." As a non-profit entity, a church does not make "profits." Rather, churches receive tithes and offerings from congregants. Tithing is a biblical mandate and an expression of faith. On the other hand, the Church has the right and obligation to protect the identities of its members who tithe, as well as the details regarding their financial contributions. Moreover, the County has already demonstrated its propensity to weaponize the Church's financial information and use it in a manner to harass and intimidate the Church. *See McClure Decl.* Specifically, the County sent threatening letters to Calvary's bank and coerced the bank to temporarily sever the relationship. This abuse heightens the need to protect Calvary's privacy.

The County's discovery requests violate the Free Exercise Clause, which protects against government interference with, or coercion of, religious belief or expression. *See Abington School District v. Schempp*, 374 U.S. 203 (1963). A demand for a church's contributor list is an obvious infringement of the First Amendment. *See NAACP v. Alabama ex. Rel. Patterson*, 357 U.S. 449, 460-61 (1958). Compelling disclosure of a church's financial records equally infringes upon the Free Exercise Clause. The County's "attempt to gather[] information accordingly are suspect, both in light of the purpose for which the information is sought and in itself, for as has long been

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recognized, ‘compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.’ ” *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 74 (1st Cir. 1979) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). Accordingly, the government was required to establish that its subpoenaing of the religious institution’s financial records was justified by a compelling state interest and was narrowly tailored. *Id.* at 79-80. Just as in *Surinach*, the Court here should preclude the government from accessing financial records because, among other reasons, “potential in the chilling of the decision making process, occasioned by the threat that those decisions will become the subject of public hearings and that eventually, if found wanting, will be supplanted by governmental control...And even if that governmental control should not come to pass, disclosure of the [church’s] finances from amounts of donations to details of expenditures could provide private groups or the press with the tools for accomplishing much the same ends.” *Id.* at 78 (internal citation omitted).

The County’s request of Calvary’s financial records to defend against this action is merely pretextual. The County does not even have a rational basis for obtaining financial records, let alone a compelling interest. The financial records sought by the County have no bearing on the subject matter of this litigation. *See Sanderson v. Winner*, 507 F.2d 477, 480 (10th Cir. 1974) (Holding discovery of plaintiff’s finances was oppressive because plaintiff’s finances had nothing to do with the merits and courts do not “eschew the question whether litigants are rich or poor.”); *cf. Boone v. Carlsbad Cmty. Church*, 2008 WL 2357238, at 9 (S.D. Cal. 2008) (Holding church finances were relevant where plaintiff alleged wrongful termination for reporting improper use of church funds).

Even if Calvary’s finances were relevant, the requests are not narrowly tailored. The County’s pretext is an inquiry into the church’s ability to pay the fines, but then requests budgets, loan information, revenue, fundraising, and other financial materials. Because the ability to pay could be readily determined from a simple balance sheet listing a summary of the church’s assets and liabilities, the County’s extensive requests must reveal a fishing expedition, misrepresentation of its intentions, or financial illiteracy. These irrelevant discovery requests infringe on the church’s ministerial and religious planning. *See Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (holding that although the financial decisions of a church are not, strictly speaking, part of the church’s “spiritual function [i.e., ecclesiastical matter],” these decisions remain vital to a religious organization’s ministerial and religious planning). The church budgets also reveal ecclesiastical matters like “faith, internal organization, or ecclesiastical rule, custom, or law....” as these disclose the church’s ministries and hierarchy. *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 713 (1976).

(b) The County’s Basis For Requesting Financial Information Is Untenable.

Contrary to the County’s baseless assertions, neither *Vasudeva v. United States*, 214 F.3d 1155 (9th Cir. 2000) nor *Balice v. U.S. Dep’t of Agric.*, 203 F.3d 684 (9th Cir. 2000) support the proposition that the church’s finances are relevant to determine whether the County’s fines are excessive. *Vasudeva* and *Balice* concerned illegal acts in the commercial market (e.g., trafficking

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food stamps). The Courts in those matters held that ascertaining profits defendants earned from their unlawful activity was relevant when deciding whether the fines levied against them were excessive. *Vasudeva*, 214 F.3d at 1161; *Balice*, 203 F.3d at 699. These cases are distinguishable for several reasons.

As a threshold matter, the County falsely equates a church to a commercial enterprise, revealing a fundamental misunderstanding of a church's distinct purpose and unique legal protections. Unlike a business, churches do not function to earn a profit. Rather, a church receives biblically prescribed tithes, which are used to sustain the church and support its missions. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344 (1987) (“[U]nlike for-profit corporations, nonprofits historically have been organized to specifically provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.”) Therefore, the County's reliance on standards applied to commercial businesses are inappropriate and non-instructive.

But even if this equivalency were apt, the County's reliance upon *Vasudeva* and *Balice* is equally misplaced because those cases dealt with proceeds derived from illegal commercial activity. So, the County contends where Calvary refused to follow the illegal health orders, it was the church, and not the County, that was breaking the law. The Supreme Court has vindicated Calvary's position. *See Harvest Rock Church v. Newsom*, 141 S.Ct. 889 (2020). And then again. *See South Bay Pentecostal Church, v. Newsom*, 141 S.Ct. 716 (2021); And again, three more times. *See Gish v. Newsom*, 141 S.Ct. 1290 (2021); *Gateway City Church v. Newsom*, 2021 WL 308606 (2021); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021). Despite this vindication, the County continues to enforce all the fines while contending that not only was the church wrong to disobey the unconstitutional health orders, but their defiance was tantamount to illegal commercial activity. Compelling discovery of the church's financial information under these auspices is fundamentally improper.

Further, the County distorts Plaintiffs' Eighth Amendment and Bane Act claims, respectively. Plaintiffs have not raised a lack of ability to pay the fines as a defense to those fines. Rather, Plaintiffs argue the fines are altogether illegal or, at best, the amount of the fines is excessive considering the nature of the offense and the fact that it was the County, not Calvary, that broke the law. With respect to the Bane Act claim, Plaintiffs allege the County's conduct interfered with the Church's religious activities, including fellowship, prayer, and singing. None of this relates to church finances.

In sum, the County's requests for Calvary's financial records violate Calvary's First Amendment rights, amount to a fishing expedition calculated to harass and burden the church, and rest on arguments cobbled together at the eleventh hour to obfuscate the County's true motive. The County is not entitled to any financial information. At most, this Court should only allow discovery of a simple, minimally detailed summary of Calvary's balance sheet. Plaintiffs also request that the observation of financial records be conducted in in-camera review.

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(2) **The County's Position.**

(a) **Calvary's Finances Are Relevant.**

The County's position is that information about Calvary's finances, including its budgets, loans, and revenue during the pandemic, is discoverable because it is relevant, reasonably calculated to lead to admissible evidence, and not privileged.

Calvary's financial information is relevant for multiple reasons. First, Calvary's finances are relevant because in its Third Amended Complaint, Calvary is seeking damages, including compensatory damages. Calvary's income over the last year is therefore relevant to whether it was harmed by the challenged conduct, as it has alleged. Second, Calvary's finances are relevant because in its Third Amended Complaint, Calvary has challenged the civil fines imposed by the County for its violations of the public health orders as unconstitutionally excessive. "A fine is unconstitutionally excessive if it is 'grossly disproportional to the gravity of the defendant's offense,' and "income earned from the illegal activity can be considered when deciding whether a fine is excessive." *Vasudeva v. United States*, 214 F.3d 1155, 1161 (9th Cir. 2000); *Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 699 (9th Cir. 2000) (fine that was "less than [the fined party's] potential profit" from unlawful activity was "not grossly disproportionate").² Here, Calvary has produced minutes from Board of Directors meetings stating that attendance and financial contributions went up "significantly" in connection with Calvary's disregard of the public health orders, and one of Calvary's pastors and board members testified in a deposition that revenue has increased by approximately 50 percent. Accordingly, discovery of Calvary's financial matters, including its revenue during the period it was violating the public health orders, is relevant to whether the fines imposed for those violations were unconstitutionally excessive.³

Moreover, Calvary's finances are relevant to other factors in the excessive fine analysis, including the recklessness of Calvary's behavior. See *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922-25 (9th Cir. 2020) (factors relevant to excessive fines analysis include "the nature and extent of the underlying offense," including the recklessness of the violator's behavior, and the extent of the harm caused by the violations). Deposition testimony obtained to date includes critical evidence not previously disclosed in the state or federal proceedings, including the

² Consistent with this principle, the Urgency Ordinance under which the County issued the fines sets forth factors relevant to setting a fine amount, one of which (for violations arising from commercial activities) is "whether the violation is likely to result in increased revenue or avoided costs." (See <https://covid19.sccgov.org/ordinance-ns-9-291-enforcement-program#:~:text=This%20Urgency%20Ordinance%20establishes%20an,the%20facts%20constituting%20such%20urgency.>)

³ Calvary's violations of the public health orders include violations of face covering and social distancing requirements (among other requirements), neither of which the U.S. Supreme Court has held unconstitutional.

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existence of positive COVID-19 cases and deaths among Calvary’s congregants—evidence that is contrary to sworn testimony provided by Pastor McClure during the two contempt proceedings in state court and in support of his request for a preliminary injunction in this Court. Evidence of Calvary’s financial condition and the financial benefit it derived from violating the public health orders—together with evidence of positive COVID-19 cases among its congregants, Calvary’s failure to comply with reporting requirements, and the significant risk to the broader community—goes directly to whether the fines are proportional to the severity of Calvary’s conduct.⁴

Finally, Calvary’s financial condition is also relevant to its claim under the Tom Bane Civil Rights Act, Civ. Code § 52.1(b) (“Bane Act”), which prohibits interference or attempted interference by “threats, intimidation, or coercion” with the exercise or enjoyment of constitutional rights. Whether the civil fines levied against Calvary could possibly be considered threatening, intimidating, or coercive—and they cannot—would of course depend on whether and to what extent Calvary continued to exercise its rights and in fact profited off the pandemic, as well as Calvary’s ability to pay the fines.

(b) Calvary’s Finances Are Not Privileged.

The County disagrees with Calvary’s position that the financial information about which it sought to question Ms. Walker is privileged. The County reviewed the authority provided by Calvary during and after the deposition, but Calvary’s authority addresses the right of associational privacy that *individuals* have in their personal contact information and affiliations. *See Planned Parenthood Golden Gate v. Superior Court*, 83 Cal.App.4th 347, 358-69 (2000) (Planned Parenthood staff and volunteers had constitutional right to privacy that protected against disclosure of their personal contact information); *Church of Hakeem, Inc. v. Superior Court*, 110 Cal.App.3d 384, 389-90 (1980) (church members had constitutional right to privacy that protected disclosure of membership list); *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 656 (1975) (customers of bank had right to privacy in confidential financial affairs).

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⁴ Calvary’s finances are also relevant to its ability to pay the fines the County imposed for its violations of the public health orders. It is an open question whether ability to pay is relevant to the analysis of an excessive fines claim. *See Pimentel v. City of Los Angeles*, 974 F.3d 917, 924-25 (9th Cir. 2020).

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Unlike in those cases, the County does not seek membership lists or lists of individual donors, nor does it seek to question any witness about the identities of donors. Rather, the County seeks testimony regarding the organization's finances and documents, including budgets, revenue, financial reports, and loans. Calvary does not have a constitutional right to privacy in such matters.⁵ See *SCC Acquisitions, Inc. v. Superior Ct.*, 243 Cal. App. 4th 741, 755 (2015) (“We conclude corporations do not have a right of privacy protected by the California Constitution. Article I, section 1 of the California Constitution protects the privacy rights of ‘people’ only.”) And under the balancing test that applies to Calvary's non-constitutional right to privacy, *see id.* at 756, the relevance of these financial matters—and the likelihood that questioning a Calvary employee about them could lead to the discovery of admissible evidence—outweighs any non-fundamental right of privacy Calvary may have. *See id.* (“Doubts about relevance generally are resolved in favor of permitting discovery.”).⁶

For similar reasons, Calvary's financial information is not privileged under the First Amendment. Calvary has pointed to *NAACP v. State of Ala. ex. Rel. Patterson*, 357 U.S. 449 (1958), but that case once again concerned constitutional protections that applied to *membership lists*, including the names and addresses of members. *See id.* at 460-66. So too in *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1497 (10th Cir. 1992) (participants in medical study had privacy interests that precluded disclosure of identities). Calvary's other legal authorities are inapposite here, including because they involve questions of the Court's authority to make decisions implicating religious doctrine, which is not the case here. *See generally Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017) (ecclesiastical abstention doctrine “is a qualified limitation, requiring only that courts decide disputes involving religious organizations without resolving underlying controversies over religious doctrine” (internal quotes omitted)). Calvary has not identified any case standing for the proposition that it has an absolute privilege under the U.S. Constitution not to disclose information about its own finances.

⁵ Even if Calvary did have a constitutional right to privacy in such financial matters, the constitutional right to privacy under the California Constitution is not absolute, nor does it require a showing of a “compelling interest,” as Calvary has asserted. *See Williams v. Superior Ct.*, 3 Cal. 5th 531, 552-57 (2017) (holding that balancing test applies to threatened invasions of constitutional privacy rights and disapproving prior authorities requiring party seeking discovery to establish compelling interest).

⁶ As noted, the deposition of Ms. Walker was noticed in a state court enforcement action in which the County has sued Calvary for public nuisance and violations of the public health orders (Santa Clara Superior Court, Case No. 20CV372285), but the parties have agreed that the depositions in that proceeding may be used in this federal case. Accordingly, the County has addressed the merits of Calvary's asserted state law right to privacy and for purposes of this discovery dispute does not argue that state law privileges do not apply to the federal action. There are no differences between federal and state privileges that are outcome determinative to this discovery dispute. However, the County respectfully requests that should the Court conclude that any state law privilege applies, it limit its decision to the state proceedings and permit the County to seek all discovery to which it is entitled in the federal case.

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For these reasons, the County requests that the Court issue an order compelling Ms. Walker to testify as to organizational financial matters. The County does not seek an order compelling Ms. Walker to testify as to the identities of any individual people who have financially contributed to Calvary. As noted, the Court's resolution of this dispute will bear on other discovery disputes, including the County's Second Request for Production of Documents, to which Calvary has not yet formally objected, but to which Calvary has stated it will raise similar objections.

iii. **The Parties' View on the Necessity of a Hearing.**

The Parties believe that a hearing on this dispute would be useful, including because the Court's resolution of this dispute will have implications for other discovery matters. The County served a request for documents on May 3, 2021 that included requests for financial documents, and it has noticed depositions in early June 2021 at which it intends to ask about Calvary's institutional financial matters.

iv. **Discovery cut-off dates for fact and expert discovery.**

The discovery cut-offs in the federal case are October 7, 2022 (fact discovery) and December 16, 2022 (expert discovery).

There is no trial date set in the state court enforcement action, and accordingly no discovery cut-off dates set.

v. **Statement of Compliance.**

Lead Counsel for the County Melissa Kiniyalocts and Lead Counsel for Calvary Robert Tyler conferred about this dispute on and off the record at the deposition on April 30, 2021, which took place over videoconference (Zoom). Counsel for the County Meredith Johnson and Counsel for Calvary Mariah Gondeiro were present.

vi. **Attachments to Letter.**

Calvary has attached an excerpt from the deposition of Ms. Walker and a copy of the request for production of documents that the County served on May 3, 2021. The County notes that Calvary has not yet served formal objections to this request for production of documents. Calvary has attached a proposed protective order and a declaration for Pastor McClure. The County requested an opportunity to review the proposed protective order during the meet-and-confer process but was not provided with a copy of that document, or of the declaration of Pastor McClure, until immediately before the filing of this letter brief.

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Respectfully submitted,

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