UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM-KGG
	:	
Defendant.	:	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

The United States of America, through the undersigned counsel, respectfully submits the following in support of its motion to compel responses to interrogatories 1-2, 8-11, and 23-25 of the United States' First Set of Interrogatories; requests 8-13 of the United States' First Requests for Admission; and request 6 of the United States' First Request for Documents.

On May 17, 2012, the United States served on Defendant its First Set of Interrogatories, First Requests for Admission, and First Requests for Production. [Dkt. 62.]. After requesting and receiving several extensions of her deadline to file responses, Defendant served her responses on the United States on July 2, 2012. [Dkt. 96.] Defendant objected to many of the requests and interrogatories, and refused to provide documents or answers on that basis. After several discussions, the parties were able to narrow the range of issues about which there is a dispute. The parties then discussed these issues with the Court, [Dkt. 123], which requested briefing. Here, then, the United States will explain why it is entitled to the information it seeks, all of which is relevant to its claim and none of which infringes on Defendant's rights or privileges.

ARGUMENT

The scope of discovery is broad, permitting a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). As Defendant acknowledges, the "basic standard of relevance thus is a liberal one." *See* Def's Resp. to Respondent's Mot. to Quash and/or Modify Subpoena, Dkt. 105, at 1 (citing *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995)). Indeed, courts construe discovery broadly "to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted). Therefore, discovery will be allowed "unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." *Hammond v. Lowe's Home Centers, Inc.*, 216 F.R.D. 666, 670 (D. Kan. 2003). *See also Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D. Kan. 1991) ("a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action").

The requests and interrogatories to which Defendant has objected and refused to respond fall into three categories: 1) Defendant's relationship with Scott Roeder; 2) Defendant's jail ministry; and 3) Defendant's relationship with Robert Campbell. Each category is relevant to the United States' claim in this case – that a letter Defendant wrote to Dr. Mila Means, who had announced an intention to perform abortions in Wichita, is a threat of force under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248.

I. Defendant's Relationship with Roeder (Interrogatories 1-2; Requests for Admission 8-13; Request for Production 6)

Defendant has objected to requests related to her relationship with Scott Roeder on the grounds of relevancy, First Amendment, priest-penitent privilege, and prejudice. However, each

objection is meritless, and the United States is therefore entitled to discovery concerning this topic.

A. Defendant's Relationship with Scott Roeder is Relevant to Defendant's Motive and Intent, and Informs Dr. Means' Reaction to the Threat

Defendant's relationship with a convicted killer of a reproductive healthcare provider, and her publicly professed admiration of him, are directly related to the letter she sent to Dr. Means. Defendant's letter references slain abortion provider Dr. George Tiller, and her relationship with his killer provides context for the state of mind of both the sender and the recipient, each of which are at issue here. Consequently, Defendant's relevancy objections are meritless. Because of this Court's broad construction of relevancy during the discovery stage, it does not sustain "conclusory allegations that the request is irrelevant," because the objection "must specifically show how each discovery request is irrelevant." *Land v. United Tel. S.E.*, No. CIV.A. 95-MC-220-KHV, 1995 WL 128500, at *3 (D. Kan. 1995).

In order to succeed on a FACE claim, the government must prove four elements, including an intent element. Here, the FACE elements are that the defendant (1) threatened force, (2) intentionally; (3) in order to intimidate Dr. Means; (4) from providing reproductive health services. 18 U.S.C. § 248(a)(1). *See also Lotierzo v. A Woman's World Med. Ctr.*, 278 F.3d 1180, 1182 (11th Cir. 2002); *Sharpe v. Conole*, 386 F.3d 482, 484 (2d Cir. 2004) ("The intent to injure, intimidate, or interfere is a separate intent requirement that must also be proved by a FACE Act plaintiff.").

1. Defendant's relationship with Roeder is evidence of her intent.

In a "true threat" case such as this, the context in which the threat is made is of great significance. *See Nielander v. Bd. of Cty. Comm'rs of Cty. of Republic, Kansas*, 582 F.3d 1155, 1167-68 (10th Cir. 2009) ("Whether a statement constitutes a 'true threat' is a fact-intensive

inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant.") (internal citations omitted); *United States v. Magleby*, 241 F.3d 1306, 1311, 1319 (10th Cir. 2001) (affirming conviction on a civil rights violation for threatening a family by burning a cross in their yard, noting that "[c]ontext is important in determining whether a true threat has been made"); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (affirming conviction for threat of force under FACE after analyzing "the alleged threat in light of its 'entire factual context'") (internal citation omitted); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc) ("[W]e hold that 'threat of force' in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person."); *see also* Mem. Order Den. Mot. Dismiss, Dkt. 30 at 5 (citations omitted) (the "determination of whether a given communication is a true threat is a fact-intensive inquiry, in which . . . the context in which the statements were made [is] . . . relevant").

Defendant has previously implied that her intent was merely to "educate" Dr. Means, just as a friend or relative might, rather than to intimidate her. However, Defendant is no friend of Dr. Means. On the contrary, Defendant appears to be a friend of a convicted slayer of an abortion doctor. Defendant's letter references reproductive health care provider Dr. Tiller's death. Defendant has a relationship with the man convicted of Dr. Tiller's murder, Scott Roeder. Defendant has publicly supported Roeder and his actions, visits him in prison, and corresponds with him. It is this relationship – this context - that informs Defendant's intent. And it is this relationship that Plaintiff is entitled to explore.

2. Defendant's public support for Scott Roeder contributed to the fear Dr. Means experienced in reaction to the letter.

Dr. Means' reaction to Defendant's letter was naturally colored by the writer's identity – someone sympathetic to the man who murdered Dr. Tiller. In analyzing threats under FACE, courts have considered a non-dispositive, non-exhaustive number of factors, including "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996). In *Dinwiddie*, the court found it significant to the true threat analysis that the defendant was "a well-known advocate of the view that it is justifiable to use lethal force against doctors who perform abortions." *Id.* The court noted specifically that, while the defendant's expression of her views was protected First Amendment speech, "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Id.* at 926, n.10 (quotation marks and citation omitted).

Here, likewise, Defendant is entitled to her views about Scott Roeder and the action he took in murdering Dr. Tiller. Those views, and her relationship with Mr. Roeder, however, are appropriate for the United States to enquire about in discovery, as they can help explain the context in which the letter was written and received. In fact, the Court has specifically noted its "concern" with the Defendant's relationship with Roeder. *See* Tr. Hrg. Mot. Prelim. Inj. 137:23-138:10. This issue is thus already on the record in this case.

B. The First Amendment cannot be used to shield the information sought by the United States

While Defendant has also objected to requests related to her relationship with Mr. Roeder on First Amendment grounds, she has not offered any basis for, or explanation of, this objection. The Tenth Circuit has generally rejected conclusory and general objections, instead requiring the

"objecting party [to] show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each question" is improper. *Hammond v. Lowe's Home Centers, Inc.*, 216 F.R.D. 666, 672 (D. Kan. 2003). Further, courts evaluating claims of First Amendment privilege in the discovery context require objecting parties to make a *prima facie* showing to justify the First Amendment objection. "To make this showing, [the party] must demonstrate an objectively reasonable probability that compelled disclosure will chill associational rights, *i.e.* that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests." *In re Motor Fuel Temperature Sales Practices Litigation*, 707 F.Supp.2d 1145, 1153 (D. Kan. 2010) (internal citations omitted). Such a showing usually is made in the context of a request for membership lists or the like, which are not at issue here, where Defendant has not pointed to any rights that might be chilled through disclosure.

Further, even if Defendant were to make such a showing, the United States could demonstrate a compelling need for the requested information. "In the Tenth Circuit, to determine whether [a party has] a compelling need, the Court considers the following factors: (1) the relevance of the information sought; (2) [the party's] need for the information; (3) whether the information is available from other sources; (4) the nature of the information sought; and (5) whether [the objecting party has] placed the information in issue." *Id.* (citations omitted). Here, the information sought is relevant, as discussed above. The United States is in need of this information as evidence of Defendant's intent, which is an element the government is required to prove. The information is maintained only by Defendant, so it is not available from other sources, and is not of a particularly intrusive nature. Finally, by referencing Dr. Tiller in her letter, Defendant put issues related to his murder and murderer in issue.

C. The priest-penitent privilege is inapplicable here

When discussing this issue with the Court, Defendant also raised, for the first time, the priest-penitent privilege. But such privilege would not be applicable here, for there is no evidence that Defendant is an ordained minister. Moreover, any communications she had with Mr. Roeder could not have been intended to be kept secret and confidential, as both Defendant and Mr. Roeder must have been aware that conversations or writings in, from, or to a prison or jail are likely to be monitored. *See U.S. v. Gordon*, 493 F.Supp. 822, 824 (NDNY 1980) (limiting application of the privilege to private, confidential communications).

D. Prejudice is not a valid basis for a discovery objection

Finally, Defendant has objected to these requests on the basis of prejudice, but, as Defendant herself has acknowledged, the exclusion of relevant evidence because of prejudice "is an evidentiary objection concerning admissibility at trial, not a proper objection at the discovery stage." Def's Response to Respondent's Motion to Quash and/or Modify Subpoena, Dkt. 105, at 19.

II. Defendant's Jail Ministry (Interrogatories 8-11)

Defendant has previously sought to explain her relationship with Scott Roeder by alluding to a jail ministry through which, she seems to claim, she has ministered to him. *See* Tr. Hrg. Mot. Prelim. Inj. 49:4-12, 54:22-23. As such, she has put this ministry at issue, and the United States is entitled to explore further the nature and purpose of this ministry, in order to put Defendant's explanation for her relationship in context. This is especially relevant here, because the United States has reason to believe that Defendant's ministry begun only after she started visiting Mr. Roeder in jail, and thus that ministry cannot explain Defendant's relationship with

Mr. Roeder. The United States can confirm this only if it is permitted to inquire about it in discovery.

While Defendant objects to these interrogatories on First Amendment grounds as well, she has not made the requisite showing to sustain such an objection, and in any event the United States could demonstrate a compelling need for it, as discussed above.

III. Defendant's Relationship with Robert Campbell (Interrogatories 23-25)

Mr. Campbell, an inmate at the Sedgwick County Jail, wrote a letter to the Court in March 2012 stating that he had information about Defendant he wished to share, and explaining that he "personally know and did some things for" Defendant. *See* Letter, attached as Exhibit E. As such, discovery related to Mr. Campbell is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26. Defendant's objection to these requests also invokes the First Amendment. However, as discussed above, she has not made the requisite showing to sustain such an objection.

CONCLUSION

Ultimately the United States "is entitled to conduct discovery that will allow it a reasonable opportunity to prosecute its claims." *B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, 01-2410-JAR, 2003 WL 21939019, at *4 (D. Kan. July 22, 2003). Therefore, the United States respectfully requests that the Court, pursuant to Fed. R. Civ. P. 36(a)(6) and Fed. R. Civ. P. 37(a)(3)(B)(iii)-(iv), grant the motion to compel and enter an order compelling Defendant to answer interrogatories 1-3, 8-13, and 23-25 of the United States' First Set of Interrogatories; to answer requests 8-13 of the United States' First Requests for Admission; and to fully respond to request 6 of the United States' First Request for Documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

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