

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

CAITLAN BERNARD, M.D., et al.,

Plaintiffs,

v.

INDIVIDUAL MEMBERS OF THE
INDIANA MEDICAL LICENSING
BOARD, et al.,

Defendants.

Case No. 21-mc-80009-LB

DISCOVERY ORDER

Re: ECF No. 12

The discovery dispute here involves the defendants’ third-party subpoenas to the University of California for data that supported a 2009 study — relevant to a lawsuit in Indiana — about the following:¹

All survey data collected or relied upon in the following study[:] Denny, C.C., Baron, M.B., Lederle, L., Drey, E.A., & Kerns, J.L. (2015). Induction of fetal demise before pregnancy termination: Practices of family planning providers. *Contraception*, 92(3), 241–245.²

¹ Mot. – ECF No. 1. Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents. The parties narrowed the dispute, and the plaintiffs no longer seek data from the individual third parties, Michele Baron and Lauren Lederle. Reply – ECF No. 10 at 2.

² Reply – ECF No. 10 at 2.

1 The court provisionally granted the defendants’ motion to enforce the third-party subpoena
 2 subject to a protective order — a concession offered by the defendants in their reply brief. The
 3 University’s concern was that disclosure of the data allowed disclosure of the study participants’
 4 identity. The defendants promised not to use the data that way. That seemed sufficient. *Murphy v.*
 5 *Philip Morris Inc.*, No. CV 99-7155-RAPJWJX, 1999 WL 33521196, at *3–5 (C.D. Cal. Dec. 28,
 6 1999) (finding a similar promise, enforced by a protective order, to be sufficient). Because the
 7 concession was offered in the reply brief, however, the court allowed the parties additional
 8 briefing to fully illuminate their positions.³ The court held a hearing on the supplemental
 9 submissions on February 11, 2021.⁴

10 Given the privacy issues here, the court now thinks the issue is whether the subpoena request
 11 is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).⁵ It is not. The defendants have the
 12 study that reports the results. The raw data necessarily reveal the identities of the study
 13 participants, given the limited number of abortion providers in particular regions.⁶ The data is
 14 private, and it was given in return for the assurance that it would remain confidential. Although the
 15 defendants’ experts have asked for the data, the University made strong arguments at the hearing
 16 about the sensitivity of the data and the concerns of having others access it, even with a protective
 17 order. Some experts have been deposed, and that — coupled with their access to the report itself
 18 — militates against disclosure of the private data.⁷

19 In sum, given the privacy concerns and the other arguments advanced by the University about
 20 the promises of confidentiality given to the study participants, the protective order is not
 21 sufficient. *Cf. Murphy*, 1999 WL 33521196, at *4 (evaluating, among other things, “whether
 22 disclosure will violate any privacy interests”). Also, given the production of the report itself,
 23

24 ³ Order – ECF No. 11 at 2.

25 ⁴ Surreply – ECF No. 12; Response – ECF No. 16; Minute Entry – ECF No. 17.

26 ⁵ Order – ECF No. 11 at 2 (standard for third-party discovery).

27 ⁶ Reply – ECF No. 10 at 2–3 (seeking raw data in order to “determine which other medical institutions
 28 Movants need to subpoena”); Surreply – ECF No. 12 at 4.

⁷ Response – ECF No. 16 at 3 (conceding that only two expert depositions remain).

1 production of the data is not proportional to the needs of the case. The court thus denies the
2 defendants' motion for disclosure of the data.

3 **IT IS SO ORDERED.**

4 Dated: February 16, 2021



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6 LAUREL BEELER
United States Magistrate Judge

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