UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*, Plaintiffs, v. CENTER FOR MEDICAL PROGRESS, *et al.*, Defendants.	)	Case No. 3:16-cv-00236-WHO

EXPERT REPORT OF FORREST OWEN SMITH, M.D.

March 15, 2019

I. INTRODUCTION

Assignment

1. I, Forrest Owen Smith, M.D. was retained by the Center for Medical Progress ("CMP"), David Daleiden, Troy Newman, Sandra Susan Merritt, Gerardo Adrian Lopez (collectively, "Defendants") and their counsel to read, analyze, and provide opinions on medical issues and issues of medical ethics in the matter of Planned Parenthood Federation of America, Inc., et al. ("Planned Parenthood" or "Plaintiffs") v. Center for Medical Progress et al.

Experience and Qualifications

2. I am a licensed physician in the field of obstetrics and gynecology. I have an M.D. from Duke University School of Medicine and a Bachelor's degree concentration in biology from Mount Union College. I also completed an Ob-Gyn residency at Duke University. I have been a licensed medical doctor in the State of California for 45 years. I have worked in hospital and private practice environments. I continue to operate my own private practice.
3. As an Ob-Gyn, I have delivered thousands of babies. I have also performed thousands of abortions.
4. I have served with distinction in the United States Army. Among other assignments, I was a unit surgeon in the 347th Field Hospital of the Army Reserve from 1985 to 1986, and earned the Expert Field Medical Badge. During my service, I offered lectures and demonstrations on advanced surgical techniques in Iraq, was a consultant for Refugee Relief International, and organized and led medical missions for them in Central America, Africa, Myanmar, Vietnam and Iraq.

5. My resume is included at **Appendix A** to this report. **Appendix B** is a list of articles that I have authored. I have not authored any articles in the last ten years. **Appendix C** is a list of matters in which I have given testimony over the last four years.

II. INFORMATION CONSIDERED

6. **Appendix D** contains a list of documents and information I considered to reach my conclusions and opinions. If additional information is produced in this matter, I may consider it and update the conclusions and opinions expressed in this report to reflect that new information as it becomes available. I also attended the Deposition of PPFA Director of Affiliate Security, Krista Noah, on March 8, 2019 in San Francisco.
7. In addition to the analyses and opinions described in this report, I may also be asked to perform additional analysis based on new information provided to me between now and trial. I understand that I may also be asked to testify at trial and may prepare demonstrative exhibits based on the information and analyses included in this report. I will disclose these sources as they become available.

III. GENERAL CONSIDERATIONS FOR EXPERT REPORTS

8. I understand that opinions presented as expert testimony must be based upon sufficient facts or data and be the product of reliable principles and methods.[1] My approach in this matter is consistent with these threshold requirements.
9. Under Fed. R. Civ. P. 703, because I am an expert relying on evidence reasonably relied upon by experts in my field, I may rely on hearsay evidence in developing my opinions.

[1] See Rule 702, Testimony by Experts of the Federal Rules of Evidence

10. For my work in offering expert testimony on this matter, I am being compensated with a flat fee of $10,000, plus $450 per hour for expert testimony at deposition.

IV. SUMMARY OF CONCLUSIONS

11. In the course of my work on this matter, I have reached the following conclusions related to Defendants' journalistic study, *The Human Capital Project*:

Opinion 1) PLANNED PARENTHOOD PHYSICIANS VIOLATED THE MEDICAL STANDARD OF CARE FOR INFORMED CONSENT IN OBTAINING CONSENT FOR FETAL TISSUE DONATION (FTD)

Opinion 2) PLANNED PARENTHOOD PHYSICIANS IMPROPERLY ALTERED ABORTION TECHNIQUE AND TIMING FOR THE PURPOSES OF FETAL TISSUE COLLECTION

Opinion 3) IT IS A MEDICAL CERTAINTY THAT PLANNED PARENTHOOD PHYSICIANS' ABORTION PROCEDURES RESULTED IN BABIES BEING BORN ALIVE

Opinion 4) PLAINTIFFS' ACCEPTANCE OF PAYMENT FOR FETAL TISSUE DONATION, INCLUDING REIMBURSEMENT, VIOLATES THE MEDICAL STANDARD OF PRACTICE

V. BACKGROUND

12. Planned Parenthood Federation of America ("PPFA") states that it is a non-profit organization that provides reproductive healthcare in the United States and globally.

13. The Center for Medical Progress states that it is a non-profit organization of citizen journalists dedicated to monitoring and reporting on medical ethics and advances.

14. On July 14, 2015, the Center for Medical Progress released the first in a series of videos known as *The Human Capital Project.* The series of videos documented meetings of undercover journalists with Planned Parenthood employees, including Dr. Deborah Nucatola.

15. Plaintiffs allege that *The Human Capital Project* videos are highly misleading and do not present a true and accurate description of Plaintiffs' pregnancy termination practices.

VI. ANALYSIS AND OPINIONS

Opinion 1) PLANNED PARENTHOOD PHYSICIANS VIOLATED THE MEDICAL STANDARD OF CARE FOR INFORMED CONSENT IN OBTAINING CONSENT FOR FETAL TISSUE DONATION (FTD)

MEDICAL STANDARD OF CARE FOR INFORMED CONSENT

16. Medical care involves the development of a relationship between the physician and the patient. The entire relationship, from the first consultation to the procedure itself, is supervised and facilitated by the physician.

17. In seeking informed consent for any medical procedure, the physician must ensure that the patient understands the procedure in all its aspects. The physician does not push the patient one way or the other. If the physician senses any ambivalence on the part of the patient toward the procedure, the physician does not go through with the procedure.

PLANNED PARENTHOOD PHYSICIANS FAILED TO CARRY OUT THEIR DUTY TO OBTAIN PROPER INFORMED CONSENT FOR ABORTION PROCEDURES

18. As to execution of a proper Informed Consent, PPFA Senior Medical Director Dr. Nucatola, testified before a 2016 Congressional Panel in this way:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

19. When securing Informed Consent for an abortion procedure at Planned Parenthood, the institution assumes that the duty is not the responsibility of the Physician performing the surgery. Instead, the duty is delegated to relatively untrained and inexperienced Medical Assistants, as Dr. Nucatola confirmed on one CMP tape in response to a question from a "Buyer":

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

20. As to her personal knowledge of the Informed Consent process, the same Senior Director testifies to the following in a 2016 Congressional hearing:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

21. In a later exchange from the same Congressional session, Dr. Nucatola again testifies that she knows nothing of the Informed Consent process when she responds:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

[redacted]

22. Several questions later, Dr. Nucatola testifies that she does not know who procures the important Informed Consent for Fetal Tissue Donation (FTD):

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

23. As to the thoroughness and completeness of Informed Consent as practiced by at least one Planned Parenthood affiliate, PP-Hudson Peconic (NY), State Supreme Court Justice Spinner in his order granting Summary Judgment for the defendant, PP-Hudson, noted:

S-006 Thomas v PP Hudson, NY

Donna Wiemann testified that she was high school graduate and a *medical assistant*, certified in New York State. She was employed by the defendant Planned Parenthood office, and was working April 18, 2009. She interned for 80 hours at an ob/gyn office in Smithtown after completion of the program. *Ms. Wiemann continued that the person going over the paperwork sits down and goes over the consents with the patient, asking if they have read it and if they fully understand the risks involved. . .Thereafter, the patient's signature would be witnessed.*

24. According to a 2008 article from HealthLeadersMedia.com, an Informed Consent, when conducted properly:

S-024 Informed Consent is not a form

". . . is not simply a form; it's a process. . .*(a)t Stanford University Medical Center, we found that approximately 75% of our malpractice claims should not have been filed in the first place.* Most reflected inadequate patient understanding of a procedure's outcomes, which can fall into two categories: (a) known common or uncommon complications and (b) rare preventable unexpected outcomes or, in lay terms, medical errors. The problem for doctors and hospitals occurs when patients mistakenly assume that a known complication is instead due to medical error. In order to reduce the chances of this occurring, our medical center decided to strengthen the educational component of our informed consent process.. . .*(o)f course, a face-to-face conversation between doctor and patient about an upcoming procedure is still very much a part of that process."*

25. As to the importance of the face-to-face conversation between a patient and a physician in the Informed Consent process, in *Shinal v Toms* (2016), at least one judicial body, the

Supreme Court of Pennsylvania, has ruled in a case on point:

S-025 PA 2017 Ruling MD MUST get IC

"In this medical malpractice action premised upon lack of informed consent. . .the duty to obtain a patient's informed consent for the several enumerated procedures, including surgery, belongs to the physician. Section 504 does not merely require that the patient's consent be informed; it specifically imposes the duty upon physicians to provide to the patient the requisite information and to obtain informed consent. Nothing in the plain language of the Act suggests that conversations between the patient and others can control the informed consent analysis or can satisfy the physician's legal burden.. . .we conclude further that the trial court committed an error of law when it instructed the jury to consider information provided by the defendant surgeon's qualified staff in deciding the merits of the informed consent claim. Because a physician's duty to provide information to a patient sufficient to obtain her informed consent is nondelegable, we reverse the Superior Court's order affirming the judgment entered in favor of the defendant, and we remand for a new trial.

26. For reasons arising from the unique experience of pregnancy, no physician-patient relationship is more intimate than that between a patient seeking an abortion and the physician who will perform that abortion, and only the most highly-educated, completely-trained and widely-experienced professional available (ie, the abortionist him-or herself) is equipped to discern the sort of significant ambivalence alluded to by a PPFA Training Coordinator in her exchange with a "Buyer" in one CMP video:

S-016 CMP Transcript 27 February 2015 Vanderhei

PP(Grewer): There's a small subset of women, and this is unscientific, so I'm not quoting any specific, there's a small subset of women who feel like that's a lovely thing to do, and like, you know, *mitigates some of my own ambivalence about having an abortion procedure because I can do this,* right?
Buyer: Right. Yeah.

27. As to the possibility of ambivalence from women seeking abortion procedures, in the 2016 Congressional Panel hearing, Dr. Nucatola was questioned in the following way:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

28. In that same hearing, a brief exchange took place that revealed a deep misunderstanding regarding the basic concept of Informed Consent, whether in the medical field generally or the specific context of an abortion or FTD on the part of Planned Parenthood employee-

physicians, administrators, and staff. That exchange began with Charles Flint (Legislative Director and Counsel to Rep. Marsha Blackburn of Tennessee's 7th Congressional District) questioning Dr. Nucatola as follows:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

Q Have we found a cure for cancer?
Nucatola If we had found a cure, we wouldn't be asking for tissue donations to try to find a cure.
Q Have we found a cure for AIDS?
Nucatola Not that I'm aware of, not yet.

[redacted]

29. At this point, Dr Nucatola's counsel, Michael Bopp, (Partner, DC Office of Gibson-Dunn) interceded:

Ibid
Mr. Bopp. Have we established that she [Dr Nucatola] had anything to do with this form?
Mr. Flint. I'm just asking her a question.
Mr. Bopp. And I'm asking you back. I don't think we have established --
Mr. Flint. Established?
Mr. Bopp. -- that she has anything to do with this form. It's not her form. She didn't write it. (p131)
Mr Flint: I'm not saying that it is. I'm asking her to simply evaluate the form. (p131)

30. Mr. Bopp's interjection reveals displays ignorance of the concept of medical Informed Consent. In such a context, the fact that "It's not her form, she didn't write it" is immaterial. Dr. Nucatola may not have written the form, but under the medical standard of practice, she is nevertheless responsible for the effects of its content on her patients.

31. The foregoing demonstrates that Planned Parenthood physicians such as Dr Nucatola, administrators, Medical Assistants and agents lack a full appreciation of the importance of a properly executed Informed Consent under the medical standard of practice. It is not merely an event where one supervises a patient's signing a form presented by Medical Assistants – it is an event that represents the very heart and soul of the physician-patient relationship.

Conclusion

32. It is my considered professional expert opinion that to a reasonable degree of medical probability Planned Parenthood physicians, administrators and staff all failed their patients in the most elemental of duties in the physician-patient relationship: that of personally conducting and carrying out the critically-important process of Informed Consent in abortion and FTD. They instead transferred responsibility and delegated that duty to the least-trained and least-experienced staff members: the Medical Assistants. Further, it is my professional opinion that it is unethical, unprofessional and irresponsible for a gynecological surgeon to perform an abortion on a woman he or she has not personally examined and assessed for ambivalence or signs that she is acting under undue pressure.

PLANNED PARENTHOOD PHYSICIANS FAILED IN THEIR DUTY TO CONDUCT PROPER INFORMED CONSENT FOR TISSUE DONATION FROM ABORTION PATIENTS

33. Plaintiffs' physician-employees failed in their duty to conduct Informed Consent for the donation of Fetal Tissue and Organs by delegating that all-important task to less-qualified Medical Assistants, as evidenced in the statements made by Dr. Nucatola on a CMP video in which the following exchange between her and the "Buyer" took place:

S-001 Transcript 25 July 2014 - Deborah Nucatola, MD
Buyer: When- as far as consenting, at your site is it Planned Parenthood counselors who are doing the consenting [for tissue donation] or is it Novogenix?
Nucatola: *It's the same medical assistants who consent for everything else*. Once all that's done, they say oh by the way, we also do this.

34. Additionally, in Dr. Nucatola's 10/6/16 appearance before the Select Investigative Panel, the following exchange occurs regarding Informed Consent for donation of fetal tissue from an abortion:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

35. In those same proceedings, Dr. Nucatola reveals that her involvement with Informed Consent for abortion, as well as Informed Consent for donation of fetal tissue from abortion, is limited to a short series of questions at the door of the operating room, as evidenced in the following exchanges:

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

S-000 Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

36. At which point, Dr. Nucatola's attorney, Mr. Bopp, interjects:

[redacted]

37. These exchanges reveal Dr. Nucatola's deficient understanding of Informed Consent is that it is permissible that this process be conducted by the least-educated and least trained staff members: Medical Assistants,

Conclusion

38. It is my considered professional and expert opinion that in delegating the duty of conducting

Informed Consent for Tissue Donation to less-educated and lesser-trained Medical Assistants, Planned Parenthood physician-employees failed in their duty and breached the trust of their patients by depriving them of the opportunity of being personally assessed by the most highly-educated, completely-trained and widely-experienced professional available – the physician – to rule out significant ambivalence, or the possibility of their acting under extreme duress or their having their decision to terminate be influenced by undue pressure from relatives, partners or friends, such that they may later experience guilt, anxiety and depression from making a hasty decision. Under the medical standard of practice, the duty of Informed Consent for Fetal Tissue Donation lies with the physician and is non-delegable and, further, it is unethical, unprofessional and irresponsible for a gynecological surgeon to perform an abortion on a woman he or she has not personally examined and assessed for ambivalence.

PLANNED PARENTHOOD PHYSICIANS VIOLATED ETHICAL NORMS AND PATIENT-PHYSICIAN TRUST BOUNDARIES IN OBTAINING CONSENT FOR FETAL TISSUE DONATION (FTD)

39. In the above discussion, I cited evidence to show that Planned Parenthood employee-physicians demonstrated ignorance of the basic medical standard of Informed Consent so as to invalidate any consent they believed they obtained. In addition, Planned Parenthood employee-physicians violated other medical-ethical duties in the act of procuring Informed Consent for Fetal Tissue Donation.

40. The first ethical violation lies in Planned Parenthood's suggestion that patients should participate in FTD. A July 25, 2014 CMP video documents the following exchange:

S-001 Transcript 25 July 2014 -Deborah Nucatola, MD

Buyer: So, the main thing, well, not the main thing that I would like to discuss is, I'd really like to connect with people who feel they don't know we're out there. They don't know there's this opportunity. And that could be a little touchy, for them more for us, and I want to be delicate to any reservations.
Nucatola: Yeah, you know, I don't think it's a reservations issue so much as a perception issue, because I think every provider *has had patients who want to donate their tissue, and they absolutely want to accommodate them.*

41. Later in that same July 25, 2014 CMP video, Dr. Nucatola repeats her belief that the intention to engage in FTD was first raised by patients themselves when she says:

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Nucatola: And at the end of the day, they [the providers] *want to offer this service because patients ask about it.*
Buyer: So can you give me an idea of what that's like for the patient? I get to them after, but doing that, is there a way to do it in a delicate way so that—
PP: Yea, I mean, *there are obviously the patients who come in, who are asking about it from the start* so it's easy to talk about. *But the others*—

42. Another Planned Parenthood clinic addressed the consenting problem directly by turning their patients over to a tissue procurement company, as PPFA Medical Director Emerita Dr. Gatter told "Buyer":

S-014 633.5 Gatter Video: So Novogenix was our partner in PPLA and *they would send their staff to the site, and our staff, our medical assistants were used to discussing with the patients, do you want to consent? And they would say yes or no, and a lot of them said yes.*

43. In her congressional testimony, Dr. Nucatola spoke about the timing of introducing FTD to abortion patients who entered the clinic with no thought as to possible donation:

S-000 Nucatola US Congress
[redacted]

44. Some clinics, such as PPRM (Rocky Mountains), embedded a statement regarding FTD into the general consent form for abortion as evidenced by the following exchange between the Research Coordinator and the CMP "Buyer":

S-002 CMP Transcript 7 April 2015 Savita Ginde, MD & "J.R." Johnstone Clin Rsrch Coord
Buyer: They *said the standard AB consent form does mention of tissue donation in it,* can we take a look at that? While we're kind of killing time right now.
J.R (Resrch Coord): Yea, let me go grab a consent form and see.

45. Here, FTD, which was a service offered at patient request, is now presented as an explicit option designed to elicit an emotional response from the patient:

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Nucatola: *I mean honestly, there's not going to be one thing that works for every patient*. Every patient experiences a whole wide range of emotions about the experience in general, and so you don't know where they're coming at from there. And I think patients respond most to knowing the types of outcomes that it [fetal tissue] might contribute to, so for example Alzheimer's research, Parkinson's research. *I think most of these patients have some experience with at least one of these conditions or another.*

46. And in another exchange memorialized on CMP video, Dr. Nucatola discusses a marketing strategy with "Buyer" to achieve a "win-win" situation for both parties:

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Buyer: Messaging, that's a whole 'nother issue.
Nucatola: If you guys could come up with a way to message, it makes it easier for everyone at the end of the day. if there's some kind of one pager that says this is what we offer, this is the service, this is the type of research it contributes to, these are the types of achievements we've been able to work in. This is something you might be interested to ask your doctor or your nurse, if this is something that works for you. It will make it easier for whoever actually does the consenting. It'll drive demand, it's a win-win.

47. "Buyer" and Dr. Nucatola then discuss the consent form and the procedure for patients who decline to sign it:

Ibid
Buyer: So it's a PPLA consent form.
Nucatola: It is, it's a PPLA consent form for tissue donation. But the interesting thing, I'll tell you is, some people consent, some people don't. *The funny thing is, the second day, when that patients actually comes back for their procedure, when they're waiting, what often happens is, Novogenix will talk to people who haven't consented, and they usually do, once someone has the time and energy to sit and have the conversation with them. So, she ends up picking up several more specimens, just from being there and speaking.*
Buyer: The seeds have been planted.
Nucatola: The *seeds have been planted, they thought about it for twenty four hours, now here's somebody else- they're sitting there, waiting, they've got nothing else to do, it's not like one on top of the next, on top of the next. So, I think it's always beneficial, if you have somebody who that's just what they do, they're going to do it much better than incorporating it in, but it can be, it works both ways.*

48. In her Congressional testimony, Dr. Nucatola describes the role of tissue procurement companies in following up with patients who failed to sign the consent form at first impression:

S-000 Nucatola US Congress
[redacted]

49. Here, Planned Parenthood uses psychological devices and subtle emotional manipulation to take advantage of patients who felt "bad" about what they were doing, promising them an opportunity to instead feel "good" about "advancing science:"

S-001 Transcript 25 July 2014 -Deborah Nucatola, MD
Nucatola: I think that a lot of people feel strongly that the conversation shouldn't be had until after they've made their decision to terminate, they know how far along they are, and they know what's going to happen, *and when all that is said and done, and they've had time for all of that to sink in, then it's time to basically say, this is how we normally handle the tissue, but if you would be interested here's another opportunity to contribute to research, contribute to science, donate your tissue*. . .I don't think it's a difficult conversation to have because the difficult stuff has already happened, they're kind of prepped for this. If anything, this is almost a pleasant surprise in a way, you know you've been through the tough stuff, you've made this difficult decision. *Now there is one more opportunity for you to think about. And, I think they appreciate it.*

S-016 CMP Transcript 27 February 2015 Vanderhei NtlDir(CCAPS)& Grewer Tng
PP(Grewer): There's a small subset of women, and this is unscientific, so I'm not quoting any specific, there's a small subset of women who feel like that's a lovely thing to do, and like, you know, *mitigates some of my own ambivalence about having an abortion procedure because I can do this*, right? You know—
Buyer: Right. Yeah.
PP(Grewer): . . . but it can be something that is really helpful for some of the women that we see because *they feel like they're making a difference that way and it makes them feel good about what it is going on*.

50. In her Congressional testimony, Dr. Nucatola was asked to comment on certain content published in one Planned Parenthood affiliate's Consent Form for FTD:

S-000 Nucatola US Congress

[redacted]

51. Dr. Nucatola's view of her fiduciary duty as a physician is further revealed with startling clarity in the following exchange that occurred in her 2016 Congressional hearing when she was being questioned on tissue companies' sale of fetal tissue:

S-000 Nucatola US Congress

[redacted]

Nucatola: Thirty-three, forty.
Q *Three thousand three hundred and forty.* Now, that -- that particular brain is shipped -- is shipped out of the clinic. Now, here's the scenario, and we'll be done. Tissue tech learns who's available for contributing. She goes --and gets the consent. She gets paid a bonus. The Planned Parenthood clinic, I believe, gets $55, but it's in the range of $30 to $100, and StemExpress resells that brain for over $3,000. And you'll notice -- you may notice on there that the shipping and maybe some other things are paid for by the customer. Now, if StemExpress made a profit by marking up what they paid for the tissue 2,800 percent, would that bother you?
Nucatola: I don't know that they're making it up. I have no idea what their costs are.
Q *Well, if they -- if it was a profit would it bother you?*
Nucatola: *It's really none of my business, no.*
Mr. Bell. I just want to know what's sort of the global management perspective of a Planned Parenthood senior leader like you if that's a 2,800 percent profit.
Q Would that bother you?
Nucatola: So just so that I'm clear on the question you're asking me if it bothers me that StemExpress makes money reselling the tissue?
Q Yeah.
Nucatola: *It's none of my concern. It doesn't bother me.*
Mr. Bell. Not your concern. Okay. Thank you. I think we're done. (p160)

52. When the above statements are considered in totality, Dr. Nucatola, in her capacity as a representative of Planned Parenthood, reveals that the institution *firstly*, has not only failed in its basic duty to conduct Informed Consent with its patients but, *secondly*, delegated that vital task to the least-qualified members of the staff and, *thirdly*, has allowed emotional and vulnerable patients to be solicited by an outside business to donate organs from their aborted fetuses and *fourthly*, has actively colluded with that business to perform abortions in the manner best suited to obtain more valuable "specimens" while, *fifthly*, it knows that tissue will be sold for substantial profit and, *sixthly*, knows that, in return for its cooperation, it will receive financial benefit from the sale of the organs, all the while being aware, *seventhly*, that its patients have had to pay for abortion procedures that resulted in the valuable organs for resale and, *eighthly*, has concealed and withheld from its patients the fact that such organs are being sold.

53. Dr. Nucatola's statements are not merely personal opinions. Instead, they are statements in her capacity as a representative of Planned Parenthood. There is evidence that Planned Parenthood was not just a passive and naïve bystander, as documented in the Orange County Sheriff's Department investigation into the activities of Da Vinci Biologics, LLC in which

an "Interview Report" with the DaVinci Manager of Regulatory Affairs, MU, whose job it was to evaluate the consents for donations for compliance with HIPPA requirements, informed Orange County investigators that after he had examined the informed consents from Planned Parenthood he "thought they [the consents] should have said something about 'commercialization' but Planned Parenthood would not allow the informed consent forms to be amended. As a result, his suggested changes were not deemed necessary or accepted." **(S-031 OC Invest DaVinci & PPFA Awareness)**

Conclusion

54. In my professional opinion, the moral and ethical conduct of Dr. Nucatola and Planned Parenthood in regard to procurement of informed consent is unacceptable for licensed physicians and national healthcare organizations. Planned Parenthood physician-employees have failed in their fiduciary duty to their patients and transgressed the ethical boundaries of the physician-patient relationship in such a manner as to invalidate any Informed Consents for Fetal Tissue Donation signed by their patients. Additionally, Planned Parenthood physician-employees have violated their duty to look after their patients' interests by allowing tissue companies to procure consent following initial refusal or ambivalence.

Opinion 2) PLANNED PARENTHOOD PHYSICIANS IMPROPERLY ALTERED ABORTION TECHNIQUE AND TIMING FOR THE PURPOSES OF FETAL TISSUE COLLECTION

MODIFICATION OF A PROCEDURE FOR A NON-MEDICAL REASON

55. After informed consent is obtained, it is standard medical practice to avoid modifying procedures for non-medical reasons without obtaining a re-consent.

56. Modifications for non-medical reasons are modifications that are not made for the health or benefit of the patient. Any modifications must be made in the patient's best interest.

57. Any modification not specifically made in the patient's best interests violates an otherwise valid informed consent.

PLANNED PARENTHOOD IMPROPERLY MODIFIED ABORTION PROCEDURES FOR NON MEDICAL REASONS

58. The controlling authority for modification of abortion procedures for the purposes of fetal tissue collection states in part:

S-029 FedLaw Fetal Tissue Donation in Exhibit
Statute on Fetal Tissue Transplantation Research (1993) PUBLIC LAW 103-43; JUNE 10, 1993
NATIONAL INSTITUTES OF HEALTH REVITALIZATION ACT OF 1993
TITLE I - GENERAL PROVISIONS REGARDING TITLE IV of PUBLIC HEALTH SERVICE ACT
(1) IN GENERAL - In research carried out under subsection (a), human fetal tissue may be used only if the woman providing the tissue makes a statement, made in writing and signed by the woman, declaring that--
(2) ADDITIONAL STATEMENT - In research carried out under subsection (a), human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that--
(A) in the case of tissue obtained pursuant to an induced abortion--
(i) the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research;
(ii) no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue; and

59. At many junctures in the CMP videos, Planned Parenthood documents, and Congressional testimony, one Planned Parenthood employee-physician or another affirms that no alteration of the technique or timing of a surgical abortion should have or ever did occur:

S-000 Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

60. In one CMP video, this exchange takes place:

S-001 Transcript 25 July 2014 - Deborah Nucatola, MD
Buyer: Well, it can't hurt if I'm in an area that I'm not familiar with, so, I don't even know how to phrase it. If there is a particular organ that we need, would the procedure be any longer?
Nucatola . . . *ideally you shouldn't do the procedure in any other way. You should always do the procedure the same, and that's what the providers try to do. They're not gonna treat these patients any differently than they would treat any other patients, just the disposition of the tissue at the end of the case is different.*

61. Dr. Nucatola's claims that no modifications take place greatly contrasts with an exchange between a CMP "Buyer" and PPFA Medical Director Emerita Dr. Gatter, in which Dr. Gatter reveals that her abortion method *did* in fact change when the patients who signed the FTD consent forms did not receive digoxin:

S-014 633.5 Gatter Video
PP (Gatter): So Novogenix was our partner in PPLA and they would send us- you know, big volume. They would send their staff to the site, and our staff, our medical assistants were used to discussing with the patients, do you want to consent? And they would say yes or no, and a lot of them said yes. Maybe it wasn't entirely sixty,
and then once the patients have signed the consent form, the patients did not receive digoxin.

62. In another CMP video, in her exchange with the CMP "Buyer," Dr. Nucatola reveals, contrary to her flat testimonial statements, that she, too, adapts the surgical method or approach:

S-001 Transcript 25 July 2014 - Deborah Nucatola, MD
Nucatola: Exactly. So then you're just kind of cognizant of where you put your graspers, you try to intentionally go above and below the thorax, so that, you know, we've been very good at getting heart, lung, liver, because we know that, *so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact. And with the caldarium[head], in general, some people will actually try to change the presentation so that it's not vertex, because when it's vertex presentation, you never have enough dilation at the beginning of the case, unless you have real, huge amount of dilation to deliver an intact calvarium. So if you do it starting from the breech presentation, there's dilation that happens as the case goes on, and often, the last, you can evacuate an intact calvarium at the end*. So I mean there are certainly steps that can be taken to try to ensure—
Buyer: So they can convert to breach [sic], for example, at the start of the—"
Nucatola: Exactly, exactly. Under ultrasound guidance, they can just change the presentation.
Buyer: Okay.

63. In that same video, she speaks to introducing another alteration to her cervical preparation technique by inserting more laminaria:

Ibid
Buyer: Who we can say, you know, we need two intact brain hemispheres, we need thymus, liver, you know, not shredded liver that's in eight pieces. Does that change the landscape at all? Kind of whoever's better suited to facilitate the process at all.
Nucatola I'll be honest with you, if you have very specific things you're looking for, you're almost more likely to get that, rather than at a clinic, and a private provider who does exactly what they want, the way they want to do it. *So for example, when I worked at PPLA, they were seen by a nurse practitioner going over protocol, you have to get at least six laminaria in, if you get more, great, if you can't, no big deal I'll figure something out. When I see my private patients at the other surgical center where I work, I put in the laminaria myself, I know that this isn't enough, so I'm going to do this, that, different things.*

64. Another Planned Parenthood employee-physician, PPOC Medical Director Dr. Jennifer Russo, responds to the CMP "Buyer's" suggestions that fetal presentation be converted:

S-003 CMP Transcript 27 February 2015 Jennefer Russo, MD
Russo: Are you working with PPLA?
Buyer: We're, no, because PPLA is very very tight with Novogenix right now. So unfortunately, because we've been communicating with Deborah Nucatola, and she's very very conscientious about trying to facilitate the process, *and even convert to breech on ultrasound to make sure we can get everything out in the right—*
Russo: *Well we like to do that too.*
Buyer: Oh you do?
Russo: Yeah.
Buyer: Excellent, yeah

65. In another CMP video, Dr. Nucatola tells the CMP "Buyer" how she arranges her approach to procure the desired tissue:

S-001 Transcript 25 July 2014 - Deborah Nucatola, MD
Nucatola: But, on the flip side, for example, so I had 8 cases yesterday. And I knew exactly what we needed, and I kinda looked at the list and said okay, this 17-weeker has 8 lams, and this one—*so I knew which were the cases that were probably more likely to yield what we needed, and I made my decisions according to that too, so it's worth having a huddle at the beginning of the day, and that's what I do.*

66. Dr. Savita Ginde, PPRM Medical Director, takes the idea of altering technique one step further as she indicates her intention to "train" the "providers" in the proper way of obtaining specimens:

S-002 CMP Transcript 7 April 2015 Savita Ginde, MD & "J.R." Johnstone Clin Rsrch Coord
044700 (Savita Ginde): *So that's where we have to do a little bit of training with the providers on making sure that they don't crush or are able to—*
Buyer: So it's a matter of just training, it sounds like, to a provider.
Ginde I think so. I mean, it's hard to know how their specimen come out right now because it's not like we've been looking.
Buyer: Right. It's not your-

Ginde: We have to kind of see the baseline of how things are getting extracted now and see if we can do any work with them to maybe be more gentle.
Buyer: So, our answers will come after we see that. *Just hearing that yes, you could be open to training providers, that if they needed to adjust their procedure-*
Ginde: *Yea, if it wasn't a major deal, like just some tweeks, I don't think it would be a major deal.*

67. In another CMP video, Dr. Gatter reveals similar practices when she describes her intention to contact other providers to see if they will also alter their technique to get better specimens by using a "less crunchy technique:"

S-014 633.5 6 Feb 2015 Gatter Video
PP (Gatter): Here is my suggestion. Write me a three of four paragraph proposal, which I will then take to Laurel and the organization to see if we want to proceed with this. *And then, if we want to pursue this, mutually, I talk to Ian and see how he feels about using a less crunchy technique to get more whole specimens.*

68. In yet another CMP video, Planned Parenthood employee-physician, Dr. Amna Dermish of Texas, responds to the CMP "Buyer's" inquiries regarding recovery of fetal brain by converting the presentation to breech:

S-005 CMP Transcript 12 October 2014 Amna Dermish MD, Texas
Buyer: Which you do if there's a request for fetal brain, they're always wanting both hemispheres, and so, yeah.
Dermish: *Yeah, I haven't been able to do that yet. The intact calvarium*.
Buyer: Oh to get the calvarium?
Dermish: To get the calvarium intact, yeah.
Buyer: [laughs] Well maybe next time, right?
Dermish: Well *this will give me something to strive for*!
Buyer: Exactly!
PP: But yeah, *I don't routinely convert to breech but I will if I need to.*

69. In a conversation with CMP "Buyer," Dr Taylor, Medical Director Emerita PPAZ says:

S-022 DN&DT(Taylor)2014
Taylor: Mhm, yeah, yeah. Mhm. Now the thing is I don't do inductions so, like my technique is, a disarticulation technique so, there would have to, you know we'd have to like talk about exactly what it is that you were needing, because--
Buyer: Right, right. Breech position [feet first] is great. I'll just throw that out there right--
Taylor: Because part of the issue is, it's not a matter of how I feel about it coming out intact,
Buyer: Ahuh
Taylor: But I got to worry about my staff, and people's feelings about it coming out looking like a baby. [laughter]

70. In the same video, Dr. Taylor notes:

Ibid
Taylor: It's creepy. So I mean there are a lot of variables that come into play. Now, for example, if we have a patient who signs the consent, then we can have a conversation about, when, you know, we're gonna do some additional preparation to try to have a certain thing occur. Right? But, so I mean, there is some flexibility in it, if we're preparing, and we know, and the patient wants to be a part of it, then we do things accordingly, right?

Taylor: Absolutely.

71. And a little farther along, in the following exchange, Dr. Taylor describes changing procedures with greater specificity:

Ibid
Taylor: Yeah, yeah. It can get difficult. Now, ideally, you want to have the best amount of dilation as possible, so I think again it kind of comes to in someone who's choosing to participate, we might just take a little extra time, you know to make sure that we have good dilation.
Buyer: Right.
Taylor: And spend a little more time on the front-end for you know, a little easier procedure on the back-end.
Buyer: Right.
Taylor: If I'm not going to be doing disarticulation, which I would normally do, you know, so. Breech makes it a lot easier 'cause then you know--but the thing is, there's still going to have to be some decompression of calvarium for it to come out, so.
Buyer: Interesting, because Deb had mentioned to me that if you're doing, there's dilation that happens as the case goes on if you're extracting from breech
Taylor: Mhm.
Buyer: And then at the end that if there's, you know you do it enough,
Taylor: Well see a lot of times what will happen is--
Buyer: And so then the calvarium can come out intact.
Taylor: It requires a--especially in further along it requires a good amount of dilation.

72. In another CMP video exchange with "Buyer," Dr. Nucatola advises the tissue "Buyer" to maintain a "dialogue" with the abortion doctor to makes "changes" to obtain better specimens:

S-001 Transcript 25 July 2014 - Deborah Nucatola, MD
Buyer: So, when you're- when you know, in the back of your mind you've got X, Y, and Z organs that need to be procured and we want them to be reasonably intact, and you convert to breech, are you saying that pretty much, I mean there's no guarantees with any of this, but we can pretty much count on having you know, the major areas, torso, thorax, abdomen intact-
Nucatola: I'll actually collect what you want sometimes, and put it aside.
Buyer: Oh, so you actually do the-
Nucatola: If I see it. Why not? I'm right there. You know, everyone has a different technique. . . With that said, *if you maintain enough of a dialogue with the person who's actually doing the procedure, so they understand what the end-game is, there are little things, changes they can make in their technique to increase your success.*

73. The most illustrative exchange related to the subject of altering surgical technique takes place in the CMP video in which Medical Director Emerita Dr. Gatter, admits that any change would be "kind of violating the protocol" but then quickly dismisses that notion as a "specious little argument" and assures "Buyer" that patients wouldn't care "one iota":

S-014 633.5 6 Feb 2015 Gatter Video
Buyer: The intact specimens, I wanted to touch on that. What I was trying to say is if the 10 to 12 week specimens, end of the 1st trimester, if those are pretty intact specimens, that's something we can work with.

PP (Gatter): So that's an interesting concept. Let me explain to you a little bit of a problem, *which may not be a big problem*, if our usual technique is suction, at 10 to 12 weeks, and we switch to using an IPAS or something with less suction, and increase the odds that it will come out as an intact specimen, *then we're kind of violating the protocol* that says to the patient, "We're not doing anything different in our care of you." *Now to me, that's kind of a specious little argument and I wouldn't object to asking Ian, who's our surgeon who does the cases, to use an IPAS at that gestational age in order to increase the odds that he's going to get an intact specimen,* but I do need to throw it out there as a concern. Because the patient is signing something and we're signing something saying that we're not changing anything with the way we're managing you, just because we agree to give tissue. You've heard that before.
Buyer: Yes. It's touchy. How do you feel about that?
Gatter: *I think they're both totally appropriate techniques, there's no difference in pain involved, I don't think the patients would care one iota. So yeah, I'm not making a fuss about that.*
Buyer: Mhm. IPAS is the manual suction, right?
Gatter: Yeah, our shorthand for that.
Buyer: So, would you, I could see where it might present some sort of problem for you. So, to, if we could compensate more on something like that, or—
Gatter: Well, now you're shading into the area of you're paying me to do something that's not right. So [laughs] that's not what I want to talk about!
Buyer: No, I don't, I don't see that. What I want to make sure is that you, whatever you have to go through to deliver intact specimen, that that's compensated. Not that I'm paying you to do something shady or—
Gatter:: Well I will discuss it with Ian, our surgeon. We'll see what he has to say.
Do you have feelings about this? [question to Laurel]
Laurel: I'm just trying to think of it from his perspective. You know, I don't know what his opinion would be on that.
Buyer: You're not putting the patient at any more risk, right? As you said.
Gatter*: No. Just slight variation of the technique.*

74. At least some Planned Parenthood affiliates were uneasy about the possibility of their physician-employees violating the federal ban on alteration of abortion techniques. Consequently, at some point, some affiliates changed their internal policies to require abortion physicians to certify that they had not made any alterations, as evidenced by the following exchange between Dr. Nucatola and Attorney March Bell in the 2016 Congressional hearing:

S- 000 Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel
Mr. Bell. Let's look at the second page of that if you would please under Roman numeral three, documentation, three, Arabic numeral two. "Documentation must include a notation signed by the clinician performing the abortion that blood and/or aborted tissue is donated, consent was obtained prior to requesting, *and no substantive alteration*, the timing of terminating or the method used was made for the purpose of obtaining blood or tissue."
By Mr Bell:
Q Do you sign those documents after every abortion you've participated in where there was a donation of blood or tissue?
Nucatola Are you asking me if I have personally signed a --a statement to this effect?
Q Yes.
Nucatola *I have never signed a statement to this effect*.
Q Have you ever been a clinician performing an abortion?
Nucatola I think we know I have.
Q But this is in the manual, and it says that someone is supposed to sign this document noting these three square

bullets. Am I misunderstanding something?
Nucatola No, I don't think you are.
Q So to your knowledge do other clinicians sign this piece of paper?
Nucatola Other clinicians where?
Q Anywhere in Planned Parenthood.
Nucatola I can only answer based on the Mar Monte form that you showed me earlier, which I believe is -- it's only one page -- Number 31 has a statement to that effect on page 2. So I am assuming -- and this is purely an assumption – that the clinicians at Mar Monte sign that document.
Q But you've never actually signed one.
Nucatola I've never worked at Mar Monte.
Q Well, you never signed on at any PP where you worked.
Nucatola That's correct.

75. As to the question of whether physician-employees did, in fact, violate the 1993 Federal law requiring that "no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue," Planned Parenthood's own updated internal policies and protocols on "Programs for Donation of Blood and/or Aborted Pregnancy Tissue for Medical Research, Education and Treatment" remove all doubt:

S-027 PP0000294
0.1.2 "Provision of Services,"
IV: The timing, method, or procedure of abortion must not be **substantively altered** for the purpose of obtaining the tissue and/or blood." [emphasis added]

76. In May 2015, following Planned Parenthood's inappropriate insertion of the term "substantively," Planned Parenthood nevertheless sensed room for violation of the "no alteration" law. Consequently, Planned Parenthood addressed the subject with another directive which read in part:

S-028 PP0001424
Federal law establishes additional requirements applicable when the research involving fetal tissue is conducted or supported by the federal government. *PPFA recommends* these requirements be adhered to without regard to whether the tissue donation program is federally funded or not. These requirements are:
1-3.[…]
4. That there be *no changes* to how or when the abortion is done in order to obtain the blood or tissue.

77. On the surface, it seems that Planned Parenthood changed its official policy in order to ensure compliance with Federal law. In reality, in the May 2015 document, PPFA removed

the whole FTD Program from its *official policy* and, with the operative word "recommends" labeled the directive as only advisory to physician-employees in their various affiliates.

78. One year later, PPFA brought FTD back into the fold, with a new directive on the subject which stated in part:

S-030 June 2016 PPFA Policy for Donation of Pregnancy Tissue and/or Blood for Medical Research
1.4 ABORTION PROCEDURE:
[As detailed in Appendix B, the federal law that governs fetal tissue that is donated for use in federally funded research involving human transplantation of that tissue prohibits any change in the abortion timing, method, or procedure solely to obtain the tissue. There has been no federal funding of research involving human transplantation of fetal tissue since at least 2007. Thus, these federal statutory prohibitions do not apply generally to fetal tissue donations at Planned Parenthood. Nonetheless, the requirements below reflect the substance of these restrictions.]
1. When collecting pregnancy tissue for donation, the abortion procedure must be done with the aim of completing the procedure in the safest manner possible, with no changes to the affiliate's standard of care and usual protocols solely in order to obtain tissue for donation.
2. Once the decision is made as to the method to be used, in the course of performing an abortion, clinical judgments involving unanticipated minor adjustments are often made for a variety of reasons, such as to accommodate a patient's anatomy or to decrease a patient's discomfort. Likewise, a clinician may make similar unanticipated minor adjustments to achieve the patient's desire to donate tissue. These adjustments are consistent with this policy, provided:
A. that they do not change the timing, method or procedure of the abortion, and
B. that any such minor adjustment does not entail any greater risk to the patient.

Conclusion

79. It is my considered professional expert opinion that, to a reasonable medical probability, during the time period encompassed by the contested CMP videos, Planned Parenthood employee-physicians actively cooperated with tissue company representatives and repeatedly altered the timing, method and procedures of abortions for the purpose of obtaining fetal tissue in second-trimester abortions. It is also my considered professional opinion that Planned Parenthood Central Office was well aware of the violations of the "no alteration" clause of Federal law being committed by physician-employees in various affiliates but turned a blind eye until the problem could no longer be ignored.

Opinion 3) IT IS A MEDICAL CERTAINTY THAT PLANNED PARENTHOOD PHYSICIANS' ABORTION PROCEDURES RESULTED IN BABIES BEING BORN ALIVE

80. The 2003 Federal Partial Birth Ban (PBBA) reads in part:

> . . .an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant.

81. The words "outside the body of the mother" are most important when considering the statements from the CMP videos.

82. In second-trimester abortions, as indeed in all abortions, the abortion doctor seeks to perform an appropriate pregnancy-termination procedure in a safe, expeditious, and cost-effective manner. By contrast, the goal of the Tissue Harvesting Company (THC) participating in the Fetal Tissue Donation Program (FDP) is to recover as much usable fetal tissue and/or organs as possible from each procedure, with the ultimate goal being the extraction of a complete, intact fetus, but in compliance with the above law.

83. As to whether Planned Parenthood employee-physicians actually performed banned partial birth abortions, in a 2016 Congressional hearing, PPFA Senior Medical Director Dr. Nucatola testified:

S-000 CMP Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted] .

84. At another juncture in the same Congressional session Dr Nucatola responded:

S-000 CMP Transcript Oct 6, 2016 D Nucatola Testimony Before Select Investig Panel

[redacted]

[redacted]

85. As to the official posture of PPFA regarding Federal law, Senior Medical Director Dr. Nucatola explains that the policy requires physicians to comply with the PBBA:

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Buyer: Do they do dig?
Nucatola Yea, they dig.
Buyer: How late?
Nucatola: 20, most people do 20.
Buyer: *So that- it's not a PPFA National policy though right*?
Nucatola: Not a PPFA National policy.
Buyer: New York is not using it then.
Nucatola: *PPFA National policy is you must comply with the Federal Abortion Act*. There are a variety of ways to do that.

86. In another CMP video, Florida PPFA employee-physician Dr Prabhakaran explains to "Buyer" that using digoxin is one way to comply with the Federal PBBA to the "buyer":

Smith #011 27 February 2015 S Prabhakaran, MD VP Med Affairs, PP (FL)
Buyer: Can you explain to me about the documentation?
Prabhakaran: So, so there's--the reason people do digoxin at all is for one of two reasons.
Buyer: Right.
Prabhakaran: One is to comply with the Partial-Birth Abortion Ban,
Buyer: Right.
Prabhakaran: So that's why. Or that they--and/or, they think that digoxin makes the procedure easier--
Buyer: Right.

87. The "digoxin" mentioned by Dr. Nucatola and Dr. Prabhakaran is a preparation of the heart medicine, digitalis, which is injected by some abortion doctors into the second-trimester fetus to induce death prior to the actual extraction procedure, which would mean the physician would be removing a dead fetus, thereby complying with the Federal PBBA.

88. There is a difference of professional opinion as to the advisability of using digoxin, as evidenced by the following exchanges:

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Nucatola At the Planned Parenthoods in California. New York, doesn't use digoxin at all-
Buyer: Not at all?
Nucatola: Not at all. There's like a culture war on feticide. *People on the west coast seem to prefer feticide, people*

on the east coast seem to not believe in feticide. Everyone has their own styles.

S-011 CMP Transcript 27 February 2015 S Prabhakaran, MD VP Med Affairs, PP (FL)
Buyer: Do you know when they start to dig? What age do they use digoxin?
Prabhakaran: I don't think she dig's at all actually.
Buyer: They don't use dig at all?
Prabhakaran: No, I don't think that she does.
Buyer: And they go up to 22 [weeks]?
Prabhakaran: Yeah.
Tech: Because cell viability for us is the most important thing.
Prabhakaran: *Yeah. No, I don't think she does dig at all. She trained like I did, which is like, not dig.*

S-001 CMP Transcript 25 July 2014 -Deborah Nucatola, MD
Buyer: Do they do dig?
Nucatola Yea, they dig.
Buyer: How late?
Nucatola: 20, most people do 20. 042119
Buyer: *So that- it's not a PPFA National policy though right?*
Nucatola: Not a PPFA National policy.

89. Injecting digitalis, even a short time before the extraction, renders tissue and organs useless for FTD as evidenced in the following exchange:

S-005 CMP Transcript 12 October 2014 Amna Dermish MD, Texas
Dermish: Um, I use dig after 20 [weeks].
Buyer: After 20. Okay.
Dermish: Yes. So you guys can't take dig'ed specimens?
Buyer: *Yeah, dig nukes the stem cells so it's just no longer useful.*

90. Because digoxin "nukes" stem cells and renders them useless for research purposes, PPFA Medical Director Emerita Dr. Gatter explains that, at PPLA, the drug would be withheld from patients consented to FTD to secure better tissue:

S-014 633.5 Gatter Video
Gatter: So Novogenix was our partner in PPLA and they would send us- you know, big volume. They would send their staff to the site, and our staff, our medical assistants were used to discussing with the patients, do you want to consent? And they would say yes or no, and a lot of them said yes. Maybe it
wasn't entirely sixty, *and then once the patients have signed the consent form, the patients did not receive digoxin.*

91. Failure to induce fetal death with digoxin prior to the abortion means the fetus is still alive, which sets the stage for having to perform a PBA and even causing a live birth, causing the physician to run the risk of performing an illegal PBA. This is a risk that Dr. Prabhakaran eliminates in the following imaginative way:

S-011 CMP Transcript 27 February 2015 S Prabhakaran, MD VP Med Affairs, PP (FL)
Prabhakaran: So some people train to just document that like, you know to comply with the Partial-Birth Abortion

Ban, you basically have to say, "I intend to utilize dismemberment techniques for this procedure," which is what we do always,
Buyer: It's just a standard form that the provider signs every time, or what does it look like?
Prabhakaran: It's in each--so every time you do a procedure, that's how you document. *So, like, there's like a checkbox that says, "I intend to u"--so it would be before the procedure, you do your evaluation, you write, "I intend to utilize dismemberment techniques for this procedure."*
Prabhakaran: I mean you just do the procedure. Like it's not--and this is the thing. Like so you know, I trained with somebody who just was like*, I'm not doing digoxin, and we're just going to document and there's never been a problem.* So that's just how we do it, you know, because that's just how I learned. So and that's--I don't, I don't think Mary does dig, I'm like 90--yeah, I'm--she doesn't, I don't think she does. So that's just it. It's just a training thing, and like how you're, what you're comfortable with, and some people say that dig makes the procedure easier. So, if you haven't trained with it, and that's what you're used to, so.

92. Not using digoxin to induce fetal death creates the inevitable situation in which the living 18-19 week-old fetus slips through the dilated cervix to the critical anatomic level proscribed by the PBBA.

93. The following exchange between "Buyer" and PPFA Dr. Dermish (Texas) was filmed is a 2014 CMP video:

S-005 12 October 2014 Amna Dermish MD, Ferrigno VP Whole Woman's Health
Dermish: Um, I use dig after 20 [weeks].
Buyer: After 20. Okay.
Dermish: Yes. So you guys can't take dig'ed specimens?
Buyer: Yeah, dig nukes the stem cells so it's just no longer useful.
WWH: I think, we go to 22 [weeks], I mean, again, because of the ban, we can't go farther. But definitely dig at that point.
Buyer: Right. And they need to be pretty intact as well, with the body cavity not too torn up.
Dermish: Oh, okay. Right right right. Okay. So I mean we do, I do 2-day cervical Prep. . . so I can usually get good dilation, so my aim is usually to get the specimens out pretty intact.
WWH: Like an induction type of thing?
Dermish: Well no, I just do, I do laminaria. But leaving them in for 24 hours, I can usually get 3 to 4 centimeters of dilation, which usually allows me to get, to extract it more intact. I do that starting at 18 weeks. The 16 to 18 weeks I do a same-day prep, so that's just sort of, you know—r
Buyer: So can you convert to breech?
PP: I can. If I need to, and if it's—I generally don't have to do that, I don't usually do that in the 16 to 18 weeks 'cause I don't usually need to, but but with the further gestation I will sometimes do that if it's a cephalic presentation, just 'cause it's easier to get, so—
Buyer: Right, yeah, that's what Deb [Nucatola] was telling us, was really it makes a difference for tissue collection at PPLA—
PP: It's really nice when it's, yeah—I trained with her.
Buyer: Yeah she said if you convert to breech—
PP: Convert to breech!
Buyer: At the start, you get—
PP: Grab the spine.
Buyer: Yeah she said you get increased dilation as the case goes on—
PP: Right.
Buyer: And then she said at the very end, you can even evacuate the entire calvarium [head] intact if you need to.
PP: Yeah, yeah.
Buyer: Which you do if there's a request for fetal brain, they're always wanting

both hemispheres, and so, yeah.
PP: Yeah, I haven't been able to do that yet. The intact calvarium.
Buyer: Oh to get the calvarium?
PP: To get the calvarium intact, yeah.
Buyer: [laughs] Well maybe next time, right?
PP: Well this will give me something to strive for! [laughs]
Buyer: Exactly!
PP: But yeah, I don't routinely convert to breech, but I will if I need to.

94. Though not describing the manner of fetal death, in one CMP video, Dr. Ginde of PPRM speaks to her ability to recover an intact torso; namely, extracting a fetal body to at least the neck level:

S-002 DrGindeTranscript
Ginde): *A lot of times 'll get a full torso, I'll spine, kidneys, you could send the whole thing or pick that apart.*
Buyer: You mean, would we take the whole torso and ship it to somebody? not usually, most people want specific organs out of that- if we get a whole torso, it makes it a lot easier for the procurement tech- you can see right now, this is what a tech would be doing. It's already been however many minutes and it's time consuming.
Buyer: That's a great heart specimen right there.
Ginde: *The hearts I can say we usually get.* (inaudible) This is liver or kidney right here

95. Another way to obtain an "intact specimen" is by using misoprostol: a powerful prostaglandin often used therapeutically in doses of 50-110mcg by obstetricians to soften the cervix, but which is used by abortion physicians in doses of 400-1200mcg, 8 to 20 times the therapeutic dose, which not only softens the cervix but throws the uterus into tumultuous contractions which greatly increases the risk of a live birth, as suggested by Dr. Alicia Goldberg in a slide presentation at a 2015 abortion convention:

S-023 Goldberg Optimal Cerv Prep (022715)

SLIDE: MISOPROSTOL
PGE1 analogue
•*Softens/ripens cervix, causes uterine contractions*
•Side effects: Pain/cramping, N/V, diarrhea, fever, chills
Risk of unscheduled delivery prior to D&E
• Generally safe and effective, but use *off-label* Largest case series from PPLA1 (N=6620) @ 12-16wks (400mcg buccal miso) Uterine perforation 0.45%, no cervical lacerations

96. From the practices described by the PPFA physician-employees on the CMP videos, I am led to the logical conclusion that, in cases of second-trimester abortion procedures in patients consenting to FTD, when the physician: 1) states her aim is to extract an "intact

specimen"; 2) does not inject digoxin to kill the fetus pre-operatively; 3) uses multiple dilating agents for the widest possible cervical opening, and; 4) uses supra-therapeutic doses of misoprostol (400-1200mcg) to cause the uterus to go into tumultuous labor and force the fetus through the cervical canal, where the risk of unscheduled delivery and live birth rises to a high level of medical probability; indeed, to a near certainty. As to the actual frequency, an indication is provided in a CMP video in which the PPRM Medical Director tells the CMP "Buyer":

S-002 CMP Transcript 7 April 2015 Savita Ginde, MD & "J.R." Johnstone Clin Rsrch Coord
Ginde: Intact. *So we do basically D&Es. Intact is less than ten percent.*
Buyer: Ok. Less than ten percent.

Conclusion

97. It is my considered professional and expert opinion to a reasonable medical probability, indeed to a near-certainty, that Planned Parenthood physician-employees have, in fact, experienced births/deliveries of live fetuses in the course of second-trimester abortions, intentions to the contrary notwithstanding.

Opinion 4) PLAINTIFFS' ACCEPTANCE OF PAYMENT FOR FETAL TISSUE DONATION, INCLUDING REIMBURSEMENT, VIOLATES THE MEDICAL STANDARD OF PRACTICE

98. I owned my own clinic during the 1990s. At that time, a representative of a tissue procurement firm visited and asked to check my specimens for tissue she may need.

99. The technician offered to pay me for the specimens that I allowed them to take. The standard of practice in the medical profession is to refuse such payment due to the appearance of impropriety, as in a true medical setting, there is no reimbursable cost for only providing access to tissue.

100. Reimbursement for occupation of space and equipment in facilitating access to fetal tissue is untenable, as the costs involved in such procurement are de minimis at greatest.

101. Planned Parenthood alleges that it has accepted payment from tissue procurement organizations in order to reimburse for costs related to use of medical equipment and occupation of building space.

102. It is my opinion that costs related to the use of medical equipment and occupation of building space are de minimis costs that are not reimbursable. Planned Parenthood violates the medical standard of practice by accepting payment for tissue procurement.

Executed this 15th day of March at Pleasanton, CA

Forrest Owen Smith, MD

Dr. Forrest Owen Smith, M.D.

APPENDIX A – CURRICULUM VITAE

Forrest Owen Smith

DOB 01/27/39, Pittsburgh, Pennsylvania

Address and Contact

Work - 1393 Santa Rita Road, Suite B, Pleasanton, CA 94566 (925) 734-0100
Home - 6707 Paseo San Leon, Pleasanton, CA 94566 (925) 484-4433
Fax – (925) 734-0207 *Cell* – (925) 872-9965

Education

Duke University – OB-Gyn Residency (Academic)	1970 - 1974
M.D. from Duke University School of Medicine (Durham, NC)	1970
San Francisco State College	1964 - 1966
B.S. in Biology from Mount Union College	1960

Medical Licensure

California, #C-35811	05/22/1974 (by reciprocity	Exp 01/31/20

Board Certification

Passed written exam American Board of Ob-Gyn	06/1997
Passed written exam American Board of Ob-Gyn	06/1974

Professional Liability Carrier

Cooperative of American Physicians – Mutual Protection Trust (CAP-MPT) #1871

Professional Society Memberships

Association of Cannabis Specialists
Society of Cannabis Clinicians
American Association of Gynecologic Laparoscopists

Alameda-Contra Costa Medical Association	1984 - Present
Bayard Carter Society of Ob-Gyn	1974 - Present

Panels

Alameda County Bar Court-Appointed Attorneys Expert List

Hospital Staff Status

ValleyCare, 5575 W Las Positas, Pleasanton, CA 94588 Chairman of Ob-Gyn
San Ramon Regional Medical Center, 6001 Norris Canyon Rd, San Ramon, CA 94583

Employment Experience

06/1974-12/1977	Permanente Medical Group, South San Francisco – Staff Ob-Gyn
01/1978-09/1982	Private practice Ob-Gyn, Women's Hospital of Oakland
10/1982 – Present	Private Practice Ob-Gyn (Sole Practitioner), Livermore-Pleasanton, CA
08/1988 – 09/2005	Consultant in Ob-Gyn, Federal Correctional Institution, Dublin, CA
09/2016 – Present	Consultant in Ob-Gyn, Federal Correctional Institution, Dublin, CA

APPENDIX A – CURRICULUM VITAE (cont)

Military Service

Highest Rank Attained: O-5 (Lieutenant Colonel), Honorable Discharge	2002
Operation Desert Storm: Small Arms Instructor, Fort Benning, GA	1991
3rd Bn/12th Special Forces Group, Airborne, Battalion Surgeon	1986-1990
347th Field Hospital, Army Reserve, Unit Surgeon	1985-1986
452nd Combat Support Hospital, Army Reserve, Unit Surgeon	1980-1985
Individual Ready Reserve, Honorable Discharge	1964-1970
Walter Reed Army Medical Center, Medical Sciences Specialist	1962-1964

Military Qualifications and Awards

Expert Field Medical Badge
Basic Airborne Qualification
Expert Marksman (M-1)
Expert Marksman (M-16)
National Defense Service Ribbon
Professional Development Ribbon
Global War Against Terror Ribbon
Good Conduct Ribbon
Basic Airborne Qualification (Israeli, 1985)

Ancillary Medical Service/Experience

*Lectured and demonstrated advanced surgery techniques in urinary incontinence to Iraqi Surgeons: Baghdad, *Iraq* – Saddam Hussein Medical College, July – August 2003
*Consultant in field medicine/combat casualty evacuation for 'Northern Alliance' (Commander Ahmed Shah Massoud), Dash't-E-Qala, *Afghanistan*, October 2001
*Field Survey for Latter Day Saints Church, Quang Tri Province, *Vietnam*, July 1998
*Consultant in field medicine/special operations to Karen National Army, Manerplaw, Myanmar (*Burma*), May 1997
*Consultant to Refugee Relief, International in support of United Nations Medical Field Operations, Kigali, Rwanda, July 1985
*Consultant to 'Cynthia's Clinic for Burmese Refugees', Mae Sot, *Thailand,* April 1986
*Field Operative for Refugee Relief International, Kigali, *Rawanda*, June 1994
*Consultant in field medicine and special operations to Karen National Army (Commander Saw Bo Mya), Manerplaw, Myanmar (*Burma*), July 1992
*Consultant in field medical support to National Islamic Front for Afghanistan (Commander Sayed Mohammed Gailani), Khost, *Afghanistan*, January 1988
*Consultant in airborne medical operations, Government of *El Salvador*, 1985

Noteworthy Associations/Accomplishments/Events

Knew Ayn Rand Personally, San Francisco and New York	1964-1965
Chief Medical Officer for Olympic Marathon, Los Angeles	1984
Oldest officer to complete Special Forces Jump School, Ft. McCoy, Wisconsin	1986
Offered employment by Osama bin Laden, Pakistan	1988

APPENDIX B – PUBLICATIONS

Pursuant to Fed. R. Civ. P. (26)(b)(2)(b)(iv), which requires that an expert "report must contain […] a list of all publications authored in the previous ten years," the following bibliography constitutes a complete, true, and accurate report of Dr. Forrest Owen Smith M.D.'s published authorial work.

Cole, M; Rutherford RB; Smith, FO: *Experimental Ammonia Encephalopathy in the Primate*, Transactions of the American Neurological Association, 1970, Vol 95.

APPENDIX C – MATTERS ON WHICH TESTIMONY HAS BEEN PROVIDED

Pursuant to Fed. R. Civ. P. (26)(b)(2)(b)(v), which requires that an expert "report must contain […] a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition," the following bibliography constitutes a complete, true, and accurate report of cases on which Dr. Forrest Owen Smith, M.D. provided expert testimony.

Dr. Forrest Owen Smith has not testified as an expert at trial or by deposition at any point in the last four years.

APPENDIX D – DOCUMENTS AND SOURCES CONSULTED

S-000 6 October 2016 – Dr. Nucatola Testimony Before Select Investigative Panel

S-001 25 July 2014 – Transcript by Center for Medical Progress: Dr. Nucatola

S-002 8 April 2015 – Transcript by Center for Medical Progress: Savita Ginde

S-003 27 February 2015 – Transcript by Center for Medical Progress: Jennifer Russo

S-004 12 October 2014 – Transcript by Center for Medical Progress: Dr. Nucatola & Dr. Gatter

S-005 12 October 2014 – Transcript by Center for Medical Progress: Amna Dermish

S-006 15 February 2012 - Thomas v Planned Parenthood Hudson Peconic, Inc.

S-011 27 February 2015 – Transcript by Center for Medical Progress: S. Prabhakaran

S-014 6 February 2015 - CMP Video of Mary Gatter

S-016 27 February 2015 – Transcript by Center for Medical Progress: Vanderhei

S-022 CMP Video of Dr. Taylor

S-023 Goldberg: Optimal Cervical Preparation (022715)

S-024 "Informed Consent: It's Not Just a Form – It's a Process" *Health Leaders Media* https://www.healthleadersmedia.com/innovation/informed-consent-it%E2%80%99s-not-just-form-it%E2%80%99s-process

S-025 *Shinal v Toms* (PA) No. 31 MAP 2016

S-027 PP Medical Procedure Manual Bate PP0000294

S-028 PP Medical Procedure Manual Update Bate PP0001424

S-029 Federal Law – Fetal Tissue Donation Public Law 103-43: 6/10/93

S-030 PPFA Policy for Donation of Pregnancy Tissue Bate PP0017586

S-031 Orange County Investigation of DaVinci Biologicals – Interview Report

Declaration of David Daleiden in Support of Motion to Compel Document Production re Subpoena Served on StemExpress, LLC and Sarah Heuston in N.D. Cal Case No. 3:16-CV-00236

Declaration of David Daleiden in Support of Defendants CMP, Biomax, Daleiden and Newman's Motions to Compel, Planned Parenthood Federation of America, Inc., et al. v. The Center for Medical Progress, et al. Jan 10, 2018.

"Mortality Records with Mention of International Classification of Diseases-10 code P96.4 (Termination of Pregnancy): United States, 2003-2014" Center for Disease Control, 2016. https://www.cdc.gov/nchs/health_policy/mortality-records-mentioning-termination-of-pregnancy.htm

Other Information Considered

Deposition of Krista Noah, Director of Affiliate Security PPFA March 8, 2019