IN THE STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

PAUL GESSING *and* CARE NET PREGNANCY CENTER OF ALBUQUERQUE, INC.

Plaintiffs,

v.

STEPHANIE YARA, *in her official capacity as director of finance and administration for the City of Albuquerque*; CAROL M. PIERCE, *in her official capacity as director of family and community services of the City of Albuquerque*; *and* PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.

Defendants.

Case No. D-202-CV-2023-00316

PLAINTIFFS' RESPONSE TO PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, Paul Gessing and Care Net Pregnancy Center of Albuquerque, Inc. ("Care Net"), submit this response in opposition to Planned Parenthood of the Rocky Mountains' ("PPRM") Motion for Summary Judgment. When Plaintiffs filed their Complaint, they suspected, but could not yet prove, that rather than purchasing services for residents, the real intent of the gift from the City was that "Planned Parenthood will use the City's funds to supplant private funds to offer the same services." Compl. ¶ 53. The evidence PPRM attached to its Motion for Summary Judgment proves Plaintiffs are correct. The November 2022 progress report from PPRM to the City, attached as Exhibit 2 (PPRM 000265) to its Motion for Summary Judgment, explicitly says that "The generous support from the City has allowed us to support our patient base by offsetting core staff salary costs," which in turn allowed it to increase the services it is providing to *out-of-state* residents. The result of the City's gift, per PPRM, is that it was able to reduce the percentage of its resources that go to residents of the City, and even residents of New Mexico. *See Id.* at PPRM 000267.

These reports, in PPRM's own words, demonstrate what Plaintiffs have alleged from the beginning: the City of Albuquerque ("the City") wanted to give a gift of $250,000 to Planned Parenthood in retaliation for the Supreme Court's leaked *Dobbs* decision. The Agreement is simply a bad-faith attempt to disguise that donation as a business transaction.

RESPONSE TO PPRM'S UNDISPUTED FACTS

Plaintiffs respond to each of PPRM's claimed undisputed material facts (*See* PPRM MSJ at 1-3) in order:

1. Plaintiffs agree that PPRM and the City signed an agreement dated August 5, 2022. Plaintiffs dispute that this agreement was to reimburse PPRM for the provision of services up to $250,000. The $250,000 had already been allocated to Planned Parenthood; the agreement simply attempted to justify money that the City had already directed to the organization as a sponsorship.
2. Plaintiffs agree that the term of the August 5, 2022 Agreement was back-dated to run from July 1, 2022 to June 30, 2023. Plaintiffs agree that ¶ 2 of the Agreement includes boilerplate language that "The Contractor shall perform the services set out in Exhibit A." Plaintiffs dispute that this boilerplate renders the Agreement a bone fide contract for services.
3. Plaintiffs agree that ¶ 4.B of the Agreement includes a provision that the $250,000 will be distributed "on a cost reimbursement basis . . . [and] [o]nly those costs which are allowable under the terms of this Agreement and Exhibit B shall be reimbursed." Plaintiffs dispute that the costs as described in Exhibit B constitute reimbursement for services rendered, as opposed to defraying existing operating expenses. PPRM does not appear to have attached Exhibit B, but the Court can find it attached as an Exhibit to Plaintiffs' Complaint.
4. Plaintiffs agree ¶ 9 of the Agreement states that the funds are "primarily intended to provide the Services called for by this Agreement to low and moderate income residents. . ." Plaintiffs dispute this language creates any binding obligation to use the funds for the sick or indigent.
5. Plaintiffs agree that this paragraph accurately quotes from the "Outputs" listed in the Agreement.
6. Plaintiffs agree that there are "Outcomes" attached to the Outputs, though the summary here is imprecise. For instance, "the number of clients served" and "the number of services provided" are actually part of the Outputs.

7. Plaintiffs accept PPRM's representation that Exhibit 2 contains true and correct copies of periodic reports provided by PPRM to the City. Plaintiffs dispute that these reports include "the number of clients served and the services provided." The first report also explicitly supports Plaintiffs' contention that, rather that expanding services, the funds have been used to defray existing salary expenses: "The generous support from the City has allowed us to support our patient base by offsetting core staff salary costs."
8. Plaintiffs accept PPRM's representation that Exhibit 3 is a true and correct copy of demographic data provided by PPRM to the City. Plaintiffs note that this data also represents at least some information on the number of patients served, though it does not identify the number or type of services provided.
9. Plaintiffs accept that attached as Exhibit 1 to the Wilson Declaration is PPRM's first-quarter invoice. Plaintiffs note that this invoice confirms that City funds are only being used to cover staff salaries, rather than payment for the provision of specific services.
10. Plaintiffs agree that Exhibit 2 to the Wilson Declaration is a check in the amount of PPRM's first-quarter invoice. Plaintiffs dispute that a check to cover existing staff salaries qualifies as "services rendered."

LEGAL STANDARD

"Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Romero v. Phillip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. "All reasonable inferences are construed in favor of the non-moving party." *Id.* The moving party bears the initial burden of establishing a "prima facie showing that he is entitled to summary judgment." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241.

ARGUMENT

I. The Agreement is not a bone fide contract for services.

To determine whether an appropriation is an illegal donation, a court evaluates "its nature and the circumstances surrounding it." *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50. If an appropriation "take[s] on character as a donation in substance and effect," it is illegal. *Id*. When evaluating an appropriation, the court should consider "the ills [the anti-donation clause] was intended to correct," 1985 N.M. AG LEXIS 36, *4, which include stopping "gifts or donations disguised as business transactions." *City of Raton*, 600 F. Supp. 2d at 1161. Here, the nature and

circumstances of the sponsorship clearly indicate an illegal donation. First, PPRM's own evidence supports the claim that the Agreement does not provide adequate consideration. Second, the timing of the Agreement demonstrates that it was a late-in-the-day attempt to paper over an illegal donation. Third, the lack of any open bidding process provides this court further indicia that this was not a good-faith effort to purchase services.

i. The Agreement does not provide adequate consideration because it simply defrays PPRM's existing operating expenses rather than purchasing services for the City.

PPRM claims that the Agreement is enforceable because it contains "an offer, acceptance, consideration, and mutual assent." *See* PPRM MSJ pg. 4. But the Agreement lacks any performance metrics, contains no minimum criteria, and provides taxpayers no guarantee of adequate consideration. Nor is it even purchasing services for the people of Albuquerque: PPRM's own exhibits support Plaintiffs' allegation that the funds are simply defraying existing costs and salaries so that PPRM can serve more out-of-state patients.

The November 28, 2022 report from PPRM to the City explicitly confirms this:

> Since the fall of Roe, our Albuquerque health centers have been consistently overwhlemed [sic] with out of state patients flooding to New Mexico for care. Last year during this quarter, 94% of our patients lived in New Mexico and 6% were from out of state. This year during the same quarter our out of state patients rose to 23% of our total patient volume. *The generous support from the City has allowed us to support our patient base by offsetting core staff salary costs and freeing up dollars* to increase our patient assistance dollars from $25,706 last year during this quarter to over $220,000 this year.

PPRM MSJ Ex. 2 at PPRM 000265 (emphasis added). The March 1, 2023 report also mentions the increase in out of state patients: "Patients from out of state continue to travel to our health centers for expert abortion care, leaving less appointment availability for our local family planning patients. Over 20% of patients seen at our Albuquerque health centers traveled from out of state to access care during the second quarter." *Id.* at PPRM 000267.

PPRM's own Exhibit confirms Plaintiffs' allegation: rather than a contract to purchase services for Albuquerque residents, the "sponsorship" provided by the City has been used to defray existing staff salaries, freeing up PPRM's *other money* to serve *other patients*. The end result of the City Council-directed sponsorship for PPRM has been to serve more patients from *outside New Mexico*. Local residents now account for only about 77% of patients, whereas before the donation they

were 94%. What exactly are the taxpayers of Albuquerque supposed to have gotten out of this deal?

Courts must ensure an "exchange of adequate consideration." 2019 N.M. AG LEXIS 11, *13-14. Indeed, the "Supreme Court of New Mexico has stricken transactions under the Anti-Donation Clause in circumstances involving an outright gift of money or property to a private entity with no exchange of adequate consideration." *City of Raton v. Ark River Power Auth.*, 600 F. Supp. 2d 1130, 1147 (D. N.M. 2008). When analyzing the anti-donation clause, "New Mexico courts, and the New Mexico Attorney General's Office, have generally . . . scrutinized contracts for consideration." *Id.* at 1160. The anti-donation clause is implicated when there is not "true consideration—money exchanged for a real product." *Id.* at 1161. Even if the purported appropriation has an objective benefit to the State, that is not sufficient to deem it legitimate. *See State ex rel. Mechem v. Hannah*, 63 N.M. 110, 314 P.2d 714 (1957) (finding that the fact that the program assisted the livestock industry, for the general economic benefit of the state, was still an illegal donation).

It's no surprise that the City's sponsorship of PPRM has resulted in no actual increase in services for residents, because none was ever intended, as a closer look at the terms of the Agreement confirm.

a. Output 1

Under Output 1, PPRM is to "offer healthcare services to New Mexican residents" that are "limited to wellness visits, breast exams, telehealth visits, health center visits and any follow-up or treatment as needed, cancer screening and prevention services, provision of birth control and testing for sexually transmitted infections." *See* PPRM MSJ pg. 2. PPRM must document this by "report[ing] on the number of clients served and the number of each service provided." *See* PPRM MSJ, Ex. 1 at PPRM 000052. In other words, Planned Parenthood could provide one wellness visit and fulfill its obligation; there is no expectation of a particular number or type of clients or visits.

PPRM argues that this is adequate consideration because "[i]n return for providing these services, the City promised to reimburse PPRM for the cost of providing the specific services bargained for under the Agreement." *See* PPRM MSJ at 5. But PPRM's own claim of adequate consideration is disproven by its own documents. Appendices 2 & 4 to the agreement state that all $250,000 will go to paying salaries and benefits for PPRM employees. No provision is made in

the Agreement for "consumable supplies" like pregnancy or STI tests that require "cost reimbursement" or "requisitions for payment." 100% of the money is dedicated to salaries for staff, specifically the three nurses and three health assistants. *See* Appendix 4. If those staff people "offer services," the Agreement has been fulfilled, and PPRM is entitled to the full $250,000, regardless of the actual number of patients seen or services provided—and regardless of whether the services offered by these staff members are provided to New Mexico residents. Indeed, PPRM's reimbursement documents attached to its Motion for Summary Judgment prove as much. The reimbursement documents do not include an ounce of information about any of these "specific services" discussed in the motion nor in Output 1. Instead, the only tracked costs are salaries of staff members. PPRM MSJ, Wilson Dec. Ex. 1. Defraying the cost of staff salaries is the only thing PPRM seeks reimbursement for, and the only thing the City reimburses. *Id.*, Ex. 2. The reimbursement materials are absent of any evidence of consideration, or any evidence of "services rendered."

The only specific services mentioned in PPRM's reports are abortions for visitors from outside New Mexico, which PPRM itself says have displaced service provision for the taxpayers of Albuquerque. PPRM MSJ Ex. 2 at 000267. And abortions, much less abortions for out-of-state visitors, are not even a service Planned Parenthood is supposed to provide under the agreement "to New Mexican residents." *Id.* at 000052. PPRM is not even indirectly fulfilling its purported consideration, and PPRM is not actually reporting to the City the provision of the supposed services it was asked to provide. The City is reimbursing staff costs, not services, and the money "free[d] up" from paying salaries goes toward abortions for people from other states, not providing the named services in the Agreement to New Mexicans.

PPRM argues that "payments made to PPRM for the provision of services identified in the Agreement compensates PPRM for services provided," citing *Treloar v. Cty. of Chaves*, 2001-NMCA-074, 130 N.M. 794, 803, 32 P.3d 803, 812. But *Treloar* simply held that severance pay when an employee is terminated is the equivalent of wages earned, and therefore the City had received consideration in the form of the labor. By contrast, *in Nat'l Union of Hosp. & Health Care Emples. v. Bd. of Regents of the Univ. of N.M.*, 2010-NMCA-102, ¶ 38, 149 N.M. 107, 119, 245 P.3d 51, 63, the Court found that paying retroactive bonuses to employees *would be* an illegal donation. The City is not paying PPRM for the provision of services identified in the Agreement—

PPRM's own description states that the City is simply defraying the cost of preexisting staff salaries.

b. Outputs 2 & 3

PPRM only mentions Output 1 in its Motion for Summary Judgment, but nonetheless, neither Outputs 2 or 3 are adequate consideration. The second output is to "expand health equity by promoting equitable access to services and care." *See* PPRM MSJ Ex. 1 at 000052. Planned Parenthood is to do this by "disaggregating data to assess for any difference in patient access, experience, or clinical outcomes across demographic groups, including age, race, ethnicity, income level, region of residence, etc." *Id.* at 000053. In other words, Planned Parenthood might produce some sort of report, presumably the one-page spreadsheet attached as Exhibit 3 to its Motion. The third output is to "provide patient education to 8,000 participants regarding healthy choices on sexuality and parenting. The agency will report numbers served; monitor strategies, outputs, and outcomes." The Agreement provides no other detail regarding this output. Nothing indicates whether it covers providing information on Planned Parenthood's website, speaking at school assemblies, or providing individual counseling. It contains no specifics on the curriculum that will be used in this education. There is nothing to substantiate that these educational activities, whether at school assemblies, public events, or one-on-one counseling sessions, combine with the other outputs to create $250,000 in value.

The law requires that the City purchase "a real product" from PPRM. *City of Raton*, 600 F. Supp. 2d at 1161. The Agreement provides no evidence of such a purchase—reflecting the fact that it did not go through a normal, robust procurement process, it uses high-level language without setting specific expectations to actually deliver value. The so-called consideration PPRM points to is vague, contains no minimum compliance standards, and is not supported by PPRM's own reimbursement documents. Therefore, the Agreement lacks true consideration and is cover for an illegal donation, rather than a bone fide contract for services.

ii. The timing of the Agreement shows it was disguised as a business transaction.

PPRM claims that the Agreement is enforceable because it contains "an offer, acceptance, consideration, and mutual assent." *See* PPRM MSJ at 4. But all these elements, if they happened at all, occurred *after* the money was donated to PPRM.

The documented history shows that the money was meant as a donation and the idea for an Agreement only came after the fact. Amendment 13 simply said the money was "for Planned Parenthood," not that it was approved funding for healthcare services. (Compl. ¶ 16). The final adopted budget simply listed "Planned Parenthood NM" under the Department of Family & Community Services (Compl. ¶ 17), again with no reference to healthcare services. Drawing inferences in favor of the Plaintiffs, Plaintiffs credibly alleged that the purpose and intent was to make a donation to Planned Parenthood, not to purchase wellness services or sex and parenting education. It is PPRM's burden to demonstrate otherwise in the context of a Motion for Summary Judgment, and they have not done so.

iii. The lack of open bidding process and legislative history indicate an illegal donation.

PPRM's Motion for Summary Judgment argues that the Agreement meets all the criteria of an enforceable contract. *See*, PPRM MSJ at 4. But it skips over the entire history and context of what led to the Agreement. Examining such details ensures that an appropriation does not "take on character as a donation in substance and effect." *Moses*, 2019-NMSC-003, ¶ 50. Additionally, to avoid corruption, an appropriation must go through the normal procurement process rather than be designated before the fact for a particular organization. As the City's own Inspector General said recently in considering another anti-donation case, "City personnel should have slowed down to ensure proper procedures were being followed and that the purchase met all standards."[1] Those proper procedures are laid out in the City's procurement manual, which pledges "to reduce unethical behavior by providing a procurement process that promotes fair and open competition. Competition is the foundation of any public procurement process." City of Albuquerque Procurement Manual, pg. 1 (Oct. 2019).[2] The City's procurement principles include "ensure transparency," "obtain the best value for the money expended," and "promote competition and allow a fair opportunity to compete." *Id*. at 2.

Here, the City set out to make a donation from the start. The donation was motivated by the Supreme Court's leaked decision in *Dobbs*, as Councilwoman Fiebelkorn unequivocally declared:

[1] Report of Investigation, File No. 22-0203-C, *Alleged violation of Article IX Section 14 regarding the purchase and installation of stadium turf and a misuse of taxpayers' dollars*, City of Albuquerque Office of the Inspector General (March 10, 2023), pg. 16.
[2] *Available at* https://www.cabq.gov/dfa/documents/city-of-albuquerque-procurement-manual.pdf.

"The reason it came about is because I am pro-choice. I am a supporter of Planned Parenthood. Period." (Compl. ¶ 23). Because the $250,000 was a planned donation from the start, normal procurement procedures were not followed. There was no request for information, request for proposals, sealed bids, or neutral panel of city procurement officers deciding among bidders. There was no public posting identifying the services the City thought it required, the approximate amount it thought those services should cost, and the criteria for successful bids. No other organization received an opportunity to compete. With a complete lack of transparency, the City formulated the Agreement with PPRM in private, sharing no drafts and accepting no comments. The stated motivation for giving $250,000 to PPRM along with the failure to follow a normal procurement process display that this was an illegal donation in "substance and effect."

II. The Agreement does not satisfy any exception.

PPRM claims that even if this is a donation, the "sick and indigent persons" exception to the anti-donation clause should apply. But that exception only applies when a contract documents that public funds have actually served "sick and indigent persons" within the City's responsibility. The contract should be specific, made on a reimbursement basis, and paid out with specific proof of service to named sick and indigent persons. 1961 N.M. AG LEXIS 82, *3-4; Compl. ¶ 54.

The Agreement contains none of these requirements. PPRM claims that the Agreement has "specific performance metrics and provides for payments on a reimbursement basis" and that it has provided "specific proof" through its Demographic Reports that "health care services were provided to sick and indigent individuals." PPRM MSJ at 7. But no specific performance metrics exist, and no such metrics are reported to the City. Again, PPRM's own documents demonstrate that no performance metrics must be met, nor any services proven for reimbursement, since the only thing reimbursed is staff salary. PPRM presents no "specific proof of service," just generic demographic information. PPRM does not even ask for reimbursement based on these alleged services, as required by the exception.

PPRM emphasizes that the exception should apply to either sick *or* indigent persons. PPRM MSJ at 7. It does not explain *why* this distinction is relevant or helpful to their position, simply that "indigent" depends on a current understanding of the word—and then fails to define it. But either way, the Agreement and the demographic information are not sufficient to support such an exception. They lack *any* specific proof of services for specific indigent persons. Indeed, to satisfy the exception, PPRM would need to "make a periodic accounting to the city . . . listing the names

and addresses of sick and indigent persons who have been recipients of the service" and then to receive reimbursement on a cost basis. 1961 N.M. AG LEXIS 82, *3. PPRM provides no names, no addresses, nor anything else beyond some rough buckets of income ranges for patients served. PPRM MSJ at Ex. 3. And that data itself makes clear this is not specifically for the poor or needy—with many patients listed exceeding the 80% Median Income threshold. *Id.*

If PPRM's vague information were deemed sufficient to satisfy the exception, then practically any organization that claims to serve any lower-income persons would be able to receive huge appropriations from the City and only produce demographic information in return. This tramples over the purpose of the exception, which is to provide *specific proof* of service to *named* individuals. And if Plaintiffs are correct about the purpose of this appropriation, then the sick-and-indigent exception does not apply. The City Council did not appropriate these funds to "make provision for the care and maintenance of sick and indigent persons." The City Council appropriated these funds to make a political statement about abortion rights. The inquiry can end there.

"[T]he sick and indigent exception does not permit the state or a local government to make donations to a private or nonprofit organization that are used for the organization's operating expenses." 2011 N.M. AG LEXIS 15, *15-16. *Accord* 1956 N.M. AG LEXIS 81, *4-5 ("Article IX, Section 14 of the Constitution would also prohibit the use of public funds to operate a privately leased county hospital."). Yet all the money at issue is, according to PPRM itself, defraying existing staff salaries. Nothing else has been reimbursed or requested for reimbursement.

Finally, the sick and indigent exception does not apply when a contract does not lead to new or additional services beyond those already offered in the community, but "instead provides a subsidy to a private concern" that happens to operate in the medical arena. 1970 N.M. AG LEXIS 26, *5-6. Nothing in the Agreement requires PPRM to provide new or additional services. Indeed, PPRM's own documents admit that the money from the City is being used to fund staff salaries, and that the money that was previously going to salaries is now "free[d] up" to direct toward patience assistance dollars," and abortion. PPRM MSJ at Ex. 2, PPRM 000265. Drawing inferences in favor of the non-moving party, this use of City funds does not implicate the sick and indigent exception.

CONCLUSION

For the forgoing reasons, PPRM's Motion for Summary Judgment should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was electronically filed and served through the Court's E-file and E-service system on the following parties on the 19th day of October, 2023.

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