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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SAN FRANCISCO

10  
11 EVAN MINTON,  
12 Plaintiff,  
13 vs.  
14 DIGNITY HEALTH; DIGNITY HEALTH  
d/b/a MERCY SAN JUAN MEDICAL  
15 CENTER,  
16 Defendants.

Case No. CGC 17-558259

**DEFENDANT DIGNITY HEALTH'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEMURRERS TO FIRST AMENDED  
VERIFIED COMPLAINT**

[Filed concurrently with: (1) Notice of  
Demurrers; (2) Demurrers; (3) Request for  
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Rochman; (5) Notice of Payment for Court  
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1       **I. INTRODUCTION**

2           On August 30, 2017, the Court sustained Dignity Health’s demurrer to Plaintiff Evan  
3 Minton’s (Minton”) Verified Complaint For Declaratory and Injunctive Relief and Statutory  
4 Damages (the “original complaint,” or “Complaint”) based upon the Supreme Court’s decision in  
5 *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 44 Cal. 4th 1145, 1159  
6 (2008) (“*North Coast*”). Minton’s amended allegations in the First Amended Complaint (“FAC”)  
7 do nothing to change that result. Minton’s single cause of action complaint asserting intentional  
8 discrimination in violation of the Unruh Act, Civil Code § 51(b) fails because Dignity Health’s  
9 Mercy San Juan Medical Center (“Mercy”) followed the direction of the Supreme Court in *North*  
10 *Coast* to health care providers who must respond to a potential conflict between the Unruh Act  
11 and the constitutional right to free exercise and expression of religion. *See Harris v. Capital*  
12 *Growth Investors XIV*, 52 Cal.3d 1142, 1174 (1991) (noting the importance of construing the  
13 Unruh Act to avoid exposing “businesses to new liability and potential court regulation of their  
14 day-to-day practices in a manner never intended by the Legislature”), superseded by statute on  
15 other grounds, Civ. Code, § 52, subd. (f).

16           Indeed, neither the original complaint nor the FAC alleges intentional discrimination on  
17 the basis of sex at all. *Id.* at 1177-72 (rejecting argument that the Unruh Act applies to claims of  
18 disparate impact discrimination). The FAC alleges that Mercy made a distinction amongst  
19 patients who sought a hysterectomy based upon whether the procedure was scheduled for gender  
20 dysphoria or another medical condition such as pelvic pain or uterine fibroids. (FAC, ¶ 40). Such  
21 allegations do not state a claim for intentional discrimination on the basis of sex. At most, such  
22 allegations purport to state a claim for disparate impact discrimination, which is not actionable  
23 under the Unruh Act. *Id.*; *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824, 853 (2005).

24           Minton, a transgender man, seeks to hold Dignity Health liable for intentional  
25 discrimination because Mercy, a Dignity Health Catholic hospital, declined to provide him with a  
26 hysterectomy as a treatment for gender dysphoria, but rescheduled the procedure to take place  
27 within 72 hours at a non-Catholic Dignity Health hospital in Sacramento. In the Court’s August  
28 30<sup>th</sup> order sustaining Dignity Health’s demurrer to Minton’s original complaint, the Court noted

1 that both sides agreed the procedure was rescheduled because of Mercy’s interpretation of the  
2 Ethical and Religious Directives for Catholic Health Care Services (the “ERDs”) and, therefore,  
3 the Court found that the case was controlled by the California Supreme Court’s decision in *North*  
4 *Coast*. Specifically, in light of *North Coast*, the Court determined that Minton had “alleged  
5 insufficient facts to show that Dignity Health’s conduct in permitting Mr. Minton to receive a  
6 hysterectomy at another of its hospitals violated Dignity Health’s obligation per Civil Code 51 (b)  
7 to provide ‘full and equal’ access to medical procedures without regard to gender.” (Order  
8 Sustaining Dignity Health’s Demurrer to Verified Complaint (filed August 30, 2017)(the  
9 “Order”)) (citing *North Coast*). The Court granted Minton leave to amend “[b]ecause *it is at least*  
10 *theoretically possible* that Mr. Minton is able to allege sufficient facts to avoid a demurrer. . .*if he*  
11 *can do so in good faith. . .*”) *Id.* (emphasis added)).

12 The amended allegations in the FAC fail to state a claim for the same reasons. Minton  
13 cannot change the alleged fact that Dignity Health did reschedule his procedure to be performed  
14 at a non-Catholic hospital in accordance with the guidance in *North Coast*. Indeed, as Minton  
15 previously pled very clearly, the President of Mercy quickly offered that alternative and the  
16 procedure was not performed immediately because Dr. Dawson, Minton’s physician, had  
17 scheduling conflicts. (Complaint at ¶¶ 24-25.) While the FAC now seeks to obscure this  
18 admission and other important facts giving the complaint an aura of sham pleading, the Court  
19 must ignore contradictory facts pled in the FAC. The FAC also engages in a series of verbal  
20 gyrations in an attempt to bury Minton’s prior allegations that Mercy denied the procedure  
21 because the procedure was scheduled to treat gender dysphoria and the FAC attempts improperly  
22 to equate that decision with denying the procedure because Minton is transgender. But, Minton  
23 cannot contradict his original complaint in the FAC. He pled and still pleads that Mercy’s  
24 decision was based on a medical diagnosis and not because Minton is transgender.

25 None of the changes in the FAC alleviates the fatal defects that caused the Court to sustain  
26 Dignity Health’s previous demurrer. Neither associating the term “transgender” with the medical  
27 condition of “gender dysphoria” nor embellishing the story surrounding Mercy’s rescheduling of  
28 the procedure alters the Court’s conclusion that Dignity Health acted properly under *North Coast*

1 by rescheduling the procedure to take place at a non-Catholic hospital within 72 hours.  
2 Ironically, aside from sham pleading, the FAC does plead new facts that weaken Minton’s claim  
3 even further. For example, the FAC pleads that even though Dignity Health told Minton’s  
4 physician that the procedure could not be performed at Mercy *because it was indicated for the*  
5 *diagnosis of gender dysphoria*, Minton’s physician incorrectly told Minton that Dignity Health  
6 actually rescheduled the procedure *because (apparently in her opinion) he is transgender*. (FAC,  
7 ¶¶ 24-25.) Minton also adds an allegation that he was “devastated” that he was denied the  
8 procedure “because he was transgender” but the new allegations in the FAC establish that this  
9 fact is something that his physician simply made up, not something he or even his physician heard  
10 from Dignity Health.

11 Minton has not offered any allegations that disturb the outcome in this case, as dictated by  
12 the Supreme Court’s interpretation of the Unruh Act in *North Coast*. Specifically, the FAC does  
13 not demonstrate any failure by Dignity Health to provide “full and equal” accommodations. *See*  
14 *North Coast*, 44 Cal. 4th at 1159. Nor does it evince any discrimination by Dignity Health,  
15 regardless of how it is described: intentional, disparate impact, or sex-based. Although Dignity  
16 Health distinguishes between medical conditions, it does so only because, and to the extent, that  
17 is dictated by its religious directives.<sup>1</sup> Such a distinction—between hysterectomies performed to  
18 treat gender dysphoria and hysterectomies performed to treat other medical conditions — is not a  
19 cognizable ground for a claim under the Unruh Act.

20 Even if it were, such a distinction made for religious reasons receives constitutional  
21 protection. Accordingly, Minton’s claim also fails because he ignores decades of jurisprudence  
22 holding that a Catholic hospital may prohibit procedures that violate the hospital’s well-  
23 established religious mandate, in this case, “to protect and preserve bodily and functional integrity  
24

25 <sup>1</sup> That such a distinction incidentally burdens transgender people because they have a higher incidence of  
26 gender dysphoria—a medical condition that is ultimately unrecognized in the Unruh Act—and some  
27 percentage of transgender men have had, or would like to have, a hysterectomy—does not state a cause of  
28 action under the Unruh Act which also does not recognize a cause of action for disparate impact  
discrimination. *Turner v. Ass’n of Am. Med. Colls.*, 167 Cal.App.4th 1401, 1408 (2008) (“A policy that is  
neutral on its face is *not actionable* under the Unruh Act, even when it has a disproportionate impact on a  
protected class”) (emphasis added). In any event, Dignity Health’s policy of distinguishing between  
hysterectomies performed as a treatment for gender dysphoria and hysterectomies performed to treat other  
conditions does not even give rise to disparate impact discrimination.

1 of the person.”<sup>2</sup> See *infra* Section II.B discussing Ethical and Religious Directive 29. In so  
2 doing, the FAC facially infringes on Dignity Health’s freedom of expression and free exercise, as  
3 well as the Catholic hospital’s freedom of conscience and right to avoid excessive entanglement.

4 The Court should sustain the demurrer without leave to amend because there is no  
5 reasonable or even theoretical possibility that Minton can state a claim by further amendment.  
6 *Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985).

## 7 **II. FACTS**

### 8 **A. Minton’s Allegations**

9 The FAC alleges many of the same facts as the original complaint; however, there are  
10 some notable and improper changes in the FAC through which Minton flatly contradicts his  
11 original pleading in order to state a claim. Both pleadings make clear that Minton was diagnosed  
12 with gender dysphoria sometime after 2011. (FAC ¶¶ 9, 17.) In August 2016, Minton scheduled  
13 a hysterectomy for August 30, 2016, to be performed by his physician, Dr. Lindsey Dawson, at  
14 Mercy. (*Id.* ¶¶ 18, 19.) On August 29, 2016, the hysterectomy was cancelled at Mercy. As the  
15 Court noted, the parties agree that Mercy declined to permit the hysterectomy because of its  
16 interpretation of the ERDs. (*See* Order at 2.) Dr. Dawson performed Minton’s hysterectomy at a  
17 non-Catholic Dignity Health hospital on September 2, 2016. (FAC ¶¶ 21, 24, 39.)

18 In the FAC, Minton makes a number of changes apparently intended to address Dignity  
19 Health’s argument that the complaint fails to allege intentional discrimination on the basis of sex.  
20 For example, the FAC (1) adds the term “transgender” each time the medical condition of gender  
21 dysphoria is referenced in an attempt to brand them together and 2) sometimes omits, the term  
22 “gender dysphoria” entirely substituting the term “transgender” to try to compensate for the  
23 absence of any connection between gender dysphoria and transgender identity. (FAC, ¶¶ 3, 5, 26,

24  
25 <sup>2</sup> *Taylor v. St. Vincent’s Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975) (“If the hospital’s refusal to perform  
26 sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is  
27 outweighed by the need to protect the freedom of religion of denominational hospitals ‘with religious or  
28 moral scruples against sterilizations and abortions’”) (citation omitted); *Watkins v. Mercy Med. Ctr.*, 364 F.  
Supp. 799, 803 (D. Idaho 1973) (“Mercy Medical Center has the right to adhere to its own religious beliefs,  
and not be forced to make its facilities available for services which it finds repugnant to those beliefs”) *aff’d*, 520 F.2d 894 (9th Cir. 1975); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212, 1214 (N.D. Tex. 1973)  
 (“The interest that the public has in the establishment and operation of hospitals by religious organizations  
is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or  
await a later date for her sterilization”), *aff’d*, 490 F.2d 81 (5th Cir. 1974).



1 43, 48, 50.) To the extent that these “amendments” contradict the prior clear pleading, they must  
2 be disregarded.<sup>3</sup> Regardless, the FAC continues to plead the key fact (although with different  
3 language) – that Mercy told Minton’s physician that it would not proceed with the hysterectomy  
4 because it was intended to address the “indication” of “gender identity disorder,” the former name  
5 for “gender dysphoria.” (FAC, ¶ 24). The key point remains that the hospital’s decision was not  
6 based on the fact that Minton is transgender, but on the fact that the procedure was intended to  
7 address “gender dysphoria.”<sup>4</sup> As discussed below, this admission requires the conclusion that  
8 Minton has not alleged intentional discrimination. *See infra* Section III.A.4.

9 Troublingly, the FAC makes it clear that Dr. Dawson, not Dignity Health, was the  
10 immediate source of Minton’s hurt and distress. Dr. Dawson, not anyone at Dignity Health, told  
11 Minton that he was denied the procedure because he is transgender. (FAC, ¶ 25 (“When Mr.  
12 Minton asked why [Mercy had declined to provide the procedure], Dr. Dawson explained *her*  
13 *understanding* that the hospital had cancelled his hysterectomy because he was transgender”  
14 (emphasis added)). Thus, Dr. Dawson took it upon herself to advise her patient that Dignity  
15 Health had based its decision on his gender identity rather than to convey exactly what she was  
16 told – that the decision was made based upon a medical diagnosis. One wonders whether this  
17 lawsuit would even exist if Dr. Dawson had simply told her patient the truth. In any event this  
18 new allegation further establishes that Minton has not alleged intentional discrimination based  
19 upon sex. *See infra* Section III.A.4.

20 In another attempt to avoid a demurrer, the FAC deletes all of paragraph 24 of the original  
21 complaint which clearly and succinctly pled that Mercy’s President quickly “*suggested*” an  
22 alternative location for his surgery, and that any delay in receiving his surgery was due to his

23 \_\_\_\_\_  
24 <sup>3</sup> “[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by  
25 omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations  
26 of prior pleadings . . . the policy against sham pleading permits the court to take judicial notice of the prior  
27 pleadings and requires that the pleader explain the inconsistency.” *Owens v. Kings Supermarket*, 198 Cal.  
28 App. 3d 379, 383-84 (1988) (citations omitted; emphasis added). If the amending party fails to do so “the  
court may disregard the inconsistent allegations and read into the amended complaint the allegations of the  
superseded complaint.” *Id.*; *see also Lockton v. O’Rourke*, 184 Cal. App. 4th 1051, 1061 (2010); *Ivanoff v.*  
*Bank of America, N.A.*, 9 Cal. App. 5th 719, 733 (2017) (plaintiff cannot avoid defect in case by omitting  
damaging allegation in subsequent pleading).

<sup>4</sup> The original complaint made the same point in much simpler terms. Complaint, ¶ 22 (“According to Mr.  
Ivie, MSJMC would not allow the hysterectomy to proceed because it was scheduled as part of a course of  
treatment for gender dysphoria, as opposed to any other diagnosis.”)

1 doctor's schedule as can be seen in the following redline of paragraph 24:

2 24. Mr. Ivie further informed Dr. Dawson that MSJMC would not allow the hysterectomy  
3 to proceed because of the "indication" it was intended to address. Mr. Minton's medical file reflected  
4 an "indication" of gender dysphoria, under that condition's former name of "gender identity disorder,"  
5 and Mr. Minton had further informed the MSJMC nurse the previous day that he was a transgender  
6 man undergoing the procedure in conjunction with gender transition.

7 ~~24. As an alternative, Mr. Ivie suggested that Dr. Dawson could get emergency admitting~~  
8 ~~privileges at Methodist Hospital, a non-Catholic Dignity Health hospital about 30 minutes away from~~  
9 ~~MSJMC. Dr. Dawson's schedule could not accommodate that alternative immediately.~~

10 Eliminating these important facts, in this case a judicial pleading admission, is improper and  
11 constitutes sham pleading to the extent that the FAC is to be read any different on this point.<sup>5</sup>

12 However, as noted, the attempt fails in any event because the FAC continues (though in  
13 somewhat obscured form) to plead what happened even though the original complaint was much

14 clearer on the subject. Mercy declined to perform the procedure based upon its religious  
15 convictions, Mercy's President offered to have the procedure performed at a non-Catholic Dignity

16 Health hospital, and the procedure was performed within 72 hours. (FAC, ¶¶ 2, 22, 35, 39.)  
17 Minton's extended riff in the FAC on the calls and interviews he and his physician engaged in

18 after Mercy unsurprisingly declined to perform the hysterectomy procedure does nothing to alter  
19 those facts or to make a case of intentional discrimination. (FAC, ¶¶ 29, 30, 32, 33, 34, 35).

20 Those were his actions, not the hospital's, and Minton cannot create a case by making calls and  
21 being interviewed by the news media.

22 **B. Mercy**

23 Mercy is a Catholic hospital owned by Dignity Health. (FAC ¶ 10.) It was founded in  
24 1967 by the Sisters of Mercy, a congregation of Catholic women religious who carry out the

25 healing ministry of Jesus by bringing health care to millions of people through the founding and  
26 administration of hospitals. The Sisters of Mercy first arrived in Sacramento in 1857 and began

27 <sup>5</sup> Minton's complaint also cites an article that confirms the correct fact that "[t]he hospital tried to schedule  
28 Minton's hysterectomy at another hospital, but it conflicted with [Dr.] Dawson's schedule." KCRA Article  
(cited by FAC ¶ 31.) Notably, Minton also does not allege that his physician, Dr. Dawson, practiced  
exclusively at Mercy. However the FAC also does not specify the other Sacramento hospitals at which Dr.  
Dawson may have had admitting privileges.

1 providing healthcare to the community before the turn of the century.<sup>6</sup> Today the Sisters of  
2 Mercy serve in six health systems and many related facilities across the United States.<sup>7</sup> Cf.  
3 *McKeon v. Mercy Healthcare Sacramento*, 19 Cal.4th 321, 324 (1998) (recognizing the Catholic  
4 identity of Mercy Healthcare Sacramento which was part of Dignity Health’s predecessor  
5 organization, Catholic Healthcare West, and noting that “[n]o activities or procedures shall be  
6 permitted within the facilities owned by the corporation which are contrary . . . to the” ERDs”),  
7 superseded by statute as stated in *Silo v. CHW Med. Found.*, 27 Cal.4th 1097, 1110 (2002).

8 Like its predecessor, the mission of Dignity Health is to “further[] the healing ministry of  
9 Jesus.”<sup>8</sup> Additionally, Mercy is listed in the Official Catholic Directory (OCD), establishing that  
10 Mercy is an official part of the Catholic Church. (See Request for Judicial Notice to Dignity  
11 Health’s Demurrers to First Amended Verified Complaint (“RJN”) Ex. 1.)<sup>9</sup> As such, Mercy is  
12 bound to follow the ERDs, which are promulgated by the U.S. Conference of Catholic Bishops.<sup>10</sup>  
13 (RJN, Ex. 2.) The ERDs’ purpose is to “reaffirm the ethical standards of behavior in health care  
14 that flow from the Church’s teachings about the dignity of the human person” and “to provide  
15 authoritative guidance on certain moral issues that face Catholic health care today.” *Means v.*  
16 *U.S. Conf. of Catholic Bishops*, No. 1:15-CV-353, 2015 WL 3970046, at \*3 (W.D. Mich. 2015),  
17 *aff’d*, 836 F.3d 643 (6th Cir. 2016). Directive 29, concerning integrity of the person, provides,  
18 “All persons served by Catholic health care have the right and duty to protect and preserve their  
19 bodily and functional integrity. The functional integrity of the person may be sacrificed to  
20 maintain the health or life of the person when no other morally permissible means is available.”  
21 Directive 5 provides that “Catholic health care services *must adopt these Directives* as a policy,  
22 [and] *require adherence to them* within the institution as a condition for medical privileges and  
23 employment . . .” (RJN Ex. 2 (emphasis added).) Catholic hospitals that fail to adhere to the

24 <sup>6</sup> <https://www.dignityhealth.org/sacramento/about-us/our-history>

25 <sup>7</sup> <https://www.sistersofmercy.org/what-we-do/healthcare/>

26 <sup>8</sup> <https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values>

27 <sup>9</sup> “An entity is listed in the [OCD] only if a bishop of the Roman Catholic Church determines the entity is  
‘operated, supervised, or controlled by or in connection with the Roman Catholic Church.’ Courts view the  
[OCD] listing as a public declaration by the Roman Catholic Church that an organization is associated with  
the Church.” *Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (citation omitted).

28 <sup>10</sup> “Individual bishops exercise authority under Canon Law to bind all Catholic health care institutions  
located within their diocese to the ERDs as particular law within the diocese.” *Means*, 2015 WL 3970046,  
at \*3.

1 ERDs would violate their own mission and may no longer be qualified as a “Catholic” entity or  
2 permitted to describe themselves as “Catholic.”<sup>11</sup>

3 **III. ARGUMENT**

4 **A. The Unruh Act Claim Fails as a Matter of Law.**

5 **1. *North Coast* is Controlling Authority.**

6 As the Court previously found, the California Supreme Court’s decision in *North Coast*  
7 controls this case. In *United Steelworkers of America v. Board of Education*, 162 Cal.App.3d 823  
8 (1984), the Supreme Court held that its opinions are binding on Courts of Appeal, and not dictum,  
9 when: (a) The Supreme Court’s analysis is relevant to material facts before the Court; and (b)  
10 even when arguably not relevant, *if it is responsive to arguments raised by counsel and*  
11 *presumably intended for guidance of the Court and attorneys.* In *North Coast*, the Court’s  
12 analysis was both responsive and intended to guide in future cases.

13 The parties questioned the standard of scrutiny to be applied to the Unruh Act when its  
14 enforcement burdened religious belief or practice. Responding to that debate, the Court  
15 considered “the least restrictive means” to further the state’s interest in ensuring full and equal  
16 access to medical treatment and held: “To avoid any conflict between [the healthcare providers’]  
17 religious beliefs and the state Unruh Civil Rights Act’s antidiscrimination provisions, defendant  
18 physicians can simply refuse to perform the IUI [intrauterine insemination] medical procedure at  
19 issue here for any patient of North Coast, the physicians’ employer. Or, because they incur  
20 liability under the Act if they infringe upon the right to the ‘full and equal’ services of North  
21 Coast’s medical practice (Civ. Code, § 51, subd. (b); *see id.* §§ 51, subd. (a), 52, subd. (a)),  
22 defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI  
23 receives ‘full and equal’ access to that medical procedure though a North Coast physician lacking  
24 defendants’ religious objections.” *North Coast*, 44 Cal.4th at 1159.

25 The quoted language is both responsive to arguments raised by counsel and intended for  
26

27 <sup>11</sup> <http://archive.azcentral.com/ic/pdf/1221olmsted-decree.pdf>; <http://abcnews.go.com/Health/abortion-debate-hospital-stripped-catholic-status/story?id=12455295>; *see also* <https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied> at p. 7 (“[D]eviation [from the ERDs] can sometimes carry penalties – including the loss of the hospital’s ‘Catholic’ status . . . .”) (last accessed Oct. 23, 2017.)  
28

1 guidance of the Court and attorneys—including in this case where a Catholic hospital’s directive  
2 is based upon 2000 plus years of religious doctrine.<sup>12</sup>

3 **2. Dignity Health Followed the Rule Stated in the California Supreme**  
4 **Court’s Decision in *North Coast*.**

5 *North Coast* struck a balance between the Unruh Act’s anti-discrimination provisions and  
6 health care providers’ religious rights. Dignity Health followed the rule in *North Coast*. Nothing  
7 in Minton’s amended pleading suggests otherwise. The FAC continues to demonstrate that  
8 Dignity Health acted in accord with the Supreme Court’s instructions to health care providers  
9 confronted with a conflict between religious tenets and a patient’s request for health care. *See*  
10 *North Coast*, 44 Cal. 4th at 1159. Consequently, Minton’s Unruh Act claim still fails.

11 In *North Coast*, the Supreme Court held that where certain physicians in a medical group  
12 had religious objections to providing fertility treatment to lesbians, their medical practice could  
13 avoid liability under the Unruh Act by “ensur[ing] that every patient [receive the procedure]  
14 th[r]ough a North Coast physician lacking [the objecting health care providers’] religious  
15 objections.” *North Coast*, 44 Cal.4th at 1159.<sup>13</sup> In determining the least restrictive means, the  
16 Court balanced the state’s interest in ensuring full and equal access to medical treatment and the  
17 health care provider’s constitutional rights, and found that a health care provider could provide  
18 full and equal access to medical treatment by ensuring that the patient received the procedure  
19 from a provider that did not have religious objections.

20 This balance is not new. For example, in the context of compliance with advance health  
21 care directives, the California Legislature has expressly authorized transfer of patients to avoid  
22 burdening the deeply held religious beliefs of health care providers and case law acknowledges  
23 the need to balance the interests of patients and health care providers where such conflicts arise.  
24 *See* Probate Code § 4736 (“A health care provider . . . that declines to comply with an individual

25 <sup>12</sup> For these reasons, the standard identified in *North Coast* is not dictum. Even if the *North Coast* holding  
26 were deemed to be dicta it is well-established that such statements should be “considered persuasive.”  
27 *United Steelworkers*, 162 Cal.App.3d at 835. “A correct principle of law may be announced in a given case,  
28 although it may not be necessary to there apply it . . .” *Smith v. Cty. of Los Angeles*, 214 Cal. App. 3d 266,  
297 (Ct. App. 1989), *reh’g denied and opinion modified* (Oct. 1, 1989) (citing *San Joaquin etc. Irr. Co. v. Stanislaus*, 155 Cal. 21, 28, 99 P. 365 (1908) ) (emphasis in original).

<sup>13</sup> The Court also held that the practice could avoid liability by refusing “to perform the IUI medical  
procedure . . . for any patient of North Coast.” *Id.*

1 health care instruction or health care decision shall do all of the following . . . (b) Unless the  
2 patient or [authorized] person . . . refuses assistance, immediately make all reasonable efforts to  
3 assist in the transfer of the patient to another health care provider or institution that is willing to  
4 comply with the instruction or decision”);<sup>14</sup> see *Brownfield v. Daniel Freeman Marina Hosp.*, 208  
5 Cal. App. 3d 405, 409, n. 2 (1989) (“‘Access to’ the treatment may take the form of transfer of  
6 the patient to another medical facility or another physician”); *Conservatorship of Morrison*, 206  
7 Cal. App. 3d 304, 311(1988) (“[N]o physician should be forced to act against his or her personal  
8 moral beliefs if the patient can be transferred to the care of another physician who will follow the  
9 [patient’s] direction”); *North Coast*, 44 Cal.4th at 1162-63 (Baxter, J. concurring) (“At least  
10 where the patient could be referred to with relative ease and convenience to another practice, I  
11 question whether the state’s interest in full and equal medical treatment would compel a physician  
12 in solo practice to provide treatment to which he or she has sincere religious objections”).

13         There are two distinctions between the circumstances of this case and *North Coast*—  
14 neither of which helps Minton. First, the physician defendants in *North Coast* conceded that they  
15 treated, or at least *viewed*, patients differently based on sex. Here, by contrast, Dignity Health  
16 vehemently rejects the notion that it differentiates based on sex or gender identity and neither the  
17 original complaint nor the FAC alleges that Dignity Health refuses to treat transgender people for  
18 any procedure besides one that is forbidden by religious directives.<sup>15</sup> Second, *North Coast*  
19 involved a medical procedure performed by a different doctor in the same medical practice,  
20 while, as this Court noted in the Order, this case involves a procedure performed by the same  
21 doctor in a different *facility*. However, as the Court ruled, the instructions provided in *North*  
22 *Coast* are “at least in some situations, also applicable to a medical procedure performed by the  
23

24 <sup>14</sup> See Probate Code § 4734 (b) (“A health care institution may decline to comply with an individual health  
25 care instruction or health care decision if the instruction or decision is contrary to a policy of the institution  
26 that is expressly based on reasons of conscience . . .”).

27 <sup>15</sup> Mercy, as a Catholic hospital, treats all of its ministry’s patients with respect and compassion. The  
28 Church articulated this requirement at the Second Vatican Council in 1965, stating: “with respect to the  
fundamental rights of the person, *every type of discrimination*, whether social or cultural, whether based on  
sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to  
God’s intent.” (Vatican Council II, Pastoral Constitution of the Church in the Modern World, n. 29  
(emphasis added)). And ERD 23 provides that “[t]he inherent dignity of the human person must be  
respected and protected regardless of the nature of the person’s health problem or social status. The respect  
for human dignity extends to all persons who are served by Catholic health care.”

1 same doctor in a different facility.” (Order at 2.) *See also North Coast*, 44 Cal.4th at 1162-63  
2 (Baxter, J. concurring) (noting that the balance may have been different if the objecting physician  
3 was a sole practitioner who could not refer a patient to a colleague at the same practice.)

4 **3. Minton Cannot Re-Cast His Allegations of Gender Dysphoria-**  
5 **discrimination as “Sex” Discrimination.”**

6 Minton’s amended pleading fails to re-cast a medical condition-discrimination claim—  
7 that is not cognizable under the Unruh Act—as one of “sex” discrimination which is actionable.  
8 Civ. Code § 51(e)(3); Gov. Code §12926(i) (Although the Unruh Act prohibits discrimination on  
9 the basis of specific “medical conditions” it does not include gender dysphoria.)

10 Minton strategically adds the word “transgender” to each allegation that initially  
11 referenced only his diagnosis of gender dysphoria. (*See, e.g.*, FAC ¶¶ 3, 43.) In other instances  
12 he omits the term “gender dysphoria” altogether and replaces it with “transgender.” (*See, e.g., id.*  
13 ¶ 50.) Minton also attempts to revise the explanation provided by Dignity Health for cancelling  
14 his hysterectomy at Mercy. For example, in paragraph 23 of his initial Complaint, he stated that  
15 Mercy’s president explained to Dr. Dawson that Mercy would not allow the hysterectomy to  
16 proceed because it was scheduled as part of a course of treatment for gender dysphoria, as  
17 opposed to any other medical diagnosis. In the FAC, however, that statement is deleted and  
18 replaced with a new allegation that Mercy’s president told Dr. Dawson that Mercy would not  
19 allow the hysterectomy to proceed because of the “indication” of gender dysphoria (contained in  
20 Minton’s medical file under that condition’s former name of “gender identity disorder”) it was  
21 intended to address *and because Minton had informed a nurse at Mercy the previous day that he*  
22 *was a transgender man* undergoing the procedure in conjunction with gender transition. (*Id.* ¶ 24  
23 (emphasis added to signify addition to FAC.)).

24 Once again, the sham pleading bar forecloses Minton’s attempts to re-cast his claim by  
25 omitting and manipulating the “facts” he originally alleged. *See Owens*, 198 Cal. App. 3d at 383-  
26 84; *Continental Ins. Co. v. Lexington Ins. Co.*, 55 Cal.App.4th 637, 646 (1997) (A plaintiff may  
27 not “discard factual allegations of a prior complaint, or avoid them by contradictory averments, in  
28 a superseding, amended pleading.”) Therefore, Minton’s admissions in the original Complaint

1 remain within the Court’s cognizance and the statements designed to conceal fundamental  
2 vulnerabilities in his case will not be accepted. *Lockton*, 184 Cal. App. 4th at 1061.

3 From the FAC, the allegations of discrimination—based on “sex” or anything else—  
4 clearly originated with Dr. Dawson and not Dignity Health. (FAC ¶ 25) (Although Mercy  
5 explained that its ERDs precluded a hysterectomy for gender dysphoria, “Dr. Dawson called Mr.  
6 Minton and informed him that Dignity Health had cancelled his surgery . . . because he was  
7 transgender.”) While the distinction between a neutral policy that has an unintended consequence  
8 and a discriminatory policy that causes intentional harm appears to have been lost on Dr. Dawson,  
9 the California Supreme Court is keenly aware of the difference. *See, e.g., Harris*, 52 Cal.3d at  
10 1172) (no violation of Unruh Act notwithstanding disparate impact on women).<sup>16</sup>

#### 11 4. Minton Fails to Allege Intentional “Sex” Discrimination.

12 Minton’s failure to allege intentional and invidious sex discrimination—a prerequisite for  
13 stating a sex discrimination claim under the Unruh Act—is an independent ground to sustain the  
14 demurrer. *See* Cal. Civ. Code § 51(b). Minton’s allegations of discrimination on the basis of  
15 “sex” are conclusory and refuted by the FAC itself. (FAC ¶ 24.)

16 Dignity Health’s refusal to permit hysterectomies for people diagnosed with gender  
17 dysphoria while permitting hysterectomies for people with other medical conditions – does not  
18 intentionally discriminate against transgender people. According to the FAC, this ERD-based  
19 policy impacts transgender people because a significant percentage of transgender men with  
20 gender dysphoria have had, or want, a hysterectomy. Minton cites statistical evidence gathered  
21 from a 2015 survey to establish that a significant number of transgender men have had or say they  
22 would someday like to have a hysterectomy. (FAC ¶ 16.) However, the alleged fact that a  
23 hospital’s alleged policy of refusing to provide a hysterectomy as a treatment for gender  
24 dysphoria *may impact* a protected group such as transgender men does state a claim for  
25

26 <sup>16</sup> *See also Koebke*, 36 Cal.4th at 853 (2005) (same); *Turner*, 167 Cal.App.4th at 1408-09 (same); *Greater*  
27 *L.A. Agency on Deafness v. Cable News Network, Inc.*, 742 F.3d 414, 427 (9th Cir. 2014) (same); Civ. Code  
28 § 51(c) (“This section shall not be construed to confer any right or privilege on a person that is . . .  
applicable alike to persons of every sex . . .”). Dignity Health is aware of no authority for the notion that  
liability for intentional discrimination can be founded on a non-party’s re-interpretation of what that person  
was told.



1 intentional discrimination. Statistical evidence-based allegations at best might state a claim for  
2 disparate impact discrimination in the right case, but it is not actionable under the Unruh Act.

3 In *Koebke* the Court held that a policy against extending the same club membership  
4 benefits to registered domestic partners as to married members, did not facially violate the Unruh  
5 Act's proscription against sexual orientation discrimination even though "using marriage as a  
6 criterion for allocating benefits *necessarily* denies such benefits to all of its homosexual members  
7 who, like plaintiffs, are unable to marry". 36 Cal.4th at 853 (emphasis added).

8 Here, by contrast, every transgender man seeking treatment for gender dysphoria does not  
9 *necessarily* seek a hysterectomy, *i.e.* transgender treatment does not always mandate a  
10 hysterectomy and the two are not perfect coincidence. However, even if they were, (*i.e.* 100% of  
11 transgender men were diagnosed with gender dysphoria and each sought treatment via  
12 hysterectomy), Minton's claim would still fail under the Unruh Act. Dignity Health's actions,  
13 described in the FAC, reflect the absence of any discriminatory animus against Minton. Mercy  
14 did not categorically refuse to treat Minton;<sup>17</sup> it declined to perform a hysterectomy based on the  
15 ERDs and an indication that it was solely for treatment of gender dysphoria. The FAC does not  
16 and cannot allege otherwise. Mercy explained this precise rationale to Dr. Dawson and would  
17 have performed any other procedure for Minton which did not conflict with its interpretation of  
18 the ERDs.<sup>18</sup> Minton's allegation that Dignity Health ensured the performance of the procedure at  
19 *one of its own* hospitals unequivocally demonstrates that it does not intentionally discriminate.<sup>19</sup>

20 **B. The State and Federal Constitutions Bar Minton's Claim.**

21 Minton's claim is also barred because he incorrectly reads the Unruh Act in absolute  
22 terms despite the constitutional issues clearly raised by the FAC. A Catholic hospital's rights to  
23 free exercise of religion, as well as to freedom of expression, are enshrined in the state and federal  
24 constitutions. Cal. Const., art. I, § 4; U.S. Const. amend. I; *People v. Woody*, 61 Cal.2d 716, 718,

25 <sup>17</sup> Notably, Minton's FAC is silent as to how long and comprehensive his treatment at Mercy had been until  
26 the time he sought a hysterectomy for gender dysphoria.

26 <sup>18</sup> ERD 29 does not operate to preclude every transgender man with gender dysphoria from receiving a  
27 hysterectomy at Mercy.

27 <sup>19</sup> As stated, Minton cannot-and does not-allege a disparate impact claim under the Unruh Act. Even if a  
28 disparate impact claim were cognizable, Minton would be required to plead and prove the absence of a  
"substantial business justification for the challenged practice." *Harris*, 52 Cal.3d at 1172. Here, the fact  
that Mercy is a Catholic hospital, bound to follow the ERDs, easily satisfies that requirement.

1 n.1, 727 (1964) (religious freedom is “guaranteed” under the California Constitution, and “the  
2 right to free religious expression embodies a precious heritage of our history”); Cal. Const., art. I,  
3 § 2; U.S. Const. amend. I. Forcing Mercy to violate the ERDs, convey the symbolic message that  
4 a hysterectomy to treat gender dysphoria is consistent with the healing ministry of Jesus and  
5 potentially forcing the hospital to become a secular institution is the ultimate burden.

6 Presumptively applying strict scrutiny in such instances, the Supreme Court found that the  
7 Unruh Act withstood the highest level of scrutiny but only because the Court found room within  
8 the Unruh Act to accommodate the deeply held religious belief of the physicians. *North Coast*,  
9 44 Cal.4th at 1158-59. The Court interpreted the Unruh Act as permitting a patient to receive  
10 requested treatment from non-objecting health care providers and did not adopt the narrow and  
11 absolute interpretation urged by Minton that would render anything other provision of the service  
12 by the objecting provider to be a *per se* violation of the statute. *Id.* *North Coast* provides that the  
13 “full and equal” requirement may be satisfied by a practice that accommodates a defendant’s  
14 religious and expressive rights and that remains correct even if Minton must travel somewhat  
15 longer from home and his doctor has a busy schedule. (FAC ¶ 35 (“Methodist Hospital is located  
16 about 30 minutes’ drive away from MSJMC . . . Dr. Dawson and the other physician who would  
17 be assisting her during Minton’s procedure could not easily fit a surgery at Methodist Hospital  
18 into a workday filled with other commitments . . .”). Adopting Minton’s interpretation of the  
19 statute in this case, would be akin to the *North Coast* plaintiff insisting that her IUI be performed  
20 only by one of the two religious objectors at the practice because their schedules were more  
21 convenient for her. *North Coast* plainly does not support such a result.

22 Moreover, although Minton has argued that strict scrutiny does not apply under the federal  
23 constitution, the U.S. Supreme Court has not agreed, particularly where, as here, the case involves  
24 expressive association. *See Boy Scouts of Amer. v. Dale*, 530 U.S. 640 (2000) (First Amendment  
25 protects the Boy Scouts’ rights to exclude gay scoutmasters); *Hosanna-Tabor Evangelical*  
26 *Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (a Court order compelling  
27 Catholic Church to ordain women would violate First Amendment); *Hurley v. Irish-American*  
28 *Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (Massachusetts’ public

1 accommodations law could not be applied to force parade organizers to admit openly gay parade  
2 unit because it posed an impermissible burden on constitutional rights).

3 The Catholic Church (including its apostolate Catholic hospitals) is clearly an expressive  
4 association that deserves as much protection as the Boy Scouts or a parade. The ERDs specifically  
5 provide that “Catholic health care expresses the healing ministry of Christ,” that the Catholic health  
6 care ministry is “rooted in a commitment to promote and defend human dignity,” and that “the  
7 biblical mandate to care for the poor requires” Catholic health care institutions “to express this in  
8 concrete action at all levels of Catholic health care.” (RJN, Ex. 2 at 8, 10.) ERD 5, requiring all  
9 Catholic health care services to adopt the ERDs as policy, and ERD 29 and 53, obliging Catholic  
10 hospitals to preserve the functional integrity of the human body and prohibit direct sterilization,  
11 inform Catholic health care providers how they must express the healing ministry of Christ. (RJN,  
12 Ex. 2 at 20, 27.) Thus, forcing Mercy to perform prohibited medical procedures contrary to Catholic  
13 doctrine would directly interfere with the expression of Catholic health services and severely burden  
14 Catholic health care’s ability to express its particular message about human dignity. As in *Dale*, such  
15 a burden cannot be justified even in the face of a compelling state interest. *Dale*, 530 U.S. at 659.

16 Finally, the relief sought by Minton would excessively entangle the Court in Catholic  
17 religious doctrine and impermissibly intrude on matters of church governance, including the  
18 application and interpretation of the ERDs, their significance and application. *Means*, 2015 WL  
19 3970046, at \*\*12-13 (court could not be required to interpret the ERDs whose application was  
20 “inextricably intertwined with the Catholic Church’s religious tenets,” to determine whether their  
21 application constituted negligence.)

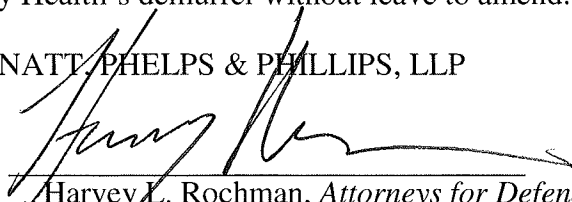
22 **IV. CONCLUSION**

23 Minton’s single claim fails as a matter of law for multiple reasons and is incurably  
24 defective. The Court should sustain Dignity Health’s demurrer without leave to amend.

25 Dated: October 23, 2017

MANATT, PHELPS & PHILLIPS, LLP

26  
27 By:

  
Harvey L. Rochman, Attorneys for Defendant  
DIGNITY HEALTH

1 **PROOF OF SERVICE**

2 I, Vanessa Q. Le, declare as follows:

3 I am employed in the County of Los Angeles, State of California, over the age of eighteen  
4 years, and not a party to the within action. My business address is: 11355 West Olympic  
Boulevard, Los Angeles, California 90064.

5 On October 23, 2017, I served the following document(s) described as: **DEFENDANT**  
6 **DIGNITY HEALTH'S MEMORANDUM OF POINTS AND AUTHORITIES IN**  
7 **SUPPORT OF DEMURRERS TO FIRST AMENDED VERIFIED COMPLAINT** on the  
interested parties in this action, addressed as follows:

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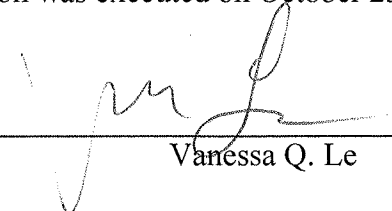
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21  **(BY ELECTRONIC MAIL)** Based on a court order or an agreement of the parties to  
22 accept electronic service, I transmitted such document(s) electronically via File &  
23 Serve Xpress, the court's approved vendor for electronic service and filing of  
documents. The transmission was reported as complete and without error.

24 I declare under penalty of perjury under the laws of the State of California that the  
25 foregoing is true and correct and that this declaration was executed on October 23, 2017, at Los  
26 Angeles, California.

27   
28 \_\_\_\_\_  
Vanessa Q. Le