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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

EVAN MINTON,

Plaintiff,

vs.

DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY SAN JUAN MEDICAL CENTER,

Defendants.

Case No. CGC 17-558259

DEFENDANT DIGNITY HEALTH'S REPLY BRIEF IN SUPPORT OF DEMURRERS TO FIRST AMENDED VERIFIED COMPLAINT

Date: November 17, 2017
Time: 9:30 am
Dept.: 302

Hearing Reservation No. 10231117-08

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I. INTRODUCTION

Plaintiff Evan Minton's ("Minton") opposition to Mercy San Juan Medical Center's ("Mercy") demurrer establishes that Minton has not pled – and cannot plead – a viable claim for intentional sex discrimination under the Unruh Act. Accordingly, the Court should sustain Mercy's demurrer without leave to amend.

First, Minton cannot avoid the Supreme Court's analysis in *North Coast Women's Care Medical Group v. Superior Court,* 44 Cal.4th 1145 (2008), regardless of whether that analysis is binding or dicta. Minton continues to allege "insufficient facts to show that Dignity Health's conduct in permitting Mr. Minton to receive a hysterectomy at another of its hospitals violated Dignity Health's obligation per Civil Code § 51 (b) to provide 'full and equal' access to medical procedures without regard to gender." (Order Sustaining Dignity Health's Demurrer to Verified Complaint (filed August 30, 2017) (the "Order") (citing *North Coast*)). Nor can Minton avoid his admission that, in accordance with the guidance in *North Coast*, Dignity Health quickly offered to reschedule his procedure at Methodist hospital, which is not Catholic, and the procedure was performed there less than 72 hours later.

Second, Minton's new allegations detailing his purported efforts to exert pressure on Mercy not only fail to establish an actionable claim, but are completely irrelevant. In fact, a careful reading of the Opposition and the FAC establishes that Minton's purported pressure had nothing to do with the outcome. Minton's procedure was canceled on August 28. The very next day, on August 29, 2017 – before Minton even knew the surgery at Mercy was canceled – Dignity Health informed Dr. Dawson that, although the procedure could not be performed at Mercy, she could perform the procedure at Methodist Hospital. *See* Section II(B), below. Thus, all of Minton's publicity-seeking was irrelevant to the outcome. Instead, it appears that Dr. Dawson (i) failed to inform Minton about the real reason that Dignity Health declined to perform the procedure – that it was scheduled for gender dysphoria as opposed to pelvic pain or other medical conditions for which the Ethical and Religious Directives for Catholic Health Care ("ERDs") would permit the procedure, (ii) incorrectly told Minton that the procedure was canceled because Minton was transgender, (iii) failed to inform Minton of Dignity Health's immediate willingness

to arrange for the procedure to be performed at Methodist and (iv) is herself responsible for the minimal delay that did occur. In any event, the new facts pled by Minton do not change the result. Minton cannot plead an actionable claim.

Third, Minton has not pled any intentional discrimination by Dignity Health, regardless of how it is described. Minton cannot erase the alleged *fact* that Mercy refused to permit his hysterectomy "because it was scheduled as part of a course of treatment for gender dysphoria," *and not because of animosity* toward transgender individuals generally or Minton specifically. (Compl. ¶ 22; FAC ¶ 24.) And, although Dignity Health distinguishes between medical conditions, it does so only because of, and to the extent that is dictated by, the ERDs. Such a distinction—between hysterectomies performed to treat gender dysphoria and hysterectomies performed to treat other medical conditions — is not a cognizable ground for a claim under the Unruh Act.

Fourth, Minton ignores decades of jurisprudence holding that a Catholic hospital may prohibit procedures that violate the hospital's well-established and sincerely-held religious belief. Though Minton dismisses Mercy's guaranteed constitutional rights, there is no doubt that the state and federal constitutions protect Catholic hospitals from being forced to use their facilities to perform procedures that violate basic tenets of Catholicism. Adherence to the ERDs is not optional. (*See* Dem. Mem. at 7:8-8:2; Request for Judicial Notice ("RJN"), Ex. 2 at 4, 12, 29 and 53.) Medical procedures that are not permitted are judged morally wrong by the Church and it is a sin to permit them.

Compelling Mercy to commit sin violates its constitutional rights. Cal. Const., art. I, §§ 2 and 4; U.S. Const., 1st Am. And, state laws that burden these freedoms have been repeatedly subjected to strict scrutiny. *Catholic Charities of Sacramento v. Sup. Ct.,* 32 Cal.4th 527, 562 (2004); *North Coast,* 44 Cal.4th at 11598-59. Here, the requested relief fails the application of strict scrutiny (or any level of scrutiny) because of the substantial interference with Mercy's constitutional rights and limited inconvenience to Minton, who promptly received the same service he sought at a local Dignity Health non-Catholic hospital.[1] Accordingly, the Court should

[1] The ACLU has conceded that it is inappropriate to compel religious health care providers to perform a

sustain the demurrer without leave to amend.

II. THE COURT SHOULD SUSTAIN MERCY'S DEMURRERS WITHOUT LEAVE TO AMEND

A. Dignity Health Followed the Rule in the Controlling *North Coast* Decision.

Minton raises a series of spurious supposed distinctions between the facts in *North Coast* and the facts here.[2] *North Coast* makes it clear that a healthcare provider's ability to provide services without sacrificing its religious convictions is an essential factor in determining whether enforcement of the Unruh Act is the least restrictive means of ensuring the state's interest in full and equal access to medical care and thus was a core part of the decision. *North Coast,* 44 Cal.4th at 1159. Minton admits he received the treatment he wanted, but at a different Dignity Health hospital. Not only is this the equivalent of the specific compliance method suggested by the Supreme Court, it establishes that forcing Mercy to perform the procedure is not the least restrictive means to ensure full and equal medical treatment. *See id.* at 1162-63 (Baxter, J. concurring) (noting balance favored enforcement of the Unruh Act because the physicians could "avoid any conflict with their religious beliefs").

Minton also argues that *North Coast* is dicta and not persuasive authority. (Opp. 10:25-12:19.) While Dignity Health contends that the rule in *North Coast* was a part of the decision, this Court has already decided in the Order that *North Coast* is at least clearly persuasive Supreme Court authority that cannot be ignored. The Supreme Court in *North Coast* was clearly providing instruction to the parties and presumably also to lower courts. Contrary to Minton's claim (Opp. 12:6-14), guidance of a lower court on remand is not the only circumstance in which a higher court's decision is binding. (*See* Dem. Mem. at 9, n. 12.)[3]

North Coast struck a balance between the Unruh Act's anti-discrimination provisions and healthcare providers' religious rights.[4] Dignity Health followed the rule in *North Coast.* Nothing

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particular treatment where the claim would "compel devout Catholics to engage in behavior ... in violation of their faith." ACLU Amicus Brief in *Catholic Charities of Sacramento v. Sup. Ct.*, Cal. S.Ct. No. S099822 (Jan. 18, 2001) p. 37. *See also* ACLU Amicus Brief in *Benitez v. North Coast Women's Care Med. Grp.*, Cal. S.Ct. No. S142892 (Apr. 27, 2007), p. 2.

[2] Minton's attempt to distinguish *North Coast* because Dr. Dawson was willing to perform the hysterectomy procedure is obviously irrelevant because the issue is *Mercy's* religious objection, not Dr. Dawson's. Similarly, for purposes of this analysis, there is no material difference between the physicians in the medical clinic in *North Coast* and Mercy, a Catholic hospital.

[3] Minton's argument that the "rule" cited was not responsive to arguments raised by counsel is clearly incorrect. Minton concedes the issue was raised in the plaintiffs' brief. (Opp. 11:24-12:19 and n.7.)

[4] Minton's mischaracterization of Mercy's argument, that *North Coast* merely requires that "a patient

in Minton's amended pleading suggests otherwise. Consequently, Minton's Unruh Act claim still fails.

B. Minton Cannot Avoid His Judicial Admissions.

Minton fabricates an argument that it took a "flurry of advocacy" to obtain his surgery,[5] but he cannot change the admitted facts that (1) he received a hysterectomy at Methodist Hospital, a Dignity Health hospital, (2) within 72 hours of the original surgery time, (3) because Dignity Health made the procedure available to him. (FAC ¶ 35; Compl. ¶¶ 24-25.) But for his own surgeon's schedule, Minton would have had the surgery even sooner. (Compl. ¶ 24.) In fact, Minton admits that Dr. Dawson knew Dignity Health would arrange for the procedure at Methodist Hospital before she even informed Minton that the surgery at Mercy was canceled.

Minton's new allegations (FAC ¶¶ 30-35), and the original complaint material that he strategically omitted from the FAC, are obviously meant to distract from the admission in paragraph 24 of the Complaint that "*Mr. Ivie suggested* that Dr. Dawson could get emergency admitting privileges at Methodist Hospital, a non-Catholic Dignity Health hospital about 30 minutes away from MSJMC. Dr. Dawson's schedule could not accommodate that alternative immediately." (Compl. ¶ 24 (emphasis added).) Omitting this statement in the FAC was neither a "factual clarification" nor an "amplification[], for which [Minton] was given leave to amend." (Opp. 10:10.) To the contrary, Minton's attempt to change the facts he pled violates the prohibition on sham pleading and should be ignored.

Moreover, Minton admits that Brian Ivie, Mercy's president, offered the alternative of going to Methodist Hospital on August 29, the day after the surgery was canceled and *before* Minton was even aware of the cancellation. In footnote 3 of the Opposition, Minton states that

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ultimately get treatment, regardless of where, or when, or how such arrangements are made"—is grossly inaccurate. (Opp. 14:2-6.) Minton knows that is not what happened, and he now knows that Mercy arranged for the surgery to proceed immediately at Methodist Hospital and informed Dr. Dawson of this fact before she informed Minton that the surgery could not proceed at Mercy. *See* Section II(B), *infra*.

[5] These allegations are belied by the very media coverage upon which Minton relies. The first articles that were published on August 30, 2016, reported that "The hospital tried to schedule Minton's hysterectomy at another hospital, but it conflicted with the [*sic*] Dawson's schedule." http://www.kcra.com/article/carmichael-faith-based-hospital-denies-transgender-man-hysterectomy/6430342 ("KCRA Article"); *see also* http://www.sacbee.com/news/local/article98943597.html ("Despite Tuesday's surgery cancellation, Dr. Dawson said Dignity Health officials were helpful in getting her set up with emergency privileges at Methodist Hospital of Sacramento, a Dignity Health facility that is not bound by Catholic doctrines. 'I don't blame the staff,' Dawson said. 'I don't blame the administrators. I blame the (Catholic) doctrines.'"

"Dr. Dawson initiated the conversation with Mr. Ivie in which the prospect of Mr. Minton's surgery taking place at Methodist Hospital first arose. FAC ¶ 23." Consistent with his original Complaint, Minton's remaining allegations show that this conversation happened on August 29, 2017 – before Dr. Dawson even told Minton that the surgery at Mercy was canceled. (FAC ¶¶ 22-23 (Dr. Dawson contacted Mercy and spoke with Mr. Ivie "the next day"), ¶ 25 (in the early afternoon of August 29, Dr. Dawson told Minton the surgery was canceled).) Similarly, as noted in Dignity Health's moving papers, Dr. Dawson, not Dignity Health, was the sole source of the notion that the procedure was canceled because Minton is transgender. What Dignity Health actually told Dr. Dawson is that the procedure was canceled because it was intended to address gender dysphoria. (FAC ¶ 26; *compare* Compl. ¶ 22 (Ivie told Dr. Dawson the surgery would not be permitted because it was "part of a course of treatment for gender dysphoria").) Accordingly, Minton's public relations efforts were unnecessary because Dignity Health had already offered Methodist Hospital as an alternative. Embellishing an amended complaint with irrelevant allegations meant to obfuscate a prior admission is textbook sham pleading.

C. Minton Fails to Allege Intentional Discrimination.

Minton wrongly argues that "[r]efusing to treat gender dysphoria is, by definition, sex discrimination against transgender people." (Opp. 9:9-10.) This sweeping statement is an incorrect legal conclusion, which the court should ignore. *See Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992). Minton may have gender dysphoria because he is transgender, but refusing to perform a hysterectomy to treat gender dysphoria is not the same as refusing to treat Minton because he is transgender. This distinction is key to an intentional discrimination claim, and Minton cannot conflate the two. In *Koebke v. Bernardo Heights Country Club*, the Supreme Court held that a policy against extending the same club membership benefits to registered domestic partners as to married members, did not violate the Unruh Act's proscription against sexual orientation discrimination, even though "using marriage as a criterion for allocating benefits *necessarily* denies such benefits to all of its homosexual members who, like plaintiffs, are unable to marry."[6] 36 Cal. 4th 824, 853 (2005) (emphasis added). As in *Koebke*, the alleged

[6] Here, by contrast, not every transgendered man seeks a hysterectomy. Minton asks the Court to take judicial notice of medical guidelines that "list hysterectomy/ovariectomy as *one* of the treatments medically

necessary *impact* of Mercy's compliance with the ERDs on transgender people is insufficient to state a claim for intentional discrimination.

The Unruh Act 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); *see also Harris v. Capital Growth Inv'rs XIV*, 52 Cal. 3d 1142, 1149 (1991), *superseded on other grounds by* Civil Code § 51(f); CACI No. 3060 (Unruh Act violation requires proof that "substantial motivating reason for defendant's conduct was the plaintiff's protected class). Here, Mercy's adherence to the ERDs, a neutral policy that distinguishes between hysterectomies performed as a treatment for gender dysphoria and hysterectomies performed to treat other conditions, does not constitute intentional sex discrimination—even if it burdens transgender people because they have a higher incidence of gender dysphoria.

Minton cites *Hankins v. El Torito Restaurants, Inc.*, 63 Cal.App.4th 510 (1998) for the proposition that California courts have upheld disparate impact claims under the Unruh Act.[7] (Opp. at 8:11-15.) However, in *Harris,* decided after *Hankins*, the California Supreme Court made clear that only intentional discrimination is prohibited by the Unruh Act and expressly refused to extend the disparate impact test to claims under the Unruh Act. "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit *intentional* discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test . . . to a general

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necessary to address gender dysphoria in *some* transgender men." *Id.* (citing RJN, Ex. 1, at 54-57)(emphasis added). Indeed even if the medical guidelines had listed "hysterectomy/ovariectomy as [the only] treatment[] medically necessary to address gender dysphoria in [all] transgender men," legal authority—including *Koebke*—does not permit him to equate gender dysphoria with transgender identity. Unsurprisingly, Minton cites no legal authority in support of his argument that "[r]efusing to treat gender dysphoria is, by definition . . . discrimination against transgender people."

[7] *Hankins* has been questioned, criticized, and not followed on that issue. *See Greater Los Angeles Agency on Deafness, Inc. v. CNN*, 742 F.3d 414, 426-27 (9th Cir. 2014) ("*Hankins* does nothing to alter the California Supreme Court's clear statement . . . that the Unruh Act requires a showing of *willful, affirmative misconduct to establish intentional discrimination*") (emphasis added); *Nat'l Fed'n of Blind v. Target Corp.*, 582 F.Supp.2d 1185, 1206 (N.D. Cal. 2007) ("[*Hankins*] is far from clear on the nature of the intent showing required by the Unruh Act"). In addition, *Hankins* rejected the defendant's contention that it had a facially neutral policy prohibiting access to employee restrooms, holding that the policy itself was to provide restrooms to patrons that were not physically disabled but to deny restroom access to physically disabled patrons even though there was an available restroom. *Hankins*, 63 Cal.App.4th at 518.

discrimination-in-public-accommodations statute like the Unruh Act." *Harris*, 52 Cal.3d at 1149. "By its nature, an adverse impact claim challenges a standard that is applicable alike to all such purposes," and thus is not prohibited by the Unruh Act. *Id.* at 1172; Civ. Code § 51(c).

A policy that permits hysterectomies when necessary "to cure or alleviate a present and serious pathology," but does not permit the removal of otherwise healthy organs, is facially neutral. Finally, even if a disparate impact claim were allowed, the plaintiff is still required to plead the absence of a "substantial business justification for the challenged practice." *Harris*, 52 Cal.3d at 1171. The fact that Mercy is a Catholic hospital, bound to follow the ERDs, easily satisfies that requirement. *See generally McKeon v. Mercy Healthcare Sacramento*, 19 Cal.4th 321, 324 (1998).[8]

D. The Relief Sought by Minton Would Violate Mercy's Constitutional Rights to Free Exercise and Expression of Religion.

Minton's statement that his allegations do not disclose that constitutional protections bar his claim is not correct. (Opp. at 14:9-12.) As Minton and Dr. Dawson admit, Mercy refused to permit a hysterectomy as a treatment for gender dysphoria because it was guided by the ERDs.[9] The ERDs are an expression of the Catholic faith as it applies to Catholic health services such as Mercy, which itself expresses the healing ministry of Jesus. Accordingly, the FAC clearly discloses that the relief Minton seeks would directly conflict with Mercy's constitutional rights.

E. The State and Federal Constitutions Bar Minton's Claim.

Bizarrely, Minton argues that Mercy "does not cite any cases to support the proposition that the federal or state constitutions treat denying healthcare services a protectable expression of speech or faith." (Opp. 16:27-17:2.) In fact, Mercy cited numerous cases.[10] Minton, however,

[8] Minton states that he has "consistently alleged individual disparate treatment under the Unruh Act." (Opp. 10:11-12.) It is unclear whether Minton means disparate treatment, an argument that he has never before raised, or disparate impact. Regardless, the theory is of no help to Minton because a disparate treatment claim still requires factual allegations of discriminatory motive. Here, the FAC does not allege any facts establishing discriminatory motive or that similarly situated individuals were treated differently. *See Koebke*, 36 Cal. 4th at 854 (disparate treatment requires proof that a policy was adopted to "accomplish discrimination").

[9] "'They were unable to do his surgery as it went against the Catholic directives of the hospital,' Dawson said." (*See* n.5 *supra* for KCRA Article *cited at* FAC ¶ 31 n. 10.)

[10] *See e.g.*, *McKeon,* 19 Cal.4th at 324; *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 409, n. 2 (1989); *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 311(1988); *Means v. U.S. Conf. of Catholic Bishops,* No. 1:15-CV-353, 2015 WL 3970046, at *3) (W.D. Mich. 2015), *aff'd,* 836 F.3d 643 (6th Cir. 2016); *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975); *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975); *Allen v. Sisters of St. Joseph,* 361 F. Supp. 1212, 1214 (N.D. Tex. 1973), *aff'd*, 490 F.2d 81 (5th Cir. 1974).

cannot point to *a single case* in which a Catholic hospital was required to perform a procedure in violation of Catholic doctrine. No such case exists because forcing a religious hospital to perform such procedures would violate its constitutional rights.

Minton's assertion that the California Supreme Court has twice held that religiously affiliated healthcare entities must comply with statutes mandating nondiscriminatory access to healthcare is false. (Opp. 12:16-17.) Neither *North Coast* nor *Catholic Charities* involved a religiously affiliated healthcare entity. The medical group at issue in *North Coast* merely included certain physicians with religious convictions, and Catholic Charities involved the employees of a social service provider, not a "healthcare entity." In contrast, Mercy is a Catholic hospital founded by the Sisters of Mercy, a congregation of women religious, and it is listed in the Official Catholic Directory making it part of the Catholic Church.[11]

Minton suggests that there is no constitutional objection to a neutral and valid law of general applicability. This is wrong as applied to the California Constitution, which guarantees freedom of religion, and the U.S. Constitution's protection of freedom of expression.[12] *First*, the California Supreme Court has refused to apply the U.S. Supreme Court's holding regarding neutral laws of general application in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 877-882 (1990), to claims under the California Constitution. *Catholic Charities*, 32 Cal.4th at 559-61; *North Coast*, 44 Cal.4th at 1159-60. While the California Supreme Court has not finally concluded that strict scrutiny applies to such claims, it has in fact applied strict scrutiny following pre-*Smith* federal case law. *Id.* Thus, contrary to Minton's suggestion, strict scrutiny applies to any claim that application of the Unruh Act infringes Mercy's constitutional rights. Minton's claims cannot survive the constitutional balancing test. Rescheduling Minton's hysterectomy to take place at a non-Catholic hospital within 72 hours is an inconvenience

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[11] (*See* Dem. Mem. at 5, n. 9; RJN Ex. 1.) *Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (citation omitted). Dignity Health's mission is to "further[] the healing ministry of Jesus." https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values. Mercy's edifice is adorned with a large cross. *See* https://www.rbbinc.com/Images/Projects/MSJMC_Master_Plan_And_New_Inpatient_Tower/Mercy_San_Juan_Medical_Center_01.jpg.

[12] Even as a general matter of federal constitutional law, this principle is subject to serious question, given the U.S. Supreme Court's grant of certiorari in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), *cert. granted,* 2017 WL 2722428 (U.S. June 26, 2017). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017).

outweighed by the very heavy burden placed on a Catholic hospital of being forced to violate its governing religious doctrine, violate its own mission, and risk losing its Catholic status.

Second, the U.S. Supreme Court has not applied the *Smith* rule to cases involving expressive association such as *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). Here, there are multiple expressive associations. The Sisters of Mercy associated to establish Mercy as an expression of the healing ministry of Jesus. (*See* RJN, Ex. 2 at 3, 7, 10, 38.) The Catholic Church (and its apostolate Catholic hospitals) associate to express the same mission. Mercy's expression of the healing ministry of Jesus includes its professed mission, the cross that adorns its edifice (and other religious symbols throughout the hospital), and its decision to provide certain services while declining to provide those that violate Catholic doctrine in accordance with the ERDs.

The ERDs specifically provide that "Catholic health care *expresses* the healing ministry of Christ," that the Catholic healthcare ministry is "rooted in a commitment to promote and defend human dignity," and that "the biblical mandate to care for the poor requires" Catholic healthcare institutions "to *express* this in concrete action at all levels of Catholic health care." (RJN, Ex. 2 at 8, 10 (emphasis added)); *see also* Dem. Mem. at 15.)[13] The Court should reject Minton's invitation to become excessively entangled in Catholic religious doctrine, including the interpretation and application of the ERDs.

Minton's reliance on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) is misplaced. In *Rumsfeld*, an association of law schools challenged the constitutionality of the Solomon Amendment, which would deny federal funding to the schools if they did not provide military recruiters access to students equal to that provided to other recruiters. *Id.* at 53. The Supreme Court noted that unconstitutional compelled speech occurs when "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. Here, forcing Mercy to perform prohibited medical procedures contrary to Catholic doctrine would directly interfere with the religious expression of Catholic health services and severely burden Catholic healthcare's ability to express its particular religious

[13] Minton's assertion that a hysterectomy is "inherently sterilizing" misses the point. (Opp. 16:7-9.) ERD 53 permits procedures that induce sterility when "their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." That is not prohibited "direct sterilization," such as the removal of a healthy organ.

message about human dignity.[14] Also, while the law schools opposed discrimination, their "limited" association with military recruiters would not cause discrimination to occur on school property. *Id.* at 69. Here, Minton seeks to associate with Mercy for the purpose of compelling Mercy to violate Catholic doctrine directly inside a Catholic hospital.

This is fundamentally different from the issues raised in the line of cases Minton cites on pages 17 and 18 of his opposition,[15] which involve individuals engaged in for-profit commercial enterprise who stand accused of some violation of public accommodation laws arising from their refusal to provide a service based upon their stated adherence to religious beliefs. The Supreme Court will soon address the First Amendment rights in such cases. But that is immaterial to this case, which involves part of the Catholic Church itself. *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) ("First Amendment jurisprudence [provides that] the Free Exercise Clause guarantees a church's freedom to decide how it will govern itself, what it will teach . . . it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application"). The right of any organization, whether the Boy Scouts or the Catholic Church, to control its message is an entirely different question from the private business practices of their members or adherents.

III. CONCLUSION

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

Dated: November 9, 2017

MANATT, PHELPS & PHILLIPS, LLP

By: _____
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[14] As in *Dale*, the burden on Mercy cannot be justified even in the face of a compelling state interest. *Dale*, 530 U.S. at 659 (refusing to apply intermediate scrutiny); *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (acknowledging that a Court order compelling the Catholic Church to ordain women would violate the First Amendment).

[15] *See also Elane Photo., LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013). Minton's casual restaurant analogy fails as to a Catholic hospital. Mercy did not refuse to provide Minton the same "full menu" it offers to cisgendered women, such as a hysterectomy for indications such as chronic pelvic pain and uterine fibroids. (FAC ¶ 40.) At best, Minton's claim is akin to that of a restaurant patron who insists on ordering something that is not offered on the menu to anyone.

PROOF OF SERVICE

I, Vanessa Q. Le, declare as follows:

I am employed in the County of Orange, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 695 Town Center Drive, 14th Floor, Costa Mesa, California 92626.

On November 9, 2017, I served the following document(s) described as: **DEFENDANT DIGNITY HEALTH'S REPLY BRIEF IN SUPPORT OF DEMURRERS TO FIRST AMENDED VERIFIED COMPLAINT** on the interested parties in this action, addressed as follows:

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 9, 2017, at Costa Mesa, California.

Vanessa Q. Le