CHRISTINE SAUNDERS HASKETT (SBN 188053)
TESS HAMILTON (SBN 279738)
KATHRYN GARCIN (SBN 296069)
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: chaskett@cov.com

ELIZABETH O. GILL (SBN 218311)
CHRISTINE P. SUN (SBN 218701)
ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Email: egill@aclunc.org

RUTH DAWSON (SBN 290628)
MELISSA GOODMAN (SBN 289464)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
Telephone: (213) 977-9500 x258
Facsimile: (213) 977-5297
Email: rdawson@aclusocal.org

Attorneys for Plaintiffs

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

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH

Plaintiffs,

v.

DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY MEDICAL CENTER REDDING

Defendant.

Case No. CGC 15-549626

DECLARATION OF DR. SAMUEL VAN KIRK IN SUPPORT OF REBECCA CHAMORRO'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

I, Samuel Van Kirk, declare:

1. I provide this declaration in support of Plaintiff Rebecca Chamorro's *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause.

2. I went to University of Southern California Medical School and was a resident at Oregon Health Science University. I have been practicing medicine as a board-certified obstetrician-gynecologist for 14 years.

3. I am Ms. Chamorro's obstetrician-gynecologist. Ms. Chamorro is currently 33 years old and pregnant with her third child. Ms. Chamorro's due date is February 4, 2016.

4. I will be performing a Cesarean section ("C-section") to deliver Ms. Chamorro's third child at Mercy Medical Center Redding ("MMCR"), which is scheduled for January 28, 2016. I am planning to deliver Ms. Chamorro's child by C-section because MMCR does not allow vaginal birth after C-sections. Thus, mothers who have previously had a C-section must deliver all subsequent babies via C-section at MMCR. Because Ms. Chamorro's second child was delivered via C-section, she will deliver her third child via C-section.

5. Ms. Chamorro has informed me that she and her husband do not desire to have more children. I provided Ms. Chamorro with information regarding all of her birth control options, including the option of immediate postpartum tubal ligation. After considering all of her options, Ms. Chamorro gave her informed consent to undergo tubal ligation at the time of her C-section. In light of Ms. Chamorro's desire for permanent contraception and the fact that she will be undergoing a C-section, I agree that tubal ligation is Ms. Chamorro's best option.

6. Tubal ligation refers to closing off the fallopian tubes, so that the egg cannot move down the fallopian tube into the uterus, which means that sperm cannot reach the egg. Tubal ligation is one of the most commonly used forms of birth control. It has a number of advantages. It does not require individualized acts, such as daily use of contraceptives. It takes immediate effect and provides permanent contraception. It is safe and effective, with a very high success rate.

7. Performing tubal ligation immediately postpartum is the best practice and the standard of care for women desiring permanent contraception. There are anatomical advantages to performing a tubal ligation at the time of delivery. The uterus is in an enlarged state and is located just under the

abdominal wall at this time, allowing easier access to the fallopian tubes. This makes the procedure easier to perform immediately following delivery compared to at a later time.

8. Postpartum tubal ligation is pregnancy-related care and is part and parcel of high quality obstetric care.

9. Because Ms. Chamorro will be receiving a C-section, she will already require spinal anesthesia as well as an operating room, equipment, and support staff for the C-section. I would not need any additional support from MMCR to perform a tubal ligation during Ms. Chamorro's C-section. There is no need for additional anesthesia as Ms. Chamorro would already have spinal anesthesia in place for the C-section. I also would not require any additional support staff in the operating room to perform the tubal ligation. Other than two pieces of suture, I would not need any additional materials or equipment in the delivery room to perform the tubal ligation. To perform the tubal ligation, I would use a piece of suture to tie a knot around each fallopian tube and then cut out a middle section of each fallopian tube. Performing this procedure at the time of delivery would take me approximately one to two minutes. The tubal ligation also would not increase Ms. Chamorro's recovery time in the hospital.

10. If Ms. Chamorro is not permitted to undergo tubal ligation during her C-section, she would have to undergo a separate and additional procedure in order to obtain the desired sterilization, which would require the administration of additional anesthetic.

11. For all of the reasons outlined above, it is my opinion as Ms. Chamorro's doctor that tubal ligation at the time of her C-section is medically indicated and in her best interest. In light of Ms. Chamorro's medical history, I recommend this course of action and fully support Ms. Chamorro's decision to undergo this sterilization procedure.

12. Given the benefits of performing tubal ligation at the time of a C-section, it is my opinion that providing Ms. Chamorro a tubal ligation at the time of her C-section is the standard of care.

13. On September 15, 2015, Ms. Chamorro signed a sterilization consent form, attesting to her informed consent, as required by state law. On the same day, I submitted a Request for Sterilization to Dignity Health, including the appropriate state form demonstrating that Ms. Chamorro has given her informed consent for the procedure. I also requested an explanation for the denial if Dignity Health would not grant permission for me to perform the tubal ligation during Ms. Chamorro's C-section. In

particular, if Dignity Health deemed sterilization not medically necessary, I requested provision of "sufficient specific information as to how we can meet your definition of medical necessity." This Request for Sterilization is attached as Exhibit 1.

14. On September 18, 2015, I received a letter from Dignity Health stating that MMCR's review committee had evaluated Ms. Chamorro's request and was denying the request because it "does not meet the requirements of Mercy's sterilization policy or the Ethical and Religious Directives for Catholic Health Services." This denial letter is attached as Exhibit 2.

15. My understanding is that MMCR's sterilization policy is the same as the Ethical and Religious Directives for Catholic Health Services: (1) direct sterilization is banned, but (2) procedures that induce sterilization may be permitted if their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available. Under these policies, tubal ligations should never be permitted because they are not used to cure or alleviate present or serious pathologies. Tubal ligations are only every performed to prevent future pregnancy.

16. Despite MMCR's sterilization ban, I have been permitted to perform some postpartum tubal ligations at MMCR. It has been my understanding that in order to perform a tubal ligation at the time of a C-section, Dignity Health requires the doctor to: (1) receive permission from the hospital's review committee prior to the time of delivery, and (2) confirm at the time of the C-section that there is "pathologically thin uterine scarring." I developed this understanding based on conversations with medical personnel at MMCR, in particular Dr. James De Soto, who I believe is ultimately in charge of granting or denying authorizations to perform postpartum tubal ligations.

17. I have tried on many occasions to learn the exact criteria that MMCR's review committee considers in determining whether to approve postpartum tubal ligation requests but I have not been able to gain access to this information. In my experience, sterilization requests are more often granted to women over the age of 35 with a history of two or more previous C-sections.

18. "Pathologically thin uterine scarring" is also not a recognized medical term and is a wholly subjective standard. There is no medical rationale for denying tubal ligations simply because Dignity Health may deem the uterine scarring not to be "pathologically thin." Because Dignity Health requires intraoperative confirmation of "pathologically thin uterine scarring," a patient and her physician

cannot know whether Dignity Health will permit the sterilization procedure until after the C-section is underway. I have had over 50 patients in the last 8 years who have similarly been denied the procedure.

19. Because I always want to do what is in the best interests of my patients, I tried to take the information I was given from MMCR and apply it to as many patients as possible. For this reason, I created a form letter—the same one I used for Ms. Chamorro—that states for patients who have had C-sections that they have prior uterine scars, and asks that I be allowed to perform the tubal ligation if the scar is "pathologically thin" at the time of the C-section.

20. My form letter also states that if I am not authorized to perform immediate postpartum tubal ligations on my patients, then they will have to undergo anesthesia in a second surgery.

21. As in Ms. Chamorro's sterilization request, my form letter also always asks that "[i]f you will not grant permission for my patient to have the indicated procedure that she desires and has given her informed consent, I would request an explanation as to why. If you deem that the current medical necessity has not been met to warrant sterilization, please provide me and my patient with sufficient specific information as to how we can meet your definition of medical necessity." I have never received a response to this request, for Ms. Chamorro or any patient.

22. Until recently, I was caring for a second pregnant patient, Lynsie Brushett, who was in a similar position to Ms. Chamorro, in that she requested but was denied permission to obtain a postpartum tubal ligation at MMCR. That patient tragically lost her pregnancy, and thus is no longer a candidate for the procedure.

23. While Ms. Brushett was still pregnant, attorneys sent a letter to Dignity Health on behalf of her and Ms. Chamorro demanding that Dignity Health allow me to provide each with postpartum tubal ligation. Dignity Health responded on December 9th in a way that I interpreted to mean I should resubmit the requests for permission to perform their sterilization procedures and include additional medical information. I did not know what further information they meant, as I had included all relevant information in the first request. I sent a letter to Dr. De Soto asking for an explanation of what the criteria were for granting the procedure (attached as Exhibit 3), as I had no indication of what information Dignity Health uses to make that determination. Counsel for Dignity Health responded to Plaintiff's counsel on behalf of Dr. De Soto and referenced an email he had sent me on October 6, 2015

that contained some of the factors that he said MMCR takes into account in assessing the "risk to the mother in future pregnancies." These factors include risk factors for uterine rupture, as well as: uterine over-distention, advanced maternal age, grand multiparity, some abnormal placentation, medication controlled diabetes mellitus, previous hx of uterine infection, and unknown scar type. The email further states that it is "the totality of risk factors, including any findings at the time of surgery, that is important."

24. Dr. De Soto's email also states that MMCR's consideration of authorizing sterilization requests is based on "the totality of the risk factors," but all pregnancies present risk to the mother. All tubal ligations immediately postpartum are medically justified - assuming proper patient consent - given the medical benefit of performing the tubal ligation immediately postpartum as described above, and because any future pregnancy creates risk to the woman. Although some pregnancies create more risk than others, in any situation a sterilization operation to prevent future pregnancy is, by definition, contraceptive. Thus, I did not resubmit the request, as MMCR/ Dignity Health provided no effective guidance as to what I could resubmit on behalf of my patients that would ensure the approval of their postpartum tubal ligations.

25. There are three hospitals with operating rooms in Redding, California, and I have admitting privileges at all three hospitals. However, only MMCR has a labor and delivery unit. In fact, all of the labor and delivery units in a geographical radius of greater than 70 miles from Redding, California are Dignity Health hospitals. My understanding is that these Dignity Health hospitals have the same sterilization policy that MMCR has. Other than these Dignity Health hospitals, there is no feasible alternative hospital in which I could continue delivering my patients, including Ms. Chamorro.

26. Scheduling a C-section at a non-Dignity Health hospital more than 70 miles away is not a practical alternative because Ms. Chamorro or any other pregnant patient could go into labor early. If Ms. Chamorro were to go into labor before her scheduled C-section, she would require an urgent C-section.

27. MMCR/Dignity Health's denial of the sterilization request is the sole impediment to Ms. Chamorro receiving a tubal ligation during her C-section. I am willing and able to perform the tubal ligation Ms. Chamorro has requested during her C-section. I have performed at least several hundred

tubal ligations and have extensive experience performing postpartum tubal ligations. I have hospital admitting privileges at MMCR and have been granted the privilege of performing tubal ligations at MMCR. I am not aware of any other procedures for which MMCR has granted a doctor the privilege to perform that procedure but then prohibited the doctor from performing the procedure on a specific patient based on purely non-medical grounds.

28. By not allowing me and other doctors to perform tubal ligations immediately postpartum, MMCR is depriving patients such as Ms. Chamorro of the various benefits of a postpartum tubal ligation discussed above and thus subjecting them to substandard pregnancy-related care.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 12/23/2015 at Redding, California.

Samuel Van Kirk MD

Samuel Van Kirk

EXHIBIT 1

FAXED 9/15/15

Samuel D. Van Kirk, M.D. 2139 Airpark Drive: Redding, CA 96001
Obstetrics & Gynecology Tel: (530) 247-0270; Fax: (530) 247-0271

Dignity Health
REQUEST FOR STERILIZATION

Rebecca Chamorro

Patient's Name

Mercy Medical Center, Redding
Facility

Gravida: 3 Para: 2 Age: 33 09/15/15
Date of Request

Number of Previous C-Sections: 1

EDC: 02/04/16 Date of Birth: 08/31/2015

Please provide the following information (Attach additional pages as necessary):

I. Medical Indications:

1 Patient with prior uterine scar is to undergo a repeat Cesarean-section. The obstetrician requests permission to perform a tubal ligation if the uterine scar is found to be pathologically thin at the time of repeat Cesarean-section, thus placing the patient at risk in a future pregnancy.

2. The patient desires to have a tubal ligation performed.

II. Other Factors Extrinsic to Medical Indications (excusing causes for material cooperation)

1. Risks of a second anesthesia in another surgery: YES

2. The patient's insurance limits access to specific facilities: Only OB at Dignity Health

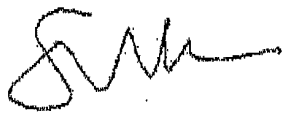
3 The physician has been granted, by your hospital the privilege of performing tubal ligations.

4. The appropriate state forms have been completed and attached demonstrating that the patient has given her informed consent for the procedure.

III. Request for Explanation in the Event that the Request is Denied:

If you will not grant permission for my patient to have the indicated procedure that she desires, and has given her informed consent, I would request an explanation as to why. If you deem that the current medical necessity has not been met to warrant sterilization,

please provide me and my patient with sufficient specific information as to how we can meet your definition of medical necessity.



Samuel D. Van Kirk, M.D.

Telephone: (530) 247-0270

SEND COMPLETED FORMS TO THE NAME IDENTIFIED BELOW AT THE APPROPRIATE FACILITY.
CONTACT INFORMATION IS INCLUDED IN CASE YOU HAVE QUESTIONS REGARDING YOUR REQUEST FOR PATIENT STERILIZATION:
Mercy Medical Center Redding – Sr. Brenda O'Keeffe (Phone: 225-6119; Fax: 242-5060)
St. Elizabeth Community Hospital – Sr. Pat Manoli (Phone: 529-8015; Fax: 529-8009)
Mercy Medical Center Mt. Shasta – Sr. Anne Chester (Phone: 926-9323; Fax: 926-0517)

EXHIBIT 2

Mercy Medical Center
Redding
A Dignity Health Member

Mercy Medical Center
2175 Rosaline Avenue
P.O. Box 496009
Redding, CA 96049-6009
direct 530.225.6000
redding.mercy.org

September 18, 2015

REQUEST DENIED

Samuel Van Kirk, M.D.
2139 Airpark Drive
Redding, CA 96001

RE: Sterilization Request for Rebecca Chamorro

Dear Dr. Van Kirk:

The Mercy Medical Center Redding facility review committee has evaluated your request for sterilization for Rebecca Chamorro. We are unable to admit your request to perform a tubal ligation at the time of Ms. Chamorro's Caesarean Section.

In reviewing your request and based on the current information submitted, it was noted that it does not meet the requirement of Mercy's current sterilization policy or the Ethical and Religious Directives for Catholic Health Services. Therefore, we cannot admit material cooperation to perform a tubal ligation at Mercy Medical Center Redding.

If you have any additional information or questions regarding the committee's decision please contact me at 225-6102 or Kim Shaw at 225-6119.

Sincerely,

James De Soto, M.D.
V.P. Medical Affairs

C: Health Information Management

EXHIBIT 3

SAMUEL D. VAN KIRK, M.D.
Obstetrics & Gynecology Board Certified

2139 Airpark Drive • Redding, California 96001 • Tel: (530) 247-0270 • Fax: (530) 247-0271

12/10/2015

Dear Dr. DeSoto and Mr. Grossman,

I am writing in response to Mr. Grossman's letter to the ACLU dated 12/9/2015. Specifically, Mr. Grossman suggests that we have a productive and complete dialogue about the medical needs of my patients. I have been and continue to be receptive to any discussion about how to provide efficient and high quality women's reproductive care.

As I have stated previously, I remain unaware of any defined medical rationale for performing a tubal ligation except for the patient's desire to have a tubal ligation performed. If you are in possession of a list or set of criteria under which tubal ligations are permissible, I would be happy to review it. In fact, each and every sterilization request that I send to our institution includes the statement, "If you will not grant permission for my patient to have the indicated procedure that she desires, and she has given her informed consent, I would request an explanation as to why. If you deem that the current medical necessity has not been met to warrant sterilization, please provide me and my patient with sufficient specific information as to how we can meet your definition of medical necessity."

I have yet to have any of my repetitive requests for a dialogue be met, until now. Please let me know when it would be convenient for you to meet, and I will be happy to discuss these issues.

Furthermore, in regards to Mr. Grossman's statement concerning a lack of a request for MMCR to assist in identifying a suitable alternative facility, please let me know what other facility in the north state that I can take my patients to in order to perform a tubal ligation at the time of a Cesarean section. I am unaware of any such facility that Dignity Health does not own within 70 miles.

Sincerely,

Sam Van Kirk MD

Sam Van Kirk, MD