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August 17, 2009

BY ECF and U.S. MAIL

The Honorable Raymond J. Dearie, Chief Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Cenzon DeCarlo v. Mount Sinai Hospital*, 09-CV-3120
Response to Letter Request for Pre-Motion Conference

Your Honor:

We write on behalf of the Plaintiff Mrs. DeCarlo, to respond to Mount Sinai's letter request for a pre-motion conference. We will be pleased to participate in the September 10 conference. We understand that the Court will set deadlines for briefing Mount Sinai's motion to dismiss. In addition, we filed and served Mrs. DeCarlo's motion for preliminary injunction with her complaint. We request that at the September 10 conference the Court also set a briefing schedule for our injunction motion. Below is a brief description of our legal positions on these motions. Facts are taken from our verified complaint, which serves as affidavit evidence for our injunction motion. *See Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995). Facts from the complaint must be taken as true, and inferences be drawn in Mrs. DeCarlo's favor, for the motion to dismiss. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 124–25 (2d Cir. 2009).

Motion for Preliminary Injunction

Mount Sinai defied federal law when it forced Mrs. DeCarlo, on pain of losing her job and her career, to assist in a late-term abortion on May 24, 2009. Mount Sinai had known Mrs. DeCarlo's religious objection for years, and she tearfully pleaded that they respect her rights before the abortion case began. Yet Mount Sinai forced Mrs. DeCarlo to witness the doctor wrench the arms and legs off a living 22-week-old baby. Mrs. DeCarlo's nurse supervisor could have covered the case herself, and Mount Sinai officials refused to allow calls to other nurses. The abortion doctor categorized this case as *not* requiring immediate surgical intervention (thus belying assertions that Mrs. DeCarlo's participation was needed due to an "emergency"). Other evidence suggests that this abortion was scheduled in advance and was not remotely urgent.

Mount Sinai's illegal compulsion has caused Mrs. DeCarlo intense emotional suffering. She has lost sleep and suffered nightmares about children in distress. She has had to receive treatment and medication from her physician. When Mrs. DeCarlo used appropriate channels at the hospital to try to correct the situation, Mount Sinai not only condoned its compulsion, but her

supervisors tried to bully her into writing a letter abandoning her religious beliefs as a condition of working on-call shifts, and let her leave their office only when she again broke down weeping.

Mount Sinai's compulsion violates 42 U.S.C. § 300a-7(c), "the Church Amendment" (named after Senator Frank Church). This law provides that no recipient of federal health funds may discriminate in the employment or privileges of its health care personnel because of their religious objection to abortion. § 300a-7(c)(1). The law contains no exception letting Mount Sinai compel assistance based on their unbridled judgment that abortion is an "emergency." Mount Sinai's actions are a quintessential example of discriminating in employment and privileges on condition that Mrs. DeCarlo violate her objection to abortion. Mount Sinai voluntarily subjected itself to the Church Amendment by receiving hundreds of millions of federal health dollars every year. Yet Mount Sinai persists in violating the law by continuing to maintain that it can compel Mrs. DeCarlo and other employees to assist abortion. Indeed, Mrs. DeCarlo believes that Mount Sinai has been violating other nurses' abortion objections for years.

Mount Sinai's illegal behavior is causing irreparable harm to Mrs. DeCarlo and similar health personnel. A preliminary injunction is needed to protect Mount Sinai's employees from being compelled to assist in abortion in violation of federal law. *See* Mrs. DeCarlo's Mot. for Prelim. Inj. and Memo in Supp. (file stamped July 21, 2009); *see also Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996) (listing standards for granting preliminary injunction). Mrs. DeCarlo has shown a likelihood of success on the merits due to the law's direct applicability to Mount Sinai's compulsory tactics. Mrs. DeCarlo has raised inherently serious questions on the merits of whether Mount Sinai should be able to illegally compel assistance in abortion. Mrs. DeCarlo faces intense hardship if forced to choose between her job and her beliefs, but Mount Sinai would suffer no burden in simply being required to follow a law it voluntarily subjected itself to, by assigning their willing staff to abortions rather than compel religious objectors.

Motion to Dismiss

Mount Sinai compounds its contempt of the law by denying the individual rights-conferral language contained in the Church Amendment. In attempting to obtain dismissal of Mrs. DeCarlo's complaint, Mount Sinai wrongly suggests that no court has ruled that an implied right exists in the Church Amendment. But just this year the United States District Court in Arizona not only recognized an individual right, but allowed the plaintiff (in that case an abortion supporter) to seek punitive damages. *Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. 2009). Mount Sinai cites two unpublished district court cases from the Seventh Circuit that are not persuasive for this Court and do not thoroughly analyze the applicable law.

Mount Sinai presents a superficial glance at the presumption against implied private rights of action. But careful examination of the governing precedent shows that the Church Amendment uses language that creates individual rights and an implied right of action.

The Church Amendment involves all of the factors that the Supreme Court has used to recognize implied private rights and remedies. First and most importantly, Congress wrote language that creates protection from discrimination for individuals such as Mrs. DeCarlo, in mandatory terms, against this defendant. The Church Amendment is not an order to HHS to deny funding, nor is it focused on aggregate outcomes. The Church Amendment requires that

Mrs. DeCarlo not be discriminated against by Mount Sinai. *See Gonzaga University v. Doe*, 536 U.S. 273, 278-79, 281-82 (2002) (discussing the provisions of FERPA as a command to the federal agency rather than a protection of individuals, and discussing *Blessing v. Freestone*, 520 U.S. 329, 343 (1997) as relying on the statute's generalized rather than individual standards).

Second, the Church Amendment contains no language suggesting that other remedies preclude private action. Indeed, Congress gave the Church Amendment *no administrative remedy whatsoever*. It is curious that Mount Sinai argues this factor in its favor, since the Supreme Court recognizes implied rights and remedies under Titles VI and IX where Congress did create extensive administrative relief. Mount Sinai can only cite agency regulations, enacted not by Congress but by HHS mere months ago. Those regulations nowhere deny the existence of a private right and remedy, and Mount Sinai failed to mention that the new Secretary of HHS promptly noticed the rescission of its new rules. Proposed Rules, 74 Fed. Reg. 10207-01, 2009 WL 586368 (Mar. 10, 1009). On-again, off-again regulations by HHS occurring in 2009 do not negate the individual rights language used by Congress in 1974.

Third, Congress' words are to be interpreted in light of the legal standard at the time. Federal courts in 1974 universally interpreted language such as used in the Church Amendment as implying a private right and remedy. *See Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). The Court's more restrictive approach came later and still only precludes private recourse when the statutes use fundamentally different language. The Church Amendment's legislative history does not undercut Congress' language creating a right and implied remedy.

Like the Supreme Court caselaw, all of the cases that Mount Sinai cites from the Second Circuit are cases where the statutes contraindicated private relief in ways that are not operative in the Church Amendment. In *Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429, 432-33 (2d Cir. 2002), the statutes lacked any focus on protected individuals. Likewise in *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 (2d Cir. 2002), the statute required investors to file statements but didn't say individuals have any protection. In *Alaji Salahuddin v. Alaji*, 232 F.3d 305, 308-12 (2d Cir. 2000), the statute recognized a pre-existing, state-created right rather than creating its own. And in all these cases, the statutes explicitly created other penalties, remedies, and governmental responsibility for enforcement. *Id.; Olmsted*, 283 F.3d at 432-33; *Hallwood*, 286 F.3d at 619-20; *Barnes v. Glennon*, 2006 WL 2811821 at *6 (N.D.N.Y. 2006); *Hayden v. Pataki*, 2004 WL 1335921 at *5 (S.D.N.Y. 2004); *Gilmore v. Amityville Union Free School Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004).

Notably, *Hallwood* recognized a right to seek injunctive relief even though it denied an action for damages. 286 F.3d at 620-21. Thus even under Mount Sinai's restrictive view, Mrs. DeCarlo is at least entitled to an order enjoining Mount Sinai from continuing to defy the law.

We look forward to discussing these and related issues at the conference on September 10th. Thank you for your consideration of this matter.

Yours truly,

s/

Matthew S. Bowman