

HOPE MEDICAL GROUP FOR WOMEN,
on behalf of itself and its patients
seeking abortions,
Petitioner;

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NUMBER: SECTION:

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

VERSUS

ANTHONY KECK, in his official capacity
as Interim Secretary of the Louisiana
Department of Health and Hospitals, and
in his individual capacity; and BRUCE
GREENSTEIN, in his official capacity as
Secretary of the Louisiana Department of
Health and Hospitals, and in his
individual capacity,
Respondents;

**PETITION FOR TEMPORARY RESTRAINING ORDER AND/OR STAY
PURSUANT TO LA. REV. STAT. ANN. § 39:964(C) AND REQUEST FOR
RULE TO SET HEARING ON PRELIMINARY INJUNCTION**

Petitioner Hope Medical Group for Women, a medical practice located in Shreveport, Louisiana, challenges the Louisiana Department of Health and Hospital’s (“DHH”) September 3, 2010, action of immediately suspending, without prior notice or hearing, Petitioner’s license to operate an abortion clinic (“Immediate Suspension”). In support of this petition, Hope Medical submits the accompanying affidavits of Kathaleen Pittman and D.B, M.D., and states the following:

1.

The Immediate Suspension was based on alleged regulatory violations regarding two areas of Hope Medical’s practice: (1) the monitoring of patients who were administered medications to alleviate pain and anxiety (“patient monitoring violations”); and (2) certain documentation practices in patients’ records (“record keeping violations). DHH knew and acknowledged almost three weeks prior to ordering the Immediate Suspension that Hope Medical had submitted a plan of correction to DHH addressing the patient monitoring violations; that DHH had accepted Hope Medical’s plan of correction; and that, pursuant to the plan of correction, Hope Medical had ceased the conduct alleged to underlie the patient monitoring violations. In addition, DHH brought the alleged record keeping violations to Hope Medical’s attention almost three weeks prior to ordering the Immediate Suspension, but did not notify Hope Medical that the violations posed any immediate threat of harm or that they provided any basis for suspending Hope Medical’s license; rather, DHH informed Hope Medical that it would receive written notice of these violations in the mail and would be given an opportunity to submit an appropriate plan of

correction.

2.

There existed no reasonable basis for the Department to conclude that the alleged conduct underlying the Immediate Suspension posed a threat of immediate or imminent harm to a client or patient; nor to conclude that the conduct violates the plain language of the regulations governing abortion clinics. Despite these circumstances, the Department issued the Immediate Suspension without prior notice or hearing.

3.

Defendants' issuance of the Immediate Suspension was arbitrary and capricious, contrary to law, unsupported by a preponderance of the evidence, and made upon unlawful procedure in violation of § 49:964(G) of the Administrative Procedures Act, La. Rev. Stat. Ann. §§ 49:950 *et seq.*, and the guarantees of due process and procedural due process under Article I, § 2 of the 1974 Louisiana Constitution, the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983. Petitioner seeks declaratory and injunctive relief and damages.

4.

Venue is appropriate in this Court under La. Rev. Stat. Ann. §49:964(B) and § (H)(2) of Act No. 490, Reg. Session (La. 2010) (to be codified at La. Rev. Stat. Ann. § 40:2175.6(G)-(I)).

5.

Defendants are Anthony Keck, in his official capacity as Interim Secretary of the Louisiana Department of Health and Hospitals, and in his individual capacity; and Bruce Greenstein, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and in his individual capacity.

6.

Plaintiff is Hope Medical Group for Women ("Hope Medical"), a medical practice in Shreveport, Louisiana that has provided family planning and abortion care for over thirty years, and that, prior to September 2, 2010, had been continually licensed as an abortion clinic by the State of Louisiana since the State began licensing such facilities in 2004.

Statutory and Regulatory Framework

7.

In 2001, Louisiana enacted the Outpatient Abortion Facilities Licensing Act, La, Rev. Stat. Ann. § 40:2175 to 2175.6, authorizing DHH to promulgate regulations governing all outpatient

facilities that provide any second trimester abortions or more than five first-trimester abortions per month. In May 2003, the Board issued regulations governing licensing and minimum standards for such abortion facilities. La. Admin. Code tit. 48, ch. 44 (“abortion facility regulations”).

8.

The abortion facility regulations regarding nursing personnel provide, in relevant part:

5. Nursing care policies and procedures shall be in writing and be consistent with accepted nursing standards. Policies shall be developed for all nursing service procedures provided at the facility. The procedures shall be periodically reviewed and revised as necessary.

6. A formalized program of in-service training shall be developed for all categories of nursing personnel. Training related to required job skills shall be provided to nursing personnel.

La. Admin. Code tit. 48, pt. I, § 4409(B)(5)-(6).

9.

The abortion facility regulations regarding patient records and reports provide, in relevant part:

B. Content of Medical Record

1. The following minimum data shall be kept on all patients:

- a. identification data;
- b. date of procedure;
- c. medical and social history;
- d. physical examination;
- e. chief complaint or diagnosis;
- f. clinical laboratory reports (when appropriate);
- g. pathology report (when appropriate);
- h. physicians orders;
- i. radiological report (when appropriate);
- j. consultation reports (when appropriate);
- k. medical and surgical treatment;
- l. progress notes, discharge notes, and summary;
- m. nurses' records of care given, including medication administration records;
- n. authorizations, consents or releases;
- o. operative report;
- p. anesthesia report, including post-anesthesia report; and
- q. special procedures reports.

La. Admin Code tit. 48, pt. I, § 4415(B)(1).

10.

The abortion facility regulations regarding anesthesia services provide, in relevant part:

B. Local anesthesia, nitrous oxide, and intravenous sedation shall be administered by the treating physician or by qualified personnel under the orders and supervision of the treating physician, as allowed by law.

La. Admin Code tit. 48, pt. I, § 4423.

11.

Until this past legislative session, the process by which facilities such as Hope Medical could be denied a license or have their licenses suspended or revoked was governed by the same statute governing the licensing of hospitals. See La. Rev. Stat. Ann. § 2175.6; La. Admin. Code § 4403(F); *see* La. Rev. Stat. Ann. § 40:2110. That statute states that “[t]he secretary may deny, suspend or revoke a license in any case in which he finds that there has been a substantial failure of the applicant or licensee to comply with the requirements of” the regulations, rules and standards governing hospitals. La. Rev. Stat. Ann. § 40:2110 (A).

12.

On June 22, 2010, the State enacted Act No. 490, Reg. Session (La. 2010) (to be codified at La. Rev. Stat. Ann. § 40:2175.6(G)-(I)), which amended and revised section 2175.6 of the Outpatient Abortion Facilities Licensing Act to remove the earlier statutory provision subjecting abortion facilities to the same standards as hospitals for license denial, revocation or suspension, and to state that “the secretary of the department may deny a license, may refuse to renew a license, or may revoke an existing license, if an investigation or survey determines that the application or licensee is in violation of any provision” of the regulations governing outpatient abortion facilities, “or in violation of any other federal or state law or regulation.” The Act also permits the Secretary to immediately suspend a facility’s license if he or she “determines that the applicant is in violation of any provision of” the regulations governing outpatient abortion facilities or any other federal or state law or regulation if the Secretary also determines “that the violation or violations pose an imminent or immediate threat to the health, welfare or safety of a client or patient.” In the case of an immediate suspension, the Act permits the facility to file a devolutive appeal with the Secretary and to file for injunctive relief from the immediate suspension with the district court for the parish of East Baton Rouge. Lastly, if a license is finally revoked or “renewal of a license is denied other than for cessation of business or non-

operational status, or if the license is surrendered in lieu of an adverse action, any owner, officer, member, manager, director or administrator of the licensee may be prohibited from owning, managing, directing or operating another outpatient clinic in the state of Louisiana.”

Factual Allegations

13.

Hope Medical Group for Women (“Hope Medical”) is a medical facility located in Shreveport, Louisiana. Affidavit of Kathaleen Pittman 9/10/2010 (“Pittman Aff.”) ¶ 2. It has operated continuously since 1980. *Id.* It is licensed by the Louisiana Department of Health and Hospitals (“DHH”) to perform abortions, and does so up to 16 weeks, 6 days of pregnancy measured from the date of the woman’s last menstrual period (“Imp”). Affidavit of D.B., M.D. 9/10/2010 (“D.B. Aff.”) ¶ 6. On average, between 200 and 300 abortions per month are performed at Hope Medical. Pittman Aff. ¶ 2. In addition to abortion services, Hope Medical also provides non-directive options counseling, contraceptive counseling and services, pregnancy testing, and referrals for other medical procedures. *Id.*

14.

Hope Medical is one of only two active facilities in northern Louisiana that are licensed to perform abortions and one of only six active facilities in the entire State that are licensed to perform abortions. Patients travel to Hope Medical from a 200-mile radius to obtain abortion services. Pittman Aff. ¶ 3.

15.

Hope Medical has an excellent safety record. D.B. Aff. ¶ 4; Pittman Aff. ¶ 3. Hope’s patients rarely experience complications, and during the past 30 years, Hope has never had a patient experience lasting injury as a result of an abortion. D.B. Aff. ¶ 4; Pittman Aff. ¶ 4.

16.

Hope Medical also has an excellent track record with respect to medications used to alleviate pain and anxiety. D.B. Aff. ¶ 5; Pittman Aff. ¶ 5. Hope Medical has been using the same medication regimens for these purposes for over 18 years, and it has never had problems with them. *Id.* Specifically, Hope Medical has never had a patient experience an allergic reaction or overdose as a result of these medications; nor has Hope Medical ever had to hospitalize a patient or administer reversal agents due to these medications. *Id.*

Licensing Surveys at Hope Prior to August, 2010

17.

DHH first required abortion facilities such as Hope Medical to obtain a license and undergo licensing inspections in 2004. Pittman Aff. ¶ 6. Hope Medical underwent an inspection in June of that year in order to obtain its initial license, and Hope Medical generally undergoes an inspection each year in connection with its license renewal. *Id.* Hope Medical's license has been continuously renewed since it was first issued in 2004. *Id.*

18.

Prior to Hope Medical's most recent inspection, in August, 2010, its annual inspections followed a familiar routine. Pittman Aff. ¶ 7.

19.

The inspector would come to the facility, unannounced, and state to the facility administrator that he or she was there for an inspection. Pittman Aff. ¶ 8. The inspector would ask the facility to review Hope Medical's written protocols. *Id.* Those protocols, which reflect the practices and procedures approved by the facility's medical director, have been substantially the same for the entire time that Hope has been licensed and inspected by the State. *Id.* Those protocols have been reviewed during every inspection Hope Medical has undergone. *Id.*

20.

The inspector would also ask to review patient charts and employee files. Pittman Aff. ¶ 9. Additionally, the inspector would examine parts of the physical facility, check the equipment and supplies, and interview members of the staff. *Id.*

21.

At the end of the inspection, which never took more than one day, the inspector would conduct an exit interview with the administrator of Hope Medical. Pittman Aff. ¶ 10. During the interview, the inspector would alert the administrator to the violations he or she had found and would ask the administrator whether she had further information to give on those issues. *Id.* Then the inspector would tell Hope Medical's administrator to expect to receive a written statement of deficiencies in the mail, and to send in a plan of corrections after receiving the deficiencies. *Id.*

22.

Hope Medical would receive the statement of deficiencies in the mail a few days to a week later.

Pittman Aff. ¶ 11. The statement of deficiencies would give Hope Medical 10 days to submit a plan of correction. Hope Medical always submitted its plans of corrections in a timely way, and its plans of corrections were always accepted by the DHH. *Id.* The DHH would then send Hope Medical a notice informing the administrator that the corrections had been accepted. *Id.*

23.

Following this process, an inspector would sometimes, but not always, conduct a follow-up survey to confirm that the plan of correction was in place. Pittman Aff. ¶ 12.

August 11-13, 2010, Inspection

24.

On August 11, 2010, DHH inspector Lou Anne Gonyea presented herself at Hope Medical to conduct a survey inspection. Pittman Aff. ¶ 13. She asked to review Hope Medical's protocols, along with certain patient records and employee files. *Id.* Unusually, the inspector did not complete her inspection on the first day, but came back again on August 12 and spent another whole day undertaking her review. *Id.* The inspector came again on the morning of August 13th and announced that she needed to give Hope Medical an "IJ" based on the intravenous administration of Nubain-Phenergan, and the administration of nitrous oxide, which she said was administered by unqualified staff. *Id.* Hope Medical's administrator did not know what an "IJ" was, and the inspector explained to her that it was a determination of an immediate jeopardy situation, and that the inspector could not leave until Hope Medical had submitted an acceptable plan of correction. *Id.*

25.

The administrator set out to devise a plan of correction and asked the inspector to clarify whether the problem related to Hope Medical's use of Nubain-Phenergan applied to all uses, or just to Nubain-Phenergan administered intravenously. Pittman Aff. ¶ 14. The inspector replied that the Nubain-Phenergan problem pertained only to intravenous administration. *Id.* The administrator proposed that its plan of correction be that Hope Medical stop administering Nitrous Oxide altogether, and stop administering Nubaine-Phenergan intravenously. *Id.* The inspector instructed the administrator to type up this proposed plan of correction while she called in to Headquarters to check if it was sufficient. *Id.*

26.

The inspector left the room, and the administrator typed up the Plan of Correction. Pittman Aff. Aff. ¶ 15, and Exh. A. The inspector came back and told the administrator that the plan of correction was acceptable and that she was lifting the “IJ.” Pittman Aff. Aff. ¶ 15. The inspector then indicated on the Notification of Determination of Immediate Jeopardy that the IJ situation had been removed. Pittman Aff. Aff. ¶ 15, and Exh. B.

27.

After the Immediate Jeopardy situation had been removed, the inspector looked at a few more things in the facility, including checking the expiration dates on items in Hope Medical’s crash box. Pittman Aff. ¶ 16. The inspector also stated that she needed to talk to Hope Medical’s medical director. *Id.* The administrator arranged a phone call between the inspector and the medical director that afternoon. *Id.*

28.

Following that phone call, the inspector held an exit interview with Hope Medical’s administrator. Pittman Aff. ¶ 17. The inspector told the administrator that she was going to cite Hope Medical on two things apart from the issues she had raised in regard to the immediate jeopardy determination: (a) she said that Hope Medical had no documentation in the charts that the physician reviewed the patient’s medical history; and (b) she said that the physician needed to sign off somewhere in the patient chart regarding medicines given to patients pursuant to standing orders. *Id.*

29.

The inspector then told the administrator that Hope Medical would receive its written statement of deficiencies in the mail, probably within a week, and would need to submit corrective actions in response. Pittman Aff. ¶ 18. Given the administrator’s experience with these inspections, she expected the process to continue as it had in the past: waiting for the written deficiencies, submitting a plan of correction, and receiving notice from the DHH of acceptance of Hope Medical’s corrections. *Id.*

30.

Between August 13 and September 3, 2010, Hope Medical heard nothing further from DHH with respect to the status of its license. Pittman Aff. ¶ 19. The only communications between Hope Medical and DHH during this time were two phone calls placed by the inspector to Hope Medical – in the first, the inspector sought to confirm that Hope Medical’s administrator is not a

nurse, and in the second, she asked the administrator to resubmit a disclosure of ownership form that the inspector had misplaced. *Id.*

September 3, 2010 License Suspension & Revocation

31.

At 5:00 p.m. on September 3, 2010, the Friday before Labor Day, a facsimile was sent by the DHH to the fax machine at Hope Medical. Pittman Aff. ¶ 20. Due to the late hour, no one was at the facility to receive it. *Id.*

32.

Hope Medical's administrator later discovered that the fax consisted of two letters from the DHH – one immediately suspending Hope Medical's license, and the other giving 30 days notice that Hope Medical's license was to be revoked. Pittman Aff. ¶ 21 and Exh. C. The Immediate Suspension letter states that it is based on a finding of a threat of imminent or immediate threat of harm despite the fact that the materials accompanying the order explicitly acknowledged that Hope Medical had already submitted a written plan of correction, and that "the immediate jeopardy was removed on 08/13/10." Pittman Aff. Exh. C, sheet 5 of attachment.

33.

Hope Medical's administrator first learned of the license suspension and revocation letters as she was driving home from work. Pittman Aff. ¶ 22. She received a phone call from Hope Medical's answering service notifying her that a reporter had heard about a license suspension order from a DHH press release and wanted to ask the facility some questions. *Id.*

Hope Medical's Practices & Procedures

34.

The vast majority of abortion procedures at Hope Medical are performed in the first trimester. D.B. Aff. ¶ 6; Pittman Aff. ¶ 23. A much smaller number of procedures are performed in the early second trimester.. In either case, the abortion procedure is fairly simple and lasts only a few minutes. D.B. Aff. ¶ 6; Pittman Aff. ¶ 23.

35.

On an abortion patient's first visit to Hope Medical, an abdominal ultrasound is performed, and the patient's medical history is taken from the patient and documented in the patient record. Pittman Aff. ¶ 24. The patient also talks to a staff counselor, who counsels her on pregnancy options, explains the abortion procedure, talks with the patient about her feelings and any

questions she has. *Id.* The staff counselor also goes over the forms the patient has filled out, including the patient history form, and makes sure that all the necessary information has been given. *Id.* The staff counselor performs an initial check of the patient history form to see if the patient has had any medication allergies or medical problems relevant to the procedure. *Id.* If so, the counselor writes this information in red at top of the operative note sheets as a measure of additional security. *Id.*

36.

The patient also sees a physician on her first visit to Hope Medical, and the physician carries out the State's mandatory counseling procedures. D.B. Aff. ¶ 10; Pittman Aff. ¶ 25. That physician goes over the patient's medical history form, asks any follow-up questions, and makes any additional notes he or she thinks relevant on the form. D.B. Aff. ¶ 11; Pittman Aff. ¶ 25.

37.

Hope Medical's patient history form does not include specific questions about prior experience with anesthesia; however it asks the patient about any past drug allergies. D.B. Aff. ¶ 10; Pittman Aff. ¶ 26. Information about past experiences with anesthesia or sedation is provided by patients in this area of the form. *Id.* When such allergies are noted by a patient, the staff counselor and/or the physician doing 24 hour counseling will repeat this information on the top of the operative note sheet. Pittman Aff. ¶ 26.

38.

On the day of the patient's abortion procedure, the patient first sees a laboratory technician who checks her hematocrit level and RH factor and takes her blood pressure. Pittman Aff. ¶ 27. The laboratory technician asks the patient about medication allergies regardless of what is written on the patient history form. *Id.* If the patient notes any allergy, the laboratory technician will write this information on the operative notes sheet and the nurse's notes sheet in the patient's chart. *Id.*

39.

After seeing the laboratory technician, the patient sees a nurse (either a Licensed Practical Nurse or a Registered Nurse), who administers the patient's pre-operative medications. Pittman Aff. ¶ 28. The nurse does not usually take a blood pressure reading at this point because the patient has just had her blood pressure read by the laboratory technician. *Id.* The nurse asks the patient whether she is allergic to any medications and whether she is on Methadone. *Id.* If either

question is answered affirmatively, the nurse confirms that this information is on the patient's operative notes sheet and nurse's notes sheet, and she ensures that no medication is given to the patient that will have an adverse affect. *Id.*

40.

Pre-operative medications are given to abortion patients at Hope Medical only by trained and licensed LPNs or RNs. Pittman Aff. ¶ 28. This practice accords with Hope Medical's written policy that "Pre-operative medications shall be administered by licensed healthcare professionals for whom the administration of medication is within the scope of their practice." Pittman Aff. ¶ 28 and Exh. D.

41.

Hope Medical offers its abortion patients pre-operative medications to help ease anxiety and minimize pain. D.B. Aff. ¶ 7. Pursuant to the corrective plan of action submitted by Hope to the DHH on August 13, 2010, Hope Medical no longer administers nitrous oxide to any patients; nor does it administer Nubain, or any other medication intravenously. *Id.*; Pittman Aff. ¶¶ 14-15 and Exh. A.

42.

Prior to the August 13, 2010, submission of a Plan of Correction ("Plan of Correction") by Hope's administrator, Hope's practices regarding pain and anxiety medications were as follows:

- a) For procedures through 13 weeks Imp - which constitute the great majority of Hope Medical's practice – Hope Medical customarily gave its patients 10 mg. oral Valium, 400 mg. Ibuprofen, and 25 mg. Phenergan about 20-30 minutes prior to the procedure. D.B. Aff. ¶ 8(a). Valium is an anti-anxiety medication; Ibuprofen is an analgesic, and Phenergan (brand name Phenergan) is an anti-nausea drug. *Id.* Hope Medical then administered a combination of 60% nitrous oxide, 40% oxygen through a nasal mask when the patient was undergoing the procedure. *Id.* Nitrous oxide is an analgesic gas commonly used in outpatient medical procedures that reduces pain and also has sedative effects, which help reduce anxiety. *Id.* The nitrous oxide was administered to first trimester patients for approximately 5 minutes, and was followed by approximately one minute of administration of pure oxygen to reverse any remaining sedative effect. *Id.* The nitrous oxide

machine used by Hope did not permit the administration of nitrous oxide alone, but only in combination with pure oxygen. *Id.*

- b) For procedures from 14 weeks through 15 weeks, 6 days Imp, Hope Medical gave the same medications as for first trimester patients, with the addition of 10 mg. Nubain and 12.5 mg. Phenergan administered intramuscularly. D.B. Aff. ¶ 8(b). Nubain is an analgesic drug that reduces pain and also has sedative effects, which help reduce anxiety. *Id.*
- c) For patients undergoing procedures at 16 weeks through 16 weeks, 6 days Imp, Hope Medical administered the 10 mg. Nubain and 12.5 mg. Phenergan intravenously. D.B. Aff. ¶ 8(c).
- d) Patients undergoing abortions at 14 weeks or more were also administered a combination of 60% nitrous oxide, 40% oxygen through a nasal mask during the procedure. D.B. Aff. ¶ 8(d). The nitrous oxide was administered for approximately 7-10 minutes during these procedures, and was followed by approximately one minute of administration of pure oxygen to reverse any remaining sedative effect. *Id.*
- e) The nitrous oxide machine was operated by an operating room technician acting at the direction of, and under the direct supervision of, the operating physician. D.B. Aff. ¶ 8(e). The operating room technician took a pulse oximeter reading at the outset of the abortion procedure. *Id.* Pursuant to training and standing orders from the medical director, the operating room technician was instructed to turn on the Nitrous Oxide machine when the operating physician was in the room ready to begin the procedure, and to turn off the machine when the operating physician verbally indicated that the procedure was finished. *Id.* Because the procedure lasts only a couple to a few minutes, and because the patient was alert and responding throughout the procedure, the physician did not find it necessary to take additional vital signs during the procedure. *Id.* Rather, the physician was able to monitor the patient's condition by conversing with her. *Id.* Hope Medical's procedures regarding the administration of Nitrous Oxide are described in its written protocols. Pittman Aff. ¶ 33 and Exh. F.
- f) When Hope Medical's patients are given Nubaine (intravenously or

intramuscularly in the past, intramuscularly in the present), their vital signs are measured shortly before the administration of the medications; following the administration of the medications, the patients ordinarily remain in the presence of the nurse the entire time until they go into the procedure room accompanied by the operating room technician. D.B. Aff. ¶ 8(f). During this time, the nurse converses with the patient and is able to monitor the patient's condition by visually observing her and talking with her. *Id.*

- g) All patients' vital signs are taken and documented once they arrive in the recovery room. D.B. Aff. ¶ 8(g).
- h) In the opinion of Hope Medical's medical director, and based on his decades of experience, Hope Medical's practices regarding the monitoring of patients who have received medications for pain and anxiety protect the health and safety of Hope Medical's patients. D.B. Aff. ¶ 8(h). It is the opinion of the medical director that it is not necessary to check the vital signs of a patient more frequently than Hope Medical does when the patient is directly observed by a licensed professional to be alert, verbal and ambulatory. *Id.* However, Hope Medical is both willing and prepared to implement additional monitoring measures should its license be restored. *Id.*

43.

Pursuant to the Plan of Correction, Hope's abortion patients up through 13 weeks Imp now receive only oral Valium, Ibuprofen, and Phenergan; patients from 14 through 16 weeks, 6 days Imp receive those same medications, as well as Nubain and Phenergan administered intramuscularly.¹ D.B. Aff. ¶ 9. Nubain and Phenergan are no longer administered intravenously, and no patient is administered Nitrous Oxide. *Id.* Patients receiving Nubain and Phenergan continue to be directly monitored by licensed nurses or physicians, in addition to having their vital signs measured. *Id.*

44.

¹ Patients who request additional medication to relieve anxiety may be given 10 mg. Nubain (combined with 12.5 mg. Promethazine (Phenergan), an anti-nausea agent) intramuscularly. D.B. Aff. ¶ 9 n.3.

Hope Medical maintains a supply of stabilizing drugs to reverse narcotic effect. Pittman Aff. ¶ 29. Specifically, the facility keeps a supply of Narcan on its crash cart as a reversal drug for Nubain. *Id.* This practice is documented in Hope Medical’s written procedures. *Id.* ¶ 29 Exh. E. Pure oxygen is the reversal method for nitrous oxide. Pittman Aff. ¶ 29.

45.

When it is time for the patient’s procedure, the patient is accompanied to the procedure room by an operating room technician, who helps her get settled on the procedure room table before the physician comes in. Pittman Aff. ¶ 30. The physician then comes into the room and reviews the patient’s chart, including the medical history, the ultrasound print, all lab results and vital signs. D.B. Aff. ¶ 11; Pittman Aff. ¶ 31. The operating physician ascertains whether there are any medical issues relevant to the procedure that need to be addressed, and checks to make sure that the patient has had no problems with any type of medication in the past. D.B. Aff. ¶ 11.

46.

As DHH has noted, Hope Medical’s patient history form does not include any space for physician “verification.” Pittman Aff. ¶ 31. Hope Medical’s administrator has read the licensing regulations many times, and she cannot find any requirement that the form contain such “verification.” *Id.* Hope Medical’s patient history form is the same form it has used for many years, and numerous inspectors have reviewed it and found no problem with it. *Id.* Nonetheless, Hope Medical is willing and prepared to implement additional documentation measures regarding patient examinations should its license be restored. D.B. Aff. ¶ 13; Pittman Aff. ¶ 31.

47.

After reviewing the patient’s chart and discussing any issues with the patient, the operating physician conducts a physical examination of the patient. D.B. Aff. ¶ 11. Every patient receiving an abortion receives a physical examination from the physician. *Id.* This examination always involves a pelvic examination and, where the physician believes appropriate, it also includes a vaginal ultrasound. *Id.* The operating physician documents the findings of the examination on an operative notes sheet, indicating the size and position of the uterus and estimated gestational age of the pregnancy. *Id.*

48.

Once the examination is complete, the physician performs the abortion using local anesthetic and suction aspiration. D.B. Aff. ¶ 11.

49.

At the end of the abortion procedure, the physician signs the operative notes sheet, which includes the patient's pre-operative and inter-operative medications. Pittman Aff. ¶ 34 and Exh. G.

50.

After the procedure, the patient is accompanied to the recovery room, where her vital signs (pulse, blood pressure, oxygen level) are taken and documented, and where she is given post-operative medications by a licensed nurse. Pittman Aff. ¶ 35. The nurse's notes sheet in the patient's chart indicates the medications each patient received after the procedure pursuant to a written, signed standing order. D.B. Aff. ¶ 12; Pittman Aff. ¶ 35 and Exh. H. That sheet itself is not signed by the physician, because the medications are given under a separate, signed standing order. Pittman Aff. ¶ 35. However, Hope is willing and prepared to implement additional documentation measures regarding post-operative medications should its license be restored. *Id.*

Irreparable Harms Imposed by the License Suspension

51.

The immediate shut-down of Hope Medical has caused, and continues to cause, irreparable harms to Hope Medical, its physicians and staff, and its patients. Pittman Aff. ¶ 36. These harms include the following:

- a) Hope Medical had numerous patients scheduled for abortion services on the day after the license suspension order was issued, as well additional patients scheduled for the following week. Pittman Aff. ¶ 36(a). All of these patients were forced to scramble to try to find other facilities that could provide them timely services, and to try to make new arrangements to take time off of work or school, find childcare, and line up transportation. *Id.*
- b) Patients continue to call Hope Medical to try to schedule appointments, only to be told they must try to obtain services elsewhere. Pittman Aff. ¶ 36(b). Hope Medical provides price reductions and charitable subsidies to indigent patients whenever possible, and this type of assistance is not available at other facilities in the area. *Id.* Some of Hope Medical's patients have called and informed Hope Medical's staff that they cannot afford to go to another provider, and that they are trying to wait for Hope Medical to reopen. *Id.* These financial and logistical

difficulties are likely to cause some of Hope Medical's patients to delay their abortions until later in pregnancy, when the procedure is not only more dangerous, but also potentially beyond the patients' financial reach because the cost of the procedure increases with gestational age. *Id.*

- c) Hope Medical is losing substantial revenue as a result of the license suspension. Pittman Aff. ¶ 36(c). If this continues, it will not take long for the facility to reach a point financially where it cannot reopen again. *Id.*
- d) The physicians and staff at Hope Medical have lost some or all of their livelihoods as a result of the license suspension. Pittman Aff. ¶ 36(d). Hope Medical has tried to give some hours to its physicians and staff, but it cannot keep all of the physicians and staff on for their usual hours with no revenue. *Id.* Because Hope Medical's physicians and staff all need paid work, some of them are likely to resign if the suspension order is not lifted quickly. *Id.*
- e) The license suspension is causing harm to Hope Medical's reputation and its patients' good will. Pittman Aff. ¶ 36(e). The longer a cloud of suspicion hangs over the facility because of the suspension order, the harder it will be to repair the damage to reputation and good will even if Hope Medical is ultimately vindicated. *Id.*

Claims for Relief

52.

First Claim for Relief

Defendants' issuance of the immediate suspension order to Hope Medical was arbitrary and capricious, contrary to law, unsupported by a preponderance of the evidence, and made upon unlawful procedure in violation of the Louisiana Administrative Procedures, La. Rev. Stat. Ann. § 49:964(G).

53.

Second Claim for Relief

The Immediate Suspension deprived Hope Medical of rights protected under the Due Process Clause of Article I, § 2 of the Louisiana Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983 by suspending Hope Medical's license without constitutionally adequate procedures.

54.

Third Claim for Relief

The Immediate Suspension deprived Hope Medical of rights to due process protected under Article I, § 2 Louisiana Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983 by suspending Hope Medical's license on the basis of vague regulations that fail to give notice of the conduct they prohibit and invite arbitrary enforcement.

Injunctive Relief

55.

Petitioner hereby incorporates by reference Paragraphs 1 through 54 above.

56.

Hope Medical requires the issuance of the requested injunctive relief to protect it, its physicians and staff from loss of livelihood, and harm to reputation and patient good will, and to prevent harm to the lives and health of their patients. Hope Medical's claims meet the standard for injunctive relief because Hope Medical is likely to prevail on the merits of its claims, and the conduct sought to be restrained is unconstitutional, unlawful, and unsupported by the evidence. Issuance of the injunction will retain the *status quo*.

57.

Enforcement of the Immediate Suspension is against the public interest because the order is contrary to constitutional and statutory rights and because it is impeding patients' access to lawful and needed health services.

58.

Failure to grant a temporary restraining order and/or stay will cause irreparable harm to Petitioner.

59.

Although many of the harms suffered by Hope Medical are irreparable, Petitioner seeks damages, including punitive and special damages, for other harms.

60.

Hope Medical is entitled to attorney's fees under 42 U.S.C 1988.

61.

For the foregoing reasons, Hope Medical has demonstrated that “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.” La. Code Civ. Proc. Ann. art. 3603(A). Petitioner is therefore entitled to entry of a temporary restraining order preventing Defendants as well as their employees, agents, and successors in office from enforcing any suspension of Hope Medical's license to operate an abortion facility based on the reasons set forth in the Notice of Immediate License Suspension dated September 3, 2010.

62.

Petitioner requests that a Temporary Restraining Order be issued until the PRELIMINARY INJUNCTION HEARING occurs; this hearing is expected to be set during the week of September 13, 2010—given that LSA—C.C.P. art. 3602 provides that an “application for a preliminary injunction shall be assigned for hearing not less than two nor more than ten days after service of the motion.” Petitioner further moves this court to set a Rule to Show Cause why a Preliminary Injunction should not issue, and why Defendants as well as their employees, agents, and successors in office should not be prevented from enforcing any suspension of Hope Medical's license to operate an abortion facility based on the reasons set forth in the Notice of Immediate License Suspension dated September 3, 2010.

63.

Petitioner requests that the temporary restraining order be entered without setting a cash bond given that the issuance of the temporary restraining order is unlikely to cause Defendants to incur any financial loss. *See* LSA—C.C.P. art. 3610 (the purpose of the bond is to indemnify the person wrongfully restrained or enjoined for the payment of costs incurred and damages sustained). In the alternative, Petitioner suggests that a cash bond be entered in the amount of \$1,000.

64.

By filing this petition, Hope Medical, certifies, by and through its counsel, that it has a good faith, reasonable belief that irreparable injury will ensue if a TRO and/or stay is not granted as prayed for, and undersigned counsel further certifies that he has made good faith efforts to notify defendants of this Petition for TRO and/or stay and to notify defendants of the hearing date for the preliminary injunction. Specifically, undersigned counsel has sent a copy of this pleading via

electronic mail and facsimile to: Kimberly Humbles at (225) 342-2232 and kimberly.humbles@la.gov, who is counsel for the Department and to Kyle Duncan, (225) 326-6793 and DuncanK@ag.state.la.us, who is counsel for the Attorney General, and has requested the appointment of a special process server to serve notice of the preliminary injunction hearing the temporary restraining order, and all related pleadings on Defendants.

65.

Undersigned counsel, for the reasons stated above, respectfully suggests that good cause exists for issuance of a TRO as requested without a hearing.

WHEREFORE PETITIONER PRAYS:

- I. For a TEMPORARY RESTRAINING ORDER and/or stay pursuant to La. Rev. Stat. Ann. § 39:964(C) restraining Defendants as well as their employees, agents, and successors in office from enforcing any suspension of Hope Medical's license to operate an abortion facility based on the reasons set forth in the Notice of Immediate License Suspension dated September 3, 2010.
- II. For a Rule to Show Cause why a Preliminary Injunction should not be issued;
- III. For entry of a judgment:
 - (a) Restraining Defendants as well as their employees, agents, and successors in office from enforcing any suspension of Hope Medical's license to operate an abortion facility based on the reasons set forth in the Notice of Immediate License Suspension dated September 3, 2010.
 - (b) Declaring that Defendants' immediate suspension of Hope's license was unlawful, unconstitutional and arbitrary and capricious; and
 - (c) Ordering Defendants, in their individual capacities, to pay Petitioner compensatory, punitive, special (including lost income and profits) and/or nominal damages, in an amount consistent with the facts and circumstances of this case, and attorney's fees and costs.
- IV. For all other reasonable and equitable relief allowed by law.

By attorneys:

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* Motion for Admission *Pro Hac Vice* to be filed

ATTORNEYS FOR PETITIONER

SERVICE INFORMATION

PETITIONER HAS REQUESTED THE APPOINTMENT OF A
PRIVATE PROCESS SERVER TO SERVE RESPONDENTS
WITH ALL RELEVANT PLEADINGS