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May 25, 2005

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Re: 9 Branch Street, LLC
Marcus Gordon, M. D.

Dear Paul:

As you know, this office and the American Civil Liberties Union of Massachusetts jointly represent Marcus Gordon, M.D. in connection with the issues raised in your letter of May 12, 2005.

Contrary to the representations in your letter, Dr. Gordon has not engaged in any conduct that violates the terms of his August 11, 2004 lease (the "Lease") with your client, 9 Branch Street, LLC ("Landlord"). Furthermore, the unfounded allegations in your letter are a pretext for terminating the Lease in order to prevent Dr. Gordon from exercising his legal right to engage in a perfectly legitimate medical practice as a gynecological surgeon.

Each of the arguments set forth in your letter is demonstrably without any factual basis or legal merit. I will address them in the order that you raise them.

1. **Dr. Gordon is not violating the Lease by engaging in his medical practice.** Article 1.7 of the Lease clearly specifies the type of use that is permissible at the leased premises: "Permitted Use: Office/Medical." Dr. Gordon is a gynecological surgeon, and he is engaged in a medical practice that performs outpatient gynecological surgery and provides other gynecological services, which obviously qualifies as an "office/medical" use and which is permitted under the Lease. Furthermore, an outpatient gynecological surgery practice typically performs a number of surgical procedures, including hysterectomies, laparoscopies, and pregnancy terminations. Nothing in the Lease restricts the type of medical practice that Dr. Gordon may engage in. Therefore, it is not a violation of the Lease for Dr. Gordon to provide

medical services of any kind, and it is certainly not a violation for him to perform outpatient gynecological surgery, which includes abortions.

Nor did Dr. Gordon misrepresent the nature of his practice during the lease negotiations. Those negotiations were conducted with the Landlord's representative, David Moran. He was well aware that Dr. Gordon intended to operate an outpatient gynecological surgery practice, and abortion-related services are frequently a part of such a practice. Dr. Gordon also told Mr. Moran that security glass should be installed, and another of the Landlord's employees, Steve Amanantian, said to Dr. Gordon, "I know what you need – like the pharmacy downstairs. I'll take care of it." Mr. Amanantian also said, "Well, of course, with what you guys are doing here, you obviously need this kind of glass." Thus, statements made by the Landlord's own employee demonstrate full knowledge of the nature of Dr. Gordon's practice.

Furthermore, Dr. Gordon never told any representative of the Landlord that he would not be providing abortion-related services as a part of his medical practice. In addition, Dr. Gordon has always been open about the nature of his practice and even advertises in the phone book under "Abortion." Thus, Dr. Gordon has in no way misrepresented his practice to any representative of the Landlord, and the Landlord had no basis whatsoever for assuming that Dr. Gordon would not be performing all of the surgical procedures typically associated with an outpatient gynecological surgery practice.

2. **Dr. Gordon's medical practice is not an "extra hazardous" use.** Article 7.8 of the Lease relates to activities "deemed" extra hazardous by virtue of causing an increase in the premiums for fire insurance on the leased premises. There is nothing "extra hazardous" about an outpatient gynecological surgery practice. Nor is the installation of security glass any evidence that Dr. Gordon's medical practice constitutes a fire hazard. You even concede in your letter that Dr. Gordon's activities, in and of themselves, are not "extra hazardous."

Furthermore, as you have also admitted, the one and only protest that has taken place to date was peaceful. In addition, the physical location of the building in the midst of a privately-owned office complex insures that no demonstrations will take place in close proximity to the leased premises. The mere possibility that unidentified third persons over whom Dr. Gordon has no control may engage in illegal activities at some point in the future does not convert a perfectly legitimate and peaceful medical practice into an extra hazardous activity within the meaning of Article 7.8.

3. **Dr. Gordon did not breach Article 17 of the Lease.** Dr. Gordon has not made any changes or alterations to the leased premises in violation of Article 17. As noted above, the installation of security glass was performed as part of the initial build-out of the space, and it was done with the authorization of, and at the direction of, Mr. Moran as agent for the Landlord. However, the contractor hired by the Landlord installed the wrong type of glass in an office suite that was not part of the leased premises. It was only after the Landlord and its contractor had performed the work incorrectly that Dr. Gordon offered to arrange for the work to be done, and he did so at his own expense, with the express permission of Mr. Moran.

4. **Dr. Gordon is not in violation of Article 12 because he has complied with all requirements of public authorities.** Although you have asserted that Dr. Gordon has violated Article 12 of the Lease, you have not cited a single violation by Dr. Gordon of any specific ordinance or regulation of any federal, state or local authority. Furthermore, the disposal of medical waste is strictly regulated by Massachusetts authorities, and Dr. Gordon is in full compliance with the applicable requirements. At his own expense, Dr. Gordon uses the services of a medical waste disposal company for blood-stained waste, and he disposes of all products of conception in sealed containers, with the waste being incinerated at a hospital facility.

Nor has Dr. Gordon put any of the Landlord's employees or tenants at risk. There are some types of medical waste that may be disposed of in the regular trash, even if they have a small amount of blood on them. Therefore, the Landlord's purported concerns about government sanctions that have not been threatened and a possible breach of its agreement with its waste removal contractor are totally unfounded.

5. **Dr. Gordon is not violating any of the Landlord's rules or regulations.** In your letter, you make a passing reference to violations by Dr. Gordon of the Landlord's rules and regulations. However, you have not identified any such rules or regulations, and the Landlord has never notified Dr. Gordon of any rules or regulations promulgated under Article 4 of the Lease. Moreover, any rules or regulations that the Landlord might now adopt and enforce against Dr. Gordon in an attempt to restrict the constitutionally protected surgical procedures that are a part of Dr. Gordon's practice would not be valid and would constitute a breach by the Landlord of the Lease.

6. **Your assertion that Dr. Gordon has violated Article 26 by failing to pay certain expenses is without merit.** Your assertions that Dr. Gordon is obligated to pay certain expenses and that his failure to do so is a violation of Article 26 are similarly unfounded. Specifically, there is no basis to charge Dr. Gordon for the installation of a sign. During the build-out of the office space, Mr. Moran asked Dr. Gordon if he would like to have a sign on the outside wall of the office. Mr. Amanantian then volunteered that he had some left-over lettering that he could use. He proceeded to install a "sign" consisting of letters (some of which were damaged) that spelled out the name of Dr. Gordon's practice. Neither Mr. Moran nor Mr. Amanantian stated or suggested that there would be any charge, and Dr. Gordon never agreed to make any payment for the sign. The Landlord has no right to charge Dr. Gordon after the fact for services that it volunteered in advance to provide.

Similarly, the Landlord's claim that Dr. Gordon owes $2,190.66 has never been documented. Dr. Gordon has never received the "CAM reconciliation statement" that you refer to and has no idea what this charge is for. If the Landlord provides documentation to substantiate this charge, he will review it. He is prepared to pay his share of any amounts that are legitimately due and payable under the terms of the Lease.

Finally, the assertion that Dr. Gordon is in breach of the Lease because he has not paid a rent charge in the amount of $.18 assessed by the Landlord in January is petty on its face and

demonstrates as clearly as possible that the Landlord is using purported violations of the Lease as a pretext to pressure Dr. Gordon into abandoning his practice.

Furthermore, your assertion that the Landlord is "not unsympathetic" to Dr. Gordon's surgical practice is flatly contradicted by statements that the Landlord's president, Joe Friedman, has made to the press. He is quoted as stating that the Landlord would not have entered into the Lease if it had known that Dr. Gordon performs abortions. Mr. Friedman is further reported to have said that the Landlord's owner, Harold Brooks, is personally opposed to abortions and that the Landlord was searching for a way out of the Lease.

7. **Dr. Gordon has not violated any other provision of the Lease.** You have also asserted, without explanation, that Dr. Gordon has violated Articles 11.2, 26.1(e), 26.1(f), 26.4 and 36 of the Lease. With respect to each of those articles, Dr. Gordon responds as follows:

- Article 11.2 – to the extent that your allegation is based upon the installation of the security glass, Dr. Gordon has not violated that provision, for the reasons set forth above;

- Article 26.1(e) – Dr. Gordon has not failed to perform or observe any requirement of the Lease;

- Article 26.1(f) – Dr. Gordon has not made any representation or warranty in the Lease that was "incorrect in any material respect on the date upon which it was made";

- Article 26.4 – Dr. Gordon is not in default of the Lease, so this article has no application;

- Article 36 – to the extent that your allegation is based upon the disposal of medical waste, Dr. Gordon has not violated that provision, for the reasons set forth above, and he has not otherwise violated the Hazardous Materials Transportation Act.

8. **Dr. Gordon has not interfered with the Health Inspector.** You have reported that Dr. Gordon recently failed to permit an inspection of the leased premises by the Methuen Board of Health. However, as I explained on the telephone, that is not the case. The health inspector appeared at Dr. Gordon's office once, voluntarily decided not to conduct an inspection at that time, and requested that Dr. Gordon contact him. Dr. Gordon has done so, and he has no objection to an inspection being conducted by the Board of Health at any time, so long as patient privacy is protected.

9. **The Landlord is breaching the Lease.** The Landlord is itself in violation of specific provisions of the Lease. When the Lease was being negotiated, Dr. Gordon stated that he needed to have access to the leased premises 24 hours per day, seven days per week, and Mr. Moran assured him that he would have such access. This assurance was incorporated into Article 1.20 of the Lease. Nevertheless, Dr. Gordon has not had the access necessary for him to be able to operate his practice without setting off the alarm system. Dr. Gordon sees patients in the evening, and they sometimes leave the office after 8:00 p.m., when the security system alarm

is automatically activated. As a result, any patient leaving after 8:00 p.m. will set off the alarm by opening the door to leave the building. Dr. Gordon has asked to have the alarm system reset so that it will activate later in the evening, but the Landlord has refused.

As a result, Dr. Gordon is not responsible for any alarms that are triggered by his use of the premises in accordance with his rights under the Lease, and he will not pay any charges assessed by the Methuen Police Department or by Brooks Maintenance for responding to such alarms. The Landlord is in violation of the Lease both by failing to provide the required access and by attempting to assess against Dr. Gordon the assessed charges.

Moreover, by demanding that Dr. Gordon cease and desist from the normal surgical procedures for which he leased the premises, the Landlord has breached Article 27 of the Lease.

10. **The Landlord is violating Dr. Gordon's civil rights.** The Landlord's conduct also violates the Massachusetts Civil Rights Act, Mass. Gen. Laws c. 12 § 11H and § 11I, which prohibits any interference with Dr. Gordon's exercise of his constitutional rights by threats, intimidation or coercion. The Landlord is attempting to intimidate and coerce Dr. Gordon into abandoning his Lease or restrict his practice by making unfounded allegations that he is in violation of the Lease and threatening to declare him in default.

Moreover, to the extent that the Landlord is attempting to terminate the Lease or to restrict the nature of Dr. Gordon's surgical practice because it perceives a threat of violence or coercion by any third parties, such as anti-abortion protesters, this is itself a violation of the Massachusetts Civil Rights Act. Redgrave v. Boston Symphony Orchestra, Inc. 399 Mass. 93, 100 (1987). Nor is fear of business disruption, fear of economic loss, or even fear for physical safety a defense to liability. Id. at 101. The Landlord should be aware that Dr. Gordon will be entitled to recover an award of legal fees and costs incurred in any legal proceedings required to protect Dr. Gordon from any conduct of the Landlord that violates the Massachusetts Civil Rights Act.

Dr. Gordon did not seek this confrontation and has no desire to engender animosity. He seeks only to provide medical services to his patients without further interference or harassment. However, the medical services that Dr. Gordon provides at the leased premises are protected by the United States Constitution, the Massachusetts Constitution, and the Massachusetts Civil Rights Act, and Dr. Gordon will not hesitate to seek injunctive relief and compensatory damages if the Landlord makes any further attempts to interfere with his practice. Neither the Landlord nor others opposed to the nature of Dr. Gordon's practice have any right to impose their political views upon Dr. Gordon or his patients, and he is prepared to take all steps necessary to prevent any further attempts by the Landlord to do so under the pretext of alleged leasehold violations.

In the light of the statements made by the Landlord's representatives in the press and the threats against Dr. Gordon's tenancy contained in your May 12 letter, we must receive written confirmation that the Landlord has withdrawn the demands contained in your letter and will stop any and all efforts to interfere with Dr. Gordon's rights under the Lease and under the

constitution to provide the full range of outpatient gynecological services to his patients. We do not believe it is in the interests of either party to have to litigate these matters, and I hope to hear from you as soon as possible, but in any event no later than Monday, June 6, 2005.

Very truly yours,

Dorothy M. Bickford

DMB:kkt
cc: Marcus Gordon, M.D.
Sarah Wunsch, Esquire
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