UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASHAUNA LOWRY as Next Friend of TITUS JERMAINE CROMER, JR.,	
Plaintiff,	Case No. 2:19–cv–13293
v.	District Court Judge Mark A. Goldsmith
BEAUMONT HEALTH,	
Defendant.	Magistrate Judge Michael Hluchaniuk

BEAUMONT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT [ECF 27]

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COUNTER-STATEMENT OF THE ISSUES PRESENTED

Whether this Court should deny this motion because (A) Plaintiff's proposed amendments are futile and (B) Plaintiff has failed to articulate a valid claim against Beaumont despite effectively filing five prior complaints?

(A)(1) Whether the proposed preemption claim is futile because (i) there is no private right of action under the Supremacy Clause and (ii) even if there were such a right of action against a private actor, Plaintiff's proposed amendment fails to articulate a valid form of preemption?

(A)(2) Whether Plaintiff's proposed addition of Director Gordon is also futile because (i) Plaintiff has not alleged a continuing violation of federal law *by the Director* necessary to sustain an *Ex Parte Young* action and (ii) Plaintiff has still failed to allege any basis for attributing state action to the private actions of Beaumont Health?

(B) Whether Plaintiff has been unable to cure the deficiencies in her pleadings despite effectively filing five prior complaints against Defendant?

Beaumont Health responds in the affirmative to all these issues.

CONTROLLING AUTHORITY

Beydoun v. Sessions, 871 F.3d 459 (6th Cir. 2017)

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. ___, 135 S.Ct. 1378 (2015)

State Farm Bank v. Reardon, 539 F.3d 336 (6th Cir. 2008)

Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412 (6th Cir. 1996)

Faparusi v. Case Western Reserve Univ., 711 Fed. Appx. 269 (6th Cir. 2017)

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INTRODUCTION

Between filings before the Oakland County Circuit Court and this Court, this is effectively Plaintiff Lashauna Lowry's ("Plaintiff") sixth attempt to file a claim against Defendant Beaumont Health ("Beaumont"). After Beaumont explained the incurable deficiencies in the fifth iteration of her claims, ECF 2, as fully discussed in Beaumont's pending motion to dismiss under Fed. R. Civ. P. 12(b)(6), ECF 23, Plaintiff now seeks leave to file a sixth iteration, ECF 27. Given the proposed amendments are futile and fail to address the deficiencies of the prior five filings, this Court should deny this motion and grant Beaumont's pending motion.

Plaintiff seeks to amend again to add a "preemption claim" against Beaumont and to add Michigan Department of Health and Human Services Director Robert Gordon ("Director Gordon") as a party. Briefly, the "preemption claim" is futile because (i) there is no private right of action under the Supremacy Clause through which all preemption is grounded and (ii) even if there were such a claim, Plaintiff's proposed amendment fails to articulate a valid form of preemption. Next, the proposed addition of Director Gordon is futile because (i) Plaintiff has not alleged a continuing violation of federal law *by the Director* for which she seeks declaratory or injunctive relief *against the Director* and (ii) Plaintiff has still failed to allege any basis for fairly attributing state action to the private actions of Beaumont.

As demonstrated by the five prior filings and the foregoing, Plaintiff is simply unable to articulate a valid claim against Beaumont, which is not surprising since Beaumont has engaged in no actionable conduct. Consequently, for the reasons

provided below, and in Beamont's pending motion under Fed. R. Civ. P. 12(b)(6), this Court should dismiss this matter in its entirety.

FACTUAL BACKGROUND

On October 17, 2019, Titus Jermaine Cromer, Jr. was admitted to Beaumont Hospital – Royal Oak after suffering a traumatic injury that caused "damage to the brain as a result of low levels of oxygen and cardiac arrest." ECF 2, ¶ 15, PgID 169. From the time of his injury, Titus has required "a ventilator, tube feeding, and assistance with all activities of daily living." ECF 2, ¶ 16, PgID 169. Following multiple assessments, Beaumont pronounced Titus as deceased on October 24, 2019 based on the "irreversible cessation of all function of [Titus's] entire brain, including the brain stem," consistent with M.C.L. § 333.1033(1)(b). See ECF 2, ¶ 17, PgID 169.

"On Friday, October 25, 2019, at 4:14 p.m.," Plaintiff filed a verified complaint for preliminary injunction and emergency motion for temporary restraining order," in Oakland County Circuit Court before the Honorable Hala Jarbou. ECF 2-6, PgID 332; (See **Ex. 1**, 10/25/19 Verified Complaint for Preliminary Injunction and Emergency Motion for Temporary Restraining Order). In this original complaint, Plaintiff failed to state any cause of action against Beaumont and simply demanded a temporary restraining order and preliminary injunction. (See Ex. 1).

When counsel for the parties arrived to appear before Judge Jarbou on October 28, Beaumont counsel apprised Plaintiff's counsel of the fact that no actual claim had been filed against Beaumont. Shortly thereafter, at 11:18 p.m. on October 28, Plaintiff filed a "first amended verified complaint for declaratory judgment, preliminary

injunction, and emergency motion for temporary restraining order."[1] (**Ex. 2**, 10/28/19 First Amended Verified Complaint for Declaratory Judgment, Preliminary Injunction and Emergency Motion for Temporary Restraining Order).[2] In this second try, Plaintiff asserted one count against Beaumont for "declaratory judgment," (i.e., another form of relief), but again failed to assert any actual cause of action. Despite the absence of any actual claim against Beaumont, Judge Jarbou issued a temporary restraining order compelling Beaumont "to continue [the] current level of care." (**Ex. 3**, 10/28/19 Temporary Restraining Order).

With Beaumont having raised the continued absence of any claim against it on October 28, Plaintiff filed—without the consent of Beaumont or leave of court—a "second amended verified complaint for declaratory judgment, preliminary injunction and emergency motion for temporary restraining order" on November 4, 2019. (**Ex. 4**, 11/4/19 Second Amended Verified Complaint for Declaratory Judgment, Preliminary Injunction and Emergency Motion for Temporary Restraining Order). In this third try, Plaintiff asserted four counts for declaratory judgment, again failing to articulate any actual claims against Beaumont. (*Id.*). While Plaintiff appeared to include allegations of some form of due process violation, noticeably absent were any allegations of state action—or articulation of how the actions of Beaumont—a private actor—could be fairly attributable to the state. (*Id.*)

[1] Note that in both cases, no separate motion was filed with the Court.

[2] Notwithstanding its title, this second effort was not "verified." (Ex. 2).

Hours after this third try, Judge Jarbou issued an order on November 4 directing the parties to appear the next day to "address why exclusive jurisdiction should not rest with the probate court pursuant to [M.C.L. §] 700.1302." (**Ex. 5**, 11/4/19 Order).

After providing Plaintiff with nearly two weeks to facilitate a transfer of Titus to another facility, Judge Jarbou issued an order on November 7 dismissing the matter for lack of subject matter jurisdiction, opining that the probate court had exclusive jurisdiction over the case. ECF 2-6, PgID 336. Although Plaintiff had filed an original complaint and two amendments, Judge Jarbou noted:

> Plaintiff has not put forward a cognizable claim that the circuit court would have jurisdiction over. Plaintiff has only pled remedies in the form of declaratory relief and injunctions which are not causes of action in and of themselves.

ECF 2-6, PgID 336. While no "cognizable claim" had been asserted against Beaumont for over two weeks, Judge Jarbou dismissed the case "as of Tuesday, November 12, 2019, at 12:00p.m." to effectively extend the temporary restraining order for a total of sixteen (16) days.

While the matter before Judge Jarbou was still pending, Plaintiff filed a "verified complaint for declaratory judgment, preliminary injunction and emergency motion for temporary restraining order" with this Court on November 8. ECF 1. Plaintiff's motion admits that this fourth attempt was also defective. See ECF 27, PgID 648.

Consequently, "[a] few hours later," without providing Beaumont with a copy of its filing or even advising that it was filing in federal court, Plaintiff filed its fifth try—an "amended verified complaint for declaratory judgment, preliminary injunction

and emergency motion for temporary restraining order." ECF 2. Approximately *an hour* after Beaumont was given notice of this fifth filing, Presiding Judge Roberts conducted a telephonic hearing and soon issued another *temporary* restraining order directing Beaumont to "continue to provide the current level of care to Titus." ECF 4. On November 9, Judge Robert issued an amended temporary restraining order making clear that the prior order was "intended only to *maintain the status quo* and not impose a duty on Beaumont to avoid something it believes had already occurred, but which is a main issue in the case," (i.e., Titus's brain death). ECF 7. Judge Roberts then clarified "Beaumont is ordered to continue to provide the level of care it currently extends to Titus. Beaumont is not required to perform tracheostomy and PEG procedures." (*Id.*)

After the parties submitted their briefing on Plaintiff's request for a preliminary injunction, this Court referred the matter to Magistrate Judge Hluchaniuk for a settlement conference on November 18. ECF 19.[3] The parties and their counsel appeared before Magistrate Judge Hluchaniuk three days later on November 21 and continued to engage in discussions thereafter. See e.g., ECF 20, ECF 21, ECF 22.

[3] Curiously, throughout the motion, Plaintiff's counsel criticizes Beaumont for not opposing a brief continuation of the amended *temporary* restraining order to attempt to facilitate transferring Titus's body to another facility while reserving its challenges to Plaintiff's claims. See e.g., ECF 27, PgID 642, 649-650. In other words, Beaumont is ironically attacked for continuing to exercise compassion by not immediately insisting on dissolution of the amended temporary restraining order and dismissal of the invalid claims against it.

Recognizing the due date for its response was approaching and that Plaintiff had still failed to articulate a viable claim despite five attempts, Beaumont preserved its defenses by filing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on November 27. ECF 23. Contrary to Plaintiff's efforts to misconstrue the issues raised in Beaumont's motion, the pending motion generally points out the following:

- Count I—Plaintiff cannot establish any violation of the Emergency Medical Treatment and Labor Act ("EMTALA") because she admits that Beaumont declared Titus deceased on October 24, 2019 and thus, Beaumont does not believe that Titus suffers from an "emergency medical condition";[4]
- Count II—Plaintiff cannot maintain a due process claim against Beaumont because Beaumont is not a state actor or engaged in state action;

[4] Throughout the motion, Plaintiff misconstrues this issue by inaccurately stating that Beaumont has taken the position "that it *cannot* comply with EMTALA because of its application of M.C.L. § 333.1033." See ECF, PgID 644, 651, 653 (emphasis added). Beaumont has claimed nothing of the sort and maintains that it has complied with all EMTALA obligations. Rather, stabilization claims under § 1395dd(b) arise only when "*the hospital determines* that the individual has an emergency medical condition." 42 U.S.C. § 1395(b)(1) (emphasis added). Consistent with this language, the Sixth Circuit has ruled that "if [hospital physicians] *do not believe* an emergency medical conditions exists [then] EMTALA does not apply." *Moses v. Providence Hosp. and Med. Ctrs., Inc.*, 561 F.3d 573, 585 (6th Cir. 2009) (emphasis added). Since Plaintiff admits that Beaumont has determined that Titus is deceased, EMTALA does not apply because Beaumont does not believe, and has not determined, that an emergency medical condition exists.

- Count III—Plaintiff cannot maintain a void-for-vagueness claim because Beaumont is not a state actor and because Plaintiff does not identify any part of M.C.L. § 333.1033 that is vague; and
- Count IV—Plaintiff cannot maintain a "claim" for declaratory judgment because it isn't a proper cause of action and none of Plaintiff's other claims entitle her to the remedy sought.

Apparently recognizing that the above claims would not survive the pending motion to dismiss by Beaumont, ECF 23, Plaintiff's counsel requested concurrence in the filing of Plaintiff's sixth try—a proposed "second amended complaint for declaratory judgment, preliminary injunction, and emergency motion for temporary restraining order—on December 4. (**Ex. 6**, 12/4/19 Email of Andrew Laurila and proposed "Second Amended Verified Complaint for Declaratory Judgment, Preliminary Injunction, and Emergency Motion for Temporary Restraining Order).[5] Generally, Plaintiff seeks to (i) add a non-existent "EMTALA preemption" claim and (ii) add Michigan Department of Health and Human Services Director Robert Gordon ("Director Gordon") as a party despite the absence of any alleged continuing violation of law by Director Gordon or his agency.

[5] Incidentally, the proposed amendment provided to Beaumont counsel with the request for concurrence clearly does not match the proposed amendment that is appended to Plaintiff's motion. For example, the 12/4/19 proposal contains 106 paragraphs while the appended proposal contains 108 paragraphs. (Compare Ex. 6, p. 26 to ECF 27-2, PgID 689). Similarly, paragraphs appear to contain "additional" language not contained in the 12/4/19 proposal. (Compare e.g., Ex. 6 at ¶ 40, p. 11 to ECF 27-2, ¶ 40, PgID 674). Unfortunately, Plaintiff's motion fails to disclose the addition of this and/or other material not contained in the 12/4/19 proposal.

After examining the preemption issue, Beaumont counsel advised Plaintiff's counsel that the proposed amendment would be futile, explained the futility of the preemption claim with authority, and thus declined to concur in the filing of the proposed amendment, (i.e., sixth try). (**Ex. 7**, 12/8/19 Email of Michael Price). The following day, Plaintiff filed its motion for leave to file its sixth try anyway.

For the reasons provided more fully below, this Court should deny the motion for leave to amend on the basis that it is futile because (i) there is no private right of action under the Supremacy Clause (through which all preemption is grounded) and (ii) even if there were such a claim, Plaintiff's proposed amendment fails to articulate a valid form of preemption. Further, Plaintiff's proposed addition of Director Gordon is futile because (i) Plaintiff has not alleged a continuing violation of federal law *by the Director* for which she seeks declaratory or injunctive relief *against the Director* and (ii) Plaintiff has still failed to allege any basis for fairly attributing state action to the private actions of Beaumont to support her request for continuing injunctive relief against Beaumont.

Finally, this Court should also deny this motion on the basis that Plaintiff has failed to cure deficiencies despite—collectively—five filings with the Oakland County Circuit Court and this Court. To date, Plaintiff has been the subject of *temporary* restraining orders for 53 days (since October 28) even though no viable claim has ever been asserted against it throughout that entire period. Consequently, for the reasons provided below and in Beaumont's pending motion to dismiss, ECF 23, this Court should deny this motion and dismiss this case.

LEGAL STANDARD

Although "'Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend shall be freely given when justice so requires[,]'"

> . . . leave to amend a complaint "may be denied where there is 'undue delay, bad faith or dilatory motive on the part of the movant, *repeated failure to cure deficiencies by amendments previously allowed*, undue prejudice to the opposing party for virtue of allowance of the amendment, *futility of amendment*, etc.'" [*Riverview Health Inst. LLC v. Med. Mut. Of Ohio*, 601 F.3d 505, 520 (6th Cir. 2010)] (emphasis in original [and emphasis added]) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 … (1962)).

Beydoun v. Sessions, 871 F.3d 459, 469 (6th Cir. 2017) . For the reasons provided below, this Court should deny this motion and grant Plaintiff's pending motion to dismiss under Fed. R. Civ. P. 12(b)(6) because (A) the proposed amendments—in what is effectively a fifth amended complaint—are futile and (B) Plaintiff has repeatedly failed to cure deficiencies despite effectively filing five prior complaints.

ARGUMENT

I. This Court should deny Plaintiff's motion because Plaintiff's proposed amendments are futile.

"A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Beydoun*, 871 F.3d at 469 (quoting *Riverview Health*, 601 F.3d at 512). As noted in Beaumont's pending motion to dismiss:

> Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." In evaluating a motion brought pursuant to Rule 12(b)(6), "[c]ourts must construe the complaint in the light most favorable to plaintiff,

> accept all well-pled factual allegations as true, and determine whether the complaint states a plausible claim for relief." *Albrecht v. Treon,* 617 F.3d 890, 893 (6th Cir. 2010) (internal brackets, quotation marks, and citations omitted). To survive a Rule 12(b)(6) motion, the complaint must contain specific factual allegations, and not just legal conclusions, in support of each claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 678–679, 129 S.Ct. 1937 … (2009) A complaint will be dismissed unless, when all well-pled factual allegations are accepted as true, the complaint states a "plausible claim for relief." *Id.* at 679...

Fuoco v. Bank of Am., 115 F. Supp. 3d 874, 877 (E.D. Mich. 2015).

A. Plaintiff's proposed preemption claim is futile because (1) there is no private right of action under the Supremacy Clause and (2) even if there were such a claim, Plaintiff's proposed amendment fails to articulate a valid form of preemption.

1. Plaintiff's proposed "preemption claim" is futile as there is no such thing as a private cause of action for preemption or a private right of action under the Supremacy Clause.

The doctrine of "[p]reemption is based on the Supremacy Clause" and "simply provides a 'rule of decision.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, ___ U.S. ___, 138 S.Ct. 1461, 1479 (2018) (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. ___, 135 S.Ct. 1378, 1383 (2015)).

> The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. But it is not the "'source of any federal rights,'" and certainly does not create a cause of action. Nothing in the Clause's text suggests otherwise, and nothing suggests it was ever understood as conferring a private right of action.

Armstrong, 135 S.Ct. at 1380, 1383 (citations omitted);[6] see *Doe v. University of Tennessee*, 186 F.Supp.3d 788, 803 (M.D. Tenn. 2016) (acknowledging "there is no such thing as a private cause of action for preemption, nor is there a private right of action under the Supremacy Clause"). In short, federal preemption essentially provides that "*once a case or controversy properly comes before a court*, judges are bound by federal law." *Armstrong*, 135 S.Ct. at 1384 (emphasis added).

In *Doe*, the plaintiff similarly attempted to assert a "preemption claim," which effectively argued the defendant's "pattern of using and misusing the Tennessee Uniform Administrative Procedure Act ("TUAPA") procedures" was "preempted by Title IX and the Campus Save Act." *Doe*, 185 F.Supp.3d at 792, 803. As conceded by plaintiff, the district court observed that defendant

> … is correct that there is no such thing as a private cause of action for preemption, nor is there a private right of action under the Supremacy Clause, and, therefore, the court need not address whether to dismiss

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[6] In *Armstrong*, the U.S. Supreme Court acknowledged that it had "long held that federal courts may in some circumstances grant injunctive relief against *state officers* who are violating, or planning to violate, federal law," but reiterated that it has "never held or even suggested that that [this court created remedy] rests upon an implied right of action contained in the Supremacy Clause." *Id.* at 1384; see *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890 (1983) (recognizing federal court jurisdiction to enjoin *state officials* from violating federal laws).

In *Harding v. Summit Med. Ctr.*, 41 Fed. Appx. 83 (9th Cir. 2002), the plaintiff attempted to apply this principle against private actors. After noting the plaintiff had sued "a private medical provider and its legal representative" (as opposed to any "state official of California"), it ruled that neither defendant had "the ability to enact or enforce state laws, and thus neither [could] interfere with [plaintiff]'s rights under the Supremacy Clause." *Id.* at 85.

> any such claim. The court understands Count III of the FAC not as raising its own cause of action, but rather as a part of the plaintiff's request for injunctive relief, which includes enjoining [defendant] to amend its application of TUAPA, based on the theory that [its] current TUAPA practices violate Title IX and the Campus Save Act.

Id. at 803. Finally, the district court also observed that "[w]hether TUAPA, on the whole, is preempted is irrelevant to the fact-specific question of whether" the defendant's application of TUAPA violated federal law.

Plaintiff's attempt to assert a non-existent "EMTALA preemption" claim—admittedly grounded in the Supremacy Clause, ECF 27-2, ¶¶ 96-97, PgID 686-687—is futile as "there is no such thing as a private cause of action for preemption, nor is there a private right of action under the Supremacy Clause." *Id.* at 803; see *Armstrong*, 135 S.Ct. at 1383. Rather, Plaintiff seems to be reiterating her existing request for injunctive relief based on her claim for alleged violations of EMTALA (federal law)—which is deficient for the reasons provided in Beaumont's pending motion to dismiss under Rule 12(b)(6). Since no such "preemption claim" exists and Plaintiff fails to even address the deficiencies in the EMTALA claim, this Court should deny this motion as the proposed amendments are futile.

2. Plaintiff's proposed "preemption claim" fails to articulate a valid form of preemption.

Preemption "simply provides a 'rule of decision.'" *Murphy*, 138 S.Ct. at 1479.

> Federal law may preempt state law either expressly or impliedly. Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is preempted. Implied preemption has been subdivided into "field preemption" and "conflict preemption." Field preemption exists

> "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

State Farm Bank v. Reardon, 539 F.3d 336, 341-342 (6th Cir. 2008) (citation omitted).

Contrary to the incomplete citation repeatedly offered by Plaintiff, EMTALA provides: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). Since the above provision fails to indicate "that a specific type of state law is preempted," express preemption is inapplicable. Similarly, "field preemption" is inapplicable since EMTALA expressly contemplates state supplementation to the extent it does not conflict with EMTALA. In short, the above provision does nothing more than confirm conflict preemption.

Conflict preemption occurs in one of two forms: impossibility preemption; and obstacle preemption. *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315 (6th Cir. 2017). Section 1395dd(f)—which requires a "direct conflict"—would suggest that only impossibility preemption applies here. Impossibility preemption occurs "where compliance with both federal and state regulations is a physical impossibility." *Reardon*, 539 F.3d at 342. In the proposed amendment, Plaintiff fails to allege any such physical impossibility. Indeed, to do so would be senseless as it is not physically impossible to comply with EMTALA's screening and stabilization requirements under 42 U.S.C. § 1395dd and also make a determination of death

under M.C.L. § 333.1033. To conclude otherwise would effectively mean that every death pronounced under M.C.L. § 333.1033 has violated EMTALA.

Obstacle preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Reardon*, 539 F.3d at 342. Assuming it even applies here, Plaintiff fails to articulate any basis for obstacle preemption. Further, Congress enacted EMTALA "to prevent hospitals from dumping patients who suffered from an emergency medical condition because they lacked insurance to pay the medical bills." *Estate of Lacko, ex rel. Griswatch v. Mercy Hosp., Cadillac*, 829 F. Supp. 2d 543, 548 (E.D. Mich. 2011). "The statute was not designed or intended to establish guidelines or standards for patient care, provide a suit for medical negligence, or substitute for a medical malpractice claim." *Moses*, 561 F.3d at 578. Given a pronouncement of death made in "accordance with accepted medical standards" under M.C.L. § 333.1033 does not stand as an obstacle to the "anti-dumping" objective of EMTALA, and the Sixth Circuit has noted EMTALA was *not* "intended to establish guideless or standards for patient care," obstacle preemption would have no application here.

Finally, a cursory examination of Plaintiff's proposed amendment reveals that Plaintiff is not even attempting to assert a valid form of preemption. Rather than articulate any valid form of preemption discussed above, Plaintiff claims "Beaumont has failed to comply with" EMTALA "based on an *improper reading/interpretation* of

M.C.L. § 333.1033." ECF 27-2, ¶ 100, PgID 687 (emphasis added).[7] (Neither Plaintiff's motion nor the proposed amendment explains how Beaumont is allegedly misreading the statute). Even if a private cause of action for preemption alone existed, and even if Plaintiff had alleged some form of valid preemption, the above allegation reveals that Plaintiff is simply attempting to challenge *Beaumont's purported interpretation* of the statute. Bottom line, Plaintiff is simply attempting to add a non-existent preemption claim to challenge Beaumont's pronouncement of death, (i.e., challenge its standard of care).[8] Since EMTALA was not created for this purpose, this Court should deny this motion as futile.

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[7] Similarly, in the motion, Plaintiff admits: "This is not to say that Michigan's Determination of Death Act and EMTALA are at odds generally." ECF 27, PgID 655. Indeed, Plaintiff attempts to assert a new form of "general preemption" "applied to Beaumont in this context." *Id.* Based on the above, Plaintiff effectively concedes that neither impossibility nor obstacle preemption have any application to this case.

[8] Strangely, Plaintiff cites *Bowen v. Mercy Memorial Hosp*, 1995 WL 80519 (Mich. Ct. App. Dec. 8, 1995) as support for the preemption issue. However, in *Bowen*, the Michigan Court of Appeals recognized that "EMTALA is not a substitute for state law malpractice claims, and was not intended to guarantee proper diagnosis or to provide federal remedy for misdiagnosis or medical negligence." *Id.* at *2 (quoting *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 856 (4th Cir. 1994)). Noting plaintiff failed to point to any "definition of medical malpractice that is broad enough to cover EMTALA claims," the Court of Appeals agreed that medical malpractice, (i.e., alleged misdiagnosis), actions "and EMTALA actions 'are separate and distinct causes of action focused on different conduct and aimed at different goals.'" *Id.* (quoting *Power*, 42 F.3d at 864). Alternatively, the Court of Appeals *then* found that state pre-suit requirements that directly conflict with EMTALA's two-year statute of limitations would be preempted. *Id.* at *3. Therefore, Plaintiff's own authority supports the proposition that EMTALA has no application to this case.

In closing, this Court should deny Plaintiff's motion for leave to add a claim for "EMTALA preemption" because: no such claim exists; even if it did exist, Plaintiff has failed to articulate any valid form of preemption; and Plaintiff cannot articulate a valid form of preemption to support "conflict preemption" in this case.

B. Plaintiff's proposed addition of Director Gordon is futile because (1) Plaintiff has not alleged a continuing violation of federal law *by the Director* necessary to sustain an *Ex Parte Young* action and (2) Plaintiff has still failed to allege any basis for attributing state action to the private actions of Beaumont.

1. Plaintiff's proposed addition of Director Gordon is futile as Plaintiff has not—and cannot—allege a continuing violation of federal law *by the Director* for which Plaintiff seeks declaratory or injunctive relief *against the Director*.

The *Ex parte Young* exception to the Eleventh Amendment "abrogates a state official's Eleventh Amendment immunity when a suit challenges the constitutionality of a state official's *action*." *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (emphasis in original). "In order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law" by the individual state official. *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013).

> Indeed, "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." Rather, a state official must possess "some connection with *the enforcement of the [challenged law]*," and *must "threaten [or] be about to commence proceedings"*—that is, it must be likely that the official will enforce the law against the plaintiff[.]

Doe v. DeWine, 910 F.3d 842, 848 (6th Cir. 2018) (citations omitted and emphasis added). Basically, the *Ex parte* Young exception "does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional statute." *Children's Healthcare*, 92 F.3d at 1415.

Collectively, Plaintiff's proposed amendment appears to allege that Director Gordon, in his official capacity, has the authority to enforce laws providing for the issuance, ordering, or recording of erroneous death certificates. ECF 27-2, ¶¶ 4, 40, 65-66, PgID 665, 674, 679-680; see ECF 27, 644-645. However, in addition to failing to identify any statute that provides for the issuance, ordering, or recording of death certificates, or the federal law that such statute supposedly violates, Plaintiff fails to allege that Director Gordon (or his state agency) has enforced or threatened to enforce this unidentified statute providing for issuing, ordering, or recording death certificates. Therefore, the *Ex Parte Young* exception would not apply even if any such law were identified. See *Children's Healthcare*, 92 F.3d at 1416 (concluding *Ex Parte Young* exception did not apply to action against state Attorney General since "Attorney General did not threaten to commence and was not about to commence proceedings against the plaintiffs, much less proceedings to enforce an allegedly unconstitutional act").

Finally, Plaintiff also appears to vaguely contend that Director Gordon somehow has the authority to "enforce" M.C.L. § 333.1033. ECF 27-2, ¶ 74, PgID 680; see ECF 27, PgID 644. As a preliminary matter, any such general authority is insufficient to sustain an *Ex Parte Young* action absent some action or threat of action. *Children's Healthcare*, 92 F.3d at 1415-1416. Further, M.C.L. § 333.1033 provides (i) standards

for determining death "in accordance with accepted medical standards" and (ii) pronouncements of death by a physician or nurse. It does not reference death certificates and it is entirely unclear what provision of the statute Plaintiff believes Director Gordon could enforce (and/or how such enforcement would violate federal law). In short, Plaintiff's attempt to suggest "some connection" between the Director and unlawful "enforcement" of M.C.L. § 333.1033 is just nonsensical.

At bottom, Plaintiff has not—and cannot—allege "a continuing violation of federal law" by Director Gordon (or his agency) for which Plaintiff seeks declaratory or injunctive relief against Director Gordon (or his agency). Therefore, this Court should deny this motion as any attempt to add Director Gordon is also futile.

2. Even if this Court were to entertain adding Director Gordon, Plaintiff has still failed to allege any basis for fairly attributing state action to the private actions of Beaumont.

As noted in its pending motion to dismiss, a private actor like Beaumont can "be held to constitutional standards" only when "*its* actions so approximate state action that they may be fairly attributed to the state."[9] *Faparusi v. Case Western Reserve*

[9] Incredibly, Plaintiff claims that "[f]or the first time in [its] motion [to dismiss] does Defendant Beaumont assert it is not a state actor for purposes of Plaintiff's constitutional claims . . ." ECF 27, PgID 643, 650. On the contrary, while appearing before Judge Jarbou on *November 5*, Beaumont counsel expressly noted:

> [L]et's assume for a moment that they really did assert a claim for due process, Judge you don't need me to stand here and say to you, you don't have jurisdiction absent a state actor. . . . So, no state actor for their due process theory that they're trying to now sew together as a basis for you to have jurisdiction.

Univ., 711 Fed. Appx. 269, 275 (6th Cir. 2017) (emphasis added); see *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). "Fair attribution" effectively requires "that the action be taken (a) under color of state law, and (b) by a state actor." *Id.* at 828. The Sixth Circuit employs three tests to determine if *private action* can be attributed to the state: "(1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test." *Id.*; see *Faparusi*, 711 Fed. Appx. at 275; *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

In the proposed amendment, Plaintiff fails to articulate any basis for fairly attributing *Beaumont's private action* to the state. Therefore, Plaintiff provides no basis for maintaining her due process claims (Counts II and III) *against Beaumont* even if this Court were to entertain adding Director Gordon. Further, a cursory application of the three tests demonstrates no basis for permitting a due process claim against Beaumont based on its private action.

a. The public function test.

"The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state, such as holding elections." *Id.* (emphasis added). The U.S. Supreme Court "has stressed that 'very few' functions fall into [this] category." *Manhattan Community Access Corp. v. Halleck*, ___ U.S. ___;

(**Ex. 8**, 11/5/19 Hearing Transcript, pp. 34-35). Therefore, Plaintiff, through counsel, was well aware of this deficiency in *any* "constitutional" claims before this action was *ever even filed before this Court*. To argue that it was raised for this first time in the motion to dismiss, ECF 23, on November 27 is simply incredible.

139 S.Ct. 1921, 1929 (2019). Recognized public functions include "running elections and operating a company town" while the following have been rejected:

> running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity.

Id. (citations omitted). Plaintiff's proposed amendment fails to identify any powers implicating this test, nor are any at issue since physicians have indisputably issued diagnoses and death pronouncements and consequently, such powers have not been "traditionally *exclusively* reserved" to the state.[10]

b. The state compulsion test.

"The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Wolotsky,* 960 F.2d at 1335. Since Plaintiff fails to allege that Beaumont physicians were specifically compelled to make a determination of death by Director Gordon and state compulsion under M.C.L. § 333.1033 has already been rejected by at least one district court,[11] Plaintiff cannot establish state action based on state compulsion.

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[10] Under Michigan's Determination of Death Act, only a licensed physician or nurse may make a death pronouncement. M.C.L. § 333.1033(3). To suggest that the public function test applies in this case would be to effectively suggest that doctors and physicians never made determinations of death throughout history prior to the enactment of this Act, and that only the State made such determinations.

[11] In *Willis v. Charter Twp.*, 2007 WL 2463354, at *5 (W.D. Mich. Aug. 30, 2007), the plaintiffs attempted to impute private actors with state action by claiming a

c. The symbiotic relationship or nexus test.

"Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky*, 960 F.2d at 1335. Again, Plaintiff's proposed amendment fails to identify a symbiotic relationship or nexus.

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physician was "a state actor because he was compelled by M.C.L.A. 333.1033 to pronounce [decedent] dead." The district court disagreed, explaining:

> The statute merely provides that "a physician or registered nurse may pronounce the death of a person in accordance with this act." Nothing in the statute *required* [the physician] to do so. While the statute does require a physician who makes a determination of death to apply accepted medical standards, the Supreme Court has observed that a state is not responsible for decisions that "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." [*Blum v. Yaretsky*, 457 U.S. 991, 993; 102 S. Ct. 2777 (1982)]. The fact that [the physician] was licensed by the state to practice medicine and was thus authorized to perform various procedures is insufficient to transform his status from private actor to state actor.

Id. Following the above analysis, the district court noted that "the fact that the state has authorized, but neither compels nor coerces, a person to do something is insufficient to bestow state actor status upon a private individual." *Id*. at *6 (citing *Benn v. Universal Health Sys., Inc*., 371 F.3d 165, 171 (3rd Cir. 2004)). Since M.C.L. § 333.1033 only authorizes a pronouncement of death, there is no state action.

Unlike the language from the Michigan statute at issue in this case, *Doe v. Charleston Area Md. Ctr., Inc*., 529 F.2d 638, 643 (4th Cir. 1975) addressed a hospital policy based on a Virginia statute strictly prohibiting "nontherapeutic abortions." So unlike this case, the statute in that case *compelled* hospitals and physicians not to provide such treatment regardless of their medical judgments. Consequently, application of the state compulsion test was warranted.

In *Willis*, the district court rejected application of this test because the defendant physician "had no direct contact with state officials." *Willis*, 2007 WL 2463354, at *5 (discussing *Styles v. McGinnis*, 28 Fed. Appx. 362 (6th Cir. 2001)). No such contact is alleged between physicians and Director Gordon here either.

In addition, the Sixth Circuit has made clear that "[m]erely because a business is subject to state regulation does not by itself convert its action into state action." *Wolotsky*, 960 F.2d at 1335. "Rather, it must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state . . . ." *Id.* Again, here, there are no allegations that Director Gordon was "intimately involved" in the medical care and/or pronouncement of death by Beaumont (since he wasn't) and thus, this test does not apply.

In conclusion, Plaintiff's proposed amendments are futile and thus, this motion should be denied. Further, this action should be dismissed for the reasons set forth in Beaumont's pending motion to dismiss under Fed. R. Civ. P. 16(b). ECF 23.

II. This Court should also deny this motion because Plaintiff has effectively already filed five complaints against Beaumont and been unable to cure the deficiencies in those pleadings.

As previously noted, a motion for leave to amend may also be denied based on "repeated failure to cure deficiencies by amendments previously allowed." *Beydoun*, 871 F.3d at 469; see *Nino v. Flagstar Bank*, 766 Fed. Appx. 199, 205 (6th Cir. 2019) (affirming dismissal and denial of leave to amend).

Collectively, Plaintiff has effectively filed five prior versions of the complaint against Beaumont before the Oakland County Circuit Court and this Court. To date,

Plaintiff has still failed to articulate a valid claim against Beaumont despite these many filings—even if this Court entertains the sixth try. In short, there is no viable claim against Beaumont—even though it has been subject to temporary restraining orders for months. Consequently, this Court should again deny this motion.

CONCLUSION AND RELIEF REQUESTED

For all the reasons set forth above, this Court should deny this motion and grant Beaumont's pending motion to dismiss this matter under Fed. R. Civ. P. 12(b)(6). Having now effectively offered six complaints, it is clear that Plaintiff's attorneys are simply unable to articulate a viable claim against Beaumont because Beaumont has done nothing more than rely upon its own legal rights. Respectfully, it is time for this Court to bring this matter to close by denying this motion and granting Beaumont's pending motion to dismiss, ECF 23.

Respectfully submitted,

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Date: December 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of the filing to all counsel of record.

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LOCAL RULE CERTIFICATION

I certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that are no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

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