SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SARA MYERS, STEVE GOLDENBERG, ERIC A. SEIFF, HOWARD GROSSMAN, M.D., SAMUEL C. KLAGSBRUN, M.D., TIMOTHY E. QUILL, M.D., JUDITH K. SCHWARZ, Ph.D., CHARLES A. THORNTON, M.D., and END OF LIFE CHOICES NEW YORK, Plaintiffs, -against- ERIC SCHNEIDERMAN, in his official capacity as ATTORNEY-GENERAL OF THE STATE OF NEW YORK, JANET DIFIORE, in her official capacity as DISTRICT ATTORNEY OF WESTCHESTER COUNTY, SANDRA DOORLEY, in her official capacity as DISTRICT ATTORNEY OF MONROE COUNTY, KAREN HEGGEN, in her official capacity as DISTRICT ATTORNEY OF SARATOGA COUNTY, ROBERT JOHNSON, in his official capacity as DISTRICT ATTORNEY OF BRONX COUNTY and CYRUS R. VANCE, JR., in his official capacity as DISTRICT ATTORNEY OF NEW YORK COUNTY, Defendants.	Index No. 151162/15 NYSCEF CASE Motion Sequence 002 **AFFIDAVIT OF DR. ERIC KRESS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

STATE OF MONTANA)
)ss:
COUNTY OF MISSOULA)

Eric Kress, M.D., being duly sworn, deposes and says:

1. I am a medical doctor and I received my medical degree from the University of Washington in 1984.

2. After receiving my medical degree, I completed a residency in Family Medicine at Family Medicine Spokane, affiliated with the University of Washington, between 1984 and 1987.

3. I am Board certified by the American Board of Family Practice ("ABFP") and have been since 1987; my most recent recertification was in 2008. I hold a Certificate of Added Qualifications in Hospice and Palliative Medicine. I am an Awarded Fellow of the American Academy of Family Practice. I am a member of the American Academy of Family Medicine and was awarded a Fellowship in the American Academy of Family Practice in 1994. I am a member of the Montana Academy of Family Medicine and served as President of the Montana Academy of Family Practice in 1993. I am a member of the Montana Medical Association ("MMA"), have served on the MMA's Board of Directors for several years, and currently serve on the Board of Trustees. I am President of the Western Montana Medical Society and a member of the American Medical Association. I have served as medical director at the Hospice of Missoula for nine years.

4. I have been practicing as a family physician in Missoula, Montana for 28 years. I have been the person patients look to for advice at the end-of-life on countless occasions. Most of the time, quality hospice care is all that is needed to help terminally-ill patients through their dying process in a comfortable fashion. Some patients, however, face a "hard death" and wish to have more control over the timing and manner of their passing. Some patients want a prescription for medication which, if they ingest it, will enable them to achieve a peaceful death. The practice of a physician writing a prescription for such medication to a mentally-competent, terminally-ill patient is known as aid-in-dying.

5. I began providing aid-in-dying after the Montana Supreme Court issued a decision in a case known as *Baxter v. Montana*, holding that physicians who provide aid-in-dying to their patients are not subject to criminal prosecution. Montana does not have a statute governing the practice of aid-in-dying, so physicians providing it do so subject to the court's ruling and professional practice standards.

6. Soon after the Baxter decision, one of my patients, who was dying of ALS, asked me for aid-in-dying. He was a wealthy self-made man who had been incredibly active both in his professional and personal life. The court decision being new, I was hesitant to write a prescription. He scolded me and told me I was a coward. This once strong man had been reduced to 120 pounds of skin and bone. He could not swallow or walk. He would often be found weeping and bemoaning the miserable fate that had befallen him. He begged his wife to end his suffering. My experience with this patient affected me deeply and caused me to question what kind of man or doctor would sit idly by watching a proud man suffer through a dying process he experienced as unbearable. I decided I was going to help people at the end-of-life achieve a peaceful death through aid-in-dying if that was their wish.

7. Soon after this experience, a patient of mine who was dying of esophageal cancer asked me for aid-in-dying. He wished to have the medications available if and when his suffering became unbearable. After several conversations and reconfirming his diagnosis, I wrote him a prescription. He filled it and immediately gained great peace of mind. This patient began experiencing increasing pain in his chest from the cancer growing into surrounding tissues. He started taking more narcotics and steroids to reduce pain and swelling of the tumor. Despite these efforts, his pain became unrelenting. He decided it was time to act to achieve a peaceful death. He asked his sister and hospice team to be present at his death, so he would not

be alone. We explained to him we could not aid him in the administration of the medication. He prepared the medication. He then opened a bottle of Guinness and asked that we all join him in a toast. He thanked me for having the courage to write this prescription. He told me, if there is anything I could use from his case to make aid-in-dying more available, that I please did so. He then sat in a comfortable chair and drank the medication. In two minutes, his speech was slurred. In three minutes, he was asleep. His respirations had stopped in six minutes. In 12 minutes, his pulse was absent and he had no heart sounds. All of us present were amazed at how peaceful his death was. I am proud that I had the courage to support this patient in achieving a death that he desired, which was consistent with his values and beliefs.

8. In the six years since the *Baxter* decision, thirty patients (as of April 24th, 2015) have approached me about aid-in-dying. I have written ten prescriptions (as of April, 24th, 2015), which all patients chose to utilize. I have been present at three of the deaths where aid-in-dying patients ingested the medication. All these patients expressed that it was important to them that they die in comfort and with dignity. All of them were of sound mind, none was depressed, and not one of them was "suicidal." They all loved life and expressed that they would much prefer to live, but not in the miserable condition their terminal disease imposed on them.

9. Aid-in-dying is one compassionate medical treatment option for dying patients, among a number of others that physicians providing care to dying patients can offer, which allows patients to have control over the timing of their death. The other options include removing any of a variety of life-prolonging interventions—such as a feeding tube or a ventilator, or deactivating a cardiac device—or providing palliative sedation. Palliative sedation involves IV administration of medication to induce unconsciousness, so the patient is unaware of suffering, and nutrition and hydration are withheld until death arrives. In some cases, the

medication itself causes the patient's death. None of these options are considered to be suicide, even when the patient clearly chooses the option in order to cause death. I do not consider the medical treatment option of aid-in-dying to be "suicide."

10. Patients choosing aid-in-dying are not suicidal, they don't want to die, but have been left with no alternative as their terminal disease is causing their death. Indeed, before providing aid-in-dying, any physician first confirms that the patient is not suicidal or depressed.

11. Medical doctors are readily able to determine mental competency by means of adequate tools and skills and mental status exams, for example, to determine whether the patient is oriented as to day, place and events. As a first step, medical doctors will distinguish depression from sadness. There are a set of tests and exams that can be run on the patient to determine this. Many times, a meeting with the patient and asking the simple question 'if you didn't have this disease would you want to die' is enough. Terminally-ill patients eligible for aid-in-dying all say no.

12. Following *Baxter*, there have been efforts in the Montana legislature to enact a statutory scheme to govern the practice, as exists in Oregon, Vermont and Washington. These efforts have not succeeded and there is no statute governing the practice. Opponents of aid-in-dying have attempted to enact legislation prohibiting aid-in-dying, but have not succeeded in doing so. This leaves the practice subject to the limits recognized in *Baxter* and professional practice standards. Medicine is normally governed by professional practice standards, as is the case, for example, for the medical treatments of removal of life-sustaining treatment and terminal sedation. I am comfortable practicing aid-in-dying in Montana, guided by the *Baxter* decision and professional practice standards. If I have a question, I confer with a knowledgeable colleague. For example, I discussed with the Medical Examiner the question of how to fill out

the death certificate of a patient who chose aid-in-dying. We agreed that the proper entry would be to note the underlying disease as the cause of death, following the practice developed in other states where aid-in-dying is available.

13. I frequently know the families of my patients, and I have seen that family members of a patient who chooses aid-in-dying are glad that their loved one was able to achieve a peaceful death, at home, surrounded by loved ones. This was certainly true for the three patients that asked me to be there when they took the medication. The family members of patients that have chosen aid-in-dying have universally been grateful to me for allowing the patient to have a peaceful death. I am familiar with a study that shows that none of the adverse impacts known to afflict survivors of someone who committed suicide are experienced by survivors of patients who choose aid-in-dying.[1] My experience is consistent with the findings in that study.

Dated: Missoula, Montana

April 24, 2015

Eric Kress

Sworn to before me this 24th day of April, 2015

Mary K Wheeler.
Notary Public

MARY K. WHEELER
NOTARY PUBLIC for the
State of Montana
Residing at Lolo, MT
My Commission Expires
March 14, 2016.

[1] Linda Ganzini et al. Mental Health Outcomes of Family Members of Oregonians Who Request Physician Aid in Dying, 38 Journal of Pain and Symptom Management 807 (2009).