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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

DR. PAUL E. MARIK,

Plaintiff,

v. **Case No.: CL21 - 13852**

SENTARA HEALTHCARE,

Defendant.

Serve: CT Corporation System
4701 Cox Rd Ste 285
Glen Allen, VA, 23060-6808

VERIFIED COMPLAINT

COMES NOW the Plaintiff Dr. Paul Marik, by his undersigned counsel, Fred D. Taylor, Esq., and hereby submits his Verified Complaint against the named Defendant Sentara Healthcare. Plaintiff alleges and avers as follows:

NATURE OF THE CASE

1. This is a proceeding pursuant to Code of Virginia § 8.01-184 for a judgment against Sentara Healthcare ("Sentara" or "Defendant") declaring that Sentara's treatment guidelines and procedures in regard to the treatment of Covid-19 are unlawful and unenforceable under Virginia law and policy; additionally, this case comes on related requests for injunctive relief.

PARTIES

2. The Plaintiff is Dr. Paul E. Marik ("Dr. Marik"). Dr. Marik is a licensed physician in the State of Virginia (License #: 0109-542065). He has specialized over the past thirty-five years as a bedside clinician, lecturer and author in the field of critical care medicine. He is a tenured Professor of Medicine at the Eastern Virginia Medical School

("EVMS"), and the Chief of EVMS's Division of Pulmonary and Critical Care Medicine within its Department of Internal Medicine. Dr. Marik is also the Director of the General Intensive Care Unit ("GICU") at Sentara Norfolk General Hospital. Crucially, over the past twelve years Dr. Marik has served as the attending physician of record to all patients (up to 20 at a time) in the Sentara Hospital GICU during his regular one week per month, 24/7, call rotation.

3. The Defendant Sentara Healthcare is a health care system with principal place of business in the Commonwealth of Virginia, and operating a number of hospitals and facilities, to include Sentara Norfolk General Hospital.

JURISDICTION

4. This Court has jurisdiction over this action, which seeks a declaratory judgment and ancillary relief, pursuant to Code of Virginia §§ 8.01-184 and 17.1-513.

5. That all matters at issue herein occurred in Norfolk, Virginia.

FACTUAL ALLEGATIONS

6. Patients at Sentara Norfolk General Hospital are dying who should not be.

7. They are dying because, unjustifiably and unlawfully, they are being denied potentially life-saving treatment determined to be medically appropriate for them by their attending physician.

8. Through a prohibition (the "Prohibition") codified in Sentara's Comprehensive COVID-19 Treatment Guidelines Version 26, dated Sept. 27, 2021 and announced to hospital physicians by email on October 6, 2021, Defendant Sentara Healthcare has, without justification, flatly banned the use of certain safe, potentially life-saving medicines for COVID-19, thereby violating the rights of COVID patients at Sentara

Norfolk General Hospital (the "Hospital") to be informed of and to receive treatment determined to be appropriate for them by their attending physician, Plaintiff Dr. Paul Marik, the Director of the Hospital's Intensive Care Unit ("ICU") and a world-renowned critical care expert.

9. When Dr. Marik was permitted to administer to ICU COVID patients the medicines he believed medically appropriate, he reduced COVID mortality in the Hospital's ICU by roughly fifty percent.

10. Other doctors using Dr. Marik's protocol for COVID patients—which is used by physicians all over the world—report mortality rates for hospitalized COVID patients of approximately 4-7%. By comparison, average nationwide mortality for COVID patients in U.S. hospitals is approximately 20%.

11. The Prohibition is not only costing lives. It violates the most fundamental principle of American medical law—informed consent—as well as express Virginia statutory law regarding Advance Medical Directives and Virginia's declared public policy as expressed in its Right to Try statute.

12. In Virginia (as elsewhere), informed consent requires that patients be told of, and permitted to choose among, existing alternatives to a proposed course of treatment. Health care providers violate patients' informed consent rights if they "fail[] to disclose . . . *the existence of alternatives if there are any*, thereby precluding the plaintiff from making an informed decision about whether to undertake a particular procedure or course of treatment." *Allison v. Brown*, 293 Va. 617, 628-29 (2017) (emphasis added); *Tashman v. Gibbs*, 263 Va. 65, 73-74 (2002).

13. As recognized by the United States Supreme Court, hospitalized patients are to exercise their right of informed consent primarily with and through the advice of their treating physician, and "unduly restrictive" hospital oversight regulations violate both the patients' "right to receive medical care in accordance with [their] licensed physician's best judgment and the physician's right to administer it." *Doe v. Bolton*, 410 U.S. 179, 197 (1973).

14. Moreover, under Virginia's Advance Directive statute, hospitalized individuals have the right not only to specify in advance what treatment they choose *not* to receive in case of incapacity, but "to specifically direct" the treatment they *are* to receive so long as that treatment "is medically appropriate under the circumstances *as determined by [their] attending physician*." Va. Code § 54.1-2984 (emphasis added).

15. The statute does not say, "as determined by the *hospital*." It specifically and expressly says, "as determined by [their] *attending physician*." *Id.* (emphasis added).

16. The Advance Directive statute assumes and recognizes that patients who are not incapacitated (*i.e.*, patients who are capable of make informed decisions for themselves) must also have the right "to specifically direct" the treatment they are to receive, so long as that treatment "is medically appropriate under the circumstances as determined by [their] attending physician," for it would be nonsensical to believe that the Virginia legislature gave patients greater rights over their treatment decisions when they are incapacitated than they possess when they are not incapacitated.

17. Unless the treatment specifications in an individual's Advance Directive are in violation of law, or are deemed inappropriate by the individual's attending physician, "a patient's advance directive *shall . . . be given full effect*," and "*any person*" may bring suit in

this Court for injunctive relief to ensure that treatment will not be "withheld" from a patient in violation of his or her directive. Va. Code §§ 54.1-2983.3 (emphasis added), 54.1-2985 (emphasis added).

18. In addition, under Virginia's Right to Try statute, patients with a "terminal condition" "shall be eligible" to receive medicines still undergoing clinical trials if "recommend[ed]" by their "treating physician." Va. Code § 54.1-3442.2. The statute establishes a clear public policy in favor of the right of terminally ill patients to try not-fully-approved, still-investigational, but potentially life-saving drugs if such drugs are recommended to them by their "treating physician."

19. The statute does not say that such medicines must be recommended or endorsed by a patient's *hospital*. It says that patients "*shall* be eligible" to receive such medicines if the medicines have been recommended by their "*treating physician*." *Id.* (emphasis added).

20. Because the Prohibition prevents COVID patients from being informed of and choosing existing alternative courses of treatment recommended by, and determined to be medically appropriate for them by, their attending physician, it violates patients' core rights of informed consent, their rights under Virginia's Advance Directive statute, and Virginia's public policy as expressed in its Right to Try law. The Prohibition also puts Plaintiff Dr. Marik, as attending physician to Sentara COVID patients, in the legally untenable and morally and professionally unacceptable position of having to remain silent about, and forfeit the use of, treatments that in his expert medical opinion are appropriate and necessary to save these patients' lives.

21. As detailed more fully below, Sentara's asserted justifications for the Prohibition are baseless. For example, Sentara states that the "efficacy/safety" of the prohibited medicines "is not supported in peer reviewed, published RCT" ("RCT" refers to randomized, controlled trials), when in fact: (1) the efficacy as well as the safety of the prohibited medicines *is* supported in peer-reviewed, published RCTs; (2) numerous studies confirm the life-saving effects of the medicines Dr. Marik considers appropriate, demonstrating that these medicines reduce mortality in hospitalized COVID patients by as much as 50%; (3) the medicines in question are FDA-approved and therefore known to be safe at specified dosages; and (4) Sentara (like other hospitals all over the country) in all other instances respects and abides by its attending physicians' professional right to prescribe many other drugs for uses that have *not* been validated through RCTs.

22. From October 25 to October 31, Dr. Marik assumed his regular one-week-in-four monthly duty as attending physician at the Hospital's ICU, for the first time categorically barred by the Prohibition from offering his COVID patients life-saving medicines he has previously been permitted to use.

23. Seven ICU COVID patients came under Dr. Marik's care in that period of time, and Dr. Marik was prevented from offering any of them the treatment protocol he believed medically appropriate and necessary to give them their best chance at surviving. Four died. The remaining three are now probably beyond help.

24. In short, as a result of Sentara's unlawful Prohibition, patients are dying unnecessarily at Sentara Norfolk General Hospital. Several have died in just the last few weeks, and without this Court's intervention more will needlessly die in the immediate future.

25. The Prohibition prevents Dr. Marik from: (a) attempting to save the lives of his acute COVID patients in accordance with his own best medical judgment by administering to them a COVID treatment protocol followed by many physicians all over the world and well-supported by real-world, epidemiologic, and clinical study data; and (b) from even informing patients of the existence of medically appropriate, potentially life-saving alternatives to the treatment Sentara is giving them.

26. Dr. Marik will once again resume his duties as attending physician at the ICU from November 15 to November 21, 2021, where he will certainly once again be treating acutely ill COVID patients and where he will once be barred from offering them life-saving treatment he deems medically appropriate, in violation of his Hippocratic Oath and his and his patients' legal rights.

27. Because Dr. Marik believes that there exist other, medically superior alternatives to the treatment Sentara is forcing him to give to acute COVID patients without allowing him to offer these alternatives to his patients, or even to inform his patients of their availability, Sentara is in effect asking Dr. Marik to be complicit in a violation of his patients' right to informed consent.

28. The plight of acutely ill COVID patients at Sentara Norfolk General Hospital, deprived by the Prohibition of the right to make an informed choice to receive potentially life-saving treatments deemed medically appropriate by their attending physician, Dr. Marik, is a paradigmatic example of a legal violation "capable of repetition yet evading review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *Virginia Broad. Corp. v. Commonwealth*, 286 Va. 239, 248 (2013). COVID patients admitted to the ICU are terminally ill and face imminent death. There is only a one- to two-day window after a

COVID patient is admitted to the ICU during which life-saving treatment can be maximally effective. If legal proceedings only became available after an acute COVID patient at the Hospital is admitted to the ICU, the suit would end up moot before the Court could adjudicate it.

29. In other words, this lawsuit is genuinely a life-or-death matter, and if this Court does not intervene now, critically ill people will in the immediate future—for no good reason—be denied the opportunity to receive life-saving treatment.

30. Accordingly, Dr. Marik begs this Court to vindicate his and his patients' legal rights, to declare Sentara's Prohibition unlawful and unenforceable, and to give Sentara's acutely ill COVID patients the chance to save their lives to which they are entitled to under Virginia law.

COUNT ONE
BREACH OF THE DUTY OF INFORMED CONSENT

31. Each and every allegation set forth in the above paragraphs of this Complaint is hereby repeated, reiterated, and realleged.

32. Virginia law (like the law of every state in the country) recognizes a patient's right of informed consent.

33. The right to informed consent includes the right to be informed of, and to have an opportunity to choose, feasible existing alternative treatments, if any, known to or reasonably knowable by a patient's treating physician.

34. In the hospital setting, this right is exercised with and through the advice of the patient's attending physician, and a hospital's attempt to silence the attending physician, and to bar him from discussing with and offering to patients alternative treatments that he in the reasonable exercise of his professional judgment believes appropriate, violates both the

"patient[s'] right to receive medical care in accordance with [their] licensed physician's best judgment and the physician's right to administer it." *Doe v. Bolton*, 410 U.S. 179, 197 (1973).

35. Accordingly, by preventing Dr. Marik from discussing, advising and offering his COVID patients the medicines banned by Sentara, the Prohibition violates the right of informed consent.

COUNT TWO
VIOLATION OF THE HEALTH CARE DECISIONS ACT

36. Each and every allegation set forth in the above paragraphs of this Complaint is hereby repeated, reiterated, and realleged.

37. Under Virginia's Health Care Decisions Act, individuals have the right to execute an Advance Directive not only to declare in advance what treatment they choose *not* to receive in case of incapacity, but "to specifically direct" the treatment they *are* to receive, so long as that treatment "is medically appropriate under the circumstances *as determined by [their] attending physician.*" Va. Code § 54.1-2984 (emphasis added).

38. The statute does not say, "as determined by the *hospital.*" It specifically and expressly says, "as determined by [their] *attending physician.*" *Id.* (emphasis added).

39. The health care decisions that the Act gives individuals the right to make for themselves, provided the treatment is recommended by their attending physician, include decisions to specify particular "medications" for particular illnesses. Va. Code § 54.1-2982.

40. Unless the treatment specifications in an individual's Advance Directive are in violation of law, or are deemed inappropriate by the individual's attending physician, "a patient's advance directive *shall . . . be given full effect,*" and "*any person*" may bring suit in this Court for injunctive relief to ensure that treatment will not be "withheld" from a patient

in violation of his or her directive. Va. Code §§ 54.1-2983.3 (emphasis added), 54.1-2985 (emphasis added).

41. The Health Care Decisions Act establishes two distinct rights of patients to decide specifically what medicines they shall receive if recommended by their attending physician.

42. First, it gives each individual Virginian a right to make that decision *for situations in which he becomes incapaciated.* And second, it assumes and equally recognizes an individual's equivalent right to make that decision *if he is conscious and of sound mind.* For it would be absurd to read the statute as creating a greater right to decide what one's medical treatment will be when incapacitated than to decide what one's medical treatment will be when one is conscious and of sound mind.

43. The Prohibition violates both these rights. It prohibits the enforcement of Advance Directives (such as those submitted in this case) in which individuals specifically direct that they are to receive the banned medicines in the event of incapacity if their attending physician deems them medically appropriate. And it also prohibits individuals who are not incapacitated from exercising the right to specifically direct that they are to receive the banned medicines if their attending physician deems them medically appropriate.

44. Thus the Prohibition violates the Health Care Decisions Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Dr. Paul E. Marik respectfully request that the Court enter judgment in his favor as follows:

A. An order declaring Defendant's Prohibition unlawful and unenforceable;

B. An order enjoining Defendant or anyone serving as Defendant's agent or affiliate from applying or enforcing the Prohibition, thereby permitting patients to be informed of and to receive the currently banned COVID treatments provided their attending physician deems them medically appropriate; from continuing to engage in conduct found to be unconstitutional and requiring Defendant to issue a public retraction of its letter;

C. Any and all such other relief, including attorneys' fees, this honorable Court determines to be just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Respectfully submitted,

DR. PAUL E. MARIK

BY: _____
Counsel

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Verification

I, Dr. Paul E. Marik, hereby verify under penalty of perjury that the factual allegations in the foregoing are true and correct to the best of my knowledge and belief.

Dr. Paul E. Marik

Commonwealth of Virginia
City / County of Norfolk, to-wit:

This Verification was acknowledged before me on the 8 day of November 2021, by Dr. Paul E. Marik.

Deborah Marie Lucas
Notary Public
7181351

My commission expires: 3-31-2024