BUSH & TAYLOR, P.C.
ATTORNEYS AT LAW

November 19, 2021

Via Virginia Judiciary E-Filing System
City of Norfolk Circuit Court
George E. Schaefer, Clerk
150 St. Paul's Boulevard
7th Floor
Norfolk, Virginia 23510-2773

Re: Dr. Paul E. Marik v. Sentara Healthcare
Case No. CL21013852-00
City of Norfolk Circuit Court

Dear Mr. Schaefer:

Enclosed please find a Motion for Leave to File A Reply Brief in regard to the above-referenced matter, which I ask to be filed with the other papers in this case.

Thank you for your assistance in this matter. If you have any questions or need anything further, please do not hesitate to contact me at Suffolk office.

Very truly yours,

Fred D. Taylor

FDT/dgb
Enclosures

Cc: Jason Davis, Esq.

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

DR. PAUL E. MARIK,

Plaintiff,

v. **Case No.: CL21013852-00**

SENTARA HEALTHCARE,

Defendant.

MOTION FOR LEAVE TO FILE A REPLY BRIEF

COMES NOW the Plaintiff, Dr. Paul E. Marik, by and through the undersigned counsel, Fred D. Taylor, Esq., and files this Motion for Leave to File a Reply Brief, and in support thereof states as follows:

1. On November 18, 2021, the Defendant filed its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Temporary Injunction.

2. Defendant's counsel received this twenty-seven page document via e-mail at 9:27 AM, just several hours before the hearing scheduled before the Court.

3. While the Plaintiff concedes that the Court has now been provided voluminous filings, to include memorandums of law, by both Plaintiff and Defendant, as well as having heard hours of evidence and argument, Plaintiff requests leave of Court to formally reply to the memorandum filed by the Defendant.

4. Plaintiff's filing would not exceed three pages, double-spaced, and is attached by reference hereto as Exhibit A.

5. Plaintiff submits that this brief would further aid the Court on the issues before it.

Respectfully submitted,

DR. PAUL E. MARIK

BY:
Of Counsel

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Fred D. Taylor, hereby certify that on the 19th day of November, 2021, I served via U.S. First Class Mail and e-mail a copy of the foregoing to:

Jason R. Davis
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, Virginia 23510

Fred D. Taylor

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

DR. PAUL E. MARIK,

Plaintiff,

v. **Case No.: CL21013852-00**

SENTARA HEALTHCARE,

Defendant.

REPLY BRIEF TO DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO LAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

COMES NOW the Plaintiff, Dr. Paul E. Marik, by and through the undersigned counsel, Fred D. Taylor, Esq., and states as follows:

To grant relief, this Court need not decide whether the MATH+ Protocol generally, or ivermectin in particular, is good or bad medicine. The standard of review other jurisdictions have adopted, which we submit should govern this case, explains why.

"[A] hospital has a duty to obey the instructions of a patient's physician, so long as the instructions are *not obviously negligent or dangerous*." *Franken v. Davis*, No. 5:93CV79-V, 1997 U.S. Dist. LEXIS 16081 at *36 (W.D.N.C. July 25, 1997) (emphasis added); *Burns v. Forsyth County Hospital Authority, Inc.*, 81 N.C. App. 556, 563 (1986) ("The hospital has a duty to obey instructions of a doctor, absent the instructions being obviously negligent or dangerous."). Sentara has not presented *any* evidence that Dr. Marik's instructions for COVID patients are obviously negligent or dangerous. Absent those red flags, "hospital staff" "may not invade the area of the physician's competence and . . . overrule his orders," *Abrams v Bute*, 138 A.D.3d 179 (NY App. Div. 2d Dept. 2016) (citations omitted), and it is "axiomatic that the hospital has the duty not to institute policies or practices which interfere with the doctor's

medical judgment." *Muse v. Charter Hosp.*, 117 N.C. App. 468, 474 (1995); *see also, e.g., Kellner v. Schultz*, 937 F. Supp. 2d 1319, 1326 (D. Colo. 2013) (hospital "may not interfere with the physician's independent medical judgment"); *Calcagno v. Emery*, 2012 Minn. App. Unpub. LEXIS 421 ("A hospital has a duty to follow the orders of a patient's doctor."); *Alden v. Providence Hospital*, 382 F.2d 163 (D.C. Cir. 1967) (Burger, J., concurring and dissenting) ("The hospital assumes the duty to carry out the instructions of the doctor"); Einer Elhauge, *Symposium on Regulating Medical Innovation*, 82 Va. L. Rev. 1525, 1559 (1996) ("The hospital's legal duty is to provide the services the physician orders . . . hospitals have little legal power to interfere with the judgment of treating physicians.").

Deference to the attending physician acting within his area of competence also comports with the general rule that there is a fiduciary relationship between physician and patient – *not* between hospital and patient. *Stevenson v. Johnson*, 32 Va. Cir. 157, 159 (1993) (citing 61 Am. Jur. 2d, Physicians, Surgeons, etc., § 166 (1981)); *Keophumihae v. Brewer*, 6 Va. Cir. 80, 85 (1983) (a "hospital cannot engage in a doctor-patient relationship"); *see also* Va. Code § 54.1-2962.2.A (physician-patient relationship exists between on-call physician and patient in emergency department). This fiduciary duty transcends mere agency; it calls for the physician's utmost care and loyalty in meeting his or her duty to respect the patient's autonomy, explain treatment options, obtain informed consent if circumstances permit, provide the highest standard of care, and commit not to withdraw from treatment of the patient without giving him or her adequate time to find a new doctor.[1] *See* Fallon E. Chipidza, BA, *Impact of the Doctor-Patient*

[1] By contrast, Sentara's suggestion that Dr. Marik advise patients to move to another facility to receive MATH+ or ivermectin, while they are in extremis, is obviously negligent and dangerous, and a form of abandonment at odds with his fiduciary duty.

Relationship, Prim Care Companion CNS Disord. 2015; 17(5), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4732308/

Sentara and its ad hoc committees respond to competing priorities—*e.g.*, profitability, Medicare and other government reimbursements, the desire to conform to generalized "safe harbor" standards of care espoused by government agencies—that are not sensitive to the symptoms, circumstances, or needs of any individual patient. In its Opposition papers, Sentara does not even pretend to advocate for its patients' welfare, basing its arguments instead solely on the extraordinary assertion that its patients' threatened imminent death does not qualify as irreparable harm, and on the equally specious claim Dr. Marik lacks standing to challenge a Hospital Prohibition that (a) subjects him to the loss of his hospital privileges (and hence loss of a $100,000 in income) if he tries to save his patients' lives; and (b) condemns patients under his care to likely death while denying them the opportunity to receive safe, potentially life-saving medicines determined by their attending physician, their fiduciary, to be medically appropriate.

CONCLUSION

For all of these reasons, this Court should enjoin Sentara from enforcing its Prohibition so that COVID patients can exercise their right to be advised of and to receive the treatments deemed appropriate for them by their attending physician.

Respectfully submitted,
DR. PAUL E. MARIK

BY:____________________
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