BUSH & TAYLOR, P.C.
ATTORNEYS AT LAW

office 757.935.5544
fax 757.935.5533
www.bushtaylor.com

November 15, 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 Plaintiff's Brief in Opposition to Motion to Dismiss, 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: Joseph R. Davis, Esq.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

DR. PAUL E. MARIK,

Plaintiff,

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

SENTARA HEALTHCARE,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW the Plaintiff Dr. Paul E. Marik ("Plaintiff" or "Dr. Marik"), by and through counsel Fred D. Taylor, and states in opposition to Defendant Sentara Healthcare's Motion to Dismiss for Lack of Standing:

Dr. Marik has respectfully, but urgently, moved this Court for an emergency temporary injunction to try to save lives at Sentara Norfolk General Hospital, a hospital operated by the Defendant Sentara Healthcare ("Sentara"). This is a situation where COVID patients are dying without ever getting a chance to receive—without ever even being informed of—safe, potentially life-saving FDA-approved medicines used against COVID by thousands of doctors around the country, and supported by numerous studies, attested to by independent eminent experts, and determined to be the optimal treatment for these critically ill patients by their ICU attending physician, Dr. Marik.

A hearing on Plaintiff's underlying Motion for Temporary Injunction is scheduled before the Court this Thursday, November 18, 2021. Sentara will have had *nine days* to prepare for this hearing (the case was filed and served last Tuesday, November 9, 2021). Every day that passes, more lives may be lost. Yet Defendant, claims it needs more time. It

asks this Court to hear only its own motion—a motion to dismiss for lack of standing or alternatively, to continue the temporary injunction hearing.

What Defendant *does not* say in its paper-thin motion is noteworthy.

Sentara does not deny that COVID patients are facing imminent death at its hospitals. Sentara does not deny that it is prohibiting these patients from receiving or even being informed of safe, potentially life-saving medicines recommended by their attending physician. Sentara does not even try to refute Plaintiff's evidence showing that the banned medicines' efficacy against COVID is amply supported by published randomized clinical trials.

Rather, Defendant argues that Dr. Marik lacks standing. Defendant's standing argument is baseless—contradicted by clear Virginia case law—and its delay gambit is reprehensible.

A. Dr. Marik has Standing in His Own Right To Challenge the Prohibition and To Assert His Patients' Right to Informed Consent

"A plaintiff has standing to bring a declaratory judgment proceeding if he has 'a justiciable interest' in the subject matter of the litigation, either in his own right or in a representative capacity." *Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 223 (1981). This requirement is "to be 'liberally interpreted and administered with a view to making the courts more serviceable to the people.'" *Id.* (citation omitted). A "justiciable" controversy is a "real and substantial dispute that [is] appropriate for judicial determination, as opposed to a dispute or difference of 'hypothetical or abstract character.'" *Id.* at 224 (citation omitted). *Cf. Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. State Water Control Bd.*, 52 Va. App. 807, 822-23 (2008) (discussing Article III standing under a Virginia statute) (the "injury alleged to support a claim of standing . . . need not be large; an

identifiable trifle will suffice"; the injury "may be to the plaintiff's economic interests" or to non-economic interests "deserving of legal protection," including even a "plaintiff's 'aesthetic or recreational interests;'" and the injury may be "threatened rather than actual"). What is critical is that plaintiff "must present something more than a conjectural injury"; plaintiff cannot be "some person virtually indistinguishable from the public [who] has presented some fleeting, theoretical injury." *Reston Hosp. Ctr., LLC v. Remley*, 59 Va. App. 96, 115-16 (2011).

Under these authorities, there can be no doubt that Dr. Marik has standing. The Prohibition directly injures Dr. Marik—legally, economically, and professionally—creating a "real and substantial dispute" between him and Sentara "that [is] appropriate for judicial determination" and by no means of an "abstract character." *Board of Supervisors*, 222 Va. at 224. Two weeks ago, Dr. Marik had to watch as four of seven COVID patients under his care died while he was prevented by Sentara's Prohibition from offering them, or even telling them about, safe, life-saving medicines that are, in the exercise of his professional skill and judgement, medically appropriate for them. The same state of affairs is almost certainly occurring right now in the hospital, and it will almost certainly recur when Dr. Marik resumes his on-call duties as the ICU's attending physician on Saturday, November 20.[1] There is nothing "abstract" about this controversy.

The injury to Dr. Marik's own interests and rights is real, direct and substantial. When on-call at the ICU, Dr. Marik is the attending physician, and as such he, "*and he alone*," is "responsible for the exercise of professional skill and judgment" in treating the patients under his care. *Keophumihae v. Brewer*, 6 Va. Cir. 80, 84 (Va. Cir. Ct. 1983)

[1] Dr. Marik had been scheduled to resume his on-call ICU duties on November 15, 2021, but another doctor is covering for him this week, and Dr. Marik is now scheduled to return as the ICU's on-call attending physician on November 20.

(emphasis added). An ICU attending physician can of course be sued for malpractice. *Id.* Thus Dr. Marik's potential injury is far from "trifling," "conjectural," or "theoretical," and far more serious than mere "aesthetic or recreational interests."

Because "a hospital cannot engage in a doctor-patient relationship," *id.* at 85, and because the attending physician is legally and professionally "responsible," 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 Kellner v. Schultz*, 937 F. Supp. 2d 1319, 1326 (D. Colo. 2013) (hospital "may not interfere with the physician's independent medical judgment"). In other words, the physician as well as the patient has a right to have the doctor's treatment decisions acted upon. As the United States Supreme Court has stated, where (as here) a hospital oversight committee obstructs the treating physician's medical judgment, the prohibition 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) (emphasis added). Thus Dr. Marik's rights are directly injured by the Prohibition, and he clearly has standing to challenge it.

Moreover, under well-established Virginia law, so long as "they themselves have suffered an injury," plaintiffs may also assert third party rights where they have "a close relationship with the person who possesses the right" and there is "a hindrance to the possessor's ability to protect his own interests." *Hawkins v. Grese*, 68 Va. App. 462, 481 (2018), *quoted in Sasson v. Shenhar*, 2021 Va. Cir. LEXIS 27, No. CL-2020-5997 at *3 (Cir. Ct. Fairfax Cty. Jan. 21, 2021). Unquestionably, "the physician-patient relationship" is "sufficiently close for third-party standing." *Aid for Women v. Foulston*, 441 F.3d 1101,

1112 (10th Cir. 2006) (collecting numerous cases from courts all over the country and citing 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3531.9 & n.64 (2d ed. 1984 & Supp. 2003)). And there is plainly a "hindrance"—indeed much more than a hindrance—on Dr. Marik's patients' "ability to protect [their] own interests." *Hawkins v. Grese*, 68 Va. App. at 481.

Dr. Marik's COVID patients are (like all ICU patients) in critical condition; they are in no position to bring suit; indeed, because of Sentara's Prohibition, they don't even know about the treatments they are being denied; if somehow one of them did sue, they might well be dead before a hearing could even take place; and one way or the other, the suit would be moot long before it could be adjudicated. Under such circumstances, courts routinely permit physicians to assert their patients' rights. *See Singleton v. Wulff*, 428 U.S. 106 (1976); *Compassion in Dying v. State of Washington*, 79 F.3d 790, 796 n.4 (9th Cir. 1996) (en banc) (physician had standing to assert terminally ill patients' claims where patients' claims were "capable of repetition yet evading review"), *rev'd on other grounds*, *Washington v. Glucksberg*, 512 U.S. 702 (1997); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) (standing "uniformly" recognized where plaintiffs challenge prohibitions that "regulate their activity and, as a result, violate the rights of third parties"); *see generally Kevorkian v. Thompson*, 947 F. Supp. 1152, 1159-61 (E.D. Mich. 1997) (discussing the general rule of "physician-patient standing"). Thus Dr. Marik has standing to assert not only his own rights, but also the informed consent rights of his patients.

Without rebutting or even acknowledging any of this voluminous case law authority, Defendant Sentara claims that Dr. Marik lacks standing because "'a party, to have standing, must "show that he has been aggrieved by the judgment or decree appealed from," that "he

does not have standing to assert purely abstract questions" and that he "has standing only to seek the correction of errors injuriously affecting him."'" Def. Mem. at ¶ 3 (quoting *Braddock, L.C. v. Bd. of Supervisors*, 268 Va. 420, 425-26 (2004)). Putting aside the fact that this garbled quotation refers to requirements for parties challenging a "judgment or decree appealed from"—obviously not the case here—Plaintiff is manifestly not "assert[ing] purely abstract questions." He is asserting a palpable violation of his legal and professional rights that is, in real time, costing people their lives.

It should not need saying, but saving a human being from imminent death is not an "abstract question." Dr. Marik is not "some person virtually indistinguishable from the public [who] has presented some fleeting, theoretical injury." *Reston Hosp. Ctr.*, 59 Va. App. at 115-16 (2011). He is the attending physician directly and personally responsible for patients in imminent danger of death, and under Virginia case law he undoubtedly has standing.

B. Plaintiff Also Has Statutory Standing under the Health Care Decisions Act

Defendant further claims that Dr. Marik "lacks standing to bring a claim under the Advance Directive Statute and/or the Health Care Decisions Act" [sic][2] because the Act (according to Defendant) only permits suits "where health care is being withheld pursuant to the Health Care Decisions Act." (Def. Motion to Dismiss at ¶ 5.) How this counts as a "standing" argument is not explained. In any event, Defendant's statement is wrong, and the notion that Dr. Marik lacks standing under the Health Care Decisions Act has no merit.

The Health Care Decisions Act expressly permits "any person" to sue in a Circuit Court to enforce an individual's Advance Directive. Va. Code § 54.1-2985. In Virginia, if a statute says any person may bring suit, it means any person may bring suit; such laws are said

[2] Virginia's Advance Directive Statute *is* the Health Care Decisions Act; they are one and the same.

to confer "statutory standing," and they are perfectly enforceable. *Payne v. City of Charlottesville*, 97 Va. Cir. 51, 62-63 (2017). Thus Dr. Marik plainly has standing under the Act.

It is simply not true that the Act permits suit to enforce an Advance Directive only, as Defendant claims, when "treatment *is being* withheld" and only "when the patient is deemed incapable of making an informed decision." (Def. Motion to Dismiss at ¶ 5.) On the contrary, the Act expressly permits suit when health care "*will* be . . . withheld" in violation of an Advance Directive. Va. Code § 54.1-2985 (emphasis added). According to Defendant's convoluted logic, if a hospital unequivocally announced to a conscious patient that it was not going to comply with his Advance Directive in the event of his incapacity, he himself could not enforce his rights under Va. Code § 54.1-2985 because he would not yet be incapacitated and no treatment had yet been withheld. Such a result would defy the statute's plain language and the obvious legislative intent behind it.

Making clear Sentara's true views about Advance Directives, Defendant asserts that "the statute does not afford a patient the ability to specifically direct or demand his or her own course of treatment by a . . . hospital." (Def. Motion to Dismiss at ¶ 5.) That is exactly what the statute does, provided that the patient's "attending physician"—not the hospital, but the attending—deems the specified treatment medically appropriate. Va. Code § 54.1-2984. The statutorily authorized and prescribed Advance Directive set forth in the pages of the Virginia Code contains the following language:

OPTION III: HEALTH CARE INSTRUCTIONS

(CROSS THROUGH PARAGRAPHS A AND/OR B IF YOU DO NOT WANT TO GIVE ADDITIONAL ***SPECIFIC INSTRUCTIONS ABOUT YOUR HEALTH CARE***.)

A. ***I specifically direct that I receive the following health care if it is medically appropriate under the circumstances as determined by my attending physician***:

_____

_____

_____

Id. (emphasis added).

This language could not be clearer. Contrary to Defendant's assertion, the Act offers a hospitalized patient the right to specifically direct his or her own course of treatment provided the patient's attending physician deems such treatment appropriate, and under the Act that directive "*shall* . . . be given full effect." Va. Code § 54.1-2983.3(D) (emphasis added). Thus when Dr. Marik is the attending physician, Sentara is legally bound to honor a patient's Advance Directive specifying treatment Dr. Marik deems appropriate.

Accordingly, Sentara's declaration (in its Motion) that it does not respect or acknowledge a patient's right under the Act to "specifically direct his or her own course of treatment" is a flat-out repudiation of its legal obligations. It is nothing other than an admission that Sentara will not honor, as it legally required to do, the over twenty Advance Directives before the Court specifying the MATH+ Protocol if their attending physician deems such treatment appropriate. Far from supporting its Motion to dismiss, Sentara's statement—making clear that Sentara will deny individuals' rights under the Health Care Decisions—strongly supports Plaintiff's prayer for an injunction requiring Sentara to give the proscribed medicines to any COVID patient who directs the hospital to do so, provided those medicines are determined to be medically appropriate by that patient's attending physician.

For the foregoing reasons, Plaintiff Dr. Paul E. Marik requests this Honorable Court to deny Defendant's Motion to Dismiss for Lack of Standing.

Respectfully submitted,

By: _____
Counsel

Fred D. Taylor, Esq.
VSB # 77987
Bush & Taylor, P.C.
200 North Main Street
Suffolk, Virginia 23434
P: (757) 935-5544
F: (757) 935-5533
E-Mail: fred@bushtaylor.com
Counsel for the Plaintiff

CERTIFICATE OF SERVICE

I, Fred D. Taylor, hereby certify that on the 15th day of November, 2021, I served via U.S. First Class Mail and e-mail a copy of the foregoing to:

Joseph R. Davis, Esq.
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, Virginia 23510
jrdavis@kaufcan.com
Counsel for Defendant

_____
Fred D. Taylor