STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

CHIPPEWA VALLEY ORTHOPEDICS &
SPORTS MEDICINE CLINIC, S.C.,
1200 OakLeaf Way, Suite A
Altoona, WI 54720,
a Wisconsin service corporation,

Plaintiff,

v.

HOSPITAL SISTERS HEALTH SYSTEM,
4936 Laverna Rd.
Springfield, IL, 62707,
a foreign non-stock corporation,

SACRED HEART HOSPITAL OF
THE HOSPITAL SISTERS OF THE
THIRD ORDER OF ST. FRANCIS,
900 W. Clairemont Ave.
Eau Claire, WI 54701,
a Wisconsin non-stock corporation,

and

ST. JOSEPH'S HOSPITAL OF
THE HOSPITAL SISTERS OF THE
THIRD ORDER OF ST. FRANCIS,
2661 Co Hwy I
Chippewa Falls, WI 54729,
a Wisconsin non-stock corporation,

Defendants.

Case No.
Case Classification:
30303 Other – Contracts
30701 Declaratory
Judgment
30704 Other Injunction or
Restraining Order

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

This is an action to enforce Plaintiff's rights under the Call Coverage Services Agreement ("Agreement") that it entered into with Defendants Hospital Sisters Health System ("HSHS"),

Sacred Heart Hospital of the Hospital Sisters of the Third Order of St. Francis ("Sacred Heart"), and St. Joseph's Hospital of the Hospital Sisters of the Third Order of St. Francis ("St. Joseph's").

In late January 2024, Defendant HSHS made the abrupt and extraordinary announcement that it is closing Defendant Sacred Heart and Defendant St. Joseph's by no later than April 21, 2024. The announced closures are leaving physicians, like those employed by Plaintiff, and their patients scrambling as they face this unprecedented shock to the health care system in western Wisconsin. Unfortunately, Defendants are not using the time between now and April 21, 2024, to maintain hospital services at the level that existed prior to the closure announcement. Instead, Defendants are actively forcing cancellations and winding down operations.

As a result, Defendants have breached the Agreement and continue to breach the Agreement by failing to provide Plaintiff with the required 180 days' notice prior to termination of the Agreement, cancelling surgeries, rescheduling imaging studies, terminating employees, and winding down the operations of Defendants Sacred Heart and St. Joseph's (collectively, "Defendant Hospitals").

Plaintiff's motions for a temporary restraining order and a temporary injunction seek an order of this Court to maintain the status quo prior to the breach by restraining Defendants from: terminating the Agreement without the full notice of at least 180-days; giving Plaintiff a notice of termination until Defendant Hospitals are in full compliance with the Agreement; cancelling procedures at Defendant Hospitals until the end of the notice period of at least 180-days; and winding down operations until the end of the notice period of at least 180-days.

Wisconsin law supports the conclusion that Plaintiff is likely to prevail on the merits of their claims. Moreover, as set forth in the accompanying affidavit, the Defendants' breach and actions to shut down the Defendant Hospitals by April 21, 2024 will cause irreparable harm to

Plaintiff by destroying the ability of Plaintiff's surgeons to care for their patients due to forced cancellations and gutting the resources available to Plaintiff's surgeons to serve patients and fulfill their obligations under the Agreement, and rendering the 180-day notice period meaningless through the closure of Defendant Hospitals, which are not compensable by money damages. For these reasons, the Court should grant Plaintiff's motion.

FACTAL BACKGROUND

On or about June 1, 2023, Plaintiff and Defendant Hospitals entered into the Agreement, in which the Hospitals granted Plaintiff, "the exclusive right to provide call services as more fully described in Exhibit 1.1 attached hereto (the 'Services')." (*See* Affidavit of Brent Carlson, M.D., Exhibit A, June 1, 2023 Call Coverage Services Agreement, at 1.) The services were to commence on the "Start Date" of June 5, 2023, and the "initial term of this Agreement shall be for a period of two (2) years commencing on the Start Date ("Initial Term") unless terminated earlier as provided in this Agreement." (*Id.*, at 1, 4-5.) Plaintiff agreed to provide "emergency department orthopedic call coverage in accordance with Levels III and Level IV Trauma designation requirements for [Defendants] Sacred Heart and St. Joseph's, respectively." (*Id.*, at Exhibit 1.1, Services.) The Practice Site provision of the Agreement provides that the Defendant Hospitals, "shall provide the space, staff, and equipment that they reasonably determine necessary for the provision of Services." (*Id.*, at 4.)

The Agreement's Early Termination provision provides that it "may be terminated by either Party without cause or penalty by delivering written notice of termination to the other Party at least one hundred eighty (180) days prior to such termination." (*Id.*, at 5.) The Agreement has other Termination provisions, including termination by agreement, immediate termination due to issues related to physician licensure and conduct, termination with cause, termination due to

change of law, termination due to inability to execute a professional services agreement, and termination of the professional services agreement. (*Id.*)

On January 22, 2024, Defendant HSHS, which owns Defendant Hospitals, sent Plaintiff a letter informing Plaintiff that it is ceasing healthcare operations in western Wisconsin and would be closing the Defendant Hospitals "on or before April 21, 2024 (Closure Date)." (Carlson Aff., Exhibit B, January 22, 2024 Letter from A. Bulpitt and L. Gille.) Defendant HSHS stated that the letter served "as notice of termination of the Agreement due to the closures effective as of the Closure Date" and that "[t]he Agreement remains in effect until the Closure Date." (*Id.*) Defendant HSHS did not cite any specific provision under which it was terminating the Agreement, therefore the Early Termination provision is applicable. Defendant HSHS provided at most 90-days written notice[1] of the termination of the Agreement, even though the Agreement's Early Termination provision requires Defendant HSHS to give Plaintiff at least 180 days' written notice of the termination of the Agreement.

On January 22, 2024, Defendant HSHS also announced publicly that it would be closing the Defendant Hospitals, effective April 21, 2024. (Carlson Aff., ¶ 4.) On information and belief, Defendants have already started winding down the operations of the Defendant Hospitals, including taking down signage at the Defendant Hospitals, terminating some employees, and informing other employees that their last day is no later than March 22, 2024. (*Id*., ¶ 5.)

In addition, Defendants have already started cancelling procedures at the Defendant Hospitals. (*Id*., ¶ 6.) Prior to January 24, 2024, Plaintiff's surgeons had approximately eighteen to nineteen cases at various stages of authorization for surgeries to be performed at Defendant Sacred

[1] According to the January 22, 2024 letter, the notice might actually be less than 90 days because Defendant HSHS stated that the Closure Date might actually be before April 21, 2024.

Heart. (*Id*.) On or about January 24, 2024, Defendant HSHS informed Plaintiff that all of the cases after February 1, 2024 would be cancelled. (*Id.*)

Defendant HSHS informed Plaintiff that if one of Plaintiff's surgeons felt that cancelling the case presented a significant clinical issue for the patient, the surgeon could appeal to the Chief Medical Officer for an exception. (*Id.*) Notwithstanding that statement, all but four of those cases currently remain cancelled, meaning that a suitable alternative location for these patients has not been located because: (1) there is no high-acuity facility like Defendant Sacred Heart available as required by the patient's clinical needs, (2) the patient's insurance requires that they receive treatment at Defendant Hospitals, and/or (3) there is not enough capacity, in terms of number of beds or operating rooms, in the market to process these cases in either a timely manner or in such away the patient finds convenient or acceptable. (*Id.*, ¶ 7.) Further, Plaintiff does not contract with the other nearby hospitals in the Chippewa Valley, Mayo Clinic Health System-Chippewa Valley and Marshfield Clinic Chippewa Falls Center-Family Medicine. (*Id*., ¶ 8.) As a result, Plaintiff's surgeons may have to refer their patients to other providers, or they will have to go through a lengthy process to obtain privileges and credentials at the other hospitals that can take sixty (60) to ninety (90) days or more, assuming no unexpected delays. If other suitable providers cannot be found or Plaintiff's surgeons cannot obtain privileges and credentials at other locations in a timely manner, then the patients will have to forgo surgical intervention. (*Id*.)

Defendant HSHS did not stop at cancelling surgeries. (*Id*., ¶ 9.) On or about January 25, 2024, Defendant HSHS informed Plaintiff and other clinical organizations that certain advanced imaging studies that had been referred to Defendant Hospitals would need to be rescheduled. (*Id*.) Prior to January 25, 2024, Plaintiff's physicians had approximately thirty-nine (39) advanced imaging studies to reschedule. (*Id*.) Certain imaging studies, specifically those that require an

imaging modality known as a 3 Tesla Magnetic Resonance Imaging Arthrogram ("3T MR Arthrogram"), can only be performed at one other location in the community, Mayo Clinic Health System-Chippewa Valley, which likely already has its imaging modalities booked out far in the future, thus delaying and decreasing the likelihood of completion of the studies. (*Id*.)

Defendants' actions represent a threat of irreparable harm to Plaintiff, Plaintiff's surgeons, their patients, and the community. The 180-day notice requirement of the Agreement exists to mitigate the very problem that Defendants have caused: interruption in the continuity of care between Plaintiff's surgeons and their patients, and an inability to locate suitable alternative locations for those patients to receive surgery. (*Id*., ¶ 10.) This damages Plaintiff's surgeons' ability to adequately care for their patients, and therefore the health of the patients that they care for. (*Id*.) In addition, the Agreement obligates Plaintiff to continue providing services at Defendant Hospitals until the termination of the Agreement. (*See* Agreement, at 1 and Exhibit 1.1, Services.) The Agreement also requires that Defendants shall provide the space, staff, and equipment that they reasonably determine necessary for the provision of the services. (*Id.*, at 4.) By cancelling the procedures and terminating staff members, Defendants are not providing the space, staff, and equipment, that is reasonably necessary for the provision of services. (Carlson Aff., ¶ 10.)

In order to prevent irreparable harm, Defendant must provide Plaintiff with the entirety of the 180-day notice before terminating the contract. Not only that, but Defendant must also return and maintain operations to at least the same level as existed before January 24, 2024. The wind down of operations at Defendant hospitals should only begin after the passage of at least 180 days from delivery of a proper written notice of termination, which can only occur after the operations at Defendant Hospitals are returned to at least the same level as existed before January 24, 2024.

ARGUMENT

I. THE STANDARD OF REVIEW.

Section 813.02(1)(a) of the Wisconsin Statutes governs Plaintiff's motions for temporary injunctive relief. It states:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

A temporary restraining order and temporary injunction are proper under this statute if: (1) the movant has a reasonable probability of ultimate success on the merits; (2) the injunction is necessary to preserve the status quo; and (3) the movant has shown a lack of adequate remedy at law and that irreparable harm will result unless the injunction is issued. *Wisconsin Ass'n of Food Dealer v. City of Madison*, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980). *See also Shearer v. Congdon*, 25 Wis.2d 663, 131 N.W.2d 377, 381 (Wis. 1964) ("the function of a temporary injunction is to maintain the status quo."); *Laundry, Dry Cleaning, Dye House Workers Union, Loc. 3008, AFL-CIO v. Laundry Workers Int'l Union*, 4 Wis. 2d 542, 554, 91 N.W.2d 320, 326 (1958) (noting the difference between a temporary restraining order and a temporary injunction is that a temporary restraining order is generally granted without notice to opposite parties until the propriety of granting the temporary injunction can be determined); Wis. Stat. § 813.08 ("The court or judge may, before granting the injunction, make an order requiring cause to be shown why the injunction should not be granted, and the defendant may in the meantime be restrained.")

The grant or denial of a temporary injunction under the statute is discretionary with this Court. *Mercury Records Prod., Inc. v. Economic Consultants, Inc*., 91 Wis. 2d 482, 500, 283

N.W.2d 613 (Ct. App. 1979). When exercising its discretion, the Court should consider the competing interests of the parties and be satisfied that on balance, equity favors issuing the injunction. *Pure Milk Prod. Coop. v. National Farmers Org*., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). The purpose of a temporary injunction is to maintain the status quo, not to change the position of the parties, or compel acts that constitute the ultimate relief sought. *School District of Slinger v. WIAA*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (citing *Codept, Inc. v. More-Way North Corp*., 23 Wis.2d 165, 173, 127 N.W.2d 29, 34 (1964).

II. PLAINTIFF HAS SATISFIED EACH OF THE ELEMENTS FOR A GRANT OF TEMPORARY INJUNCTIVE RELIEF TO MAINTAIN THE STATUS QUO PENDING THE COURT'S DECISION ON THE MERITS.

A. Plaintiff is Highly Likely to Succeed on the Merits of its Breach of Contract Claim.

Plaintiff is likely to succeed on the merits of its claim that Defendants breached the Agreement. A breach of contract claim requires proof of three elements: "(1) a contract between the plaintiff and the defendant that creates obligations flowing from defendant to the plaintiff (2) failure of the defendant to do what it undertook to do; and (3) damages." *See Brew City Redevelopment Grp., LLC v. The Ferchill Grp.*, 289 Wis. 2d 795, 714 N.W.2d 582 (Ct. App. 1997).

Plaintiff and Defendants entered into the Agreement, which included several obligations with which Defendants have failed to comply. The Parties agreed to an initial term of two years after the Start Date of June 5, 2023. *See* Carlson Aff., Ex. A, Agreement at 4-5. However, the Agreement has an Early Termination provision which provides that a Party that wishes to terminate the Agreement early without cause or penalty must "deliver[] written notice of termination to the other Party at least one hundred (180) days prior to such termination." *Id.*, at 5. On January 22, 2024, Defendants informed Plaintiff that they were terminating the Agreement "on or before April 21, 2024," prior to the end of the two-year initial term, therefore providing at most 90 days' notice

of termination, in violation of the Agreement's requirement of 180 days' notice. Carlson Aff., Ex. B. Therefore, Defendants breached the Early Termination provision of the Agreement.

The Agreement requires Plaintiff to provide "emergency department orthopedic call coverage in accordance with Levels III and Level IV Trauma designation requirements for [Defendants] Sacred Heart and St. Joseph's, respectively." Carlson Aff., Ex. A, Agreement, Exhibit 1.1, Services. In return, the Practice Site provision of the Agreement requires Defendant Hospitals to "provide the space, staff, and equipment that they reasonably determine necessary for the provision of Services." Agreement at 5. Although the Agreement is still in effect and Plaintiff is still performing its obligations, Defendants have refused to perform their obligations by cancelling nearly all of Plaintiff's scheduled procedures at Defendant Sacred Heart and terminating employees. Therefore, Defendants have breached the Practice Site provision of the Agreement.

B. Plaintiff is Highly Likely to Succeed on the Merits of its Tortious Interference Claims.

Plaintiff is likely to succeed on the merits of its claim that Defendants tortiously interfered with both Plaintiff's existing contracts and prospective contracts with third parties. "The elements of a claim for tortious interference with a contract are as follows: (1) the plaintiff must have had a contract or a prospective contractual relationship with a third party; (2) the defendant must have interfered with that relationship; (3) the interference by the defendant must have been intentional; (4) there must be a causal connection between the interference and damages; and (5) the defendant must not have been justified or privileged to interfere." *Finch v. Southside Lincoln-Mercury, Inc.*, 274 Wis. 2d 719, 737, 685 N.W.2d 154, 163 (Ct. App. 2004).

Plaintiff had agreements with patients to provide surgery at Defendant Hospitals which Defendants have interfered with by cancelling before the closure of Defendant Hospitals. Defendants knew about the agreements and intentionally interfered with them, because Defendants

cancelled the surgeries. *See* Carlson Aff., ¶ 6. Plaintiff will be damaged because its surgeons may have to refer their patients to other providers or go through a lengthy process of obtaining privileges and credentials at other area hospitals so that the surgeries might be able to be performed. *Id.*, ¶ 8. However, for some patients, they will need to forgo surgical intervention because there are no other suitable providers and locations in the area. *Id.* Defendants have no justification or privilege for interfering with the agreed upon surgeries.

Plaintiff had agreements to perform advanced imaging studies at Defendant Hospitals, which Defendants have interfered with by purporting to reschedule them before the closure of Defendant Hospitals. Defendants knew about the contracts and intentionally interfered with them by purporting to reschedule the advanced imaging studies. *Id.* ¶ 9. Plaintiff will be damaged because if the advanced imaging studies cannot be completed before the closure of the Hospital, some of them might never be completed because only one other hospital in the community has access to the 3T MR Arthogram, an imaging modality that is required to perform the advanced imaging studies, which has likely been booked out far in advance, thus creating the possibility that the imaging studies are never performed. *Id.* Defendants have no justification or privilege for interfering with the imaging studies.

Plaintiff also had prospective contractual relationships with patients that require surgery provided by Plaintiff's surgeons at Defendant Hospitals. Defendants knew that Plaintiff had these prospective contractual relationships because the Agreement, to which Defendants are a party, contemplates Plaintiff performing such surgeries at Defendant Hospitals. *See* Carlson Aff., Ex. A, Agreement, Exhibit 1.1, Services. Defendants intentionally interfered with Plaintiff's prospective contractual relationships with patients by failing to provide Plaintiff with the space, staff, and equipment it needs to provide surgical procedures for its prospective patients by announcing the

closure of Defendant Hospitals, terminating the Agreement, terminating staff, and subsequently cancelling nearly all surgeries at Defendant Hospitals. *Id.*, ¶ 10. Defendants have no justification or privilege for interfering with Plaintiff's prospective contractual relationships.

Plaintiff had prospective contractual relationships to perform advanced imaging studies that would need to be referred to Defendant Hospitals because only one other hospital in the community has access to the 3T MR Arthogram imaging modality, and that hospital's imaging modalities have likely been booked out far in advance. *Id.*, ¶ 9. Defendants knew about the contracts and intentionally interfered with these prospective advanced imaging studies by rescheduling previous advanced imaging studies and putting them at risk of never being completed. *Id.* Defendants have no justification or privilege for interfering with the prospective imaging studies.

C. Plaintiff is Highly Likely to Succeed on the Merits of its Declaratory Judgment Claim.

Plaintiff is likely to succeed on the merits of its claim under the Uniform Declaratory Judgments Act because the language of the Early Termination and the Practice Site provision are clear and unambiguous and, for the above stated reasons, Defendants breached those provisions. The Uniform Declaratory Judgments Act provides that any person interested under a written contract may have determined any question of construction or validity arising from the contract and obtain a declaration of rights, status or other legal relations under. *See* Wis. Stat. § 806.04(2). "Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms." *Tufail v. Midwest Hosp.*, LLC, 2013 WI 62, ¶ 26, 348 Wis. 2d 631, 642, 833 N.W.2d 586, 592 (2013).

The Early Termination provision of the Agreement states that, "[t]his Agreement may be terminated by either Party without cause or penalty by delivering written notice of termination to

the other Party at least one hundred eighty (180) days prior to such termination." Carlson Aff., Ex. A, Agreement, at 5. The terms of the Early Termination provision and the Agreement are clear and unambiguous, they mean that Defendants are obligated under the Early Termination provision of the Agreement to provide Plaintiff with 180 days' notice of termination of the Agreement if they are terminating the Agreement pursuant to that provision. For the above stated reasons, Defendants breached the Agreement when it informed Plaintiff it would terminate the Agreement with 90 days' or less of notice, when the Early Termination provision of the Agreement requires 180 days' notice.

The Practice Site provision of the Agreement states that "[t]he Hospitals shall provide the space, staff and equipment that they reasonably determine necessary for the provision of Services." *Id.*, at 4. Plaintiff is obligated to provide the referenced services under Exhibit 1.1 of the Agreement. Therefore, the terms of the Practice Site provision are clear and unambiguous, they mean that Defendant Hospitals are obligated under the Practice Site Agreement to provide the space, staff and equipment reasonably necessary for Plaintiff to fulfill its obligation to provide services at Defendant Hospitals through a properly noticed termination date. The Court should declare that Plaintiff has the right to access the space, staff and equipment reasonably necessary for Plaintiff to fulfill its obligations to provide services for at least a full 180-days prior to the termination date.

D. Status Quo

The purpose of temporary restraining orders and temporary injunctions is to maintain the status quo. *School District of Slinger v. WIAA*, 210 Wis. 2d 365, 373. "The status quo which is sought to be preserved is the situation before, not after, the contract violation. Defendant cannot breach its promise and then seek to preserve the benefits gained." *Drivers, Salesmen,*

Warehousemen, Milk Processors, Cannery, Dairy Emps. & Helpers Union Loc. 695 v. Madison Serv. Corp., No. 163-247, 1978 WL 18228, at *4 (Wis. Cir. Ct. June 19, 1978). In *Warehousemen*, defendant agreed to raise plaintiffs' wages by 34 cents per hour, but subsequently refused to honor the contract. *Id.*, at *1. Plaintiffs brought a motion for temporary injunction to enforce the contract, that is to raise wages by 34 cents per hour pursuant to the contract. *Id.* The circuit court granted the temporary injunction, holding that the status quo to be preserved is the situation prior to the breach, and therefore raising the wages to 34 cents per hour. *See id.*, at *4.

Plaintiff is simply asking to maintain the status quo of Defendant Hospitals prior to their breach, which is as fully operational hospitals where Plaintiff can perform its scheduled procedures and advanced imaging studies. Without the temporary restraining order and temporary injunction, the Defendant Hospitals will continue harming the Plaintiff by cancelling surgeries and advanced imaging studies, in violation of the Agreement and the law.

E. Plaintiff Will be Irreparably Harmed and Does Not Have an Adequate Remedy at Law.

Irreparable harm is that which is not adequately compensable in damages. *Pure Milk Prods. Co-op. v. National Farmers Org.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979). The harm to Plaintiff that will be caused by Defendants if injunctive relief is not granted cannot be compensable in damages. Nearly all of the surgeries that Plaintiff's surgeons had scheduled at Defendant Sacred Heart are currently cancelled, meaning that Plaintiff has not been able to find other suitable locations for the procedures because (1) there is no high-acuity facility like Defendant Sacred Heart available as required by the patient's clinical needs, (2) the patient's insurance requires that they receive treatment at Defendant Hospitals, and/or (3) there is insufficient capacity, in terms of number of beds or operating rooms, in the market to process these cases in a timely manner. Carlson Aff., ¶¶ 7-8. As a result, the continuity of care between Plaintiff's surgeons and their

patients is interrupted, and Plaintiff's surgeons are faced with an inability to locate suitable alternative locations for those patients to receive surgery. *Id.*, ¶ 10. This damages Plaintiff's surgeons' ability to adequately care for their patients, and therefore the health of the patients that they car for, which cannot be compensable in damages.

Plaintiff has no adequate remedy at law if the temporary restraining order is not granted and the status quo is not maintained. Without Court intervention, Defendant Hospitals will close on or prior to April 21, 2024. The declaratory relief and injunctive relief requested by Plaintiff, that the hospitals properly give Plaintiff 180 days' notice prior to terminating the Agreement and operate at least the same level as it did prior to January 24, 2024, until the end of the notice period, will be rendered meaningless because Defendant Hospitals will not exist anymore.

CONCLUSION

The equities in this case favor the Plaintiff. Accordingly, Plaintiff respectfully requests that the Court grant Plaintiff's requested temporary restraining order and temporary injunction to maintain the status quo pending the outcome of this litigation. Specifically, Plaintiff requests an order: (1) enjoining Defendants from terminating the Agreement without the full notice of at least 180-days; (2) enjoining Defendants from giving Plaintiff a notice of termination until Defendant Hospitals are in full compliance with the Agreement; (3) enjoining Defendants from cancelling procedures at Defendant Hospitals until the end of the notice period of at least 180-days; and (4) enjoining Defendant Hospitals from winding down operations until the end of the notice period of at least 180-days.

Dated this 9th day of February, 2024.

By: Electronically Signed By: *James B. Woywod*

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