

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**MARIETTA MEMORIAL HOSPITAL,
an Ohio Corporation, MARIETTA AREA
HEALTH CARE, INC., an Ohio Corporation,
MHC PHYSICIANS, INC., a West Virginia
Medical Corporation,**

Plaintiffs,

v.

Civil Action No. 2 :16-cv-08603

**WEST VIRGINIA HEALTH CARE AUTHORITY;
JAMES L. PITROLO, in his individual and official capacity as
Chairman of the West Virginia Health Care Authority;
SONIA D. CHAMBERS, in her individual and official capacity as a
Member of the West Virginia Health Care Authority;
MARILYN G. WHITE, in her individual and official capacity as a
Member of the West Virginia Health Care Authority;**

Defendants.

VERIFIED COMPLAINT

NATURE OF ACTION, JURISDICTION AND VENUE

1. Federal subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1331 and 1334 because this action challenges the constitutionality of West Virginia law under the dormant Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, and seeks redress against the Defendant Members of the HCA pursuant to the provisions of Civil Rights Act of 1871, 42 U.S.C. § 1983 for the deprivation of Plaintiffs' civil rights.

2. Personal jurisdiction is proper in this court because all Defendants reside in West Virginia and the HCA is located in this judicial district.

3. Venue is proper in this Court pursuant to 28 U.S.C. 1391(b)(1) and (b)(2) because all Defendants reside in the state of West Virginia and the events that give rise to this action occurred within the Southern District of West Virginia.

4. Plaintiffs bring this action to challenge the enactment of W. Va. Code § 16-2D-11(c)(12) by HB4365, under the dormant Commerce Clause, because the West Virginia Legislature has now created an exemption from the Certificate of Need (“CON”) process, currently codified at W. Va. Code §§ 16-2D-1, *et seq.*, for in-state hospitals to acquire, construct or develop an ambulatory care center in its county or a contiguous county. Any out-of-state hospitals, such as Plaintiff Marietta Memorial Hospital, Inc. will continue to have to file a CON application each time it tries to construct, acquire or develop any ambulatory care centers in West Virginia. The Plaintiffs seek a declaratory ruling from this Court holding that W. Va. Code § 16-2D-11(c)(12) should be construed to treat in-state and out-of-state hospitals the same as a matter of law. The Court should either construe the law to equally allow all hospitals to maintain an exemption from the CON application process for the construction, development or acquisition of ambulatory care centers or strike the provision in its entirety and require both in-state and out-of-state hospitals to continue to apply for a CON to construct, develop or acquire ambulatory care centers. Under the dormant Commerce Clause, hospitals must be treated the same, regardless of their status as in-state or out-of-state health care facilities.

PARTIES

5. Plaintiff Marietta Memorial Hospital is an Ohio Corporation that operates an acute care hospital in Ohio. It is owned by Marietta Area Health Care, Inc.

6. Plaintiff Marietta Area Health Care, Inc. is a health care system that operates two acute care hospitals in Ohio, including Marietta Memorial Hospital, as well as numerous clinics, physician practices and ambulatory care centers in Ohio and West Virginia.

7. Plaintiff MHC Physicians, Inc. is a West Virginia Medical Corporation that provides medical services through licensed physicians in the State of West Virginia.

8. Defendant, West Virginia Health Care Authority (“HCA”) was created by the Legislature in 1983 as an autonomous agency within state government. It currently administers the Certificate of Need (“CON”) program in West Virginia, under the provisions of W. Va. Code §§ 16-2D-1, *et seq.*

9. Defendants James L. Pitrolo, Sonia D. Chambers, and Marilyn G. White are each residents of West Virginia and each presently serves on the West Virginia Health Care Authority. Mr. Pitrolo serves as Chairman and Ms. Chambers and Ms. White serve as members. Each is sued in their individual and official capacity.

PRE-SUIT STATUTORY NOTICE

10. The Plaintiffs, by and through counsel, provided notice on August 3, 2016, to James L. Pitrolo, in his official position as chairman of the HCA, as required by W. Va. Code § 55-17-3, concerning the subject matters of this Complaint against the HCA. This letter was served by certified mail, return receipt card requested, as required by law.

11. Also on August 3, 2016, the 30-day notice letter was mailed to Patrick Morrissey in his official capacity as Attorney General, as required by W. Va. Code § 55-17-3. That letter was also served by certified mail, return receipt card requested.

BACKGROUND FACTS RELATED TO CERTIFICATES OF NEED

12. Since its inception in 1977 the Certificate of Need (“CON”) program in West

Virginia, currently codified at W. Va. Code §§ 16-2D-1, *et seq.*, operated under the premise that many health care services, including ambulatory health care facilities, could only be developed after the party seeking to develop the service obtained a CON. In that regard, the Legislative Findings at W. Va. Code § 16-2d-1 emphasized the importance of the CON process as follows:

(1) That the offering or development of all new institutional health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the institutional health services of the people of this state and to avoid unnecessary duplication of institutional health services, and to contain or reduce increases in the cost of delivering institutional health services.

(2) That the general welfare and protection of the lives, health and property of the people of this state require that the type, level and quality of care, the feasibility of providing such care and other criteria as provided for in this article, including certificate of need standards and criteria developed by the state agency pursuant to provisions of this article, pertaining to new institutional health services within this state, be subject to review and evaluation before any new institutional health services are offered or developed in order that appropriate and needed institutional health services are made available for persons in the area to be served.

13. Historically, obtaining a CON required the party to comply with the statutory process set forth in W. Va. Code §§ 16-2D-1, *et seq.* First, under W. Va. Code § 16-2D-3, the applicant was required to file a CON application with the West Virginia Health Care Authority (“HCA”). Next, the HCA was required to review the CON application under certain statutory provisions set forth in W.Va. Code 16-2D-6 to determine if the CON application should be approved. Finally, if requested by an “affected person,” the HCA was required to hold a hearing on the CON application and to consider any testimony and evidence offered at the hearing prior to issuance of a CON under W.Va. Code § 16-2D-7(l).

14. For years, W. Va. Code §§ 16-2D-1, *et seq.* required all hospitals in West Virginia to apply for a CON before constructing, developing or acquiring a new ambulatory care

center. Historically, there were also some exemption provisions in W. Va. Code § 16-2D-11, but none of these exemptions would have allowed an in-state hospital to make a multi-million dollar purchase of a large primary care physician practice in West Virginia and turn it into an ambulatory care center without going through a CON application.

15. The HCA promulgated WVCSR § 65-27-1 in 2010 to allow an exemption for hospitals seeking to construct, develop or acquire an ambulatory care center in the same county the hospital was located. However, that regulation still permitted an affected person to oppose the exemption and then the hospital was required to file a CON Application to construct, develop or acquire the ambulatory care center.

16. In 2016, the West Virginia Legislature passed House Bill 4365, that amended W. Va. Code § 16-2D-11 to add subsection (c)(12) that provided as follows:

(12) The construction, development, acquisition or other establishment by a licensed West Virginia hospital of an ambulatory health care facility in the county in which it is located and in a contiguous county within or outside this state.

17. This provision of the West Virginia code now creates an exemption for in-state hospitals that want to develop or acquire ambulatory care centers. Under this new provision of law, the construction, acquisition or development of an ambulatory care center by a hospital located and licensed in West Virginia is no longer subject to a CON review. Instead, in-state hospitals are allowed to file a short exemption application with the HCA. The exemption prohibits any affected persons from participating in the process, prohibits any affected persons from requesting that the HCA conduct a hearing, and more specifically, prohibits the HCA from conducting a hearing, prior to approving a CON application. It also significantly shortens the amount of time and information that an in-state hospital has to provide to the HCA and

presumably will significantly shorten the review time for those applications. This is a marked disparity in the handling of in-state and out-of-state applications.

18. Out-of-state hospitals, such as Plaintiff Marietta Memorial Hospital are not entitled to this new exemption from the CON process. An out-of-state hospital, like the Plaintiff, must still obtain a CON and undergo the same CON application process as previously enacted by the West Virginia legislature. A full CON application must be filed, and affected persons, including in-state hospitals, may intervene and request a hearing before the HCA on the CON application.

19. The Plaintiffs are aware of at least one application for an exemption that has been filed pursuant to W. Va. Code § 16-2D-11(c)(12). On or about June 27, 2016, Berkeley Medical Center filed for an exemption from the CON application process with the HCA to acquire an ambulatory care center in Berkeley County, West Virginia. The exemption was approved and the HCA allowed the acquisition of a neurologist's practice to establish an ambulatory care center on July 21, 2016, CON File # 16-9-10841-X.

**BACKGROUND FACTS RELATED TO CAMDEN-CLARK'S CON APPLICATION
FOR AN AMBULATORY CARE FACILITY**

20. On or about October 8, 2015, the HCA received Camden-Clark Memorial Hospital's ("Camden-Clark") letter of intent to file a CON for the development of a new ambulatory care facility. CON File # 15-5-10625-P. The project involved a \$9.8million dollar purchase of a large primary care physician practice in West Virginia. Camden-Clark is an acute care hospital located and licensed in West Virginia.

21. On February 5, 2016, Plaintiff Marietta Memorial Hospital and its related West Virginia entity, Plaintiff MHC Physician's, Inc., requested affected person status in the CON

application process. Both also requested a public hearing to be held on Camden-Clark's CON application.

22. MHC Physicians, Inc. was granted affected person status by the HCA. Marietta Memorial Hospital was not granted affected person status by the HCA as it is an out-of-state hospital and does not qualify as an affected person under the provisions of W.Va. Code § 16-2D-2(a).

23. On February 5, 2016, the HCA set a hearing date of March 24, 2016 and a prehearing conference on March 16, 2016 on Camden-Clark's CON application.

24. On March 12, 2016 both houses of the West Virginia Legislature passed House Bill 4365. On March 25, the Governor signed the bill and it had an effective date of ninety days after passage, or June 10, 2016.

25. On March 2, 2016, Camden-Clark requested the CON application be stayed pursuant to W. Va. Code § 65-7-13(1) and on March 2, 2016, the HCA granted this stay, stopping the CON application review process and canceling the hearing. The CON application was subsequently withdrawn by Camden-Clark pursuant to W. Va. C.S.R. § 65-32-7 on or about August 29, 2016.

26. On August 15, after the filing of the Notice referred to above, Camden-Clark filed its exemption request to open a new ambulatory care facility by completing its multi-million dollar purchase of a large primary care physician practice in West Virginia under W. Va. Code § 16-2D-11(c)(12). The exemption process requires the HCA to review the application, but neither Plaintiff Marietta Memorial Hospital nor MHC Physicians, Inc. will be able to request a hearing before the HCA to challenge that acquisition. The HCA is mandated by statute to rule on the exemption application within forty five (45) days of the filing of the application.

**BACKGROUND FACTS RELATED TO MARIETTA MEMORIAL HOSPITAL, INC.'S
CON APPLICATION FOR AN AMBULATORY CARE FACILITY**

27. On or about May 28, 2015, the HCA received Plaintiffs Marietta Memorial Hospital and MHC Physicians, Inc.'s letter of intent to file a CON for the development of a new ambulatory care facility. The project involved employing a physician and staff to open a routine physician practice in West Virginia.

28. Upon receiving the Plaintiffs' letter of intent, the HCA gave it 15 days to submit their CON application. On June 16, 2016, Plaintiffs submitted their CON application.

29. On June 10, 2015, Camden-Clark requested affected person status in the CON application process. On August 10, 2015, Camden-Clark requested a public hearing to be held on the Plaintiffs' CON application.

30. A prehearing conference was held on the Plaintiffs' CON application on January 15, 2016, and a hearing was held on January 25, 2016.

31. A decision was issued by HCA on April 11, 2016, finding that the Plaintiffs had failed to meet the statutory requirements under W. Va. Code § 16-2D-6(e) to establish a CON for the development of a new ambulatory care facility in West Virginia.

32. Pursuant to W. Va. Code § 16-2D-11(c)(12), in the future, Camden-Clark may construct, acquire or develop any physician group in its county or a contiguous county and it may establish an ambulatory care center without having to file a CON application. Plaintiff Marietta Memorial Hospital will continue to have to file a CON application, and be subject to the intervention and request for hearing by affected parties, each time it tries to construct, acquire or develop any ambulatory care centers in West Virginia.

33. Accordingly, Plaintiffs seek declaratory and injunctive relief to prevent W. Va. Code § 16-2D-11(c)(12) to operate in a discriminatory manner and to restore long-standing

preexisting West Virginia public health practice with regard to CON applications.

COUNT I

Declaratory and Injunctive Relief for Violations of the Dormant Commerce Clause

34. Plaintiffs incorporate by reference paragraphs 1 to 33 of the Complaint as if fully restated herein.

35. An actual justiciable controversy exists between Plaintiffs and Defendants concerning the constitutionality of W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365. Plaintiffs' claim the law violates the dormant Commerce Clause of the United States Constitution, facially, in purpose and effect, and as applied to Plaintiffs.

36. W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 benefits licensed, in-state hospitals over out-of-state hospitals by allowing in-state hospitals to acquire or develop new ambulatory care centers without going through the CON application process. Out-of-state hospitals must still apply for a CON before acquiring or developing an ambulatory care center. In addition, out-of-state hospitals cannot be affected parties to in state hospitals' applications for new ambulatory care centers while in-state hospitals can be affected parties, and object to, out of state hospitals' applications for new ambulatory care centers.

37. The State cannot create two different legal standards for acquiring developing ambulatory health care facilities depending on whether the hospital is an in-state or out-of-state hospital. Such a provision violates the dormant Commerce Clause. *See, Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005) (“Under the dormant Commerce Clause, if a state law has either the purpose or effect of significantly favoring in-state commercial interests over out-of-state interests, the law will ‘routinely’ be invalidated ‘unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.’”) (*quoting West Lynn Creamery*,

Inc. v. Healy, 512 U.S. 186, 192-93, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994)) (internal citations omitted).

38. Revised West Virginia Code §16-2D-11(c)(12) deprives out of state hospitals the meaningful opportunity to compete with in-state hospitals who are no longer required to apply for a CON prior to acquiring or constructing an ambulatory care center in West Virginia.

39. This amended code is discriminatory *on its face* and thus invalid if the State cannot articulate a legitimate local purpose that could not be served by other means. *See, Harper v. PSC*, 2006 U.S. Dist. LEXIS 7392, at *1 (S.D. W. Va. 2006) (“Statutes that burden interstate transactions only incidentally are evaluated under the *Pike* test, but in those cases where a statute affirmatively discriminates against interstate transactions either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”). The amended code is also discriminatory in purpose and practical effect because it places a significantly greater burden on interstate commerce than intrastate commerce. For example, *inter alia*, the amended code does not allow hospitals not licensed in West Virginia to participate as affected persons in applications by West Virginia licensed hospitals for new ambulatory care centers, will result in a significantly greater length of time for processing and obtaining a certificate of need for out-of-state hospitals with similar applications, and shows, on its face, a marked disparity in the handling of in-state and out-of-state applications. This is an undue burden on out-of-state hospitals as opposed to the burden on in-state hospitals and is clearly excessive in relation to any claimed local benefit.

40. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, this Court should determine Plaintiffs’ and Defendants’ rights and duties and declare that W. Va. Code § 16-2D-

11(c)(12) as enacted by HB4365 violates the dormant Commerce Clause of the United States Constitution by favoring in-state business and is therefore invalid and unenforceable, both on its face and in action. *See Granholm v. Heald*, 544 U.S. 460, 472, (2005) (“[t]ime and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter’”). *See also Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, (1994) (“We have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it ‘regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.’ As we use the term here, ‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid.”)

41. Without immediate relief from this Court, Plaintiffs face the imminent harm of another party, such as Camden-Clark, applying for the construction, acquisition or development of an in-county ambulatory care center through an exemption at the HCA. Plaintiffs would not be able to oppose that application nor request a hearing and that will cause irreparable injury to the Plaintiffs for which they have no adequate remedy at law. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law and thus constitute irreparable harm.

42. The harm to the Plaintiffs in the absence of injunctive relief outweighs the potential harm to the Defendants, should they prevail on the merits.

43. The request for Injunctive Relief should be granted because such would preserve the status quo until there is a final judicial resolution of the issues raised in this matter.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

- A. Issue a preliminary injunction under Rule 65, to be merged into a permanent injunction, enjoining Defendants from treating in-state and out-of-state hospitals differently. The Defendants should be required to either allow both in-state and out-of-state hospitals to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter, or Defendants should be enjoined from allowing any in-state hospital to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter;
- B. Issue a declaration pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates the dormant Commerce Clause of the United States Constitution, facially and as applied to Plaintiffs;
- C. If the Court alternatively strikes down the exemption, it should further issue a declaration that any and all actions of the HCA taken with regard to any applications that rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 are null and void *ab initio*;
- D. Issue an award of reasonable attorney's fees and costs expended as to such Defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1988; and
- E. Such other further relief that this Court deems appropriate and just.

COUNT II

Declaratory and Injunctive Relief for Violation of the Fourteenth Amendment

44. Plaintiffs incorporate by reference paragraphs 1 to 42 of the Complaint as if fully restated herein.

45. An actual controversy exists between Plaintiffs and Defendants regarding the constitutionality of W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365. The Plaintiffs have lost their Due Process rights the Fourteenth Amendment to the United States Constitution to contest CON applications as a direct result of the legislation. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from depriving any person of life, liberty, or property without due process of law.

46. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, this Court should determine Plaintiffs' and Defendant's rights and duties and declare that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates the Fourteenth Amendment to the United States Constitution by stripping the Plaintiffs of its due process rights to oppose its competitors development of new ambulatory care centers in West Virginia through the CON application process.

47. The revised West Virginia Code deprives Plaintiff of such interests without due process of law because it is impossible for Plaintiffs to intervene and request a hearing under the exemption provisions of W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365. Prior to this amendment, Plaintiffs had a clear statutory legal right to request a hearing under W.Va. Code § 16-2D-7(l) which provided as follows:

(l) The state agency shall provide a public hearing in the course of agency review if requested by any affected person and the state agency may on its own initiate such a public hearing:

(1) The state agency shall, prior to such hearing, provide notice of such hearing and shall conduct such hearing in accordance with administrative hearing requirements in article five, chapter twenty-nine-a of this code and its procedure adopted pursuant to this section.

(2) In a hearing any person has the right to be represented by counsel and to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing. Any person affected by the matter which is the subject of the hearing may conduct reasonable questioning of persons who make factual allegations relevant to such matter.

(3) The state agency shall maintain a verbatim record of the hearing.

(4) After the commencement of a hearing on the applicant's application and before a decision is made with respect to it, there may be no ex parte contacts between: (A) The applicant for the certificate of need, any person acting on behalf of the applicant or holder of a certificate of need or any person opposed to the issuance of a certificate for the applicant; and (B) any person in the state agency who exercises any responsibility respecting the application.

(5) The state agency may not impose fees for such a public hearing.

48. Said clear statutory legal right to request a hearing under W.Va. Code § 16-2D-7(l) constitutes a property interest as a matter of law that may not be summarily revoked by the State in an unconstitutional manner. Further, said enactment of W. Va. Code § 16-2D-11(c)(12) by HB4365 will likewise impair Plaintiffs' other property interests including freedom of contract and may result in substantial business losses through an inability to acquire ambulatory care centers in West Virginia.

49. W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 has no relation to any legitimate local government purpose. West Virginia has no compelling state interest or rational basis for the enactment of W. Va. Code § 16-2D-11(c)(12) by HB4365. As a result, W. Va.

Code § 16-2D-11(c)(12) as enacted by HB4365, on its face and as applied, violates the Due Process Clause of the Fourteenth Amendment.

50. Without immediate relief from this Court, Plaintiffs face the imminent harm of another party, such as Camden-Clark, applying for the construction, acquisition or development of an in-county ambulatory care center through an exemption at the HCA. Plaintiffs would not be able to oppose that application nor request a hearing and that will cause irreparable injury to the Plaintiffs for which they have no adequate remedy at law. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law and thus constitute irreparable harm.

51. The harm to the Plaintiffs in the absence of injunctive relief outweighs the potential harm to the Defendants, should they prevail on the merits.

52. The request for Injunctive Relief should be granted because such would preserve the status quo until there is a final judicial resolution of the issues raised in this matter.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

A. Issue a preliminary injunction under Rule 65, to be merged into a permanent injunction, enjoining Defendants from treating in-state and out-of-state hospitals differently. The Defendants should be required to either allow both in-state and out-of-state hospitals to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter, or Defendants should be enjoined from allowing any in-state hospital to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter;

- B. Issue a declaration pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates the Fourteenth Amendment of the United States Constitution, facially and as applied to Plaintiffs;
- C. If the Court alternatively strikes down the exemption, it should further issue a declaration that any and all actions of the HCA taken with regard to any applications that rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 are null and void *ab initio*;
- D. Issue an award of reasonable attorney's fees and costs expended as to such Defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1988; and
- E. Such other further relief that this Court deems appropriate and just.

COUNT III

Constitutional and civil rights pursuant to 42 U.S.C. §§ 1983 and 1988

53. Plaintiffs incorporate by reference paragraphs 1 to 50 of the Complaint as if fully restated herein.

54. The HCA is currently charged with the administration of the CON program in West Virginia, under the provisions of W. Va. Code §§ 16-2D-1, *et seq.* Now that the legislature has enacted W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365, it will be required to exempt from the CON application process any request by an in-state hospital to acquire or construct an ambulatory care center in its own county or contiguous county.

55. As set forth in paragraph 19 above, the Plaintiffs are aware of at least one application for an exemption that has been filed pursuant to W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365. The exemption filed by Berkeley Medical Center, an in-state hospital, was approved and the HCA allowed the acquisition by it of an in-county neurologist's practice to establish an ambulatory care center on July 21, 2016, CON File # 16-9-10841-X.

56. In considering any application for an exemption under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365, the Defendant HCA and its Members are acting under color and pretense of law, to wit, under color of statute, regulation and customs and usages of the State of West Virginia and the HCA and its members.

57. In considering any application for an exemption under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365, the Defendant Members are acting contrary to the Plaintiffs constitutional rights and as such are engaged in illegal conduct as alleged above to injure Plaintiffs and to deprive Plaintiffs of their rights, privileges and immunities secured to them by the Commerce Clause and the Fourteenth Amendment of the United States Constitution.

58. In considering any application for an exemption under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365, the acts of the Defendant Members constitute a deprivation of Plaintiffs' constitutional rights under the Commerce Clause and the Fourteenth Amendment of the United States Constitution and those acts are done at the direction of and in furtherance of the Defendant Members official policy and custom and the Defendant Members at all times are the moving force behind said deprivation and acting within their official capacities.

59. The aforesaid acts of the Defendant Members are in excess of any authority granted them by law and are without justification or excuse in law.

60. The aforesaid acts of the Defendant Members do, in fact, deny Plaintiffs their rights under the Commerce Clause and the Fourteenth Amendment of the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

A. Issue a preliminary injunction under Rule 65, to be merged into a permanent injunction, enjoining Defendants from treating in-state and out-of-state hospitals

differently. The Defendants should be required to either allow both in-state and out-of-state hospitals to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter, or Defendants should be enjoined from allowing any in-state hospital to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter;

- B. Issue a declaration pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates 28 U.S.C. § 2201 that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates the Civil Rights Act of 1871, 42 U.S.C. § 1983, facially and as applied to Plaintiffs;
- C. If the Court alternatively strikes down the exemption, it should further issue a declaration that any and all actions of the HCA taken with regard to any applications that rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 are null and void *ab initio*;
- D. Issue an award of reasonable attorney's fees and costs expended as to such Defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1988; and
- E. Such other further relief that this Court deems appropriate and just.

COUNT IV
Violation of Equal Protection Clause of the Fourteenth
Amendment of the U.S. Constitution

61. Plaintiffs incorporate by reference paragraphs 1 to 60 of the Complaint as if fully restated herein.

62. The recently enacted W. Va. Code § 16-2D-11(c)(12) violates Plaintiff's right to equal protection because it treats out-of-state hospitals differently from similarly situated hospitals in West Virginia solely because the former are licensed and located out-of-state

63. The Equal Protection Clause states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., 14th Amend. § 1.

64. The Supreme Court has found that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 439 (1985).

65. Differential treatment of in-state and out-of-state enterprises must serve a legitimate state purpose. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 (1985). ("[W]hatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.").

66. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). *Sandlands C&D LLC v. Horry*, 737 F.3d 45, 55 (4th Cir. 2013).

67. The revised W. Va. Code § 16-2D-11(c)(12) treats out-of-state hospitals differently from in-state hospitals because it allows for in-state hospitals to apply for an exemption without allowing for in the intervention of affected persons or a hearing on the exemption application based solely on their in-state status; whereas, out-of-state hospitals must

apply for a certificate of need for the exact same type of service and affected persons are authorized to intervene in the process and request a hearing on the CON application based solely on their out-of-state status.

68. The revised W. Va. Code § 16-2D-11(c)(12) continues to violate the Equal Protection Clause of the United States Constitution because it purposefully discriminates against out-of-state hospitals and serves no legitimate purpose.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

- A. Issue a preliminary injunction under Rule 65, to be merged into a permanent injunction, enjoining Defendants from treating in-state and out-of-state hospitals differently. The Defendants should be required to either allow both in-state and out-of-state hospitals to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter, or Defendants should be enjoined from allowing any in-state hospital to rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 during the pendency of this action, and permanently thereafter;
- B. Issue a declaration pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 violates the Fourteenth Amendment of the United States Constitution, facially and as applied to Plaintiffs;
- C. If the Court alternatively strikes down the exemption, it should further issue a declaration that any and all actions of the HCA taken with regard to any applications that rely upon the exemption provided under W. Va. Code § 16-2D-11(c)(12) as enacted by HB4365 are null and void *ab initio*;

D. Issue an award of reasonable attorney's fees and costs expended as to such Defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1988; and

E. Such other further relief that this Court deems appropriate and just.

PLAINTIFFS DEMAND A JURY TRIAL ON ALL ISSUES SO TRIABLE.

**MARIETTA MEMORIAL HOSPITAL,
MARIETTA AREA HEALTH CARE, INC. and,
MHC PHYSICIANS, INC.,**

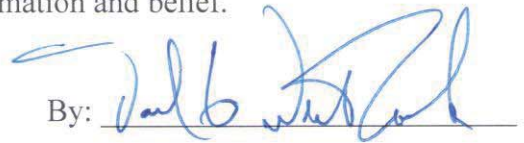
By Counsel,

LEWIS GLASSER CASEY & ROLLINS, PLLC

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, (WVSB 155)
Thomas G. Casto (WVSB 676)
Valerie H. Raupp (WVSB 10476)
Post Office Box 1746
Charleston, West Virginia 25326
Phone: 304-345-2000

VERIFICATION

I, PAUL WESTBROCK, being first duly sworn, on oath depose and say that I am authorized to verify this *Complaint*; that I have reviewed the foregoing *Complaint* and know the contents; that said *Complaint* was prepared with the advice of counsel and from information and materials made available from numerous sources; and that said *Complaint* is based upon my personal knowledge as well as upon information supplied by others. Based upon the foregoing, the *Complaint* is true to the best of my knowledge, information and belief.

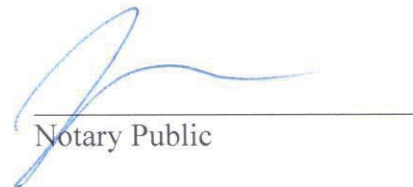
By: 

Taken, subscribed and sworn to before the undersigned authority this 6th day of **September 2016**.

My commission expires: NA



JENNIFER N. WILLIAMS, Notary Public
In and For The State of Ohio
Attorney Commission Does Not Exp.


Notary Public