UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Western Star Hospital Authority, Inc., d/b/a Metro Health EMS, *Plaintiff*, vs. City of Richmond and Richmond Ambulance Authority, *Defendant*s.	Case No.: 3:18-CV-00647-JAG **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

The Richmond VA Medical Center wants to hire Metro Health EMS—the winner of an RFP—to handle its non-emergency transportation. Metro Health is ready, able, and willing to perform this job for the Richmond VA, just like it does for VAs in many other cities. The only barrier to this happening is the refusal by the City of Richmond and the Richmond Ambulance Authority to give up their monopoly over this service market.

The cold, hard fact is that right now, every month this case continues, the VA is paying the monopolists $250,000 to $350,000 per month for these services. Under the contract with Metro Health, the VA would be paying $150,000 to $180,000 per month. So defendants are collecting significant monopoly rents for a service in which they lost the RFP, and Metro Health was forced to sue the city and its corporate ambulance authority for relief.

Defendants want these monopoly rents so badly that they have no problem taking an extra $100,000 plus per month from an underfunded government agency

whose primary mission is to provide health care for our nation's heroes. These monopoly rents are so valuable to defendants that they were willing to force Metro Health into a series of Kafkaesque wanderings through the city government and its subsidiary corporation for the obvious purpose of further delays so they can continue to collect their monthly pile of monopoly-rent cash from the federal government.

For example, the city insisted that Metro Health obtain a permit to fulfill its contract with the VA, but didn't provide any way to even try to obtain one—for months. The city and RAA then put together an application that required Metro Health—their competitor—to deliver competitively sensitive information and meet many other requirements that were arbitrary, extreme, and unfair. Metro Health, frustrated but compliant, finally jumped through these hoops and had their application approved by the fire department. But—afraid of losing their monthly pot of monopoly-rent gold—the city council overruled the fire-department experts and rejected the application for, believe it or not, lack of need. That is, the defendant monopolists didn't "need" a competitor, in their view.

Metro Health is now stuck in a situation where it must litigate a serious antitrust, constitutional, and business tort case—which can take years—while at the same time trying to keep its local employees engaged in less-compelling part time work in other areas, hoping the VA doesn't get frustrated and change its mind about the contract, losing economies of scale and risking other opportunities, and facing the real possibility that defendants could prevail on the argument they previewed that

Metro Health, under a particular federal statute, may have no right to damages at all, no matter how egregious defendants' antitrust violations.

That is why Metro Health is here before this Court asking for a preliminary injunction. Without it, Metro Health will continue to suffer irreparable harm litigating a case it will likely win, eventually, while every month defendants receive at least an extra $100,000 in monopoly rents that could fund the medical care for ten veterans for an entire year.

RELEVANT FACTS

The Richmond VA Medical Center often requires non-emergency transportation for its in-patients. They travel to the facility from a non-VA hospital or their residence at a long-term care facility or travel from the facility to other VA facilities, typically for scheduled treatments. ¶13.[1] While these transports provide treatments for stabilized patients who do not have an urgent need for treatment or transport and are not—by definition—emergency medical service transports, the VA still requires ambulance-type transport vehicles with basic and advanced life support equipment in case something goes wrong. These transports are provided at the direction of the VA, paid for by the VA, and are only for the transport of VA beneficiaries. ¶14.

In the 1990s, the City of Richmond, Virginia created (through an authorization by act of the Virginia Assembly) the Richmond Ambulance Authority (RAA). RAA is a wholly owned subsidiary of the city that provides, among other things, prehospital

1. All paragraph citations are references to the second amended complaint (Dkt. 49) unless otherwise indicated.

EMS transport. Prior to RAA's existence, the city contracted with American Medical Response (AMR) as its contracted provider. RAA and the city work closely together: RAA generates substantial revenue for the city, and the city ensures that RAA is the only ambulance gig in town.

Virginia law allows cities and certain other political subdivisions to play a role in the statewide coordinated EMS system. To that end, it allows cities to regulate some aspects of prehospital EMS transport services. The purpose of this authority is to give local governments some oversight to ensure that all Virginia citizens receive swift and adequate prehospital EMS transport and care.

Defendants, however, have abused and overstepped that authority in many ways. First, they utilized their prehospital EMS regulatory authority to exclude all of their competitors and extract monopoly rents from every patient picked up within city limits. Second, they over-interpreted their authority by falsely equivocating the concept of ***emergency*** medical services transport with the word "ambulance." So not only do they run a monopoly in the prehospital EMS transport market, but they also try to run a monopoly in the separate and distinct non-emergency interhospital transport market. Third, under a competitive threat for the first time in ages, they engaged in arbitrary and capricious shenanigans to preserve a meal ticket they've long enjoyed at the expense of competition, the U.S. Department of Veterans Affairs budget and, ultimately, our nation's heroes.

For years, the Richmond VA Medical Center was forced to utilize RAA as its provider of non-emergency interfacility transport—there was no other provider

around (by defendants' design). ¶16. Metro Health, which is already contracted to provide that service to eight VA medical centers, told the VA it could provide it for the Richmond VA Medical Center for significantly cheaper. The VA quickly organized a request for proposals and took bids from three providers: Metro Health, AMR, and RAA. ¶18.

In June 2018, the VA notified Metro Health that it was selected as the prevailing bidder—it offered the lowest price and has a long track record of dutifully fulfilling its contracts at other VA facilities. Indeed, with Metro Health, the VA's costs for non-emergency interfacility transport—a fairly significant line item in the budget—would be nearly halved. The VA was concerned, however, that defendants might take action, however unlawful, to intercept Metro Health, delay a patient in transit, or cause a complete disruption of service. ¶19. The VA is, after all, charged with these veterans' care and well-being. Thus, as a condition of commencing the contract, the VA requested that Metro Health obtain either (1) a letter of acknowledgment from the city stating it was aware that Metro Health would be operating on behalf of the VA, or (2) a permit from the city.

Metro Health first sought a letter. After all, city officials had previously told it that they did not think a permit would be necessary. Metro Health contacted various city departments, which would refer it to other departments, and finally found someone at the city's office of the chief administrator (CAO) who agreed all Metro Health would need is the letter. ¶21. But then another CAO employee came back and said that their hands were tied—they couldn't do it without explicit authorization

from the city council, and it would be at least November before that would happen. ¶22. Then the same employee changed course and claimed Metro Health would in fact need a permit or franchise. ¶23. Metro Health requested an application and, remarkably, none existed, despite the city's insistence that Metro health obtain permission. ¶23. Metro Health spent June, July, and August pressing various city officials to act before the city finally released a permit application and new criteria—which they eventually posted in August 2018. Dkt. 21 at 4. Notably, the application and requirements were not provided to or approved by the city council despite city officials' consistent claims that they couldn't do anything without council approval. ¶¶24–27.

The requirements and the information requested by the application were arbitrary, extreme, and unfair—they had been created for the specific purpose of denying Metro Health's application. ¶28. Nevertheless, Metro Health subsequently filed the application and waited yet again through more foot-dragging. Although the fire department approved and recommended granting the application, the city ultimately denied it based on a supposed lack of "need" for a competitor of RAA. ¶¶29–30. The city, of course, understands how profitable a monopoly can be to their bottom line—even at the expense to the federal government and our nation's heroes. The fire department probably didn't take the benefit of the monopoly rents into account when it originally approved the application.

Therefore, even though the VA chose Metro Health as its provider for the Richmond VA Medical Center in June 2018, RAA continues to provide those services

to the VA to date—the VA has been forced into a month-to-month arrangement with RAA as it waits for this Court to resolve the matter. [transcript at 8:2–10]. And it extracts substantial rents as it provides those services: it charges the VA at least $100,000 more per month than the VA would be paying Metro Health under the contract. ¶32. In other words, through their unlawful and anticompetitive conduct, defendants are siphoning off—for their own benefit—federal funds earmarked for veterans' healthcare in an amount equivalent to the annual cost of approximately 10 veterans' medical care. ***Every month***.

Metro Health, which had already committed significant resources to commence the contract, is paying substantial overhead costs while receiving no revenue for the contract that they bargained for. Metro Health is incurring damages of approximately $100,000 each month that defendants continue their unlawful restraints.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish that:

1. It is likely to succeed on the merits;
2. It is likely to suffer irreparable harm in the absence of preliminary relief;
3. That the balance of equities tips in its favor; and
4. That an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 19 (2008); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009). A heightened standard applies where the relief sought is a change in the status quo. *Pashby v. Delia*, 709 F.3d 307, 320 (2013). As a general rule, prohibitory injunctions preserve the status quo, while

mandatory injunctions change it. *Id.* Decisions to grant preliminary injunctions are reviewed for abuse of discretion. *Id.* at 319.

ARGUMENT

This dispute presents a straightforward case of monopolization with clear market definitions, uncontested monopoly power, multiple acts of unreasonable conduct designed to preserve or extend that monopoly, and antitrust injury that is obvious and unlikely to lead to serious question. This is the rare antitrust case that should be easy for the plaintiff to win. Defendants—like most public defendants—may contest on state-action immunity, but they can't invoke this disfavored exemption because (among other fatal problems) the State of Virginia doesn't authorize anything close to anticompetitive conduct in the relevant market.

This Court, of course, can't enter a preliminary injunction unless plaintiffs can also show irreparable harm and satisfy this Court that the balance of equities are in its favor. Defendants may have killed any argument against irreparable harm when the city asserted in its original motion to dismiss that plaintiffs can't recover damages under the antitrust laws because of the Local Government Antitrust Act of 1984. Dkt. 37–8. Metro Health disagrees with that analysis, but there is certainly sufficient risk that Metro Health won't recover damages. Moreover, as we explain below, there are several categories of damages that Metro Health is suffering that would be difficult to prove and therefore recover. Finally, the balance of equities is heavily slanted toward Metro Health as they are suffering serious injury, while defendants have only their illegal monopoly and ability to overcharge the VA to lose.

I. Metro Health Is Likely to Succeed on the Merits

A. Antitrust Claims

Metro Health is likely to succeed on its antitrust claims because it can prove (1) the relevant market is the market for non-emergency interfacility transport services in the Richmond area, (2) that defendants have violated Section 2 of the Sherman Act, (3) that Metro Health has suffered antitrust injury, and (4) that the antitrust violations had a substantial effect on interstate commerce.

i. The relevant market

There are two dimensions to any market: the product/service dimension (here, service) and the geographic dimension. The plaintiff must define each dimension with reference to substitutability (interchangeability with other services) and cross-elasticity of demand. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481–82 (1992); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446, 1448 (9th Cir. 1988) (Market definition, especially at the pleading stage, need not "pinpoint precisely the relevant market." (citing *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 460 (1986)). The only purpose of defining the relevant market is to demonstrate the anticompetitive effect of the defendants' conduct. *Indiana Fed'n of Dentists*, 476 U.S. at 460.

The relevant service market is the market for non-emergency interfacility transport. Non-emergency interfacility transport is a service that facilitates the transfer of an existing, stable patient from one facility to another. There are various reasons why a patient might require transportation, but it is primarily to transfer

them to and from a facility that provides treatments, scheduled in advance, that the patient's facility does not provide. For example, a nursing home patient may need to have a scheduled hip replacement surgery at a hospital. In the case of the VA, different VA medical centers have different capabilities and specialist programs. Non-emergency interfacility transport is distinguished from prehospital EMS transport, which is provided on an emergency basis, is more expensive to operate, requires more resources and equipment, more personnel and more training (triage, etc.).

Although both service markets require the use of ambulance vehicles equipped with basic and advanced life support equipment, they are not substitutable and there is limited cross-elasticity of demand. In addition to the characteristic differences mentioned above, the consumers of non-emergency interfacility transport are typically different from the consumers of EMS transport. Consumers of non-emergency interfacility transport are usually medical facilities, which typically have contracts for an exclusive provider or otherwise control which provider is used. Consumers of EMS transport are usually individual patients. Patients usually initiate a request for EMS transport by dialing 911 (unless one is initiated for them, such as by a family member, neighbor, or police officer on the scene). Thus, a change in the price of EMS transport is unlikely to substantially affect the market or pricing for non-emergency interfacility transport, and vice-versa. The services are distinct markets with different customers in different situations.

The relevant geographic market is also readily apparent: it is the area comprising Richmond and the close surrounding area. While non-emergency

interfacility transport often involves travel of a patient outside of Richmond, the consumers of non-emergency interfacility transport do not travel outside of Richmond to obtain non-emergency interfacility transport. This is demonstrated by the fact that each VA medical center obtains its own non-emergency interfacility transport provider with non-emergency transport vehicles based in the immediate vicinity. Providers are based locally because traveling significant distances just to begin a transport dramatically increases the costs of operation. Thus, there is limited cross-elasticity of demand for non-emergency transport within and outside the area comprising Richmond.

ii. Section 2 requirements

Monopolization. A plaintiff's prima facie case for monopolization requires proof of (1) the possession of market power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historical accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). Market power is commonly defined as the power to "control prices or exclude competition" within the relevant market. *Id.*

Metro Health has a strong likelihood of success on its actual monopolization claim. Determining market power often requires complex methods of proof, such as calculations of market share, market concentration, and other market conditions. Here, however, the answer is easy: the city ordinance conclusively shows, as a matter of law, that defendants have 100% market power. *See* Dkt. 37–1 (Richmond

Ordinances Sec. 10-78); Dkt. 37–2 (Richmond Ordinances Sec. 10-79). They have the power to exclude competition, and they have done so more than once. *See* Dkt. 22 at 1–2, ¶¶3–8. RAA is the only provider of non-emergency interfacility transport services such that even the federal government has been forced to utilize its services. They also have the ability to raise prices, as demonstrated by the fact that RAA is charging the VA between 50% and 60% more for its services than Metro Health agreed to charge, and yet the VA still is forced to pay RAA's rates. ¶32. This alone—proof of actual detrimental effects—obviates the need for any elaborate inquiry into market power. *See Indiana Fed'n of Dentists*, 476 U.S. at 460.

Conduct that is competitively unreasonable can be considered actionable willful monopolist conduct, either under the rule of reason or by other tests. One such test is whether the defendant was "attempting to exclude rivals on some basis other than efficiency," balanced against the conduct's "effect . . . on consumers, on [the defendant's] smaller rival, and on [the defendant] itself." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (citation and internal quotations omitted). Another test is whether the defendant has used "exclusionary action to maintain its . . . monopoly." *Eastman Kodak*, 504 U.S. at 483. Defendants' conduct satisfies both of those tests.

Attempted monopolization. A plaintiff's prima facie case for attempted monopolization requires proof of (1) specific predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Specific intent can often be proved by the anticompetitive conduct itself. *Id.* at 459. The "dangerous probability element" requires a market analysis similar to that of an actual monopolization claim.

Metro Health's attempted monopolization claim is pled in the alternative to the monopolization claim, so the Court need not address attempted monopolization unless it finds that the elements for monopolization have not been met (i.e., that defendants do not already have market power). The evidence that shows defendants excluded Metro Health from the market is also evidence of its anticompetitive conduct and specific intent. Specific intent can be inferred from the conduct and does not require direct evidence. *Cal. Computer Prods., Inc. v. Int'l Bus. Machines Corp.*, 613 F.2d 727, 736 (9th Cir. 1979) (" 'Direct evidence' of specific intent to . . . destroy competition . . . is not always necessary.") (citation omitted).

The dangerous probability element is also satisfied because defendants have extreme market power. Courts almost invariably hold that anticompetitive conduct by dominant firms (high market share) in industries with high barriers to entry creates a "dangerous probability" of foreclosing competition and resulting in monopoly power. *See, e.g.*, *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 783–84 (6th Cir. 2002) (upholding jury verdict of liability where defendant had 77% market share in the relevant market and engaged in tortious conduct); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) (holding that 50% of repair market where entry barriers were high sufficient to create risk of market foreclosure).

iii. Antitrust injury

To prove antitrust injury, a plaintiff must satisfy two elements: (1) the injury is of the type the antitrust laws were intended to prevent, and (2) the injury flows from that which makes the defendant's conduct unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Put another way, the "injury should reflect the anticompetitive effect . . . of the violation. *Id.*

That inquiry is simple here: defendants excluded all competition from the market for non-emergency interfacility transport in the Richmond area, and one of those competitors was Metro Health.

iv. Interstate commerce

A plaintiff's burden to show an effect on interstate commerce is negligible. Even "[w]holly local business restraints" can be condemned under the Sherman Act, and "it does not matter how local the operation which applies the squeeze." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (internal quotations omitted)); *see also United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in [the Sherman Act] . . . admits of little, if any doubt.").

Metro Health meets this minimal burden. ***First***, the VA is a federal agency using federal (and thus interstate) funds to pay for its non-emergency interfacility transport, and it has paid supracompetitive prices to RAA. ***Second***, the Richmond VA Medical Center's needs often extend beyond the boundaries of the state. Many of

these patient transfers are to other VA medical centers located outside of Virginia, such as Maryland. ***Third***, the transports often require use of federal instrumentalities such as highways and interstates (and VA facilities themselves). ***Finally***, restraints in healthcare markets necessarily affect interstate commerce. Congress' passage of the Affordable Care Act alone demonstrates this. Non-VA hospitals are consumers of non-emergency interfacility transport services, and those hospitals bill insurers located throughout the nation and payments are facilitated by interstate banks.

v. *State action immunity*

The state-action immunity is an affirmative defense and defendants must meet a heavy burden to establish it. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (It is incumbent on government to meet its burdens in opposing a preliminary injunction because "the burdens at the preliminary injunction stage track the burdens at trial.").

Nevertheless, the state-action immunity does not apply for several reasons, including:

- The state-action immunity is strictly limited and disfavored; defendants cannot meet their heavy burden to show that they acted pursuant to a clearly articulated state policy to displace competition in the market for non-emergency interfacility transport services. Virginia law may give cities some authority to regulate ***emergency*** medical services transportation as part of a larger scheme to assure coordinated 911

operations throughout the commonwealth. But that policy is not implicated here, as Metro Health does not take 911 calls or do anything but provide non-emergency service to the federal government. Virginia has not clearly articulated any policy suggesting defendants can regulate Metro Health's non-emergency operations, let alone altogether exclude it as a direct competitor.

- Even if Virginia state policy did provide for such authority, the statutory scheme qualifies that authority with prerequisites not satisfied here. Moreover, the state policy specifically carves out an exception relating to federal government operations.
- Even if Virginia state policy intended to allow cities unfettered discretion to monopolize markets and exclude their competitors (of course, that was not its intent), the state-action immunity is still inapplicable: a state cannot give a free pass to violate the antitrust laws.
- The RAA, which is not a municipality, cannot claim the narrow exception to active supervision established in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). It cannot show that it was actively supervised by the state itself in exercising its monopoly.
- Nor does the narrow *Hallie* exception apply to Richmond here. In *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1113 (2015), the Supreme Court held that active supervision "is an essential condition of state-action immunity where a nonsovereign actor has 'an

> incentive to pursue [its] own self-interest under the guise of implementing state policies.' " (Citations omitted.) That incentive is blatantly obvious here.

B. Constitutional claims

Metro Health also has a strong likelihood of success on its preemption claim, among others. Defendants have undertaken actions under color of state law that directly interfered with the operations of an executive-level agency of the U.S. Government.

Congress passed the Competition in Contract Act with the intent that U.S. agencies would procure property and services through "full and open competition" to control the cost of government. Defendants usurped that prerogative by abusing state-law authority. To the extent their regulations and application of those regulations prevent the VA from procuring its non-emergency interfacility transport services from the lowest and best bidder, as required by CICA, they are preempted under the Supremacy Clause of the U.S. Constitution.

C. Tortious interference

Likewise, Metro Health is likely to succeed on its tortious interference claim. A prima facie case for tortious interference with contract or business expectancy is established by proof of (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose

relationship or expectancy has been disrupted. *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 216 (2014). For a contract terminable at will or a business expectancy, the plaintiff must also show that the defendants employed improper methods. *Id.*

Metro Health meets each of these elements. First, it was selected as prevailing bidder by the VA for a four-year contract to provide non-emergency transport services. That is either a valid contract that defendants have prevented Metro Health from performing or, at the very least, a business expectancy. Second, defendants were aware that Metro Health was awarded the contract. Not only was RAA a losing bidder, but Metro Health informed defendants that it was awarded the contract on numerous occasions while attempting to obtain clearance from them. Third, they intentionally interfered with the contract or business expectancy—the VA has not allowed Metro Health to begin performance solely because of defendants' actions. Fourth, Metro Health has been damaged by this interference—it is losing approximately $100,000 per month as a result. Finally, defendants used improper methods—their conduct is unfair competition, violates the antitrust laws, and was arbitrary and capricious. They imposed inapplicable EMS regulations to prevent Metro Health from operating and employed stall tactics to prevent Metro Health from obtaining clearance, all in the pursuit of ill-gotten profits.

II. Metro Health Is Likely to Suffer Irreparable Harm

Unless this Court grants a preliminary injunction, Metro Health is likely to suffer irreparable harm because (1) even if it prevails, it may not be able to recover

damages from defendants under the LGAA, (2) it is likely to lose key employees in the Richmond area during the pendency of this case, and (3) defendants' exclusion of Metro Health deprives it of seeking further expansion opportunities and achieving economies of scale that may be too speculative to calculate as damages.

A. The Potential for Unrecoverable Damages

The city asserted in its first motion to dismiss that it is entitled to immunity from damages, costs, and attorneys' fees under the Local Government Antitrust Act of 1984. *See* Dkt. 37 at 8. Immunities and exemptions from the federal antitrust laws are strictly limited and disfavored, *N.C. Dental Exam'rs*, 135 S. Ct. at 1111, and it is Metro Health's position that the LGAA does not apply here for several reasons.[2] That issue is not ripe for decision—it would be premature to decide the applicability of the LGAA before a jury actually awards damages to Metro Health. Nevertheless, there is a possibility that the LGAA could bar recovery from either or both defendants, and thus Metro Health will continue to suffer potentially unrecoverable trebled damages unless this Court enjoins defendants. Moreover, various other immunity doctrines might apply to Metro Health's non-antitrust claims.

Economic loss typically does not constitute irreparable harm because it can be calculated and compensated following trial. The "threat of ***unrecoverable*** economic

2. Regardless of whether it applies to Metro Health's damages claims, the LGAA ***does not*** apply to awards of attorneys' fees for any antitrust claim seeking injunctive relief under 15 U.S.C. § 26. Since Metro Health does seek relief under Section 26 for its antitrust claims, it will be entitled to its attorneys' fees if it prevails. *Cohn v. Bond*, 953 F.2d 154, 158 (4th Cir. 1991) ("The LGAA does not extend its immunity to injunctive relief. Both the House and the Senate were careful to observe that the immunity being provided to local government was immunity from suits for damages, and not immunity from suits seeking injunctive relief."); *see also* a *Redwood Empire Life Support v. County of Sonoma*, 190 F.3d 949, 953 (9th Cir. 1999) (upholding award of attorneys' fees and costs against local government under 15 U.S.C. § 26).

loss, however, does qualify as irreparable harm." *Iowa Utils. Bd. v. FCC.*, 109 F.3d 418, 426 (8th Cir. 1996) (emphasis added); *Foltz v. U.S. News & World Rpt.*, 760 F.2d 1300, 1309 (D.C. Cir. 1985) (possibility that benefits plan would have insufficient assets to satisfy plaintiffs' damages would constitute irreparable harm if on remand the district court found that those assets were potentially insufficient); *see also Foltz*, 613 F. Supp. at 643 (finding on remand that the assets were in fact in sufficient and granting injunction). Unrecoverable damages are—by definition—harm that is irreparable. Unless this Court grants this motion, Metro Health is likely to suffer irreparable harm.

B. Loss of Key Employees and the Richmond Contract

Metro Health began hiring employees to staff its Richmond VA Medical Center operations when it was notified that it was selected as the prevailing bidder by the VA. It had hired six of the eighteen employees it needed for those operations—but they have no work to perform in Richmond because of defendants' restraints. To retain those valued employees, Metro Health has had to provide them with inferior, part-time opportunities to work in Maryland, where Metro Health also serves VA facilities—far away from the employees' homes and families. October 3, 2018 hearing transcript at 48, attached hereto as Exhibit A (excerpt); ¶40. Each day that Metro Health continues to be excluded, those employees' morale suffers and the risk that they will leave for other opportunities becomes greater. Ex. A at 48:15–16 ("We didn't think it would take this long.").

Likewise, there is a significant risk that the VA will move on before final judgment in this case. The VA has made no guarantee that it will continue to honor the award indefinitely. *See* Ex. A at 8.

C. Loss of Opportunities and Goodwill

If Metro Health were not excluded, it would achieve economies of scale that further reduce its expenses and increase its margins nationwide and provide further expansion opportunities into other markets. Defendants are likely to argue that these types of damages are speculative and they are certainly difficult to prove. And if defendants prevail on their immunity-from-damages arguments, Metro Health will certainly not recover money for these injuries. Moreover, Metro Health's inability to perform its contract due to defendants' restraints could be considered as a factor in future requests for proposals at both Richmond VA Medical Center and other VA facilities.

These damages are necessarily speculative and difficult to ascertain, and thus supports a finding that Metro Health would suffer irreparable harm in the absence of an injunction. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994), *abrogated on other grounds by Winter*, 555 U.S. 7.

III. The Balance of Equities Tips in Metro Health's Favor

The only "harm" that defendants would suffer from an order enjoining them from continuing to violate the antitrust laws is that the VA would no longer use their services once its chosen provider is allowed into the market. That isn't a cognizable

harm. The harm to Metro Health cited in this motion and in its second amended complaint, on the other hand, is significant. Thus, the balance of equities is firmly in favor of granting an injunction.

IV. An Injunction Would Serve the Public Interest

Metro Health requests an order from the Court enjoining defendants' antitrust violations. Violations of the antitrust laws harm the public interest. Enforcement, on the other hand, is deeply rooted in the nation's public policy.

In fact, the "national policy in favor of competition" has existed and been reaffirmed consistently by Congress for more than a century. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

Delay in enforcing the antitrust laws would frustrate this policy and, the prospect of immunity from damages under the LGAA would provide an incentive for defendants and similarly situated municipal entities to continue their unlawful conduct through litigation to final judgment. And it would discourage other small businesses harmed by local governments' flagrant antitrust violations from bringing expensive antitrust litigation in the first place—many will go out of business before they reach final judgment, and that assumes they can even fund such a case, having been excluded from competing and thus maintaining positive cash flow.

This case is also unique: defendants' conduct has directly harmed U.S. taxpayers and deprived an already-underfunded U.S. Department of Veterans Affairs of precious financial resources that they could use to treat veterans. Defendants' conduct does not merely harm Metro Health; it is a full-frontal assault on Americans'

pocketbooks and their deeply held commitment to provide care to those who fight in service of this great nation.

REQUEST FOR RELIEF

WHEREFORE, Metro Health requests that this Court:

A. Schedule an evidentiary hearing to determine whether it will issue a preliminary injunction prohibiting defendants from continuing their unlawful acts;

B. Enter a preliminary injunction against defendants to enjoin them from continuing their illegal acts under 15 U.S.C. § 26; and

C. Additionally or alternatively declare that defendants' conduct violates Section 2 of the Sherman Act and Virginia state law, and is preempted under the U.S. Constitution;

D. Award Metro Health its costs and expenses of obtaining this preliminary injunction, including its reasonable attorneys' fees necessarily incurred in bringing and pressing this case, as provided in 15 U.S.C. § 26; and

E. Order any other such relief as the Court deems appropriate.

CONCLUSION

For the foregoing reasons and based on evidence submitted in this motion and at the forthcoming evidentiary hearing, Metro Health requests that this Court grant this motion and enter a preliminary injunction order against defendants.

Respectfully submitted,

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