

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ALAMEDA COUNTY MEDICAL
CENTER,**
et al.

Plaintiffs,

v.

**THE HONORABLE MICHAEL O.
LEAVITT, in his official capacity as
Secretary, United States Department of
Health and Human Services,**
et al.

Defendants.

Civil Action No.

DECLARATION OF JAMES R. NATHAN

I, James R. Nathan, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am President and Chief Executive Officer (“CEO”) of Lee Memorial Health System (“Lee Memorial”). I submit this declaration in support of Plaintiffs’ complaint and motion for a preliminary injunction in the above-referenced action against Defendants.

2. I am of legal age and competent to testify. This declaration is made on personal knowledge, information contained in Lee Memorial's files upon which I normally rely, upon publicly available information, and other factual matters known to me.

3. I have served as CEO of Lee Memorial from 1982 through 1997 and again from 2001 to the present.

4. In my capacity as CEO, I am responsible for all aspects of Lee Memorial's operations, including its financial operations and its participation in and payments from Florida's Medicaid program.

5. Lee Memorial is a public healthcare system created by the state legislature as a unit of government known in Florida as an independent special district. 1963 Fla. Laws ch. 63-1552 and recodified at 2000 Fla. Laws ch. 2000-439. Forty-five (45) years ago, the healthcare system was established to serve as the public hospital "for the use and benefit of the residents of" Lee County, Florida. 1963 Fla. Laws ch. 1552, §1. Lee Memorial is owned and operated by the citizens of Lee County through a publicly elected board of directors. 1963 Fla. Law ch. 1552. The Florida legislature declared the operation and maintenance of the health system to be a public purpose. 2000 Fla. Laws ch. 2000-439.

6. Our core mission is to improve the health status of the people of Southwest Florida and to provide quality healthcare services to all patients regardless of their ability to pay. Our original enabling legislation states: "The public county hospital established under this act shall be for the use and benefit of the residents of the county...The hospital may care for and treat without charge those patients who are found by the hospital board to be indigent." 1963 Fla. Laws ch. 1552, § 14. The Florida legislature in 2000 recognized that although the health care system is primarily for the use and benefit of the residents of Lee County, the health system provides services to all persons, including

nonresidents of the county, who may seek such services. 2000 Fla. Laws ch. 2000-439, §11.

7. Lee Memorial includes seven hospitals as well as a system of primary care clinics, home health services and a skilled nursing home: Lee Memorial Hospital, a 367 bed hospital in Fort Myers, providing emergency, trauma, specialty, and rehabilitative care services; Southwest Florida Regional Medical Center, a 400-bed acute care facility in Fort Myers; HealthPark Medical Center, a 360-bed facility in Fort Myers; Gulf Coast Hospital, a 120-bed facility Fort Myers; The Children's Hospital of Southwest Florida in Fort Myers, the only comprehensive child healthcare facility between Tampa and Miami; the Rehabilitation Hospital in Fort Myers; and, Cape Coral Hospital, a 291-bed hospital with Cape Coral's largest emergency department.

8. Lee Memorial is the only trauma center in the region, providing a critical service on which we lose more than \$2 million each year.

9. Lee Memorial is a significant safety net provider for the residents of Lee County. Approximately 12 percent of our patients are enrolled in Medicaid, roughly 8 percent of our patients are self-pay (uninsured), and roughly 3.2 percent of that number are charity care patients.

10. Lee Memorial budgeted for a margin of \$44 million or 4.4 percent of operating revenues. Through the first four months of Fiscal Year 2008, Lee Memorial has fallen short of the budgeted gain by \$6.7 million. If there is a shortfall in our projected margin, Lee Memorial will be unable to reinvest in the capital needs that support the mission of the organization. Twelve (12) percent of our revenues are from Medicaid. We provide roughly \$28.5 million in cost of charity care per year.

11. Lee Memorial has significant attributes of governmental status. The Florida Legislature created Lee Memorial for a public purpose as set forth in sections 5 and 6 above.

12. The United States 11th Circuit Court of Appeals held that Lee Memorial is a “political subdivision of the State of Florida,” as a “healthcare authority created by the Florida Legislature as a special purpose unit of local government,” and therefore entitled to state action immunity from antitrust liability. *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994)

13. Lee Memorial’s board consists of ten (10) members who are publicly elected by a vote of the electorate of the county at large. Board members are public officials subject to the Code of Conduct for Public Officers. Meetings of the Board are noticed in accordance with Florida law governing special districts. Board meetings are open to the public in accordance with Florida law governing meetings of public officials. Minutes are recorded in accordance with Florida’s sunshine law and documents and materials made or received by Lee Memorial in connection with official business of the health system are subject to the Public Records Act.

14. As a governmental unit, Lee Memorial and its public employees are entitled to the provisions of the Florida Waiver of Sovereign Immunity Act, which limits the recovery of damages in ordinary negligence cases against governmental agencies and provides personal immunity to Lee Memorial’s officers, agents and employees. §768.28 Fla. Stat.

15. Florida operates its Medicaid program under a demonstration approved by the Department of Health and Human Services (“HHS”) (through the Centers for Medicare

and Medicaid Services (“CMS”)). Through Medicaid demonstrations, States are permitted to waive certain federal requirements for Medicaid programs in order to try new ways to expand coverage to targeted populations, institute new services for certain groups of Medicaid beneficiaries, etc. States must follow the written Terms and Conditions of their demonstration, as approved by CMS, which detail the rules and financing of the demonstration and also specify which federal requirements have been waived.

16. Florida does not have waivers of Section 1902(a)(2) of the Social Security Act or of 42 C.F.R. § 433.50, the relevant authorities for the unit of government definition under the Rule.

17. The Terms and Conditions contain a change of law provision requiring the state to conform its demonstration to changes in federal statutes or regulations that take effect after the demonstration was approved. *See* Special Terms and Conditions, Medicaid Reform Section 1115 Demonstration, Agency for Health Care Administration, Sec. III.3.

18. The demonstration is for five years ending June 30, 2011. Although the demonstration is eligible for renewal, the renewal will be subject to conformity with all applicable statutes and regulations, unless waived by CMS.

19. Lee Memorial currently receives supplemental Medicaid payments that support its provision of services to Medicaid patients and its role as a safety net provider. For example, Lee Memorial receives: low income pool payments to support the provision of, and offset the significant losses associated with, providing services to Medicaid and uninsured populations; enhanced reimbursement based on Medicaid utilization rates;

funding to support our Level II trauma services; and disproportionate share hospital payments based on its volume of care to Medicaid, as well as uninsured populations. Lee Memorial serves as Southwest Florida's only state designated Regional Perinatal Intensive Care Program and serves a disproportionate number of uninsured and Medicaid high risk mothers and complex neonates. Our midwife and obstetrical outreach services provide services to our neighboring county and Lee County's Medicaid and uninsured population.

20. Based on our analysis of the purported new CMS Rule, *Cost Limit for Providers Operated by Units of Government and Provisions To Ensure the Integrity of Federal-State Financial Partnership*, 72 Fed. Reg. 29748 (May 29, 2007), Lee Memorial would not meet the new restrictive definition of a unit of government, despite its continued role as the public hospital and health system for Lee County. Under the Rule, an entity may qualify as a unit of government if it 1) has taxing authority, 2) has direct access to generally applicable tax revenues as an integral part of a unit of government with taxing authority which is legally obligated to fund the health care provider's expenses, liabilities, and deficits, 3) receives appropriated funding as a State university teaching hospital, or 4) is an Indian Tribe or Tribal organization.

21. Lee Memorial does not have taxing authority. Further, as an independent special district under State law, the County and local municipalities are not legally obligated to fund Lee Memorial's liabilities. See Florida Statutes, § 189.404. Lee Memorial is not a state teaching hospital, nor a Tribal organization. Based on these factors, it is my understanding that Lee Memorial would not qualify as a unit of government under this overly-restrictive definition even though based on all of the above,

Lee Memorial was created as a public entity, has received legal rulings as a public entity and fully operates as a public entity. It simply does not have taxing authority or direct access to tax revenue.

22. We believe that the Rule will impact Lee Memorial under the Florida Medicaid waiver, as the terms of the waiver require that Florida make changes to comply with federal law (see ¶ 17) and the State does not have a waiver of the regulation at issue or the statutory authority that CMS claims in support of the new Rule.

23. CMS stated in the preamble to the final version of the Rule that it was working with the State on which Low Income Pool expenditures would still be eligible for matching funds under the Rule. 72 Fed Reg. 29748, 29814 (May 29, 2007). CMS did not indicate, however, that the unit of government definition would not be applied and that demonstrations would not have to be changed accordingly.

24. As a result of losing its status as a governmental provider for Medicaid financing purposes under the Rule, we estimate that Lee Memorial will no longer be eligible for \$23.2 million in safety net payments it currently receives under the Medicaid demonstration waiver, as the current level of payments we receive are available only to governmental hospitals, or hospitals able to provide intergovernmental transfers to support these payments.

25. The loss of 52 percent of our \$44 million budgeted margin from operations will dramatically impact our health system's ability to maintain its current levels of care. Given the current shortfall from budget combined with the loss of these funds, we will be forced to consider whether the safety net services described in this Declaration can continue, absent another source of funding (of which we are not aware). At a time when

the need for these services is growing, these cuts will increase barriers to access for Medicaid patients. In addition, a shortfall causes significant capital expenditures related to direct patient care to be delayed or cease.

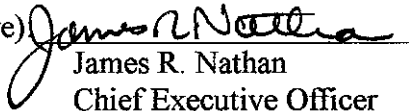
26. We have attempted to determine whether the State would provide funding to offset this loss. Based on our communications with the State, I am not aware of any replacement State or local funding to compensate our hospital for the loss of federal funds resulting from the new Rule. The State is already facing a budget crisis, and significant decreases in sales tax revenues and proposals to cut taxes further make the prospect of new funding to replace the funding lost by our hospital unlikely.

27. Lee Memorial submitted a comment letter to CMS in response to the Proposed Rule, and a supplemental letter in response to the Final Rule, describing the impact of this rule on our health system and its patients. These letters are attached as Exhibits A and B. CMS went forward with the Rule without addressing our concerns.

28. Lee Memorial is a member of the National Association of Public Hospitals and Health Systems, the American Hospital Association, the Safety-Net Hospital Alliance of Florida and the Florida Hospital Association.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 7, 2008

(Signature) 
James R. Nathan
Chief Executive Officer
Lee Memorial Health System