

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

Rio Grande Community Health Center, Inc., *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 Johnny Rullan, Secretary, Department of Health,)
)
 Defendant.)
)

Civil No. 03-1640 (JAG)

**PLAINTIFF CONCILIO SALUD INTEGRAL DE LOIZA, INC.’S
MOTION FOR TEMPORARY RESTRAINING ORDER
AND MEMORANDUM OF LAW IN SUPPORT**

I. INTRODUCTION

On or about January 16, 2004 all of the plaintiffs in this matter filed a Motion for Preliminary Injunction and for Summary Judgment. The basis for that motion was the Department of Health’s (“DOH’s”) failure to implement the Federal Medicaid statute-mandated prospective payment system (“PPS”) applicable to Federally qualified health centers (“FQHCs”) such as the plaintiffs. The DOH’s failure to implement PPS and require that supplemental payments be made to the plaintiff health centers is now about to force plaintiff Concilio Salud Integral de Loiza, Inc. (“Loiza”) to close its doors on its thousands of poor patients. As explained below, Loiza is in need of emergency relief to stay in existence.

II. ARGUMENT

A. Standard for Temporary Restraining Order

The standard used to consider a request for a temporary restraining order is the same as that used for a preliminary injunction. Four factors are to be considered by the Court in deciding whether to issue an injunction “(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) whether the balancing of hardships favors the issuance of the injunction; and (4) what effect, if any, the issuance or non- issuance of the injunction will have on the public interest.” *Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 151 (1st Cir. 1998); *accord Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161 (1st Cir. 2003); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F. 3d 12, 15 (1st Cir. 1996); *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991).

“The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir.1993); See also *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*,102 F.3d 12, 16 (1st Cir. 1996)(“Likelihood of success is the main bearing wall of the four-factor framework.”). Moreover, a strong showing of likelihood of merits success can overcome a weak showing on another prong. “When the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief.” *N.L.R.B. v. Excel Case Ready*, 238 F.3d 69, (1st Cir. 2001)(sliding scale test “allows a lower threshold for irreparable injury when the likelihood of success on the merits is particularly strong”); *accord E.E.O.C. v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996)(“when the likelihood of success on the merits is great,

a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief”).

B. Necessity for a Temporary Restraining Order

In this case, the Commonwealth’s statutory duty is clear and the evidence that such duty has not been performed is indisputable. Plaintiff Loiza hereby incorporates by reference both its and the other plaintiffs’ Motion for Preliminary Injunction and Summary Judgment and Memorandum of Law in Support and their Reply to Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction and Summary Judgment. Plaintiffs’ Reply, in particular, points out that the Commonwealth was unable to controvert the facts established in the Declarations of Jose Orlando Colon and Roberto Viera-Suárez that the Commonwealth has utterly and completely failed to implement any aspect of the PPS payment program mandated by federal law.

The four factors necessary for a temporary restraining order are discussed below.

1. **Likelihood of Success on the Merits**

As shown in its Opposition to Plaintiffs’ Motion for Preliminary Injunction, the Commonwealth has made no substantive argument whatsoever against plaintiffs’ contentions that there is a lack of a PPS payment system that comports with federal law. The only fact the Commonwealth proffered with respect to PPS implementation is that it promised to fulfill its PPS responsibilities *via* a State Plan Amendment submitted to the Centers for Medicare and Medicaid Services (“CMS”), the agency within the U.S. Department of Health and Human Services responsible for administering the Medicaid program. Review and approval of the State Plan Amendment by CMS does not mean that the Commonwealth did what it promised to do. As this case shows, that promise was not worth the paper it was printed on.

2. **Irreparable Injury**

Loiza, and the patients who rely on its services for their primary care, have and will suffer the irreparable injuries caused by the cessation of essential health services to thousands of needy patients without this Court's direction to the Commonwealth to cease its violations of FQHC rights and begin making the payments to which FQHC plaintiffs are entitled. In particular, Loiza's projected expenses for the month of March, 2004 will exceed its income by a startling \$1,630,730. Second Colon Declaration at ¶ ___, attached as Exhibit 1. A great portion of that deficiency relates to Loiza's arrearages on its mortgage which places the health center at risk of foreclosure. *Id.* at ¶ ___. Had Loiza received full and timely PPS payments from the Commonwealth for the provision of Medicaid services it would not now be facing the possibility of closing its doors. Those payments, based on 100 percent of Loiza's costs, should have been more than sufficient to cover the current deficiency.

3. **Balance of Harm**

A direction by the Court to the Commonwealth to fulfill its FQHC responsibilities and to make emergency payments to Loiza to allow Loiza to stay in operation while the Commonwealth proceeds with implementation will be doing no more than the Commonwealth is required to do by federal law and its promise to comply with its PPS responsibilities. By contrast, the harm to Loiza and the poor patients in its community for whom it has responsibilities will be irreparable.

4. **Public Interest**

The public interest obviously will be vindicated by a direction of this Court to the Commonwealth to put into effect the FQHC payment system required by federal law and to make emergency payments to Loiza to ensure its viability and continued ability to provide needed

medical care. The only way to serve the public interest in this case is to ensure that Loiza remains in operation.

III. RELIEF

In connection with their February 16, 2004 Motion for Preliminary Injunction and Summary Judgment, plaintiffs submitted a proposed order asking this Court to make certain that the Commonwealth actually implements an FQHC payment program that meets statutory requirements. Plaintiffs still require such an order. However, Loiza now requires additional emergency relief to ensure that it can continue operations during the time that defendant's efforts toward implementation take place. Accordingly, the proposed order accompanying Loiza's motion for a temporary restraining order (pursuant to Local Rule 65.1) asks this Court to direct defendant, working with Loiza's counsel and other representatives, to calculate and within ten (10) days make an emergency payment.

Respectfully submitted,



Ramon Alfaro
211 Domenech Avenue, 2nd Floor
Hato Rey, PR 00918
(787) 763-8062 (telephone)

Date: March 1, 2004

James L. Feldesman
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W., Second Floor
Washington, D.C. 20036
(202) 466-8960 (telephone)
(202) 293-8103 (facsimile)

Attorneys for Plaintiffs