

RHODE ISLAND MEDICAL IMAGING, INC., )  
COASTAL MEDICAL, INC., )  
JOSEPH C. CAMBIO, M.D. d/b/a )  
RHODE ISLAND UROLOGICAL SPECIALTIES, )  
OPEN MRI OF NEW ENGLAND, INC., and )  
LGLN CARDIOLOGY CONSULTANTS, LLC )

Plaintiffs, )

v. )

C.A. No.: 08-07492

DAVID M. SULLIVAN, in his official capacity as )  
the Administrator of the RHODE ISLAND )  
DEPARTMENT OF TAXATION, )

Defendant. )

**PLAINTIFF’S POST-HEARING MEMORANDUM OF LAW**

Plaintiffs Rhode Island Medical Imaging, Inc. (“RIMI”), Coastal Medical, Inc. (“Coastal Medical”), Joseph C. Cambio, M.D., Ltd. d/b/a Rhode Island Urological Specialties (“RI Urological”), Open MRI of New England, Inc. (“Open MRI”), and LGLN Cardiology Consultants, LLC (“LGLN Cardiology”) (collectively, the “Taxpayers”), brought this action pursuant to R.I. G.L. § 8-8-24 et seq. for declaratory and injunctive relief against David M. Sullivan in his official capacity as the Administrator of the Rhode Island Department of Taxation (hereinafter the “Tax Administrator”), appealing the final decision of the Tax Administrator denying the Taxpayers’ requests for refunds.

**Preliminary Statement**

Chapter 65 of Title 44 of the General Laws (“Imaging Surcharge”) and Chapter 64 of Title 44 of the General Laws (“Outpatient Surcharge”) (the Imaging Surcharge and Outpatient Surcharge are collectively referred to as the “Surcharges”) are unconstitutional because they are

arbitrary and because they invidiously discriminate against the Taxpayers and, therefore, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1, § 2 of the Rhode Island Constitution. See Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 556 (1935); Kalian v. Langdon, 192 A.2d 12, 15 (R.I. 1963). Further, the Surcharges are unconstitutional because they are ambiguous and illogical and do not clearly define what receipts are subject to the Surcharges. For these reasons, the Court should enjoin any further enforcement of the Surcharges and award damages to the Taxpayers in the form of refunds of all Surcharges previously paid by the Taxpayers, plus interest.

### **Facts**

#### 1. The Taxpayers

The Taxpayers are each licensed health care providers that employ numerous people including licensed physicians, medical technicians and paraprofessionals, clerical and administrative staff. Record, ¶ 3.<sup>1</sup> The Taxpayers are all Rhode Island businesses that have their principal place of business in Rhode Island. Record, ¶ 1.

With the exception of RI Urological, each of the Taxpayers provides various medical diagnostic and imaging services. Record, ¶ 4. Coastal Medical provides general radiology (x-rays), ultrasound, computed tomography (CT scans), and bone densitometry. Record, ¶ 4(a). Open MRI's medical diagnostic services are limited to magnetic resonance imaging (MRI). Record, ¶ 4(b). LGLN Cardiology provides medical diagnostic services for cardiac patients, including echocardiograms, stress tests, stress echocardiograms, dobutamine stress echocardiograms and cardiac perfusion imaging (nuclear medicine). Record, ¶ 4(c). RIMI provides general radiology (x-rays), mammograms, ultrasound, magnetic resonance imaging

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<sup>1</sup> References in the form "Record, ¶ \_\_\_" are to the respective paragraphs of the Partial Stipulated Record For Tax Appeal filed with the Court on May 13, 2010, and to the exhibits attached thereto.

(MRI), CT scans and bone densitometry. Record, ¶ 4(d). RIMI also provides ambulatory or outpatient surgical services. Id. RI Urological’s services include the diagnosis and treatment of male urological conditions, including surgery on outpatients. Record, ¶ 4(e).

## 2. The Imaging Surcharge

As enacted and codified at R.I. G.L. Title 44 Chapter 65, the Imaging Surcharge establishes a two percent (2%) surcharge imposed on the monthly “net patient revenue” received by each “provider.” R.I. G.L. § 44-65-4. The term “net patient revenue” is not defined anywhere in the Imaging Surcharge. Rather, the Imaging Surcharge only contains definitions for the terms “gross patient revenue” and “net patient services revenue.”<sup>2</sup>

The definition of “imaging services” is replete with ambiguity, including references to certain imaging modalities and techniques, but omitting other techniques. The Imaging Surcharge broadly defines “imaging services” subject to the surcharge as “all the professional and technical components of x-ray, ultrasound (including echocardiography), computed tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.” R.I. G.L. § 44-65-2(4). Notably absent from this definition are certain commonly used diagnostic techniques, such as mammograms, fluoroscopy angiography, obstetric ultrasonography, bone scanning, thyroid scanning, lymphoscintigraphy, hepatobiliary

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<sup>2</sup> “Gross patient revenue” means “the gross amount received on a cash basis by a provider from all income derived from the provision of imaging services to patients. Charitable contributions, fundraising proceeds, and endowment support shall not be considered as ‘gross patient revenue.’” R.I. G.L. § 44-65-2(2). “Net patient services revenue” means “the charges related to patient care services less (i) charges attributable to charity care, (ii) bad debt expenses, and (iii) contractual allowances.” R.I. G.L. §§ 44-65-2 and 44-65-2(3).

scan, and certain diagnostic services, such as stress tests, stress echocardiograms, and dobutamine stress echocardiograms. Record, ¶¶ 31A(2)-31A(5); 31B(2); 31D(3)-31D(6).

However, as detailed below, several types of medical practices are not subject to the Imaging Surcharge even though they perform the same imaging services as the Taxpayers. Specifically, a “provider” subject to the Imaging Surcharge does not include providers who perform two (200) hundred or less radiological procedures per month, as well as dentists, podiatrists and veterinarians. R.I. G.L. § 44-65-2(6).

Under the Imaging Surcharge, providers must file a return and pay the 2% surcharge within 25 days after the end of the month in which a provider receives net patient services revenue. R.I. G.L. §§ 44-65-3 & 44-65-4. All of the Taxpayers, with the exception of RI Urological, are subject to the Imaging Surcharge. Record, ¶ 5.

### 3. Origins And Legislative History Of The Imaging Surcharge

The Imaging Surcharge legislation was originally introduced on February 1, 2007, as part of House Bill 5300, entitled “an Act Making Appropriations for the Support of the State for the Fiscal Year Ending June 30, 2008” (a/k/a the “Budget Bill”). Record, ¶ 13. House Bill 5300 proposed the amendment of Title 44 of the General Laws to include Chapter 65 known as “The Imaging Services Surcharge Act.” Record, ¶ 14.

The language of the Imaging Surcharge in House Bill 5300 was taken, verbatim, from a draft prepared by Donald C. Williams, then the Associate Director for Health Services Regulation and Environmental Health Services, sometime between January 23, 2007 and January 29, 2007. See Record, ¶ 26 (citing Exhibit 21, Williams Depo. at 6-9,

16, 33-34.)<sup>3</sup> Mr. Williams worked in that position at the Department of Health from 1989 until December of 2007, and reported directly to Dr. David R. Gifford, the Director of Health. Williams Depo. at 5. Mr. Williams was familiar with the provision of radiology services by health care providers because he was involved with the Certificate of Need program for computed tomography and magnetic resonance imaging machines, as well as in the licensing and oversight of facilities which performed radiologic operations.

Williams Depo. at 5-6.

From his own experience and from other areas, Mr. Williams drafted the portions of the proposed Imaging Surcharge specifically relating to imaging services, including the proposed legislation's definitions. Williams Depo. at 35-36. In Mr. Williams' draft, "imaging services" were defined as including:

[A]ll the professional and technical components of x-ray, ultrasound (including echocardiography), computed tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron emission tomography/computed tomography (PET/CT), mammography, and bone densitometry procedures.

Williams Depo. at 22. (emphasis added); Record, ¶ 28 and Exhibit 8.

Before Mr. Williams wrote this definition, there had been discussions in the Department of Health about whether mammography should be included or excluded from the proposed surcharge. Williams Depo. at 22, 50. These discussion arose because there was a public health interest in expanding the use of mammography services at the time.

Id. Ultimately, it was decided that mammography should be subject to the Imaging Surcharge because "[t]he public health interest in expanding mammography was not so

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<sup>3</sup> References in the form "Williams Depo. at \_\_\_\_" are to the pages of the Transcript of the Deposition of Donald C. Williams, which is Exhibit 21 to the Partial Stipulated Record For Tax Appeal.

large that it was to be excluded.” Williams Depo. at 50. Consequently, Mr. Williams inserted a specific reference to mammography into the draft legislation’s definition of “imaging services.” Williams Depo. at 50.

Mr. Williams also drafted the definition of a “provider” subject to the Imaging Surcharge, which provided as follows:

“Provider” means any person who furnishes imaging services for the purpose of patient diagnosis, assessment or treatment, but does not include licensed hospital or rehabilitation hospital center pursuant to the provisions of chapter 17 of title 23 of the Rhode Island General Laws, as amended.

Record, Exhibit 8.

Finally, in Mr. Williams’ draft of the original legislation, he borrowed from other general laws, with very few edits, the parts of the proposed legislation relating to tax collection and tax procedures, including the last section relating to severability, § 44-16-15. Williams Depo. at 34-35.

Mr. Williams’ draft became House Bill 5300. Record ¶ 28. However, on June 7, 2007, the Rhode Island House of Representatives’ Committee on Finance recommended the indefinite postponement of House Bill 5300 and the passage of House Bill 5300, Substitute A (“Substitute A”). Record, ¶ 15. Article 11 of Substitute A was entitled “Relating to Hospital Facilities and Other Medical Facilities and Services.” Section 3 of Article 11 proposed amendment to the proposed Imaging Surcharge within Chapter 65 of Title 44 of the General Laws. Id.

Substitute A made several substantive changes to the proposed Imaging Surcharge. For example, under Substitute A, the definition of “imaging services” subject to the surcharge was revised to provide as follows:

“Imaging services” means and includes all the professional and technical components of x-ray, ultrasound (including echocardiography), computed tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.

Record, Exhibit 10.

Where the definition of “imaging services” in the original legislation had included a reference to “mammography,” Substitute A deleted this reference from the definition.

Id. Substitute A also added the term “general nuclear medicine” to the definition of “imaging services.” Id.

Substitute A also revised the definition of a “provider” subject to the Imaging Surcharge, adding several exclusions for different types of persons. Id. First, this definition added an exclusion from the Imaging Surcharge for any person “not performing more than two hundred (200) radiological procedures per month.” Record, Exhibit 10. There is no evidence in the legislative record or otherwise indicating how the legislature arrived at the benchmark of 200 radiological procedures. Likewise, there is no evidence that there was any study or analysis that formed the basis for this exclusion. Williams Depo. at 59.

Second, the definition of “provider” under Substitute A also added an exclusion for “any person licensed in the state of Rhode Island as a dentist or a podiatrist or a veterinarian.” Record, Exhibit 10. There also is no evidence of any investigation, analysis or information generated by the legislature that provided the rationale for this exclusion. Williams Depo. at 64.

Finally, Substitute A added an exclusion for both “not-for-profit organization ambulatory care facility[ies]” and “any person subject to the provisions of chapter 64 of title 44.” Record, Exhibit 10.

On June 8, 2007, Substitute A was placed on the calendar of the full House of Representatives and, on June 15, 2007, Substitute A was revised by floor amendments. Record ¶¶ 18-20. The revised legislation, know as Substitute A as Amended, made only a few revisions to the language of the proposed Imaging Surcharge. Record, ¶ 19. Specifically, the text of the proposed Imaging Surcharge was revised to state that a two percent (2%) surcharge shall be imposed on the “gross patient revenue” of each provider. Record, Exhibit 12. The previous version of the legislation had proposed a tax on the monthly “net patient revenue” received by each “provider.” Record, Exhibit 10. The definitions of both “imaging services” and “provider” under Substitute A as Amended remained unchanged from the definitions under Substitute A. Record, Exhibit 12.

On or about June 15, 2007, the House of Representatives passed Substitute A as Amended on a roll call vote. Record, ¶ 20. On June 19, 2007, following the Senate Finance Committee’s recommendation for passage, the full Senate passed Substitute A as Amended on a roll call vote. Record, ¶ 22.

On June 21, 2007, the Governor vetoed the Budget bill, but on June 21, 2007, the General Assembly overrode the Governor’s veto. Record, ¶ 23. The Budget Bill was enacted as PL 2007, Chapter 73, with the Imaging Surcharge set forth in Article 11, at Chapter 65. Id.

#### 4. The Outpatient Surcharge

In its present form, the Outpatient Surcharge, codified at R.I. G.L. Title 44 Chapter 64, establishes a two percent (2%) surcharge imposed on the monthly “net patient services revenue” received by each “outpatient health care facility.” “Net patient services revenue” is defined as “the charges related to patient care services less (i) charges attributable to charity care, (ii) bad debt expenses, and (iii) contractual allowances.” R.I. G.L. § 44-64-2(3).

The Outpatient Surcharge provides that an “outpatient health care facility” means “a person or governmental unit that is licensed to establish, maintain, and operate a free-standing ambulatory surgery center or a physician ambulatory surgery center or a podiatry ambulatory surgery center, in accordance with chapter 17 of title 23.” R.I. G.L. § 44-64-3. However, the terms “free-standing ambulatory surgery center” and “ambulatory surgery center” are not defined in Chapter 17 of Title 23.

The Outpatient Surcharge stipulates that, within 25 days after the end of the month in which a provider receives net patient services revenue, the provider shall file a return and pay the 2% surcharge. R.I. G.L. §§ 44-64-3 & 44-64-4. RI Urological and RIMI are both subject to the Outpatient Surcharge. Record, Exhibits 3-D & 3-E.

#### 5. Origins And Legislative History Of Outpatient Surcharge

Like the Imaging Surcharge, the Outpatient Surcharge was originally introduced on February 1, 2007, as part of the Budget Bill, House Bill 5300, and was ultimately enacted as part of Substitute A as Amended. Record, ¶¶ 13, 23. House Bill 5300 proposed the amendment of Title 44 of the General Laws to include Chapter 64 known as “The Outpatient Health Care Facility Surcharge Act.” Record, ¶ 14. However, unlike the Imaging Surcharge, the origins of the Outpatient Surcharge are unknown.

Under House Bill 5300, the Outpatient Surcharge provided that a two percent (2%) surcharge shall be imposed on the monthly “gross patient revenue” received by each “outpatient health care facility.” Record, Exhibit 8. “Gross patient revenue” was defined as “the gross amount received on a cash basis by the provider from all patient care and other gross operating income. However, charitable contributions, fund raising proceeds, and endowment support shall not be considered ‘gross patient revenue.’” Id.

House Bill 5300, Substitute A made several revisions to the Outpatient Surcharge. Record, Exhibit 17. Most notably, Substitute A changed the type of revenue that was subject to the surcharge. Record, ¶ 10. Under House Bill 5300, a surcharge was to be imposed upon “gross patient revenue.” Record, ¶ 8. Under Substitute A, a surcharge was to be imposed upon “net patient services revenue.” Record, ¶ 10. A definition of “net patient services revenue” was also added to the Outpatient Surcharge under Substitute A. Id. “Net patient services revenue” was defined as “the charges related to patient care services less (i) charges attributable to charity care, (ii) bad debt expenses, and (iii) contractual allowances.” Id.

However, there was an internal inconsistency in the language of Substitute A. Although the proposed legislation provided that surcharge was to be imposed upon “net patient services revenue,” the term “surcharge” was defined to mean “the assessment that is imposed upon gross patient revenue pursuant to this chapter.” Compare Substitute A, R.I. G.L. § 44-64-2(5) with R.I. G.L. § 44-64-3(b)) (emphasis added). This inconsistency was corrected by Substitute A as Amended, which the House of Representatives passed on a roll call vote on June 15, 2007, and the Senate passed on June 19, 2007. Record, ¶22 and Exhibit 12. Substitute A as Amended revised the definition of “surcharge” to mean “the assessment that is imposed upon net patient revenue.” Record, Exhibit 12.

After the Budget Bill was enacted over the Governor’s veto, the Outpatient Surcharge was set forth in Article 11, at Chapter 64. Record, Exhibit 23.

### **The Travel**

After the Surcharges were enacted, each of the Taxpayers filed timely tax returns with the Tax Division and made payments under the Surcharges. Record, ¶ 5. The Taxpayers also filed timely requests for refunds of the amounts they had paid. Record, ¶ 6.

On February 22, 2008, the Tax Division denied the Taxpayers' refund requests, and on March 5, 2008, the Taxpayers filed a timely request for an administrative appeal. Record, ¶¶ 7-8.

On November 10, 2008, the Division of Taxation's Hearing Officer issued a Decision and Recommendation, which concluded that the Taxpayers were not entitled to the requested refunds under the Surcharges. Record, ¶ 10. On November 28, 2008, the Tax Administrator adopted the Hearing Officer's Decision and Recommendation. Record, ¶ 11.

On December 22, 2008, the Taxpayers filed a timely Complaint in this present action. Record, ¶ 12. Pursuant to R.I. G.L. 8-8-24, the Taxpayers' present appeal of the final decision of the tax administrator is "an original, independent proceeding in the nature of a suit in equity to set aside the final decision and shall be tried de novo and without a jury."

### Argument

- I. The Surcharges Violate The Equal Protection Clauses Of The United States And Rhode Island Constitutions
  - A. The Equal Protection Clause Of The United States Constitution And Analogous Provisions Of The Rhode Island Constitution Prohibit The Arbitrary Discrimination Among Taxpayers.

Although economic regulations, such as tax statutes, are judged under a rational basis test, Exxon Corp. v. Eagerton, 462 U.S. 176, 195 (1983), it is well-settled that a state law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 2 of the Rhode Island Constitution<sup>4</sup> if it classifies taxpayers arbitrarily or on grounds that are wholly irrelevant to the achievement of the State's objective. See Williams v. Vermont, 472 U.S. 14, 22-23 (1985); Kalian v.

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<sup>4</sup> Article I, § 2 of the Rhode Island Constitution provides, in pertinent part, that "All free governments are instituted for the protection, safety, happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to fairly distributed among its citizens."

Langton, 192 A.2d 12, 17 (R.I. 1963). In other words, when a tax statute is challenged on the grounds that it constitutes a form of unconstitutional discrimination, the issue for the Court is whether the classifications created by the law are rationally related to that act.

Id.<sup>5</sup>

Under well-settled Fourteenth Amendment analysis, “a party challenging the legislative judgment may attack its constitutionality by bringing to the court’s attention any facts that the court can judicially notice to support the proposition that the legislative judgment is without rational basis.” Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983). In evaluating the challenge, the Court may “not speculate as to unexpressed permissible state interests which may rationally be furthered by a challenged classification, but [should] confine its inquiry to articulated or obvious objectives.” Women’s Liberation Union of Rhode Island, Inc. v. Israel, 379 F. Supp. 44, 49 (D. R.I. 1974) (holding that statute in question had no rational basis and thus denied equal protection); Boucher, 459 A.2d at 93 (declining to speculate about unexpressed or unobvious permissible state interests). Moreover, the Court should “not accept factually unsupported assumptions to demonstrate the reasonableness of a challenged classification.” Women’s Liberation Union of Rhode Island, Inc., 379 F. Supp. at 49.

Although cases in which a tax law is held unconstitutional are admittedly rare, the legislature’s power to impose taxes is not unlimited. Insofar as a state discriminates among those subject to the tax, the Equal Protection Clause requires that classifications created by the tax cannot be arbitrary or irrational. Williams, 472 U.S. at 22-23; Stewart

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<sup>5</sup> The party seeking to hold the statute unconstitutional - in this case, the Taxpayers - admittedly bears the burden of proving that the act is not related to a legitimate legislative objective. State v. Fonseca, 670 A.2d 1237, 1240 (1996).

Dry Goods Co. v. Lewis, 294 U.S. 550, 557-58 (1935). Laws that have been held to violate the Equal Protection Clause include taxes that impose unequal and irrational burdens on businesses that were providing the same good or service. Stewart Dry Goods Co., 294 U.S. at 557-58.

For example, in Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935), the United States Supreme Court considered a challenge to a Kentucky statute that imposed a tax on retail merchants. The Kentucky statute was a ‘progressive’ tax on gross sales; tax rates increased proportionately as sales volumes increased. The taxpayers challenged the statute on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. Kentucky attempted to defend the statute by contending that a higher tax rate was justified for larger merchants because there was a rational relationship between the volume of sales and a merchant’s ability to pay the tax.

In rejecting Kentucky’s argument, the Court held that the

law arbitrarily classifies those vendors for the imposition of a varying rate of taxation solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar Acts because one has performed the act oftener than the other. We hold the act unconstitutional, and reverse the judgment.

Id. at 565.

Similarly, in Kalian v. Langton, 192 A.2d 12 (R.I. 1963), the Rhode Island Supreme Court addressed the constitutionality of R.I. G.L. § 44-10-22, which imposed a tax on the gross receipts of an unincorporated retail establishment. In that case, the statute imposed different tax rates on merchants. Significantly, the law provided a total exemption or immunity for persons whose receipts fell below a certain monetary

threshold. The Rhode Island Supreme Court held that this exemption was unconstitutional. “If in the judgment of the general assembly sound fiscal policy is thereby established, legislative authority for such an act is not lacking. The act, however, must not result in an arbitrary discrimination between two groups in the same classification.” Id. at 377. The Court held that “the immunity thus accorded is, in our judgment, a violation of the equal protection clause of the fourteenth article of amendments.” Id.

The lesson to be drawn from these cases is that two persons providing the same services should bear an equal burden. In other words, it is unconstitutional and a violation of the Equal Protection Clause for a state to impose differing rates of taxation on persons in similar circumstances. Stewart Dry Goods Co., 294 U.S. at 557-58. Similarly, where all the members of a group are performing the same act, it is a violation of the Equal Protection Clause to impose a tax on only certain members of that group. Kalian, 192 A.2d at 16.

#### B. The Surcharges Are Unconstitutional

The Surcharges clearly violate this constitutional proscription and, therefore, the Surcharges should be declared unconstitutional and all monies paid by the Taxpayers under the Surcharges should be refunded, with interest.

##### 1. The Imaging Surcharge

The Imaging Surcharge is unconstitutional because it irrationally and arbitrarily imposes differing burdens on persons providing the same services. Specifically, the definition of “provider” is so riddled with exclusions and exceptions that the

classifications drawn by the legislature lack any rhyme or reason. These arbitrary and irrational classifications are an unconstitutional burden on the Taxpayers.

i. The Exception For Persons Performing 200 Or Less Procedures Violates Equal Protection

First, the Imaging Surcharge imposes a tax solely on the basis of the number of procedures. Under the statute, providers who do not perform more than 200 procedures a month are exempt from the Imaging Surcharge. R.I. G.L. 44-65-2(6). As a result, a person providing 200 procedures is exempt from the Imaging Surcharge. However, a person conducting 201 procedures a month must pay the Imaging Surcharge on all net patient services revenue derived from imaging services.<sup>6</sup> Thus, medical practices with a larger volume of procedures must pay the tax and smaller practices are exempt. In other words, the Imaging Surcharge places a differing tax burden on person providing the same service solely on the basis of how many procedures are performed.

An example helps illustrate this point. Both primary care physicians and Ear, Nose and Throat (ENT) physicians typically perform radiological services, including x-ray, at their offices. Transcript at 19-20.<sup>7</sup> The professional and technical components of the radiological services provided by these physicians do not differ in any way from the provision of radiological services performed at the offices of RI Medical Imaging, one of the Taxpayers. Id. at 20. However, RI Medical Imaging is subject to the Imaging Surcharge, while primary care physicians and ENT physicians who perform less than 201

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<sup>6</sup> The Imaging Surcharge does not exempt from taxation net patient services revenue earned on the first 200 imaging procedures.

<sup>7</sup> References in the form “Transcript at \_\_\_\_” are to the pages of the transcript of the hearing conducted on May 27, 2010.

imaging procedures per month are not subject to it. Such an arbitrary distinction can not withstand constitutional scrutiny.

Moreover, there is no evidence that the legislature had any rational basis for excluding providers who perform less than 201 imaging procedures. Rather, it appears that the legislature picked the number 200 out of thin air. Although Mr. Williams acknowledged during his deposition that there was desire at the time to exempt individuals with a low level of usage, he had no knowledge of how the number 200 was selected. Williams Depo. at 58-59. Moreover, there is nothing to indicate that any study or analysis or information formed the basis for the number 200. Id. at 59.

The exemption for persons providing 200 or less procedures per month is exactly the kind of irrational and arbitrary exemption held unconstitutional by the Rhode Island Supreme Court in Kalian. In addition, differential rates of taxation based solely on how often a service is provided was held unconstitutional by the United States Supreme Court in Stewart Dry Goods.

ii. The Exemption For Medical Practices That Provide The Same Type Of Imaging Services Violates Equal Protection

Second, the Imaging Surcharge unconstitutionally exempts from taxation certain medical practices that provide the same ‘imaging services’ as the Taxpayers. “Imaging Services” in the Imaging Surcharge are broadly defined as “all the professional and technical components of x-ray, ultrasound (including echocardiography), computerized tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.” R.I. G.L. 44-65-2(4). These diagnostic services, especially x-rays, are provided by a wide range of medical practices in Rhode

Island. However, the legislature exempted certain types of medical practices (podiatrists, veterinarians, and dentists) from paying the Imaging Surcharge, even though these specialties perform many of the same ‘imaging services’ as are provided by the Taxpayers. See Williams Depo. at 64-66; Transcript at 21-25 (noting that there is no difference in the X-ray equipment used by veterinarians). Like several of the Taxpayers here, dentists, podiatrists, and veterinarians all regularly use x-ray ionizing radiation to take an image of a particular part of the body. Transcript at 21-25. Yet none of these specialties is required to pay the Imaging Surcharge for performing exactly the same diagnostic technique. Because these specialties provide the same service, their exemption from the Imaging Surcharge is irrational.

In addition, neither the statute nor the legislative history provide any justification for exempting these particular medical specialties. It does not appear that there was any investigation, analysis, or information that was generated by the legislature that provided the rationale for these exclusions. Williams Depo. at 64.

iii. The Exemption Of Certain Diagnostic Imaging Techniques Violates Equal Protection

The Imaging Surcharge’s definition of “imaging services” combines both imaging modalities and specific imaging techniques, and as a result, the Imaging Surcharge appears to exempt certain types of diagnostic techniques from the surcharge while taxing other diagnostic techniques, in violation of the Equal Protection clauses. There are four major modalities within the realm of diagnostic imaging: x-ray, ultrasound, magnetic resonance imaging, and nuclear medicine. Record, ¶ 31; Transcript at 11-12. Within each of these modalities, there are particular imaging techniques. For example, X-ray is a diagnostic imaging modality that uses ionized radiation to produce images. Computed tomography (CT), bone densitometry,

fluoroscopy, mammography, and angiography are all imaging techniques that use ionizing radiation. Record, ¶ 31A; Transcript at 11, 13, 15.

The Imaging Surcharge does not impose a surcharge on the net patient services revenue for certain commonly used diagnostic techniques. Transcript at 16-17. For instance, the definition of “imaging services” specifically lists the imaging technique of CT, which uses ionizing radiation. R.I. G.L. § 44-65-2(4). However, all of the other imaging techniques that use ionizing radiation, including mammography, bone densitometry, fluoroscopy, and angiography, are not listed. *Id.* Likewise, an echocardiograph, which is an imaging technique that uses ultrasound technology, is listed in the definition of “imaging services.” *Id.* However, the definition contains no reference to other imaging techniques, like obstetric ultrasonography, which also use high frequency sound waves to produce images. *Id.* Finally, the statute lists general nuclear medicine in the definition of imaging services, as well as the nuclear medicine imaging technique of positron emission tomography. R.I. G.L. § 44-65-2(4). However, the statute does not reference bone scanning, thyroid scanning, lymphoscintigraphy, hepatobiliary scan (HIDA scan), and stress tests, which all also involve use of radioactive isotopes to form images of internal body tissue. *Id.*

These exclusions appear, both from the plain language of the statutes and from the language of an earlier, unenacted bill, to have been intentional acts of the legislature.<sup>8</sup> Therefore, although the statute includes some – but not all – forms of medical diagnostic imaging services and there is no apparent rational basis for including some diagnostic procedures, but excluding others.

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<sup>8</sup> As detailed above, House Bill 5300 included “mammograms” with the definition of “imaging services.” Record, Exhibit 8; See Sutherland Stat. Const. § 45:6 (6th ed.).

In short, the imposition of the Imaging Surcharge is dependent on several unrelated factors: how often the service is provided, what kind of medical practice provides the services, and the precise diagnostic service that is provided. Practices with a lower volume of diagnostic services (less than 201 a month) are exempt from the Imaging Surcharge. In addition, certain medical specialties (podiatrists, veterinarians, and dentists) are exempt. Moreover, the statute makes no mention of a tax on revenue earned from certain other diagnostic techniques (mammography, bone densitometry, fluoroscopy, angiography, obstetric ultrasonography, bone scanning, thyroid scanning, lymphoscintigraphy, HIDA scan, and nuclear cardiology stress tests). Record, Exhibit 10.

The cumulative impact of the numerous exemptions and exclusions from the definition of provider in the Imaging Surcharge is that the law imposes a tax according to a series of irrational and arbitrary legislative classifications. The Imaging Surcharge is a confusing and jumbled patchwork in which a tax is imposed irrationally and arbitrarily on some diagnostic practices (and not on others) solely on the basis of the volume of services provided, which kind of practice provides the service, and the precise diagnostic service provided.<sup>9</sup>

## 2. The Outpatient Surcharge

The Outpatient Surcharge suffers from a similar, though not identical infirmity. As noted above, the Outpatient Surcharge is imposed on each “outpatient health care facility.” R.I.G.L. 44-64-3(b). “Outpatient health care facility” is defined as “a person or governmental unit that is licensed to establish, maintain, and operate a free-standing

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<sup>9</sup> These constitutional infirmities can not be cured by severing any of the provisions because it can be inferred from the legislature history that the legislature considered these exclusions to be essential to the statute.

ambulatory surgery center or a physician ambulatory surgery center or a podiatry ambulatory surgery center, in accordance with chapter 17 of title 23.” R.I. G.L. 44-64-3. However, the terms “free-standing ambulatory surgery center” and “ambulatory surgery center” are not defined in chapter 17 of title 23. Thus, by the statute’s own terms, the Outpatient Surcharge is imposed on some – but not all – ambulatory surgery centers. Because neither the legislative history nor the language of the Outpatient Surcharge provide any rationale for this exemption, it would appear that the Outpatient Surcharge irrationally discriminates against persons who are in the same class and provide the same service, namely outpatient surgical services.

II. The Surcharges Are Ambiguous As To What Receipts Are To Be Taxed And There Is No Statutory Basis For The Imposition Of The Surcharges On Some Of The Taxpayer’s Receipts

A. The Imaging Surcharge

The Imaging Surcharge is also unenforceable because the list of modalities and diagnostic techniques that comprise the definition of “imaging services” is vague, confusing, and illogical. As noted above, the Imaging Statute defines “imaging services” as “all the professional and technical components of x-ray, ultrasound (including echocardiography), computerized tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.” R.I. G.L. 44-65-2(4).

The statute’s definition of “imaging services” does not include any reference to commonly used diagnostic services such as mammography, bone densitometry, fluoroscopy, angiography, obstetric ultrasonography, bone scanning, thyroid scanning,

lymphoscintigraphy, HIDA scan, and nuclear cardiology stress tests. R.I. G.L. 44-65-2(4); Record ¶¶ 31A(2)-31A(5); 31B(2); 31D(3)-31D(6). Accordingly, it would appear that the Imaging Surcharge does not apply to these diagnostic services. Thus, the Imaging Surcharge is ambiguous on its face and there is no clear basis for the imposition of the Imaging Surcharge on all of the diagnostic services not explicitly mentioned in the statute.

In interpreting the provisions of the Surcharges, the Court is guided by settled precepts of statutory construction. In a situation such as this, where the definition of “imaging surcharge” is ambiguous, the Court must heed the interpretive canon of *expressio unius est exclusio alterius* -- that is, the mention of one is exclusion of another -- in construing the language in the definition of “imaging surcharge.” Sutherland Stat. Const. § 47:23 (6th ed.); 5 Corbin on Contracts (Interpretation of Contracts) § 24.28 at 315-16 (Margaret N. Kniffin, rev. ed. 1996); Orthopedic Specialists, Inc. v. Great Atlantic & Pac., 388 A.2d 352, 354 (R.I. 1978) (applying this maxim to the interpretation of the Workmen’s Compensation Act); Gorman v. Gorman, 883 A.2d 732, 738 n.9 (R.I. 2005) (employing this maxim in interpreting the meaning of a contract).

By specifying certain specific imaging techniques in the definition of “imaging services,” in addition to listing modalities, the General Assembly manifested its intent to exclude the imaging techniques not mentioned. Simply stated, if the General Assembly had intended to provide a surcharge on all imaging techniques, why would it not have said so expressly? The only reasonable conclusion is that the legislature did not include references to these techniques because it did not intend to subject them to the surcharge.

This conclusion is supported by the legislative history, which indicates that the legislative intent was to include some imaging techniques and not others. See Sutherland Stat. Const. § 45:6 (6th ed.) (“It is possible, to determine what the legislative intent of the statute is, by considering sequential drafts of the legislation); Spokane County Health District v. Brackett, 839 P.2d 324, 331 (Wash. 1992) (holding it is appropriate to consider changes between sequential drafts of legislation to determine legislative intent); Clark v. Worker’s Compensation Appeal Bd., 230 Cal. App. 3d 684, 696 (1991) (“Successive drafts of a bill may be helpful in construing a statute if the meaning of the statute is unclear.”).

The imaging technique of mammography is the best example. As detailed above, in Substitute A, the General Assembly intentionally removed the term mammography but left in place references to two other imaging techniques (computed tomography and bone densitometry) that utilize ionized radiation to create an image. See Williams Depo. at 52-53, 56 (indicating that in all likelihood the changes from the original legislation to Substitute A would have been suggested or recommended by the administration). If the legislature had intended the surcharge to apply to all imaging techniques, as the Tax Administrator contends, it would have deleted the references to all of the individual techniques and simply left the references to the four modalities. The General Assembly did not do this and, thus, its inclusion of some techniques but not others illustrates a clear intent for the surcharge to cover only the referenced techniques. Accordingly, after applying these principles of statutory interpretation and considering the legislative history, the proper conclusion is that any imaging technique not specifically enumerated in the definition is not covered by the Imaging Surcharge.

Further, the Imaging Surcharge is illogical because it purports to impose the surcharge on certain imaging services that are not performed by any persons that are subject to the statute. More specifically, the Imaging Surcharge purports to impose the surcharge on positron emission tomography (PET) and positron emission tomography-computed tomography (PET CT), which are both specifically enumerated in the definition of “imaging services.” R.I. G.L. § 44-65-2(4). These two imaging procedures, however, are not performed anywhere in Rhode Island other than in licensed hospitals, which are specifically excluded from the definition of “provider” subject to the Imaging Surcharge. See R.I. G.L. § 44-65-2(6); see also Williams Depo. at 47-48 (testifying that, at the time he drafted the original legislation, neither of these procedures were done outside the licensed hospital setting); Transcript at 17-18 (testifying that PET and PET CT scans are not performed in any nonhospital settings). In fact, a health care provider has to get state approval through the certificate of need process before they can use PET or PET CT equipment, and there is no evidence that any health care providers other than hospitals have received licenses to operate this equipment. Transcript at 18. Thus, the Imaging Surcharge is illogical because even some of the specific imaging techniques that are referenced in the statute are not performed by anyone that is subject to the surcharge<sup>10</sup>

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<sup>10</sup> The Imaging Surcharge is so ambiguous that it is, in effect, void for vagueness. “[T]he unconstitutional vagueness of a statute is essentially a common-sense determination of fundamental fairness.” Corpus Juris Secundum, Certainty and Definiteness, 82 C.J.S. Statutes § 86. Statutes have been held to be invalid for vagueness if it compels “a person of average intelligence to guess and to resort to conjecture as to its meaning and/or as to its supposed mandated application.” Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1 (R.I. 2005) (finding statute was not vague) (quoting Trembley v. City of Central Falls, 480 A.2d 1359, 1365 (R.I. 1984)); see also Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (holding section of state education law impermissibly vague where it has “quality of ‘extraordinary ambiguity’”). A person of reasonable intelligence, who also understood the different imaging modalities and techniques, would be hard pressed to say whether a particular technique not mentioned in the statute was intended to be taxed. Accordingly, the Imaging Surcharge should be declared unconstitutional and its enforcement should be enjoined.

B. The Outpatient Surcharge

The Outpatient Surcharge also is ambiguous with respect to which medical practices are subject to the Surcharge. The Outpatient Surcharge is imposed on each “outpatient health care facility.” R.I. G.L. 44-64-3(b). “Outpatient health care facility” is defined as “a person or governmental unit that is licensed to establish, maintain, and operate a free-standing ambulatory surgery center or a physician ambulatory surgery center or a podiatry ambulatory surgery center, in accordance with chapter 17 of title 23.” R.I. G.L. 44-64-3. However, the terms “free-standing ambulatory surgery center” and “ambulatory surgery center” are not defined in Chapter 17 of Title 23. Thus, by the statute’s own terms, the Outpatient Surcharge is not imposed on all ambulatory surgery centers.

Because neither the legislative history nor the language of the Outpatient Surcharge provide any rationale for why certain practices are excluded, the Outpatient Surcharge is ambiguous as to which outpatient surgical centers must pay the Surcharge. Under the circumstances, it is a fair inference that the Taxpayers who have thus far paid the Outpatient Surcharge (RIMI and RI Urological) are not obligated to make any further payments.

**Conclusion**

For the foregoing reasons, the Imaging Surcharge and the Outpatient Surcharge are unconstitutional and, therefore, unenforceable as violative of the Fourteenth Amendment to the United States Constitution and the analogous provisions of the Rhode Island Constitution. The Court should permanently enjoin the Tax Administrator from collecting the the Imaging Surcharge and the Outpatient Surcharge, and order the

Defendant to make a full refund, plus all accrued interest, for all amounts paid by the Taxpayers under the the Imaging Surcharge and the Outpatient Surcharge, together with interest, costs and attorneys fees.

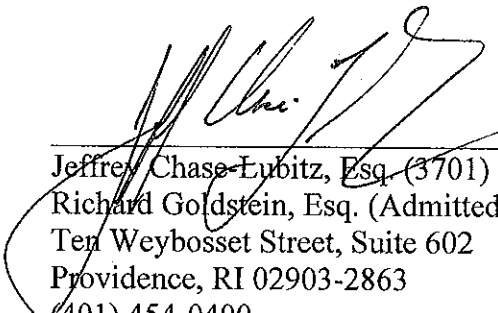
Respectfully submitted,

For the Taxpayers,

RHODE ISLAND MEDICAL IMAGING,  
INC., COASTAL MEDICAL, INC.,  
JOSEPH C. CAMBIO, M.D., LTD. d/b/a  
RHODE ISLAND UROLOGICAL  
SPECIALTIES, LGLN CARDIOLOGY  
CONSULTANTS, LLC, and  
OPEN MRI OF NEW ENGLAND, INC.

By their attorneys,

DONOGHUE, BARRETT & SINGAL, P.C.



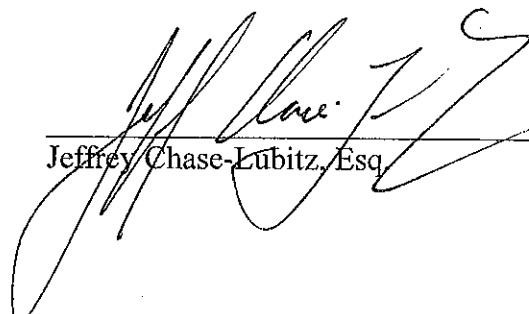
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Jeffrey Chase Lubitz, Esq. (3701)  
Richard Goldstein, Esq. (Admitted Pro Hac Vice)  
Ten Weybosset Street, Suite 602  
Providence, RI 02903-2863  
(401) 454-0400

Dated: July 7, 2010

**Certificate Of Service**

The undersigned hereby certifies that a copy of the foregoing document was served by hand on Bernard Lemos, Senior Legal Counsel, Division of Taxation, One Capitol Hill, Providence, RI 02908-5800 on the date set forth above.



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Jeffrey Chase Lubitz, Esq.