

No. 24-1773

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

REAL TIME MEDICAL SYSTEMS, INC.,

Plaintiff-Appellee,

v.

POINTCLICKCARE TECHNOLOGIES, INC.,
d/b/a PointClickCare,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland,
No. 8:24-cv-00313-PX, Hon. Paula Xinis

Appellant's Motion to Expedite Appeal

William C. Jackson
GOODWIN PROCTER LLP
1900 N Street NW
Washington, DC 20036

Nicole Bronnimann
KING & SPALDING LLP
1100 Louisiana Street
Suite 4100
Houston, TX 77002

Rod J. Rosenstein
Jeremy M. Bylund
Counsel of Record
Amy R. Upshaw
Joshua N. Mitchell
Caroline Malone
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
jbylund@kslaw.com

Counsel for PointClickCare Technologies Inc.

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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND.....	1
ARGUMENT	5
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

INTRODUCTION

Under 28 U.S.C. § 1657(a) and Local Rule 12(c), Defendant-Appellant PointClickCare respectfully requests that this Court expedite the briefing schedule and oral argument in this appeal. Interpreting a federal statute on a question of first impression, the district court granted an unprecedented preliminary injunction, R.69 at 26, R.70 at 1, that prohibits PointClickCare from protecting patients' sensitive healthcare information against bots that cause system slowdowns and security risks. The injunction is inconsistent with the federal Cures Act and is also constitutionally suspect because the district court effectively mandated giving Plaintiff-Appellee Real Time Medical Systems (RTMS) free and unlimited access to PointClickCare's software-as-a-service offering. The district court's reasoning poses a major risk to the security and privacy of sensitive electronic health information across the country.

BACKGROUND

PointClickCare provides cloud-based software-as-a-service solutions to more than 27,000 senior-care facilities and more than 3,000 hospitals and health systems, serving more than approximately 1.6 million patients per day. R.69 at 2. Underlying those solutions is PointClickCare's cloud-based repository of those patients' electronic

health information. R.44-3 ¶ 6. PointClickCare serves the life-saving function of providing secure and stable access to this information, including medication and procedure information. *Id.* ¶¶ 4-5. PointClickCare also partners with thousands of other vendors that provide services to PointClickCare customers with integrations on PointClickCare's platform. *Id.* ¶ 14.

Plaintiff-Appellee RTMS offers a service that purports to provide care facilities with notifications of patients' potentially emergent conditions. R.69 at 3. To provide this service, RTMS accesses patient data from those care facilities. *Id.* Instead of entering into an agreement with PointClickCare to access the data on PointClickCare's system, RTMS uses user credentials belonging to PointClickCare's nursing-home customers to log into PointClickCare's system. *Id.* Once in the system, RTMS uses automated software bots that bombard the system with rapid-fire demands for data and custom reports. R.44-2 ¶¶ 15, 18-24, 53. It is undisputed that PointClickCare's contracts with its customers expressly forbid using nursing-home logins to deploy bots. R.44-2 ¶ 13; R.69 at 3.

The use of bots by third parties in PointClickCare's system poses two serious risks. First, the automated requests overtax PointClickCare's system and cause slowdowns or even outages for PointClickCare's paying customers. R.44-2 ¶¶ 15, 18-24, 53; R.62 ("06/25/24 Tr.") at 12-13; R.69 at 11. And second, the use of automated bots also poses unacceptable security risks. 06/25/24 Tr. at 11:13-12:2. Poorly programmed bots that have been given the same administrative access rights as human users have the capability of modifying or deleting patients' EHI. *Id.* And maliciously programmed bots can cause a host of additional security risks, opening PointClickCare's data and system to a variety of potential attack vectors. *Id.*

PointClickCare has long employed tools to enforce the contractual provisions that prohibit bot usage. R.44-2 ¶¶ 24, 27-40. As technology has progressed, the tools PointClickCare uses have also become more sophisticated. One such tool is the industry-standard software protection "Completely Automated Public Turing Test to Tell Computers and Humans Apart" or "CAPTCHAs." PointClickCare deploys CAPTCHAs only when signs suggesting bot use are detected during a user session, and they increase in difficulty until they become indecipherable and

effectively block the user ID associated with the bot. R.44-2 ¶¶ 24, 27-40; R.69 at 18. Serving their intended function, these CAPTCHAs blocked a number of user credentials that had been used by RTMS bots. R.69 at 18.

PointClickCare and RTMS initially entered into negotiations to find a way to allow RTMS to access the electronic health information in a safe, secure, and standardized way that did not interfere with the operation of PointClickCare's systems. R.44-4 ¶¶ 4, 7. PointClickCare offered to provide data to RTMS in several ways. *Id.* But RTMS rejected the offer. *Id.*

After negotiations broke down, RTMS sued PointClickCare and moved for a preliminary injunction. According to RTMS, PointClickCare's use of CAPTCHAs to enforce its no-bot contract provision constituted (among other things) a third-party-beneficiary breach of contract, tortious interference with contract, and unfair competition. R.6 (RTMS Complaint). Undergirding its state-law theories, RTMS argued that the use of CAPTCHAs to block users associated with bot usage violated the 21st Century Cures Act. R.6 at 1.

The district court agreed with RTMS's theory and granted a preliminary injunction that bars PointClickCare from deploying certain CAPTCHAs that prevent RTMS's bots from running on PointClickCare's system. R.69 at 26, R.70 at 1. In addition to harming PointClickCare's customers by slowing or preventing the access to their patients' electronic health information, the injunction forces open a security hole in PointClickCare's system that malicious actors using an RTMS user ID could use to exfiltrate, modify, delete, or hold for ransom the health information that PointClickCare has an obligation to safeguard. Every day the injunction remains in effect increases the probability that RTMS's ill-conceived injunction will cause PointClickCare and its patients irreparable harm. Accordingly, PointClickCare seeks expedited briefing and consideration of this appeal of the district court's injunction order.

ARGUMENT

Under Local Rule 12(c), expedition is warranted. There are strong reasons to expedite consideration of this case. The parties are able to present the appeal on the existing record. And an expedited oral argument would assist the Court.

Reasons supporting expedition. Expedited consideration of an appeal is required in “any action for temporary or preliminary injunctive relief.” 28 U.S.C. § 1657(a). Because PointClickCare appeals an order granting a preliminary injunction, Section 1657(a) instructs that this Court “shall expedite” its consideration.

Expedited consideration is also needed because there is “good cause” for a swift decision. *See id.* The district court’s flawed injunction poses an unacceptable risk of irreparable harm to PointClickCare, as well as to its paying customers and their patients. And the court based its injunction on a flawed understanding of recently enacted federal law.

First, the risks. Under the injunction, PointClickCare may no longer employ certain CAPTCHA protections that prevent RTMS’s bots from accessing its system, leaving a gaping hole in PointClickCare’s ability to ensure system stability and security. PointClickCare faces the conflicting demands of the district court’s security-weakening injunction and its own obligations under federal law (including HIPAA and the HITECH Act) to safeguard patients’ electronic health information. *See* 45 C.F.R. §§ 164.306; 164.308. Every day the injunction remains in effect increases the risk that the security hole it leaves open will permit a

malicious actor using an RTMS user ID to execute malware on, or exfiltrate large amounts of data from, PointClickCare's system. Such malware attacks may modify or delete patient health information, or may encrypt that information and provide the keys to the encryption only on payment of ransom. In a worst-case scenario, this type of breach could harm patients and expose PointClickCare to the risk of massive liability for which neither RTMS nor the district court could make PointClickCare whole.

Moreover, while the injunction operates and RTMS's bots continue to roam unfettered through PointClickCare's system, PointClickCare's nursing-home customers are not receiving the service they contracted for. That is because RTMS's bots continue to threaten slowdowns or system outages, impeding nursing-home customers' access to their patients' electronic health information. R.44-2 ¶¶ 15, 18-24, 53; 06/25/24 Tr. at 12-13. The district court's suggestion that PointClickCare should increase server space R.69 at 11—at great expense to PointClickCare—to enrich RTMS is not an equitable answer.

And the patients bear the most severe risk of all. Because their electronic health information is used for diagnosis and treatment, delays

in accessing that information or its inaccessibility during an RTMS-caused slowdown or outage risks delaying treatment or causing mistreatment, with resulting damage to patients' health. R.44-3 ¶ 20.

Second, the court's erroneous and constitutionally suspect interpretation of recently enacted federal law warrants expedited review. Underlying all of RTMS's claims and the district court's grant of the injunction at issue is the notion that the 21st Century Cures Act provides RTMS an unqualified right to access electronic health information stored on PointClickCare's system using any technical means RTMS can devise, no matter whether those means are standard or not, nor whether PointClickCare's system was designed to accommodate those means. Anything less than that unfettered access, RTMS's argument goes, is "information blocking" under the Cures Act.

But as PointClickCare will explain, RTMS and the district court misread the law. Federal law excludes "reasonable and necessary activities" from the prohibition on "information blocking." 42 U.S.C. § 300jj-52(a)(3). For example, the Manner Exception in 45 C.F.R. § 171.301, provides that it is not information blocking to deny a request for access to data in a particular manner if the custodian "cannot reach

agreeable terms with the requestor” and instead offers the data in an alternative standardized manner. PointClickCare offered to give RTMS data in that alternative standardized manner recognized under federal regulations, but the district court concluded that meeting the federal standard was insufficient. According to the district court, PointClickCare was required to accede to any terms *RTMS* deemed “agreeable.” *See* R.69 at 21 (“In a nutshell, PCC appears more unwilling than unable to reach a mutually agreeable solution.”).

But as the Department of Health and Human Services explained when promulgating the regulation, the intention is the opposite: this exception is to “allow *actors* [*i.e.*, custodians such as PointClickCare] to first attempt to negotiate agreements ... with whatever terms *the actor chooses*” and then “allow flexibility for actors to still satisfy the exception by fulfilling the request in an alternative manner if the actor cannot reach agreeable terms with the requestor to fulfill the request.” 85 Fed. Reg. 25,642, 25,877 (May 1, 2020) (emphasis added). Further, “actors who cannot reach agreeable terms with the requestor to fulfill the request are *not* required to license their IP to proprietary technology in order to

satisfy the exception.” *Id.* But that is exactly what the district court is ordering here: a free license for RTMS to use PointClickCare’s system.

The district court’s interpretation of the 21st Century Cures Act is not only inconsistent with the plain text of the law and its implementing regulations, it also raises grave constitutional issues. Requiring PointClickCare to provide unlimited access to its software-as-a-service property to a third party that the district court identified as a competitor cannot pass constitutional muster under the Takings Clause. *See, e.g., Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (“Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation.”); *see also Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc) (“Because there is a likely constitutional violation, the irreparable harm factor is satisfied.”).

And while delaying this Court’s review will greatly harm PointClickCare and its patients, expedited review will not cause any prejudice to RTMS. The schedule PointClickCare proposes grants RTMS more than the 30 days it would otherwise have under the Federal Rules

to file its brief. *See* Fed. R. App. P. 31(a)(1). And both parties will benefit from this Court's interpretation of federal law. The proposed schedule balances the need for thorough briefing on a complex and novel legal issue with PointClickCare's need for a speedy resolution of the preliminary injunction.

Ability to present the appeal on the existing record. The parties are fully able to present the appeal on the existing record. The issues PointClickCare plans to raise are predominantly questions of law. And because of the case's preliminary-injunction posture, the record on RTMS's injunction is limited, comprising a handful of motion papers and associated exhibits, along with two days of hearing transcripts already filed with the district court and the district court's orders.

Need for oral argument. Because this case involves the interpretation of regulations that are only a few years old, implementing a statute not much older, and little case law exists to guide this Court in its analysis, PointClickCare believes that oral argument will assist the Court in better understanding the parameters of the dispute and determining its correct outcome.

Proposed Schedule. Accordingly, PointClickCare proposes that the following briefing schedule, or a substantially similar one, will be appropriate for this case:

September 16, 2024: PointClickCare's opening brief due;

November 1, 2024: RTMS's response brief due;

November 15, 2024: PointClickCare's reply brief due.

PointClickCare further requests that this Court schedule oral argument as soon as practicable after the service of the reply brief.

Pursuant to Circuit Local Rule 27(a), counsel for PointClickCare contacted counsel for RTMS in advance of making this motion. Counsel for RTMS agreed to file RTMS's response brief on November 1, 2024. With regard to oral argument, RTMS will defer to the Court as to a date and whether the Court will schedule argument or not.

CONCLUSION

For the foregoing reasons, PointClickCare moves this Court to expedite the briefing and order the schedule proposed above.

Respectfully submitted,

/s/ Jeremy M. Bylund

William C. Jackson
GOODWIN PROCTER LLP
1900 N Street NW
Washington, DC 20036

Nicole Bronnimann
KING & SPALDING LLP
1100 Louisiana Street
Suite 4100
Houston, TX 77002

Rod J. Rosenstein
Jeremy M. Bylund
Counsel of Record
Amy R. Upshaw
Joshua N. Mitchell
Caroline Malone
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
jbylund@kslaw.com

Counsel for PointClickCare Technologies Inc.

August 19, 2024

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2), because it contains 2,123 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook 14-point font.

Date: August 19, 2024

/s/ Jeremy M. Bylund
Jeremy M. Bylund

*Counsel for PointClickCare
Technologies Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit via the CM/ECF system. Counsel was served through the CM/ECF system.

/s/ Jeremy M. Bylund

Jeremy M. Bylund

*Counsel for PointClickCare
Technologies Inc.*