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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY  
JOCELYN NEWMAN, CIRCUIT COURT JUDGE

Appellate Case No. 2025-000592

Health Promotion Specialists, LLC, .....Appellant,

v.

South Carolina Department of Health and Environmental  
Control, The South Carolina Dental Association,  
Dr. Richard E. Boyd, as Personal Representative of the  
Estate of Rocky Napier, and one or more John Does,  
Unidentified current or former agents of South Carolina  
Department of Health and Environmental Control, Defendants,  
of which South Carolina Department of Health and Environmental  
Control, LLC are the, ..... Respondents.

**RECORD ON APPEAL**

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|                                         |   |                              |
|-----------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS |
|                                         | ) | FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND                      | ) |                              |
|                                         | ) |                              |
|                                         | ) | Case No. 2019-CP-40-04567    |
| Health Promotion Specialists, LLC,      | ) |                              |
|                                         | ) |                              |
| Plaintiff,                              | ) | <b>ORDER GRANTING</b>        |
| vs.                                     | ) | <b>MOTION TO AMEND AND</b>   |
|                                         | ) | <b>SUPPLEMENT COMPLAINT</b>  |
| South Carolina Department of Health     | ) |                              |
| and Human Services, and                 | ) |                              |
| South Carolina Department of Health and | ) |                              |
| Environmental Control,                  | ) |                              |
|                                         | ) |                              |
| Defendants.                             | ) |                              |

This matter comes before this court on Plaintiff Health Promotion Specialists, LLC's (hereafter "HPS") Motion to Amend and Supplement Complaint. A hearing was held on February 14, 2022 in Richland County, South Carolina. Attorney Desa Ballard appeared on behalf of Plaintiff. Attorney Joey Floyd appeared on behalf of Defendant SCDHEC.

Rule 15 of the South Carolina Rules of Civil Procedure provides that "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRPC. A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993).

At the hearing, Defendant maintained that Plaintiff should not be entitled to amend their complaint to add additional claims. Defendant cited *Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) where the Supreme Court held

that Circuit Court Judge William Keesley had not abused his discretion in denying Plaintiff's Motion to amend because the motion was untimely and extensive discovery had been conducted over the seven-year time period between the filing of the initial complaint and the motion. The case presently before the Court is distinguished from the above cited case, however, in that no discovery has been conducted and this case was only filed in 2019. Therefore, the Court finds no prejudice to Defendant in allowing Plaintiff to amend and supplement their complaint.

Therefore, after consideration of the Motion, rules, precedent and arguments by counsel, the Court **GRANTS** Plaintiff's Motion to Amend and Supplement Complaint.

**IT IS THEREFORE ORDERED** that Plaintiff is authorized to file and serve an Amended and Supplemental Complaint,<sup>1</sup> and that Defendant will have 30 days to answer after the filing of that pleading. It is further ordered that this matter shall not appear on the trial roster before 120 days following entry of this Order.

**AND IT IS SO ORDERED.**

---

Deandrea G. Benjamin  
Circuit Court Judge

Columbia, South Carolina  
March \_\_, 2021

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<sup>1</sup> Plaintiff's motion included an attached "Exhibit A" that was Plaintiff's proposed Amended Complaint, which bears a caption erroneously referencing that proposed pleading as its "Third Amended Complaint" but the record shows that only the initial complaint and one amended complaint are previously of record. As such, the amended and supplemental complaint to be filed by Plaintiff following entry of this order should be correctly captioned as a "Second Amended and Supplemental Complaint."



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Leave to Amend

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-03-24 09:34:16 page 3 of 3

ROA 000005

## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF Richland  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP4004567

Health Promotion Specialists Llc  
PLAINTIFF(S)

South Carolina Department Of Health And Environmental Control et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded;  
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing on September 13, 2022,

All of Defendants' Motions to Dismiss were TAKEN UNDER ADVISEMENT; and

Defendants' Joint Motion for the Designation of this Case as a Complex Case (filed on 8/12/22) was GRANTED by consent of all parties. Formal written Order is forthcoming.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/22/2022 .

John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of  
Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED.

Jocelyn Newman, Chief Judge for Administrative  
Purposes, Court of Common Pleas, 5th Judicial  
Circuit

Electronically signed on 2022-09-22 12:20:16 page 3 of 3

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ROA 000008

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2019-CP-40-04567

Health Promotion Specialists, LLC,

Plaintiff,

v.

South Carolina Department of Health and  
Environmental Control,  
The South Carolina Dental Association, Dr.  
Richard E. Boyd, as Personal Representative  
of the Estate of Rocky Napier, and  
one or more John Does, unidentified current or  
former agents of South Carolina Department  
of Health and Environmental Control,

Defendants.

**ORDER GRANTING DEFENDANT SOUTH  
CAROLINA DENTAL ASSOCIATION'S  
MOTION TO DISMISS**

This matter came before the Court on September 13, 2022, for a hearing on Defendant South Carolina Dental Association's Motion to Dismiss the Plaintiff's Complaint. Attorneys Desa Ballard and Haley Hubbard appeared on behalf of the Plaintiff; attorney Joey Floyd appeared for Defendant South Carolina Department of Health and Environmental Control ("DHEC"); attorney E. Raymond Moore, III, appeared on behalf of Defendant South Carolina Dental Association ("SCDA"); and attorney Rebecca Laffitte appeared on behalf of Dr. Rocky Napier's estate. SCDA asserts that it should be dismissed because Plaintiff has not alleged facts sufficient to constitute a cause of action under the South Carolina Unfair Trade Practices Act or for civil conspiracy.

After considering the arguments of counsel, the pleadings herein, the memoranda and exhibits filed by the parties, as well as applicable law, the Court hereby **GRANTS** SCDA's Motion, and SCDA is hereby **DISMISSED**.

### **FACTUAL BACKGROUND**

Plaintiff is a for-profit business that provides dental hygiene services to various public schools in South Carolina. (Second Amd. Compl. ¶ 3). In 1988, the Dental Practices Act authorized dental hygienists, like Plaintiff, to provide oral health services in public schools and DHEC with implementing and monitoring the Public Health Dental Prevention Program (the “Program”) that oversees and regulates those dental hygienists performing the work. (*Id.* at ¶¶ 1, 6; *see also* S.C. Code Ann. § 40-15-110(a)(10)). For two decades, Plaintiff worked in the Program regulated by DHEC, and during that time, DHEC and Plaintiff entered into several Memoranda of Agreement (“MOAs”) that set forth DHEC’s standards and operations for the Program. (Second Amd. Compl. ¶ 12). SCDA was never part of the MOAs entered between DHEC and Plaintiff, nor does Plaintiff allege such.

Prior to the 2020–21 school year, DHEC produced a new MOA for *all* members in the Program to execute, including Plaintiff. (*Id.* at ¶ 57). Plaintiff admits that it voluntarily refused to sign the new MOA because Plaintiff objected to DHEC’s new guidelines. (*Id.* at ¶¶ 61, 63). Plaintiff admits that it notified DHEC that it objected to the guidelines and that it would continue to provide health services in South Carolina’s public schools pursuant to the expired MOA. (*Id.* at ¶ 64).

On August 16, 2019, Plaintiff filed this lawsuit against DHEC and the South Carolina Department of Health and Human Services (“DHHS”) only. The original Complaint alleged that DHHS administered the South Carolina Medicaid program, which compensates providers like Plaintiff for services it provides in public schools. (*Id.* at ¶¶ 32–35). Plaintiff’s claims against DHHS appear to have arisen out of DHHS’ suspension of Medicaid payments to Plaintiff for what DHHS believed to be “illegal” or fraudulent conduct on behalf of Plaintiff. (*Id.* at ¶¶ 32, 72–73).

However, Plaintiff has resolved its claims against DHHS pursuant to a confidential settlement agreement. Thereafter, Plaintiff filed a Second Amended Complaint to add SCDA.

### **ALLEGATIONS AS TO SCDA**

Against this factual background, Plaintiff now vaguely alleges that SCDA was involved in lobbying public officials for the economic gain of its member-dentists. (Second Amd. Compl. ¶¶ 11, 20, 22, 26). Specifically, Plaintiff alleges that SCDA lobbied and persuaded DHEC to impede Plaintiff's work in public schools "solely for the purpose" of increasing the financial income of SCDA's member-dentists (*id.* at ¶ 11, 18, 19, 22, 32) and that Defendants' collective efforts resulted in DHEC's decision to terminate Plaintiff from the Program. (*Id.* at ¶ 26).

Nowhere in the Complaint does Plaintiff allege that SCDA was involved in trade or commerce under SCUTPA, and nowhere does Plaintiff allege that SCDA's lobbying efforts involved corrupt conduct, bribes, or misrepresentations.

### **MOTION TO DISMISS STANDARD**

A motion to dismiss "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997). While the Court must consider the facts in a light most favorable to the Plaintiff, only well-pled facts are entitled to a presumption of truth. *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) ("A demurrer admits facts well pleaded in a complaint but does not admit conclusions of law."). "[O]n a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010).

## ANALYSIS

### **I. Plaintiff's claim under the SCUTPA fails as a matter of law.**

Plaintiff's SCUTPA claim cannot prevail against SCDA because Plaintiff has failed to allege that SCDA was acting in "trade or commerce" as required by statute. See S.C. Code Ann. § 39-5-10(b). The SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (emphasis added). In *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) (hereinafter "*HPS I*") – a case involving allegations similar to the current matter – the Supreme Court explained that the words "trade or commerce" apply to the advertisement, sale, or distribution of services or property. But here, Plaintiff has not alleged that SCDA was involved in any such transactions.

The SCUTPA defines "trade or commerce" as "*the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.*" *Id.* at 638–39, 743 S.E.2d at 816 (citing S.C. Code Ann. § 39-5-10(b)) (emphasis added). In *HPS I*, the Supreme Court made it clear that "the General Assembly intended for the SCUTPA to apply to *business or consumer transactions.*" *Id.* at 639, 743 S.E.2d at 816 (emphasis added). But in this case, there are no allegations that SCDA – a nonprofit company – acted in trade or commerce. Plaintiff does not allege that SCDA advertised, sold, or distributed services or property within a business context. In *HPS I*, The Supreme Court stated that, "by its very definition, 'trade or commerce' involves '*every business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic.*'" *Id.* (citing Black's Law Dictionary (9th ed. 2009)) (emphasis added). But in this case, Plaintiff has failed to allege that SCDA acted in the "sale,

barter, exchange, or traffic” of goods or services for profit. Therefore, the allegations in Plaintiff’s Complaint fall short of satisfying the definition of trade or commerce under the SCUTPA.

Finally, Plaintiff has broadly alleged that SCDA was engaged in lobbying activities, but even assuming the truth of these allegations, Plaintiff’s claim still cannot prevail. In *HPS I*, the Supreme Court held that the Board of Dentistry’s action – promulgating a regulation – did not fall within the SCUTPA’s definition of “trade or commerce” because it did not include the advertisement, sale, or distribution of services or property within a business context. 403 S.C. at 639, 743 S.E.2d at 816. Likewise, Plaintiff’s argument that the SCUTPA should apply because SCDA’s alleged lobbying efforts impacted trade or commerce is without merit. For these reasons, Plaintiff’s SCUTPA claim cannot prevail as a matter of law, and therefore, Plaintiff has failed to state a claim for which relief can be granted.

## **II. Plaintiff’s claim for civil conspiracy fails as a matter of law.**

For Plaintiff’s civil conspiracy claim to prevail, Plaintiff must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). Plaintiff failed to plead facts establishing all of these elements, and therefore, Plaintiff’s civil conspiracy claim against SCDA must be dismissed.

### **A) Plaintiff has failed to allege that SCDA acted for the purpose of harming the Plaintiff.**

The second element of a civil conspiracy claim consists of two separate prongs: (1) an unlawful act or (2) a lawful act by unlawful means. *Id.* at 574, 861 S.E.2d at 780. As to the first prong, Plaintiff has failed to allege any well-pled facts supporting its claim that SCDA committed an unlawful act. Plaintiff repeatedly makes vague and conclusory assertions that SCDA acted

unlawfully, but such bald allegations are not entitled to a presumption of truth because they are not well-pled. As explained by the Court of Appeals, a Plaintiff “cannot transform an unsupported proposition of law into a statement of fact merely by stating that they are informed and believe it to be so.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. at 635, 699 S.E.2d at 705; *Cf. Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (holding that the plaintiff failed to allege well-pled facts in a breach of contract case when the plaintiff failed to produce the contract or aver to the substance of the instrument in the pleadings). Simply, Plaintiff has failed to allege that SCDA committed an unlawful act and, therefore, cannot satisfy the first prong.

Plaintiff has also failed to meet the second prong because Plaintiff has not alleged that SCDA committed “a lawful act by unlawful means” – which requires considering SCDA’s intent behind its alleged conduct.<sup>1</sup> To satisfy this requirement, Plaintiff must allege that the “object” of the conspiracy was “to ruin or damage the business of another.” *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) (overruled on other grounds). The “principal purpose” of the conspiracy must have been to harm the Plaintiff as opposed to achieving another end, like generating profits as alleged in the Complaint. *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (overruled on other grounds).

Plaintiff repeatedly alleges that SCDA acted “solely” for the purpose of increasing profits for its member-dentists (Second Amd. Compl. ¶¶ 22, 32), but a person’s pursuit of profits does not satisfy the intent-to-harm requirement of a civil conspiracy claim, even if the pursuit of profits incidentally impacts a competitor financially. As explained in *Paradis*:

In our free-enterprise economy, we encourage entrepreneurs to use aggressive tactics to seize competitive advantage, create jobs for our people, and build value for our communities. For these efforts, entrepreneurs rightfully expect to earn

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<sup>1</sup> “Since civil conspiracy is an intentional tort, an intent to harm...remains an inherent part of the analysis.” *Paradis*, 433 S.C. at 574 n.9, 861 S.E.2d at 780 n.9.

handsome profits. Participants in this healthy competition use every lawful tactic at their disposal. Those who lose out are understandably envious, and often angry. But, actions that conform to the law – even when motivated by anger or an intent to harm – must not be the basis of civil liability.

433 S.C. at 583, 861 S.E.2d at 785 (J. Few, concurring in part and dissenting in part). Assuming, as alleged, that SCDA acted to increase the profits of its members, this conduct does not create an actionable conspiracy claim. The Fourth Circuit Court of Appeals, as well as South Carolina’s district courts, follow the same logic. *See, e.g., Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993) (“That increased profits for one enterprise may come at the expense of a competitor is a fact of life in a market economy. We cannot, however, simultaneously encourage competitors to compete and hold them liable in tort whenever they do so successfully.”); *Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2021 WL 4711408, at \*3 (D.S.C. Oct. 8, 2021) (“Where, for example, alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie.”).

Since civil conspiracy is an intentional tort, Plaintiff must show that SCDA acted for the principal/primary purpose of harming the Plaintiff. *Allegro, Inc. v. Scully*, 418 S.C. at 32, 791 S.E.2d at 144 (“The primary inquiry in civil conspiracy is whether the *principal purpose* of the combination is to injure the plaintiff.”) (emphasis added); *Pye v. Est. of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (“The essential consideration in civil conspiracy is...whether the *primary purpose* or object of the combination is to injure the plaintiff.”) (emphasis added). But in this case, Plaintiff repeatedly alleges that SCDA acted “*solely for the purpose* of increasing the private financial income of private dentists.” (*See, e.g.,* Second Amd. Compl. ¶ 22) (emphasis added). Although the Complaint broadly alleges that SCDA harmed the Plaintiff, the Complaint undisputedly alleges that SCDA acted “for the purpose” of increasing the profits of its members. *Id.* Clearly then, any harm caused to Plaintiff is merely incidental to SCDA’s alleged



principal/primary goal of pursuing profits, and therefore, a civil conspiracy claim cannot stand against SCDA as alleged.

**B) Plaintiff has failed to allege well-pled facts showing that SCDA committed an “overt act” in furtherance of a conspiracy.**

The Supreme Court of South Carolina has said that the “gravamen” of a civil conspiracy claim is the damage resulting to the plaintiff from an “overt act” done pursuant to a common design. *Paradis*, 433 S.C. at 568, 861 S.E.2d at 777. But here, the only “overt act” that SCDA allegedly committed was to lobby public officials “to increase the financial income of private dentists of South Carolina.” (See Second Amd. Compl. ¶ 11). Even if true, this allegation fails to satisfy the elements of a civil conspiracy claim.

**III. SCDA is protected by the *Noerr-Pennington* doctrine.**

SCDA’s alleged lobbying efforts are protected by the *Noerr-Pennington* doctrine, which grants First Amendment immunity to those who engage in activities such as petitioning or lobbying the government, regardless of their intent or purpose. See *IGEN Int’l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003).<sup>2</sup> “The *Noerr–Pennington* doctrine protects attempts to influence virtually all types of governmental entities,” and therefore, Plaintiff’s allegations that SCDA lobbied DHEC falls squarely within the doctrine. *BCD, LLC v. BMW Mfg. Co., LLC*, No. 6:05-CV-2152-GRA, 2008 WL 304878, at \*13 (D.S.C. Jan. 31, 2008), aff’d, 360 F. App’x 428 (4th Cir. 2010).

Members of the public, including SCDA, are not co-conspirators with the government just because they lobby for their individual interests. This principle is embodied in *Angus v. Burroughs*, where the Supreme Court held that an employee terminated by Horry County could

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<sup>2</sup> The doctrine arose out of two decisions from the United States Supreme Court: *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961) and *United Mineworkers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965).

not maintain a conspiracy claim against members of the public who allegedly conspired with the County to have her terminated. 368 S.C. 167, 628 S.E.2d 261 (2006) (stating that “members of the public are not third-party interlopers”). SCDA and other members of the public cannot be co-conspirators or “interlopers,” as considered in *Angus*, with a governmental entity like DHEC. DHEC and its officials were tasked by the General Assembly with overseeing the Program, and while DHEC may be answerable to the public for the actions it takes, SCDA and other members of the public are not liable as a conspirator. As a result, Plaintiff’s civil conspiracy claim must be dismissed.

While Plaintiff argues that the *Noerr-Pennington* doctrine does not mandate dismissal, it nevertheless acknowledged the immunity provided under the doctrine but fails to set forth any allegation against SCDA that would avoid application of the doctrine. At the hearing on this matter, counsel for the Plaintiff argued that *Noerr-Pennington* did not apply to bar its claims because SCDA’s alleged lobbying efforts were *successful*. Since then, Plaintiff has presented no authority for its position taken at the hearing. Rather, Plaintiff pivoted its argument by stating that the doctrine does not apply if the lobbying efforts are a “*sham*.” However, Plaintiff’s argument at the hearing that the alleged lobbying efforts were *successful* belies its later argument that the lobbying efforts were a *sham*. The very definition of the term “sham” offered by the Plaintiff (taken in part from the *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991)), involves a defendant whose activities are “not genuinely aimed at procuring governmental action.” Here, Plaintiff has both pled and argued before the Court that the lobbying efforts *were intended to and did result* in government action. Indeed, if Plaintiff’s well-pled allegations in the Complaint are accurate, as they are presumed to be, then various state agencies involved took action at the behest of SCDA. Therefore, by definition, these efforts could not constitute a “sham.” At the very

least, there is simply no allegation in the Complaint that SCDA's lobbying was a sham; rather, the allegations are that SCDA acted to pursue profits, which is not a "sham" basis for lobbying under the cases cited by Plaintiff.

Finally, Plaintiff argued the lobbying is not protected if it involves bribery, corruption and "misrepresentation (in the adjudicatory process)." However, there are no allegations of any such activities on behalf of SCDA. Plaintiff refers to "false" statements in approximately 19 of the 115 paragraphs of the Complaint, but not one of these paragraphs allege that SCDA made false statements to any agency or entity it allegedly lobbied.

#### **IV. The issues raised are not "novel."**

Finally, Plaintiff argued that the issues it raised are "novel" and therefore not subject to Rule 12(b)(6) dismissal. However, those state law issues have been evaluated and adjudicated by the Supreme Court in *HPS I*, and the Supreme Court recently clarified the issues and elements of a common law civil conspiracy claim in *Paradis*. Further, the issues of First Amendment immunity and *Noerr-Pennington* immunity have been recognized in Constitutional jurisprudence since the 1960s with continued application over the years, including the *Omni Outdoor* case decided in 1991. The immunities provided by the First Amendment cannot reasonably be considered "novel."

#### **CONCLUSION**

For the foregoing reasons, Plaintiff has failed to plead facts sufficient to constitute a cause of action against SCDA, and as a result, SCDA's Motion to Dismiss is **GRANTED**. Defendant SCDA is hereby **DISMISSED**.

Electronic signature to follow

The Honorable Jocelyn Newman



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman

Electronically signed on 2023-07-17 16:27:08 page 11 of 11

ROA 000019

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Health Promotion Specialists, LLC, )

Civil Action No. 2019-CP-40-04567

Plaintiff, )

vs. )

South Carolina Department of )  
Health and Human Services, The )  
South Carolina Dental Association, )  
Dr. Richard E. Boyd, as Personal )  
Representative of the Estate of )  
Rocky Napier, and one or more )  
John Does, unidentified current or )  
former agents of South Carolina )  
Department of Health and )  
Environmental Control, )

Defendants. )

**ORDER GRANTING DEFENDANT,**  
**DR. RICHARD E. BOYD AS**  
**PERSONAL REPRESENTATIVE OF**  
**THE ESTATE OF DR. ROCKY**  
**NAPIER'S MOTION TO DISMISS**

This matter came to be heard before the Court on September 13, 2022, on the Motion to Dismiss filed on April 29, 2022, by and on behalf of the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier (“Dr. Boyd, Individually and as Personal Representative and the Estate”) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Desa Ballard, Esquire, and Haley Hubbard, Esquire, of Ballard & Watson, appeared on behalf of plaintiff, Health Promotion Specialists, LLC, and Becky Laffitte, Esquire, of Robinson Gray Stepp & Laffitte, LLC, appeared on behalf of the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier.

After hearing the arguments of counsel, reviewing memoranda filed on behalf of the respective parties, and viewing all facts and allegations within the four corners of the Second

Amended Complaint in a light most favorable to plaintiff, the Court finds no facts or inferences reasonably deducible therefrom which support either of the causes of action asserted by plaintiff against the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, sounding in Unfair Trade Practices and Civil Conspiracy. Therefore, the Court grants the Motion to Dismiss filed by defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, as detailed below.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; Burns v. Gardner, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007); Overcash v. South Carolina Elec. & Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); Benson v. United Guar. Residential Ins. of Iowa, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987).

### **I. The Plaintiff's Claims Are Time Barred**

It is undisputed that the Second Amended Complaint was filed over two (2) years after the initial Complaint and after years of litigation involving the underlying claims and issues. Dr. Richard E. Boyd, as Personal Representative of the Estate of Dr. Napier, was not added as a party defendant until a Second Amended Complaint was filed on March 28, 2022.

It is uncontroverted that plaintiff did not file any claim or action against the Estate of Dr. Napier within one (1) year after Dr. Napier's death. It is well settled in South Carolina that S.C. Code Ann. § 62-3-803(a) provides that "[a]ll claims against a decedent's estate which arose before the death of the decedent ... are barred against the estate [and] the personal representative ... unless presented" within "one year after the decedent's death." S.C. Code Ann. § 62-3-803(a) applies to "[a]ll claims against a decedent's estate which arose before the death of the decedent, including claims ... founded on contract, tort, or other legal basis[.]"

The Supreme Court of South Carolina has expounded on the application of S.C. Code Ann. § 62-3-803, functioning as a "special statute of limitations" or nonclaim statute "to take away the right of recovery when a claimant fails to present his or her claims as provided in the statute." In re Est. of Hover, 407 S.C. 194, 206, 754 S.E.2d 875, 881-82 (2014). As a nonclaim statute, S.C. Code Ann. § 62-3-803 "is in the nature of, and is similar to, a statute of limitations, in that it prevents the enforcement of stale demands," but it is "broader" in its operation. Id. at 881 (internal citations omitted). As such, the Supreme Court has instructed that the statute should be strictly applied "as it is mandated by our rules of statutory construction" and to "effectuate[ ] the purpose of the nonclaim statute, which is to expedite and resolve claims against a decedent's estate with finality." Id. at 212, 754 S.E.2d at 884.

The Court finds plaintiff's argument that S.C. Code Ann. § 62-3-803 is not applicable to the present case simply because it is contained within the South Carolina Probate Code and is not a statute of limitations to be unconvincing and without legal support. First, although this statute is not a traditional statute of limitations, it still acts to time-bar the plaintiff's claims. See In re Est. of Hover, 407 S.C. 194, 206, 754 S.E.2d 875, 881-82 (2014). It is a further time limitation on claims against an estate in addition to any other applicable statutes of limitation. See S.C. Code Ann. § 62-3-803(a)(limiting "[a]ll claims against a decedent's estate which arose before the death of the decedent ... if not barred earlier by another statute of limitations or nonclaim statute.").

Second, plaintiff's contention that S.C. Code Ann. § 62-3-803(a) applies only to claims made or adjudicated in Probate Court contradicts the plain language of the statute. S.C. Code Ann. § 62-3-803(a) expressly applies to "[a]ll claims against a decedent's estate which arose before the death of the decedent, including claims ... founded on contract, tort, or other legal basis[.]" The statute is inclusive and applies to all claims arising from all "legal basis," expressly including tort actions, which are civil causes of action outside the jurisdiction of the probate court. See also, Moulitis v. Degen, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983) (holding that claims against the estate "includes tort claims as well as liquidated claims of creditors"). Further, this Court finds that the South Carolina Probate Code clearly has effect outside matters within the exclusive jurisdiction of the probate court. See S.C. Code Ann. § 62-1-302(a)(1) ("The circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court[.]")

Dr. Napier died on March 7, 2021. Prior to filing the Second Amended Complaint on March 28, 2022, the plaintiff did not previously present a claim against the Estate and did not



previously file any action against Dr. Napier, his Estate, and/or Dr. Boyd as Personal Representative. Therefore, applying the strict application of S.C. Code Ann. §62-3-802 as instructed by the South Carolina Supreme Court, this Court finds that the plaintiff's claims are time barred.

## **II. Plaintiff's Claims Do Not Survive the Death of Dr. Napier**

South Carolina courts have recognized that the state's "general survivability statute has a wide ambit" but with certain exceptions, including fraud and deceit, slander, and malicious prosecution. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96–97 (2002). As applicable to this matter, "South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit." Id. (citing Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). "[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. ... [T]he difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justifie[s] excepting fraud from the survival statute." Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991) in reliance on S.C. Code Ann. § 19-11-20 and Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997) (superseded by statute on other grounds). Based on the controlling authority, the Court finds that plaintiff will not be permitted to testify "concerning conversations or transactions with the decedent [Napier] if the testimony could affect his ... interest ... [based on] the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted."). Hanahan, 326 S.C. at 151, 485 S.E.2d at 909 (internal citations omitted).

Since plaintiff's causes of action against the Estate of Dr. Napier purportedly arise from the alleged fraudulent or deceitful actions of the decedent, Dr. Napier, see Pl.'s Second Am. Compl. ¶29 (alleging "actual fraud, actual malice and intent to harm"), and Dr. Napier is now deceased, the causes of action cannot survive the death of Dr. Rocky Napier.

### **III. South Carolina Unfair Trade Practices Act (SCUTPA)**

It is well settled that "to recover in an action under the SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affects the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012).

As provided in the SCUTPA, "trade" and "commerce" are defined terms that include the "advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate[.]" S.C. Code Ann. §39-5-10(b). The Court finds the acts of which plaintiff complains arise out of Dr. Napier's alleged membership in "the Dental Association" and his conduct "as a volunteer advocate" do not fall within the definition of trade or commerce. Pl.'s Second Am. Compl. ¶¶9-10. The Second Amended Complaint only references Dr. Rocky Napier ten (10) times among the 115 Paragraphs. See Pl.'s Second Am. Compl., ¶¶ 9, 10, 18, 20, 22, 34, 39, 53, 73, and 98. The majority of the assertions are made and referenced in paragraphs referencing the South Carolina Dental Association of which he was a member.

Further, given that the decedent, Dr. Napier, passed away on March 7, 2021, the Court finds that his alleged actions are not capable of repetition. "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Hollman v. Woolfson, 683

S.E.2d 495, 499 (2009). Without the possibility of repetition, the plaintiff has alleged the public impact of Dr. Napier's alleged actions only in conclusory and speculative terms. "South Carolina courts have consistently rejected speculative claims of adverse public impact and require evidentiary proof of such effects." Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502 (4th Cir. 1992). See also, Jefferies v. Phillips, 316 S.C. 523, 527 (Ct. App. 1994) ("Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a 'speculative [claim] of adverse public impact' and that will not suffice for a recovery under the UTPA.").

#### IV. Civil Conspiracy

The Second Amended Complaint alleges that not only is Dr. Napier a dentist and a member of the South Carolina Dental Association, but that he "operated as a volunteer advocate" and "had involved himself in the work of public and private organizations, including DHEC and the Dental Association." Pl.'s Second Am. Complaint ¶¶9, 10.

The Court finds that plaintiff has not alleged facts sufficient to constitute a cause of action for civil conspiracy against Dr. Richard E. Boyd, as Personal Representative of the Estate of Dr. Rocky Napier, or the Estate as "a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." Paradis v. Charleston Cty. Sch. Dist., 432 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).

Plaintiff has failed to allege or identify any overt action undertaken by Dr. Napier in furtherance of the alleged agreement. Pl.'s Second Am. Compl. ¶98. Further, there are no

allegations that Dr. Napier negotiated or participated in any agreements entered into by and between plaintiff or any of the co-defendants or committed “a lawful act by unlawful means,” which requires consideration of intent behind the conduct. Paradis, 432 S.C. at 574, 861 S.E.2d 780. Plaintiff’s allegations that Dr. Napier objected, had ongoing narratives, lobbied, and advocated are not unlawful acts and do not show that he acted for the primary purpose of causing harm to the plaintiff. See Pl.’s Second Am. Compl., ¶¶ 9, 10, and 20.

Plaintiff has also failed to allege that the “object” of the conspiracy “is to ruin or damage the business of another.” LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988). Of the ten (10) paragraphs in which Dr. Rocky Napier is mentioned and allegations asserted, none satisfy the intent to harm requirement. Plaintiff asserts that Dr. Napier’s actions allegedly were in furtherance of his own economic interests rather than damages incurred by the plaintiff. See Pl.’s Second Am. Compl., ¶¶ 9, 18, 19, 20, 22, 26, 32, 39. The pursuit of profits does not satisfy the intent-to-harm requirement, even if doing so incidentally impacts a competitor financially. See Paradis, 432 S.C. at 574 n.9 (“Since civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis.”).

For the reasons set forth herein, the Second Amended Complaint in the above-entitled action is dismissed as to all causes of action asserted against the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier.

AND IT IS SO ORDERED.

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The Honorable Jocelyn Newman  
Chief Administrative Judge  
Fifth Judicial Circuit

Columbia, South Carolina

November \_\_\_\_\_, 2022



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al

**Case Number:** 2019CP4004567

**Type:** Order/Other

So Ordered

Jocelyn Newman

Electronically signed on 2023-09-11 15:47:46 page 10 of 10

ROA 000029

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**ORDER GRANTING IN PART AND  
DENYING IN PART SOUTH CAROLINA  
DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL CONTROL'S  
MOTION TO DISMISS PURSUANT TO  
RULE 12(B)(6), SCRCP**

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Dismiss* all causes of action asserted against DHEC by Plaintiff Health Promotion Specialists, LLC (HPS) in its Second Amended Complaint. DHEC filed its *Motion* pursuant to Rule 12(b)(6), SCRCP, arguing that Plaintiff failed to state facts sufficient to constitute a cause of action. In furtherance of its *Motion*, DHEC submitted a Memorandum in Support. Plaintiff HPS filed a Memorandum in Opposition. The Court held a hearing on September 13, 2022, and the parties were represented at the hearing by counsel. After hearing arguments, the Court gave Plaintiff ten (10) days to provide to the Court case law supporting its position and ten (10) days after for DHEC to respond. On September 23, 2022, Plaintiff submitted a Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss. In reply, DHEC filed a Supplemental Memorandum in Support on September 27, 2022. The Court considered the *Motion*, memoranda, pleadings, applicable law, and all arguments

presented at the hearing. For the reasons that follow, this Court grants Defendant DHEC's *Motion to Dismiss* in its entirety.

### **FACTUAL BACKGROUND**

The basic facts underlying this dispute, based on the Plaintiff's pleadings,<sup>1</sup> arise out of HPS's provision of dental hygiene services to various public schools, some of which took place through DHEC's Public Health Dental Prevention Program (also referred to as the "Dental Program").

DHEC administers the Dental Program pursuant to Section 40-15-110 of the Dental Services Act. Providers who participate in the Dental Program must perform services "under the direction of the Department of Health and Environmental Control State Dental Coordinator," but without the requirement that a "licensed dentist be present." S.C. Code Ann. 40-15-110(A)(10).

To participate in the Dental Program and take advantage of this provision, a provider must be "employed within or contracted through" DHEC. *Id.* To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement ("MOAs") with providers, which incorporate specific guidelines established by the Department. (See Paragraph 12 of Plaintiff's Second Amended Complaint.) The guidelines are modified from time to time by DHEC. The MOAs terminate after one year; but, can be renewed in writing by both parties (See, e.g., Exhibit C to Plaintiff's First Amended Complaint, pp. 4-5, ¶ III.A., reading that "[t]his MOA is renewable for four (4) additional one-year periods based on an annual review of the MDD Provider and its

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<sup>1</sup> In accordance with Rule 10(c), SCRPC, the pleadings include copies of documents attached to the pleadings as exhibits to the pleading. Notably, the Plaintiff's Amended Complaint included copies of the Memorandum of Agreement between DHEC and HPS covering July 1, 2016 – June 30, 2017 (executed by DHEC and HPS in 2016), the Memorandum of Agreement covering July 1, 2018 – June 30, 2019 (executed by HPS in April of 2019) and a letter from DHEC to HPS dated November 22, 2019.



compliance with this MOA and the DHEC PHDPP Guidelines. To be effective, a renewal must be acknowledged in writing by both parties.”)

HPS knows and understands the process of the MOA and guidelines because HPS had been operating in the program for nearly 20 years prior to 2019. (See Paragraph 12, of Plaintiff’s Second Amended Complaint.) In August 2019, HPS was invited to and participated in the DHEC provider information conference, which it had done annually. (See Paragraph 60 of Plaintiff’s Second Amended Complaint.) In connection with the August 2019 provider conference, DHEC presented a new MOA to HPS for the 2019-2020 school year. (See Paragraph 61 of Plaintiff’s Second Amended Complaint.) However, HPS refused to sign the new MOA. (See Paragraph 63 of Plaintiff’s Second Amended Complaint). HPS admits that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraph 64 of Plaintiff’s Second Amended Complaint.)

In spite of HPS’s decision to refuse to sign the MOA, HPS continued delivering its services in public schools without a contract/MOA with DHEC, in direct contradiction of S.C. Code Ann. § 40-15-110. (See Paragraph 69 of Plaintiff’s Second Amended Complaint.)<sup>2</sup>

Instead of signing the August 2019 MOA, ceasing its operations under the Dental Program, or modifying its method of delivering services (as a result of its refusal to enter into a statutorily required contract), HPS filed a lawsuit against DHEC and the South Carolina Department of Health and Human Services (“DHHS”) on August 16, 2019.

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<sup>2</sup> HPS admits in its pleadings that it continued to operate in the public schools under the program through the use of mental gymnastics to “argue” that HPS was somehow operating under some prior MOA. (See Paragraph 67 of Plaintiff’s Second Amended Complaint.) Notably, HPS alleges in its Second Amended Complaint that HPS was operating under the April 2019 MOA (See Paragraph 67); but, in its Memorandum in Opposition to DHEC’s Motion to Dismiss, HPS alleged that HPS was operating under the June 3, 2016 MOA (Plaintiff’s Memorandum in Opposition, filed 11/12/22, p. 4).

The South Carolina Department of Health and Human Services was an original Defendant in the first Complaint filed by Plaintiff. While no longer a party to this civil action, the prior claims involving DHHS provides some additional background as to why this civil action was filed. The vast majority of school children served by HPS were Medicaid beneficiaries. (Paragraphs 5 and 21 of Plaintiff's First Amended Complaint.) DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program. (See Paragraph 6, 23 and 34 of Plaintiff's First Amended Complaint.) DHHS has exclusive administrative responsibility for Medicaid payments. (See Paragraphs 8 and 10 of Plaintiff's First Amended Complaint.) DHHS was a primary payor for the services rendered by HPS to the public school children who were Medicaid beneficiaries.

As outlined in the Plaintiff's First Amended Complaint (See Paragraph 37-44 of Plaintiff's First Amended Complaint), HPS took issue with DHHS's decision to stop paying HPS for a procedure known as atraumatic restorative treatment, or "ART." On April 5, 2019, DHHS issued a Medicaid Bulletin advising all Medicaid dental providers about changes to reimbursements relating to protective services. (See Paragraph 43 of Plaintiff's First Amended Complaint and Exhibit 1 attached to Plaintiff's First Amended Complaint).

The Plaintiff alleges in Paragraph 73 of the Second Amended Complaint that HPS had to engage in "aggressive litigation with DHHS" regarding Medicaid overpayments and also notes that that the DHHS "matters were concluded confidentiality." During the hearing on DHEC's Motion, it was noted that the settlement between DHHS and HPS (which is subject to FOIA and Plaintiff's Counsel acknowledged) was a "walk-away" settlement where both sides simply walked away. Thereafter, DHHS was dismissed from this civil action.

### **PROCEDURAL HISTORY**

HPS initiated this civil action on August 16, 2019,<sup>3</sup> asserting claims against two parties (South Carolina Department of Health and Human Services and South Carolina Department of Health and Environmental Control). Those claims included declaratory judgment, a request for temporary and permanent injunction, and prayer for attorney's fees under "S.C. Code Ann. § 15-77-140" (No section "15-77-140" exists in the South Carolina Code of Laws. Presumably, HPS intended to cite to section 15-77-300).

On November 22, 2019, HPS filed an Amended Complaint<sup>4</sup> without filing a Motion to Amend and without leave of Court. HPS's First Amended Complaint included a claim for declaratory judgment, temporary and permanent injunction, and a prayer for attorney's fees, again under "S.C. Code Ann. § 15-77-140."

On March 17, 2021, HPS voluntarily dismissed the South Carolina Department of Health and Human Services from the civil action.

On March 28, 2022, HPS filed its Second Amended Complaint, this time with leave of Court. HPS's Second Amended Complaint added two Defendants to the civil action, eliminated claims for declaratory judgment and temporary and permanent injunction, and asserted three new tort claims against DHEC (unfair trade practices, civil conspiracy, and breach of contract accompanied by a fraudulent act), along with a statutory claim for attorneys' fees pursuant to SC Code § 15-77-300.

DHEC filed its Rule 12(b)(6) Motion on April 5, 2022, and submitted its Memorandum in Support. HPS submitted its Memorandum in Opposition (before the hearing). A hearing on the

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<sup>3</sup> The Plaintiff's initial pleading was styled as "Complaint and Petition for Emergency and Permanent Injunct [sic] Relief."

<sup>4</sup> The Plaintiff's first amended pleading was styled as "Amended Complaint and Petition for Emergency and Permanent Injunctive Relief."

Defendants' Motion to Dismiss was held on September 13, 2022. The issues relating to DHEC's Motion to Dismiss have been extensively briefed, articulated and argued by the parties in this civil action.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

### **RULING**

#### **I. The Plaintiff cannot sustain a Civil Conspiracy cause of action against Defendants DHEC.**

##### **a. Civil Conspiracy**

Civil conspiracy requires the combination or agreement of two or more persons, to commit an unlawful act or a lawful act by unlawful means, together with the commission of an overt act in furtherance of the agreement, and with damages proximately resulting to the plaintiff. *Paradise v. Charleston Cty. Sch. Dist.*, No. 28030, 2021 S.C. LEXIS 56 (2021). The Plaintiff alleges that because of this alleged conspiracy, the Plaintiff experienced a loss.

The South Carolina Tort Claims Act expressly states that a governmental entity is not liable for a loss from administrative action or inaction. S.C. Code Ann. 15-78-60(2). A governmental entity is not liable for any adoption, enforcement, or compliance with any policy or regulation. S.C. Code Ann. 15-78-60(4). Government entities or employees are immune from a loss caused by exercises of discretion or judgment by employees in performing their duties. S.C. Code Ann. 15-78-60(5). Furthermore, a government employee who commits a tort within the scope of his official duty is protected by the SC Tort Claims Act. S.C. Code Ann. §15-78-70(a). Additionally, a government agency is not liable if an employee commits a tort when acting outside of the scope of his official duties, or if he acts to commit fraud, malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

Notably, paragraph 83 of the Plaintiff's Second Amended Complaint alleges that certain employees were acting outside of their scope of employment when committing this tort, and, at the same time, were operating inside the scope of their employment as agents of DHEC. These allegations, in the same paragraph of Plaintiff's Second Amended Complaint, are diametrically at odds with one another. Either an employee committed a tort in the scope of their official duties and would be immune from suit or the employee committed a tort outside the scope of their duties or with one of the other exceptions and is personally liable for their actions. Regardless, under either scenario, the SCTCA provides DHEC with immunity.

The United States Supreme Court case of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991) also provides some guidance on the facts at hand. The Plaintiff's allegations, taken at face value, suggest that DHEC's regulations were implemented (or perhaps were enforced) and caused harm to Plaintiff. The United States Supreme Court stated that "virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners." *City of Columbia* at 1352. In other words, there is no conspiracy for governmental entities enacting and/or enforcing regulations.

For these reasons, the Plaintiff has failed to state facts sufficient to constitute a cause of action against DHEC for civil conspiracy, and such claim fails as a matter of law.

**b. Statutory Attorney's Fees**

Plaintiff cannot sustain a cause of action against DHEC for statutory attorney's fees under S.C. Code Ann. § 15-77-300. To recover attorney's fees under the statute a court must find that the agency acted without substantial justification in **pressing its claim against the party**. S.C. Code Ann. § 15-77-300(A)(1) (emphasis added). HPS did not provide any evidence that DHEC pressed any claim against HPS. In fact, to the contrary, HPS filed this lawsuit and asserted claims against DHEC when HPS refused to sign the August 2019 MOA (i.e., the contract to perform the dental hygiene services in accordance with the Dental Services Act). DHEC has not pressed any claim(s) against HPS. DHEC did insist that HPS comply with the statute and execute a MOA/contract in August of 2019 so that HPS could deliver its services under the DHEC Public Health Dental Prevention Program. However, HPS refused to sign the August 2019 MOA/contract.

To the extent HPS was forced to defend itself against DHHS, HPS could have, if it would have so desired, pursued DHHS for its attorneys' fees and costs that it may claim was unwarranted

or unjust. But, HPS elected to settle its disputes/claim(s) with DHHS by executing a release with DHHS. HPS cannot sustain a cause of action for attorney's fees under this statute against DHEC for attorneys' fees it could have claimed against DHHS, and this cause of action fails as a matter of law.

### **CONCLUSION**

HPS cannot maintain a cause of action against DHEC for Civil Conspiracy or Statutory Attorney's Fees and therefore those claims are hereby DISMISSED and DHEC's "MOTION TO DISMISS" is GRANTED IN PART for the reasons set forth herein.

Defendant DHEC's "MOTION TO DISMISS" is DENIED IN PART as it relates to Health Promotion Specialist's claims under S.C. Unfair Trade Practices Act and Breach of Contract Accompanied by a Fraudulent Act.

**~ Signature page of Judge follows ~**



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman

Electronically signed on 2023-09-11 15:48:06 page 10 of 10

ROA 000039



## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF Richland  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP4004567

Health Promotion Specialists Llc  
PLAINTIFF(S)

South Carolina Department Of Health And Environmental Control et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):  
☐ Affirmed; ☐ Reversed; ☐ Remanded;  
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion for Reconsideration (filed on Sept. 21, 2023) is granted.

Defense counsel shall e-file a proposed order within 15 days.

## ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/20/2024 .

John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of  
Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2024-11-20 10:19:34 page 3 of 3

ROA 000042

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC

Plaintiffs,

-vs-

South Carolina Department of Health and  
Environmental Control, the South Carolina  
Dental Association, Dr. Richard E. Boyd, as  
personal representative of the Estate of Rocky  
Napier, and one or more John Does,  
unidentified current or former agents of South  
Carolina Department of Health and  
Environmental Control,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2019-CP-40-04567

**ORDER DESIGNATING CASE AS  
COMPLEX**

The Court having reviewed the pleadings and considered the requests of the parties in this matter,

IT IS ORDERED that this matter be designated complex and that this case be assigned to **the Honorable Thomas W. McGee, III** to hear and dispose of all pre-trial motions, trial, and other matters.

IT IS FURTHER ORDERED that the parties contact Judge McGee within fifteen days to give him an update as to the case.

AND IT IS SO ORDERED.

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Chief Administrative Judge  
Richland County



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of  
Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Other

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2024-11-22 10:00:08 page 2 of 2

ELECTRONICALLY FILED - 2024 Nov 22 11:02 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4004567

ROA 000044

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**ORDER GRANTING SOUTH  
CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S MOTION TO  
RECONSIDER AND ORDER OF  
DISMISSAL OF PLAINTIFF'S  
REMAINING CLAIMS, PURSUANT TO  
RULE 12(B)(6), SCRCP<sup>1</sup>**

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Reconsider*. DHEC's Motion to Reconsider, filed on September 21, 2023, requested that this Court revisit its September 11, 2023, *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP*. More specifically, DHEC requested that the Court re-visit the causes of action that were not dismissed in the September 11, 2023, Order. Having reviewed the pleadings, the filings and the memoranda submitted by the parties, this Court has determined that the remaining causes of action asserted by Plaintiff (Unfair Trade Practices and Breach of Contract Accompanied by a Fraudulent Act) should also be dismissed. This Court adopts and incorporates the Factual Background, Procedural History

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<sup>1</sup> To the extent necessary, this Order of Dismissal shall also dismiss the Plaintiff's purported claims against "one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control" as identified in Plaintiff's caption.

and Ruling from its *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCF*, filed on September 11, 2023, as if set forth verbatim.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

## **RULING**

### **I. Plaintiff cannot sustain an Unfair Trade Practices Act (“SCUTPA”) claim against DHEC.**

The SCUTPA is intended to prevent unfair methods of competition and unfair or deceptive acts. S.C. Code Ann. § 39-5-20 (emphasis added). “To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). However, the Act has an express exclusion for regulatory bodies, which provides as follows:

Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

S.C. Code Ann. § 39-5-40(a).

DHEC is the regulatory body charged through Section 40-15-110 of the South Carolina Code of Laws with administering its Public Health Dental Prevention Program (“Dental Program”). All alleged actions or transactions of DHEC occurred within the context of its administration of the Dental Program. As such, this Court finds that Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC.

In addition, the SCUTPA can only be applied to those persons or entities engaged in trade or commerce. S.C. Code Ann. § 39-5-10. The SCUTPA defines “Trade” and “Commerce,” as follows:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or missed, and any other article, commodity or thing of value wherever situate, and shall include any



trade or commerce directly or indirectly affecting the people of this State.

S.C. Code Ann. § 39-5-10(b). “[T]rade or commerce’ involves ‘[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic.’” *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (citing Black's Law Dictionary (9th ed.2009); and *Bretton v. State Lottery Comm'n*, 41 Mass.App.Ct. 736, 673 N.E.2d 76, 78–79 (1996)). “By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.” *Id.*

DHEC is a state agency. It provided no services to anyone and engaged in no business or consumer transactions. To the contrary, all services relevant to this matter were provided by PLAINTIFF, and all payments for services were administered by the Department of Health and Human Services. As a result, this Court finds that at all times relevant to these proceedings, DHEC acted under its authority as a regulatory body in administering its Dental Program and did not engage in “Trade” or “Commerce.” For this additional reason, Plaintiff’s cause of action for violation of the SCUTPA fails, as a matter of law.

This is not the first time Plaintiff has attempted and failed to sustain this same cause of action against a state agency. In *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013), the same counsel that is representing Plaintiff HPS in the present matter filed a lawsuit on behalf of HPS against the S.C. Board of Dentistry alleging that its emergency regulation imposing restrictions on dental hygienists’ work in school settings violated the SCUTPA. The South Carolina Supreme Court found that as the Board of Dentistry’s sole action was the promulgation of an emergency regulation, even if that action was found to be unfair, it did not fall within the definition of “trade or commerce” and “did not involve

advertisement, sale, or distribution of services or property within a business context.” *Id.* The Supreme Court concluded that because the Board of Dentistry was a state agency exercising its regulatory authority, HPS could not sustain a cause of action against it for violation of the SCUTPA. 403 S.C. at 640, 743 S.E.2d at 816-817.

DHEC is a state agency, tasked with administering the Public Health Dental Prevention Program in accordance with the Dental Services Act. The subject MOAs and accompanying guidelines are created by DHEC to regulate the services performed by dental hygienists in accordance with the Dental Practices Act. DHEC is not engaged in trade or commerce. For the reasons stated above, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff fails to state a valid claim for relief for violation of the SCUTPA against DHEC.

**II. Plaintiff cannot sustain a cause of action for Breach of Contract Accompanied by a Fraudulent Act against DHEC.**

“To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with fraudulent intent; and (3) the breach was accompanied by a fraudulent act.” *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E. 2d 684, 688 (Ct. App. 2010) (citations omitted). First and foremost, a contract must exist between the parties.

To participate in DHEC’s Dental Program, a provider must be employed within or contracted through DHEC. S.C. Code Ann. § 40-15-110(A)(10). To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement (MOAs) with providers. The MOAs, which Plaintiff attached to the pleadings, by their own terms terminate after one year, but can be renewed in writing by both parties.

Plaintiff knows and understands the process of the MOA for participating in the Dental Program because Plaintiff had been operating in the Dental Program for nearly 20 years prior to 2019. Based solely upon the pleadings, Plaintiff admits that DHEC advised all attendees at an August 2019 provider information conference, which Plaintiff attended, that a new MOA would be required for the school year 2019-2020. (See Paragraph 61 of the Plaintiff's Second Amended Complaint.) Plaintiff alleges in Paragraph 61 of its Second Amended Complaint that "[i]n connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS." Plaintiff admits that it did not have a meeting of the minds with DHEC regarding the terms of the August 2019 MOA and that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraphs 62, 63, and 64 of Plaintiff's Second Amended Complaint.)

Considering solely the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, this Court finds that no contract existed between Plaintiff HPS and DHEC for the school year 2019-2020.

Despite the language in all prior MOAs terminating the agreements after one year absent a writing signed by both parties, despite Plaintiff's acknowledgment that DHEC instructed providers that signing the 2019 MOA would be required, and despite Plaintiff's refusal to sign the 2019 MOA, Plaintiff argues that for the 2019-2020 school year it operated under either the 2016 MOA or the April 2019 MOA. Plaintiff's arguments fail due to the following:

- a. By its specific terms, the April 2019 MOA:<sup>2</sup> (1) terminates on June 30, 2019, (2) is "renewable" only if both parties execute a renewal "in writing," and (3) for any renewal, the provider, HPS, has to comply with DHEC's Guidelines. Notably, the

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<sup>2</sup> Attached to Plaintiff's First Amended Complaint (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019.

MOA does not “automatically renew,” indicating that additional action would have been required – a renewal “acknowledged in writing by both parties” – in order to renew the April 2019 MOA. The parties did not sign any renewal.

- b. By its specific terms, the 2016 MOA:<sup>3</sup> (1) terminates on June 30, 2017, (2) is “renewable” and requires all amendments to be in writing, and (3) for any renewal, the provider, HPS, has to comply with DHEC’s Guidelines. Again, the MOA does not “automatically renew,” which means that additional action would have been required to renew the MOA. The parties did not sign any renewal.
- c. Plaintiff also executed an acknowledgement of receipt of the PHDPP Guidelines<sup>4</sup> in connection with the 2016 MOA and the April 2019 MOA. The acknowledgments (both the 2016 and 2019 acknowledgement) state, in relevant part:

I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective.” (emphasis by DHEC)

Under the 2016 and 2019 MOAs, Plaintiff was bound by the DHEC guidelines (and any future modifications). To reiterate, in Paragraphs 63 and 64 of the Plaintiff’s Second Amended Complaint, Plaintiff admits that it objected to DHEC’s Guidelines. To participate in the Dental Program under the prior MOAs, Plaintiff agreed to be bound by the DHEC guidelines. In light of

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<sup>3</sup> Attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

<sup>4</sup> The Acknowledgments, 2016 and 2019, are attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

Plaintiff's objections to the DHEC Guidelines in August of 2019, Plaintiff's own admissions preclude the prior MOAs from being renewed because there was no meeting of the minds.

In summary, HPS cannot allege that it was operating under a prior MOA, while at the same time, openly admitting that it would not comply with DHEC's Guidelines in August of 2019. Both MOAs state that the MOAs are one-year terms that are "renewable" and require "compliance with . . . the DHEC PHDPP Guidelines." Plaintiff also openly admits that it refused to sign the 2019-2020 contract. Without a contract, Plaintiff cannot establish the first element – "breach of contract" – to prove Breach of Contract Accompanied by a Fraudulent Act.

For these reasons, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff has failed to state facts sufficient to constitute a cause of action for breach of contract accompanied by a fraudulent act against DHEC. As such Plaintiff's claim for breach of contract accompanied by a fraudulent act against DHEC fails as a matter of law.

### **CONCLUSION**

For the reasons set forth herein, Plaintiff cannot maintain a cause of action against DHEC for an Unfair Trade Practice under the SCUPTA, nor can the Plaintiff maintain an action against DHEC for Breach of Contract Accompanied by a Fraudulent Act. Based on this Court's prior Order dated September 11, 2023, and this Order, DHEC's Motion for Reconsideration is hereby granted, and all causes of action against DHEC are now dismissed.

IT IS SO ORDERED.

~ Signature page of Judge follows ~



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman

Electronically signed on 2024-12-10 14:25:38 page 9 of 9

ROA 000053

## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF Richland  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP4004567

Health Promotion Specialists Llc  
PLAINTIFF(S)

South Carolina Department Of Health And Environmental Control et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded;  
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider (filed on 12/20/24) is DENIED.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/25/2025 .

John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al

**Case Number:** 2019CP4004567

**Type:** Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2025-02-25 11:36:09 page 3 of 3

ROA 000056

|                                     |   |                              |
|-------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS |
|                                     | ) | FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND                  | ) |                              |
|                                     | ) |                              |
|                                     | ) | Case No. 2019-CP-40- _____   |
| Health Promotion Specialists, LLC,  | ) |                              |
| Plaintiff,                          | ) |                              |
| vs.                                 | ) | SUMMONS                      |
|                                     | ) | (Non-jury)                   |
| South Carolina Department of Health | ) |                              |
| And Human Services, and South       | ) |                              |
| Carolina Department of Health and   | ) |                              |
| Environmental Control,              | ) |                              |
| Defendants.                         | ) |                              |

**TO THE DEFENDANTS ABOVE NAMED:**

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the plaintiff's counsel at her office at P.O. Box 6338, West Columbia, South Carolina 29171, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

**BALLARD & WATSON**

s/ Desa Ballard

Desa Ballard  
Harvey M. Watson III

Post Office Box 6338  
West Columbia, South Carolina 29171  
Telephone 803.796.9299  
Facsimile 803.796.1066  
desab@desaballard.com  
harvey@desaballard.com

ATTORNEYS FOR PLAINTIFF

August 16, 2019

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
  
Health Promotion Specialists, LLC, )  
  
Plaintiff, )  
vs. )  
  
South Carolina Department of Health )  
And Human Services, and South )  
Carolina Department of Health and )  
Environmental Control, )  
  
Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Case No. 2019-CP-40-\_\_\_\_\_

**COMPLAINT AND  
PETITION FOR EMERGENCY AND  
PERMANENT INJUNCT RELIEF**

## INTRODUCTION

For more than two decades, there has been a concerted effort among a faction of licensed South Carolina dentists in private practice (hereafter “private dentists”), particularly those who are affiliated with the South Carolina Dental Association, to limit and restrict the dental hygiene work that licensed dental hygienists provide to public school children throughout the state. The work of the licensed dental hygienists dramatically reduces the incidence of oral disease among public school children, which increases their chances of reaching adulthood without diseased oral health and the invasive dental work that many private dentists provide (and from which they profit). The gist of these efforts involved lobbying, at considerable expense, for legislation that limited the services dental hygienists could provide in the public health setting, for the sole purpose of increasing the revenue that private dentists generate from their practices.

For many years, the South Carolina Board of Dentistry (hereafter the “Dental Board”), which is primarily comprised of licensed dentists who have the same interest in minimizing the scope of practice of dental hygienists in order to increase their own bottom

line, has assisted these private dentists in their efforts to place limits on work dental hygienists can do in the public health setting under general supervision of a licensed dentist. This is so even though dental hygienists are qualified to perform the work and even though the work can minimize or eliminate the need for intrusive dental reconstructive work, protect children, and save money. Of course, intrusive dental reconstructive work costs a lot of money, so private dentists prefer that patients do not get more than basic preventative dental care because a diseased mouth in a child (or adult) is a virtual goldmine for private dentists. And if a child with a diseased mouth receives Medicaid, there is certain payment for the work done by private dentists.

Most recently, the Defendants have undertaken efforts to further the agenda of the private dentists, and to assist the private dentists in their continued efforts to restrict the care provided by dental hygienists in the public health setting, for the same purpose of increasing the income of private dentists at the cost of public school children in the state as well as taxpayers.

At one point, the efforts of the Dental Board to interfere with the work of licensed dental hygienists in the state was so overbearing that, in 2003 the Federal Trade Commission (hereafter “FTC”) stepped in and filed a complaint for violation of federal law by the Dental Board. The FTC alleged that the Dental Board “restrained competition in the provision of preventative dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists.” After litigating the matter for more than four (4) years and the United States Supreme Court refusing to hear the case, the South Carolina Board of Dentistry entered into an agreement under the terms of which the Dental Board was required to notify

the FTC prior to taking any action to promulgate. . . any proposed or final rule, regulation, policy. . . formal complaint in a disciplinary action, or other action of the Board relating to the provision by dental hygienists of preventative dental services in a public health setting. . . including but not limited to, an action concerning a dentist who authorizes, supervises, or bills for the provision by dental hygienists of preventative dental services in a public health setting.” (FTC Order No. 9311 dated June 20, 2007). The Dental Board was subject to the FTC order for a period of ten (10) years. It expired in 2017<sup>1</sup>.

Plaintiff is not aware of any direct action the Dental Board has undertaken since 2017 (the expiration of the FTC order) to inhibit the practice of dental hygiene in the public health setting. However, the same cannot be said for the Defendants here. It appears that some private dentists are still working to make sure public-school children do not get preventative dental care in the schools, so public school children are much more likely to get caries (more commonly known as cavities) and other diseases of the mouth. More caries equals more money for private dentists.

These Defendants have taken up the cause and are taking steps to minimize the preventative health care that dental hygienists can do in the public schools. It appears that both Defendants are allowing themselves to be manipulated by the private dentists for the purpose of increasing the bottom line of those private dentists. The long-term health of public-school children in South Carolina is at risk as a result of actions of the Defendants which are being taken to enrich private dentists.

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<sup>1</sup> To obtain antitrust immunity for conduct that might otherwise violate the federal antitrust laws, the state must clearly articulate its intent to displace competition in favor of regulation. See N.C. State Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015); FTC v. Phoebe Putney Health Systems Inc., 133 S.Ct. 1003 (2013). By entering into the agreement with the FTC, the Dental Board avoided litigation of these issues.

**COMPLAINT.**<sup>2</sup>

1. Petitioner Health Promotions Specialists, LLC (hereafter “HPS”) is a corporate entity organized and existing under the laws of the State of South Carolina. HPS provides preventative dental care and education to tens of thousands of school-aged children throughout the state based on an agreement between HPS and the South Carolina Department of Health and Environmental Services (hereafter “SCDHEC”), which operates a Public Health Dental Prevention Program (hereafter referred to as “DHEC PHDPP). That PHDPP provides preventative dental care and education to students in public schools of South Carolina.
2. On information and belief, Defendants South Carolina Department of Health and Environmental Control (hereafter “SCDHEC”) and South Carolina Department of Health and Human Services (hereafter “SCDHHS”) are agencies created by statute which operate as part of the executive branch of state government.
3. Defendant SCDHEC is “the sole advisor to the State in all questions related to public health within its limits.” S.C. Code Ann. Sec. 44-1-110. SCDHEC “shall target services in a public health setting to under-served populations” including educational institutions. S.C. Code Ann. Section 44-15-110(E).
4. Defendant SCDHEC is charged by statute with the duty to implement a targeted community program for dental health, education, screening and treatment referral in the public schools. S.C. Code Ann. Section 44-8-10.

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<sup>2</sup> HPS previously filed a similar suit prior to the effective date of the “Medicaid Bulletin” in the South Carolina Administrative Law Court (hereafter “ALC”) in an effort to prohibit the implementation of the “Medicaid Bulletin.” The ALC recently issued an order concluding it lacked jurisdiction to provide the relief HPS was seeking. See Order of Judge Robinson dated August 2, 2019.

5. Through its agreement with SCDHEC, HPS provides preventative dental care and education (hereafter “preventative dental care”) to students in the public schools, when any student’s parent authorizes the child to receive preventative dental care at school, during school hours to protect the health and welfare of the students of the public schools. Through its many years of operation and provision of preventative dental care through its agreement with SCDHEC, HPS is informed and believes it has provided preventative dental care to tens of thousands of public-school children who might otherwise not receive any dental care during their childhood. On information and belief, the dental health of public school children in South Carolina has significantly improved<sup>3</sup>.
6. Respondent South Carolina Department of Health and Human Services (hereafter “SCHHS”) is an agency created by the General Assembly of South Carolina for the purposes of administering Title XIX of the Social Security Act (Medicaid), including the Early Periodic Screening Diagnostic and Screening program and to coordinate and implement the South Carolina Cooperative Health Statistics Program pursuant of the Public Health Services Act. S.C. Code Ann. Section 44-6-30.
7. Among the statutory requirements for SCDHHS is its statutory mandate to “prepare and approve state and federal plans prior to submission to the appropriate authority as required by law for final approval or for state and federal funding, or

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<sup>3</sup> A ten year randomized study compared traditional amalgam restorations (fillings) that removed all decay to composite restorations over untreated decay. The results indicated that existing caries (cavity) removal does not have to be removed prior to filling. In fact, drilling away caries and replacing with amalgam fillings leads to significantly increase nerve exposure and to an increased risk of tooth abscess. Perhaps most importantly, the cost is for composite restorations in approximately half of the cost of amalgam restoration done by private dentists.

both.” S.C. Code Ann. Section 44-6-40(1). On information and belief, any substantive changes to the SCDHHS plan requires the approval of the United States Department of Health and Human Services (USDHHS), Center for Medicare & Medicaid Services.

8. HPS files this action for declaratory relief, and in doing so seeks emergency relief from this Court to temporarily enjoin SCHHS from enforcing a “memorandum” issued to licensed dental providers that is contrary to the approved State Plan (see below) that governs Medicaid reimbursement for preventative dental health procedures in South Carolina for children who receive dental benefits through the South Carolina Medicaid Program and who are patients of HPS.
9. In addition, HPS seeks an order requiring defendant South Carolina Department of Health and Environmental Control (hereafter “SCDHEC”) to provide for preventative dental health care that minimizes the risk of caries that is consistent with the standard of care nationwide as it has been doing until the present school year for public-school children whose dental benefits are provided by Medicaid.
10. HPS requests this emergency relief preliminarily, while the merits of the declaratory action can proceed. HPS is informed and believes that the absence of comprehensive preventative health care to public school children, including those whose dental benefits are paid by Medicaid, is a harm for which no remedy can be provided. The public-school children whose dental disease is not prevented by the preventative measures that could be lawfully provided by licensed dental hygienists will suffer immediately and permanently, and in a manner that cannot be rectified after the fact if not stopped immediately.



**DEFENDANTS' RECENT EFFORTS THAT HARM CHILDREN**

11. In April 2019, SCDHHS issued a “Medicaid Bulletin that went into effect on May 1, 2019, which was not authorized by the State Plan, and had not been properly adopted as a regulation pursuant to S.C. Code Ann. Section 1-23-111 (1976, as amended). **Exhibit A.**
12. The effect of the “Medicaid Bulletin” is to restrict the scope of preventative dental services that can be performed by licensed dental hygienists in the public school setting, in violation of federal law and the standard of care. The “Medicaid Bulletin” requires that temporary or protective restorative services can only be provided to children “as a component of permanent restorative care.” In other words, only private dentists can provide this “preventative” dental care, vitiating the goals of the Public Health Dental Prevention Program adopted by SCDHEC
13. On information and belief, SCDHHS did not seek an amendment to the State Plan as required by federal law prior to issuing the “Medicaid Bulletin.” Implementation of the regulation, without proper research, study, and public comment as required for regulations under state law will cause irreparable harm to the tens of thousands of children treated by HPS annually through the South Carolina Medicaid Program.
14. HPS has been asked by SCDHEC to sign an “agreement” which would require it to immediately begin to deviate from the standard of care by forcing HPS to include a provision that will prevent HPS from offering the full extent of primary preventative care that is mandated by the standard of care. It will also, coincidentally,

drive public school children out of the school dental health program for preventative care and into the office of private dentists.

15. On information and belief, the essentially contemporaneous actions by the agency Defendants is not a coincidence.
16. On information and belief, the efforts of the two (2) agency Defendants are being influenced by private dentists in South Carolina. On information and belief, SCDHEC recently hired Raymond Lala, a dentist licensed only in Louisiana, to serve as SC State Dental Director. On information and belief, Lala was intimately involved in influencing the actions of the South Carolina Board of Dentistry which led to the FTC intervention and the conditions imposed by the FTC upon the Board's actions through 2017.

**HISTORY OF PREVENTATIVE DENTAL HEALTH FOR CHILDREN  
IN SOUTH CAROLINA**

17. In 1987, the General Assembly expressly authorized licensed dental hygienists to provide primary preventative care that is reversible to patients in the public health setting. S.C. Code Ann. Section 40-15-110 (10).
18. In 2000, the General Assembly amended existing statutory provisions to permit licensed dental hygienists to “apply topical fluoride and . . . the application of sealants and oral prophylaxis” under specified conditions in school settings. S.C. Code Ann. Section 40-15-80(B) (1976 as amended).
19. Lastly, “licensed dental hygienists . . . within the public health system may perform other duties authorized by regulations of the State Board of Dentistry.” *[Id. at (H)]*.

20. HPS also serves as an advocate for its patients, many of whom come from low-income areas of the state and who receive preventative dental care they would not otherwise not receive but for the services provided by HPS which enables them to receive preventative dental care in the public-school setting.

**CHILDREN ON MEDICAID – THE FIRST VICTIMS**

21. The students to whom HPS provides preventative dental care include a large percentage of children whose preventative dental care is paid through South Carolina Medicaid.
22. On information, SCDHHS has complied with its obligation to prepare the state plan for preventative dental care and education in public health settings by coordination with statutory assignment to SCDHEC, which “shall target services in a public health setting to under-served populations” including in educational institutions. S.C. Code Ann. Section 44-15-110(E). Many, but not all, of those public-school children are on Medicaid.
23. On information and belief, SCDHHS has contracted out to a private vendor the process and procedure for payment of Medicaid benefit to providers who provide preventative dental service through the public health setting and it allows the private vendor to make substantive decisions directly affecting the health of Medicaid recipients. To the extent that the “Medicaid Bulletin” is the product of the private vendor, the delegation by SCDHHS of the right to make substantive decisions as to change in codes for payment and substantive changes to the dental care of Medicaid recipients is unlawful. *See Paragraph 11.*

24. SCDHHS is also charged by statute with the obligation to “formulate for consideration and promulgation criteria, standards and procedures that ensure assigned programs are administered effectively, equitably and economically in accordance with statewide policies and priorities. S.C. Code Ann. Section 44-6-40(5).
25. SCDHHS is charged with the obligation of creating and implementing a state plan for each program assigned to it and...“also prepare resource allocation recommendation based on such plans.” S.C. Code Ann. Section 44-6-70. SCDHHS is required to have plans that pay “specific attention to... (a) Prevention measures as addressed in health and human services programs.” *Id.*
26. To the extent that any of the statutory obligations of SCDHHS has been delegated to a private vendor, such delegation is an unlawful delegation of executive power and should be declared unlawful.
27. As an approved provider of preventative dental health care in the public-school setting, HPS furthers the goals and efforts of the DHEC Preventative Health Dental Prevention Act (DHEC PHDPP) by providing services state-wide for public school students whose administrations elect to participate in the DHEC PHDPP for the benefit of its public school students.
28. The DHEC PHDPP provides for contracts with public or private providers to provide preventative dental care in public settings to underserved populations which are eligible for participation in the DHEC PHDPP. HPS is among the vendors that carry out the implementation of the DHEC PHDPP.

29. The Division of Oral Health at SCDHEC reviews and monitors all aspects of the PHDPP, which preventative dental care is provided by HPS pursuant to statutory guidelines adopted by the General Assembly.
30. On information and belief, the recent efforts by SCDHEC to amend the status-quo by restricting the provision of preventative dental care to public school students are contrary to the Public Health Dental Prevention Program adopted by SCDHEC and in violation of federal and state law.

### **LEGAL CLAIMS**

31. Both DHEC (Section 44-6-90) and SCDHHS (Section 44-1-70) are required to promulgate regulations for implementation of their respective programs, DHEC for establishing, staffing and monitoring the preventative dental care provided to eligible public institutions, and SCDHHS for implementing the allocation of state and federal resources allocated for providing services through the South Carolina Medically Indigent Assistance Act, S.C. Code Ann. Section 44-6-135, which includes school-aged children of medically-indigent South Carolina families.
32. To the extent either Defendant asserts they are permitted to promulgate “policy” without complying with state or federal law, HPS disagrees. Both DHEC and SCDHHS are required to comply with statutory procedures of the Administrative Procedures Act in promulgating regulations<sup>4</sup>. S.C. Code Ann. Section 1-23-110 and 111. *See* S.C. Regs Chapter 61 and 126. The requirements for promulgating

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<sup>4</sup> The distinction between a “regulation” and an agency “policy” is the subject of judicial debate. *See e.g., South Carolina Department of Revenue v. Blue Moon of Newberry Inc.*, 397 S.C. 256, 725 S.E.2d 480 (2012).

regulations include, *inter alia*, filing of proposed regulations with the South Carolina Legislative Council with a preamble, for purposes of notice, and public hearings to permit members of the public to participate in the decision-making prior to adoption of a regulation. *Id.*

33. The United States Department of Health and Human Services has recognized that “children covered by Medicaid have higher dental care utilization rates than do uninsured children... the Centers for Medicare and Medicaid Services (CMS), working in partnership with states, is committing to building upon recent progress in improving access to oral health care among children... enrolled in Medicaid.”<sup>5</sup> Participation by the States is key to achieving the goals of the Center for Medicaid and Medicare Services by ensuring that children covered by Medicaid are provided preventative dental care<sup>6</sup>.
34. Federal law mandates a single state agency administer a state’s Medicaid plan. 42 U.S.C. Section 1396a(5). SCDHHS is the state agency responsible for administering and supervising the state’s Medicaid program. SCDHHS is not prohibited from coordination with other agencies to implement the provision of

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<sup>5</sup> Keep Kids Smiling: Promoting Oral Health Through the Medicaid Benefit for Children and Adolescents, Early and Periodic Screening, Diagnostic and Treatment, September 2013. <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Dental-care.html>. “In 1967, Congress introduced the Medicaid benefit for children... to ensure that children receive the health they need at the time they need it – *the right care to the right child at the right time in the right setting*... States share responsibility for implementing the benefit.”

<sup>6</sup> In a recent report to the White House, the USDHHS stated that “State policies that restrict entry into provider markets can stifle innovative and more cost-effective ways to provide care while limiting choice and competition.” The report made recommendations to “the development of value-based payment models that offer flexibility and risk-based incentives for providers, especially without unduly burdening small or rural practices.” Reforming America’s Health Care System, USDHHS Report to the President 2018.

preventative dental care in the public health setting, which has been implemented primarily by DHEC through its agreements with providers such as HPS.

35. SCDHS has published a manual for implementation of dental preventative services (and other dental services) for recipients of Medicaid (hereafter “SC Dental Manual, July 1, 2018”)<sup>7</sup>.
36. The SC Dental Manual provides that protective restoration services for children up to age 20 for teeth 1-32, A-T is covered by Medicaid with no pre-payment review and no prior authorization required, and authorizes payment for one protective restoration per tooth every 36 months, not provided on the same date as other specified services. (Page 138 of 329).
37. The South Carolina Board of Dentistry ruled on January 19, 2018, while acting pursuant to its authority granted by SC Code Ann. Section 44-5-110(H), stated that “therapeutic sealants and [preventative]<sup>8</sup> fillings, such as Atraumatic Restorative Technique, Interim Restorative Technique, and Caries Control Technique” constitute “primary preventative care that is reversible” and could therefore be performed by dental hygienists in public health settings in accordance with S. C. Code Ann. Section 44-15-110(A)(10). See Minutes of the Board of Dentistry meeting held January 19, 2018 at p. 6.
38. The SC Dental Hygienists’ Association obtained a grant and provided training to dental hygienists who work in South Carolina public health settings to provide

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<sup>7</sup> South Carolina Health Connections (2018)  
<https://www.scdhhs.gov/internet/pdf/manuals/dental/Manual.pdf>

<sup>8</sup> The meeting minutes reflect a reference to “temporary” fillings, but the Board explicitly referenced and approved procedures of ART, IST, etc. involve *preventative* fillings.

therapeutic sealants and preventative fillings, including atraumatic restorative technique (ART) and intermediate restorative technique (IST) as part of the preventative dental care it provides to patients in the public health setting. The grant additionally trained the faculty at the dental hygiene schools across the state so that the technique is incorporated into the curriculum, and the graduates are prepared upon graduation for jobs in public health.

39. ART is a needle-less and drill-less treatment for tooth decay and the reduction of pain caused by caries in children's teeth. The process involves placing a clear liquid compound to a tooth followed the application of a glass ionomer over tooth decay. The treatment seals the affected tooth, which arrests the spread of disease in the tooth. The process has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014.
40. Pursuant to the authorization of the South Carolina Board of Dentistry and its agreement with SCDHEC, HPS began providing ART as part of its preventative dental care in school settings in August, 2018. These preventative dental services are covered by Medicaid are assigned a specific, independent billing code, and to date SCDHHS has authorized payment for ART in the public-school setting. HPS has been able to offer ART therapy to more than 19,000 teeth for the more than 6,000 students treated with ART since the FY 2018-2019 school year began, thereby making a significant impact on the improvement of dental health among the medically-indigent students in South Carolina.
41. After approval of the South Carolina Dental Board for licensed dental hygienists to begin providing ART as part of the preventative care provided to students under



general supervision, and after extensive training, licensed dental hygienists with HPS began providing ART as part of its preventative dental care in school settings.

42. HPS is informed and believes that SCDHEC, through Raymond Lala and perhaps others, participated in the efforts of the private dentists to restrict the availability of ART through the public-school program and into the arms of private dentists.
43. On or about April 5, 2019, without following the procedure for adoption of regulations set forth under South Carolina law, SCDHHS issued a memorandum entitled “Bulletin” in which it advised that, effective May 1, 2019, SCDHHS would no longer pay for protective restoration such as ART to children receiving Medicaid who receive preventative dental care in the public health school setting by dental hygienists.
44. SCDHHS’ unilateral and unexplained decision, by withdrawing reimbursement completely for such applications, effectively bars protective restorations such as ART from being performed by licensed dental hygienists in the public-school setting, despite prior approval of the Board of Dentistry of such applications, and despite state policy and priority areas that favor and promote the *expansion* of provision of such services to Medicaid recipients in the school setting, not withdrawal from under-served children in the public schools of South Carolina.
45. The effect of this decision by SCDHHS means that Medicaid-eligible children will be able to receive protective restoration via ART only in the private setting of a dental office, exponentially increases the cost of the preventative restoration which, if done by licensed dental hygienists in the public-school program, saves

the Medicaid hundreds of thousands of dollars annually, significantly impacts the funds available for payment of Medicaid benefits for Medicaid-eligible students<sup>9</sup>, and drastically reduces the effectiveness of the public health program in the public schools. In essence, the unilateral action by SCDHHS denies preventative restoration services to children who need it most.

46. On information and belief, the decision by SCDHHS to stop payment for preventative restorations to Medicaid-eligible children in the public health setting by hygienists is arbitrary and capricious, was not made legally through the statutory procedure for enacting regulations, is violative of law, contradictory to public policy and priorities of this state, and places the dental health of Medicaid-eligible children at risk.
47. On information and belief, immediate and irreparable harm will result to Medicaid-eligible children whose parents have elected to obtain preventative restorations for their children through public-school based public health programs such as that provided by HPS if SCDHHS is permitted to deny payment for ART preventative restorations by hygienists in that public health setting.
48. On information and belief, the revision of the Medicaid reimbursement program for preventative dental care for children in the public health setting constitutes a regulation as defined by S.C. Code Ann. Section 1-23-10(4), which requires

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<sup>9</sup> On information and belief, eliminating Medicaid payments by dental hygienists in the public health setting provided for in the South Carolina Dental Manual (D2940), and requiring the treatment to be done by traditional drilling and placement of amalgam fillings in private dental offices almost triples the cost to Medicaid of dental services which accomplish the same objective, *i.e.*, to prevent the spread of dental disease.

promulgation through the statutory procedure for enacting and amending regulations, as set forth in Section 1-23-40 through 60 and 1-23-110 *et seq.*

49. On information and belief, SCDHHS and/or its private contractor has failed to comply with the proper procedure for enacting or amending a regulation in accordance with S.C. Code Ann. Section 1-23-110 and 111, and as a consequence the “Medicaid Bulletin” which announces the intent of SCDHHS to eliminate the Medicaid reimbursement for preventative dental care involving protective restorations has been issued without proper investigation, study and deliberations, and decision by the General Assembly or any other person or entity.
50. On information, the change in procedure set forth in the Bulletin from SCDHHS and/or its private contractor is void and unenforceable, or should be declared void and unenforceable, and SCDHHS should be ordered to cease, *pendente lite* and permanently, refusing payment to providers in the public health setting for preventative restorations as authorized by the South Carolina Board of Dentistry and as currently authorized by the South Carolina Dental Manual.
51. HPS continued to comply with the standard of care for the public-school students for whom it was contracted by SCDHEC to provide preventative dental care after the “Medicaid Bulletin” went into effect and continued to provide the full range of dental preventative services available to its licensed hygienists. SCDHHS and/or its private contractor has refused to pay for the work performed by HPS for the balance of the 2018-19 school year.

52. SCDHHS and/or its private contractor should be ordered and required to pay for the dental preventative services that were provided by HPS under the terms of its then-existing mandate from SCDHEC.
53. Similarly, the efforts by SCDHEC to restrict the ability of the dental hygienists to provide new modalities such as ART through the preventative dental health program is an unlawful effort to restrict the availability of the full range of preventative dental care to children in the public schools, and is designed to enrich the private dentists whose bidding is the foundation of these unlawful actions.
54. Additionally, the efforts by SCDHEC to restrict the ability of dental hygienists to provide preventative modalities to its patients, is in direct contravention of its statutory obligation to provide preventative dental care in public settings to underserved populations which are eligible for participation in the DHEC PHDPP.

#### **PRAYER FOR ATTORNEY FEES**

55. On information and belief, the positions taken by the agency Defendants serve the interests of private dentists, do not further the interests of the state or the public, and are unlawful.
56. On information and belief, there is no substantial justification for the positions taken by the agency Defendants to assist private dentists in limiting the preventative dental services that can be provided by licensed dental hygienists as approved by the Board of Dentistry and as required by the standard of care.
57. HPS has incurred attorney's fees and costs in connection with its efforts to enforce compliance by the agency defendants with applicable law. HPS is informed and

believes that the agency Defendants should be required to reimburse HPS for the costs of its attorney's fees and costs pursuant to S.C. Code Ann. Section 15-77-140.

Wherefore, Petitioner Health Promotions Specialists, LLC files this declaratory judgment action, seeking emergency relief from this Court to temporarily and permanently

- A. Enjoin, temporarily and permanently, Defendant South Carolina Department of Health and Human Services from continuing its cessation of reimbursement for preventative dental health procedures performed by dental hygienists in South Carolina for children who receive dental benefits through the South Carolina Medicaid Program; and
- B. Enjoin, temporarily and permanently, Defendant South Carolina Department of Health and Environmental Control from implementing a restriction to Public Health Dental Prevention Program which has the effect of limiting provision of ART and other preventative dental treatments through the public school program for the economic benefit of private dentists, when the licensed dental hygienists are trained for this process, and the standard of care provides for this preventative service to be provided as part of a lower cost program available for public school students.
- C. Declaring the delegation by SCDHHS of responsibility of the right to make substantive decisions regarding dental preventative care for Medicaid recipients to a private contractor and to disguise such substantive changes as change in codes for payment and substantive changes to the dental care of Medicaid recipients to be unlawful.

- D. Enjoin, temporarily and permanently, Defendant South Carolina Department of Health and Environmental Control from unlawfully delegating its responsibilities as set forth herein to a private contractor.
- E. Ordering and requiring SCDHHS to reimburse HPS for the costs of the full scope of preventative dental care provided to Medicaid recipients after issuance of the “Medicaid Bulletin” as was required by HPS’s contract with SCDHEC.
- F. Ordering the Defendants to pay attorney fees to HPS for the bringing and prosecution of this action.
- G. And for such other and further relief as the court deems just and proper.

S/ Desa Ballard

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August 16, 2019

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April 5, 2019  
MB# 19-002

## MEDICAID BULLETIN

**TO: Dental Providers**

**SUBJECT: Temporary or Protective Restorative Services**

Effective for services rendered on or after May 1, 2019, the South Carolina Department of Health and Human Services (SCDHHS) will no longer reimburse for Current Dental Terminology (CDT) code D2940 (Protective Restoration) as a separate service. Reimbursement rates for restorative services will include the costs of providing temporary or protective fillings as a component of permanent restorative care.

For questions regarding this bulletin, please contact the DentaQuest Provider Service Center at (888) 307-6553.

Thank you for your continued support of the South Carolina Healthy Connections Medicaid program.

/s/  
Joshua D. Baker

## EXHIBIT 1



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and  
Human Services, and South Carolina  
Department of Health and Environmental  
Control,

Defendant.

IN THE FAMILY COURT  
FIFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-40-04567

**ANSWER OF DEFENDANT SOUTH  
CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL**

Defendant South Carolina Department of Health and Environmental Control (DHEC),  
hereby answers the Complaint herein as follows:

**FOR A FIRST DEFENSE**  
**(General Answer)**

1. Each and every allegation of the Complaint not specifically admitted herein is denied.
2. The first and second paragraphs of the Introduction to the Complaint are not directed at DHEC and do not require a response. To the extent any allegations are directed at DHEC and a response is required, DHEC denies the same.
3. DHEC denies the allegations contained in the third paragraph of the Introduction to the Complaint.
4. In responding to the allegations contained in the fourth paragraph of the Introduction to the Complaint, DHEC craves reference to FTC Order No. 9311 dated June 20, 2007, avers that the Order speaks for itself, and denies any allegations contained in the fourth paragraph of the Introduction to the Complaint that are contrary thereto or inconsistent therewith.



5. DHEC denies so much of the allegations contained in the fifth paragraph of the Introduction to the Complaint as allege that DHEC has taken direct action since 2017 to inhibit the practice of dental hygiene in the public health setting. DHEC is without sufficient information or knowledge to form a belief as to the remaining allegations contained in the fifth paragraph of the Introduction to the Complaint and, therefore, denies the same.

6. DHEC denies the allegations contained in the sixth paragraph of the Introduction to the Complaint.

7. DHEC is without sufficient information or knowledge to form a belief as to so much of the allegations contained in paragraph 1 of the Complaint as allege that Plaintiff is a corporate entity organized and existing under the laws of the State of South Carolina and provides preventative dental care and education to tens of thousands of school-aged children in South Carolina and, therefore, denies the same. DHEC denies so much of the allegations contained in paragraph 1 of the Complaint as allege that Plaintiff has an existing agreement with DHEC. DHEC admits the remaining allegations contained in paragraph 1 of the Complaint.

8. DHEC admits the allegations contained in paragraph 2 of the Complaint that are directed to DHEC.

9. In responding to the allegations contained in paragraph 3 of the Complaint, DHEC craves reference to the two statutes cited by Plaintiff, S.C. Code Ann. § 44-1-110 and S.C. Code Ann. § 40-15-110(E), incorrectly cited as 44-15-110(E), avers that the statutes speak for themselves, and denies any allegations contained in paragraph 3 of the Complaint that are contrary thereto or inconsistent therewith.

10. In responding to the allegations contained in paragraph 4 of the Complaint, DHEC craves reference to the statute cited by Plaintiff, S.C. Code Ann. § 44-8-10 as well as the entirety

of Chapter 8, Title 44, avers that the statutes speak for themselves and denies any allegations contained in paragraph 4 of the Complaint that are contrary thereto or inconsistent therewith.

11. DHEC denies so much of the allegations contained in paragraph 5 of the Complaint as allege that Plaintiff has an agreement with DHEC through which it provides dental care and education to students in public schools. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the Complaint and, therefore, denies the same.

12. DHEC avers that paragraphs 6, 7 and 8 of the Complaint are not directed to it and that no response is required. In the event a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 6, 7 and 8 of the Complaint and, therefore, denies the same.

13. DHEC admits so much of the allegations contained in paragraph 9 of the Complaint as allege that Plaintiff is seeking an order for the relief requested. DHEC denies that Plaintiff is entitled to the relief requested and denies any allegations contained in paragraph 9 of the Complaint as allege that DHEC's Public Health Dental Prevention Program (PHDPP) is inconsistent with or contrary to the standard of care.

14. DHEC denies the allegations contained in paragraph 10 of the Complaint.

15. DHEC avers that paragraphs 11, 12 and 13 of the Complaint are not directed to it and do not require a response. In the event a response is required, DHEC denies the same.

16. DHEC denies the allegations contained in paragraphs 14 and 15 of the Complaint.

17. DHEC admits so much of the allegations contained in paragraph 16 of the Complaint as allege that DHEC hired Raymond Lala, a dentist currently licensed only in Louisiana. DHEC denies the remaining allegations contained in paragraph 16 of the Complaint.

Further, DHEC avers that Dr. Lala is not the S.C. State Dental Director as alleged by Plaintiff, but is the Director of DHEC's Division of Oral Health.

18. In responding to the allegations contained in paragraph 17 of the Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(A)(10), incorrectly identified as Section 40-15-110(10), avers that the statute speaks for itself, and denies any allegations contained in paragraph 17 that are contrary thereto or inconsistent therewith

19. In responding to the allegations contained in paragraph 18 of the Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-80(B), avers that the statute speaks for itself, and denies any allegations contained in paragraph 18 that are contrary thereto or inconsistent therewith.

20. In responding to the allegations contained in paragraph 19 of the Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(H), incorrectly cited as Section 44-15-80(H), avers that the statute speaks for itself, and denies any allegations contained in paragraph 19 that are contrary thereto or inconsistent therewith.

21. DHEC is without sufficient information or knowledge to form a belief as to the truth of so much of the allegations contained in paragraph 20 of the Complaint as allege that Plaintiff serves as an advocate for its patients and, therefore, denies the same. DHEC admits so much of the allegations contained in paragraph 20 as allege that many of the patients served by Plaintiff come from low-income areas of the state. DHEC denies the remaining allegations contained in paragraph 20 of the Complaint.

22. DHEC admits the allegations contained in paragraph 21 of the Complaint.

23. DHEC avers that paragraph 22 of the Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge

to form a belief as to SCDHHS's obligations and actions and, therefore, denies the same. For the remaining allegations contained in paragraph 22, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(E), avers that the statute speaks for itself, and denies any allegations contained in paragraph 22 that is contrary to or inconsistent therewith.

24. DHEC avers that paragraph 23 of the Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 23 and, therefore, denies the same.

25. In responding to the allegations contained in paragraphs 24 and 25 of the Complaint, DHEC craves reference to the statutes cited, S.C. Code Ann. §§ 44-6-40(5) & 44-6-70, avers that they speak for themselves, and denies any allegations contained in paragraphs 24 and 25 that are contrary thereto or inconsistent therewith.

26. DHEC avers that paragraph 26 of the Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations and, therefore, denies the same.

27. DHEC admits so much of the allegations contained in paragraph 27 of the Complaint as allege that providers enrolled in DHEC's PHDPP further the goals of DHEC's PHDPP by providing services state-wide for public school students whose administrations elect to participate in the PHDPP for the benefit of its public school students. DHEC denies so much of the allegations contained in paragraph 27 as allege that Plaintiff is an approved provider in PHDPP. DHEC avers that Plaintiff has refused to sign the agreement necessary to become an approved provider in PHDPP.

28. DHEC denies so much of the allegations contained in paragraph 28 of the Complaint as allege that Plaintiff is among the vendors that carry out the implementation of the DHEC PHDPP. DHEC avers that Plaintiff has refused to sign the agreement necessary to become an approved provider in the PHDPP. DHEC admits the remaining allegations contained in paragraph 28 of the Complaint.

29. In responding to the allegations contained in paragraph 29 of the Complaint, DHEC avers that its Division of Oral Health monitors compliance with its Memorandum of Agreement entered into between DHEC and providers for participation in the PHDPP, which allows approved providers to provide primary preventive care that is reversible in public health settings. DHEC further avers that Plaintiff is not an approved provider in its PHDPP program as Plaintiff has refused to sign the Memorandum of Agreement. DHEC denies any allegations contained in paragraph 29 of the Complaint that are contrary to or inconsistent with these averments.

30. DHEC denies the allegations contained in paragraph 30 of the Complaint.

31. DHEC denies the allegations contained in paragraph 31 of the Complaint.

32. In responding to the allegations contained in paragraph 32 of the Complaint, DHEC craves reference to the statutes cited, S.C. Code Ann. §§ 1-23-110 & -111, avers that the statutes speak for themselves, and denies any allegations contained in paragraph 32 that are contrary thereto or inconsistent therewith.

33. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint and, therefore, denies the same.

34. In responding to the allegations contained in paragraph 34 of the Complaint, DHEC craves reference to the statute cited, 42 U.S.C. Section 1396a(5), avers that the statute speaks for itself, and denies any allegations contained in paragraph 34 that are contrary thereto or inconsistent

therewith. DHEC admits so much of the allegations contained in paragraph 34 as allege that SCDHHS is the state agency responsible for administering and supervising the state's Medicaid program. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 34 and, therefore, denies the same.

35. In responding to the allegations contained in paragraphs 35 and 36 of the Complaint, DHEC craves reference to the Dental Services Provider Manual cited in footnote 7 to the Complaint, avers that the manual speaks for itself, and denies any allegations contained in paragraphs 35 and 36 that are contrary thereto or inconsistent therewith.

36. In responding to the allegations contained in paragraph 37 of the Complaint, DHEC craves reference to the minutes from the meeting of the South Carolina Board of Dentistry of January 19, 2018, avers that the minutes speak for themselves, and denies any allegations contained in paragraph 37 that are contrary thereto or inconsistent therewith.

37. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 38 of the Complaint and, therefore, denies the same.

38. DHEC is without sufficient information or knowledge to form a belief as to the truth of so much of the allegations contained in paragraph 39 of the Complaint as allege that ART has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014 and, therefore, denies the same. DHEC admits the remaining allegations contained in paragraph 39 of the Complaint.

39. DHEC denies so much of the allegations contained in paragraph 40 of the Complaint as allege that Plaintiff has an agreement with DHEC. DHEC admits so much of the allegations contained in paragraph 40 as allege that Plaintiff began providing ART in school settings in August, 2018. DHEC is without sufficient information or knowledge to form a belief

as to the truth of the remaining allegations contained in paragraph 40 and, therefore, denies the same.

40. DHEC admits so much of the allegations contained in paragraph 41 of the Complaint as allege that licensed dental hygienists with Plaintiff began providing ART as part of its preventative dental care in school settings. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 41 and, therefore, denies the same.

41. DHEC denies the allegations contained in paragraph 42 of the Complaint.

42. In responding to the allegations contained in paragraph 43 of the Complaint, DHEC craves reference to the Medicaid Bulletin attached to the Complaint as Exhibit 1, avers that the Bulletin speaks for itself, and denies any allegations contained in paragraph 43 that is contrary thereto or inconsistent therewith.

43. DHEC avers that paragraphs 44, 45, 46, 47, 48, 49 and 50 of the Complaint are not directed to it and that no response is required. To the extent a response is required, DHEC denies the same.

44. DHEC is without sufficient information or knowledge to form a belief as to the truth of so much of the allegations contained in paragraph 51 of the Complaint as allege that SCDHHS and/or its private contractor has refused to pay for the work performed by HPS for the balance of the 2018-19 school year and, therefore, denies the same. DHEC denies the remaining allegations contained in paragraph 51 of the Complaint.

45. DHEC denies the allegations contained in paragraphs 52, 53, 54, 55, 56 and 57 of the Complaint.

46. DHEC avers that footnotes 1-9 are not directed to it, do not fall within the requirements of Rule 8 of the South Carolina Rules of Civil Procedure and, therefore, do not require a response.

**FOR A SECOND DEFENSE**  
**(Failure to State a Cause of Action)**

47. The Complaint fails to state facts sufficient to constitute a cause of action and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**  
**(Standing)**

48. The Complaint should be dismissed because Plaintiff lacks standing.

**FOR A FOURTH DEFENSE**  
**(Justiciable Controversy)**

49. The Complaint should be dismissed because no justiciable controversy exists.

**FOR A FIFTH DEFENSE**  
**(Ripeness)**

50. The Complaint should be dismissed because the matter is not ripe for judicial review.

**FOR A SIXTH DEFENSE**  
**(Equity)**

51. Plaintiff's claims are barred, in whole or in part, by one or more of the doctrines of laches, estoppel, unclean hands, or waiver.

**WHEREFORE**, having duly answered the Complaint, Defendant South Carolina Department of Health and Environmental Control requests that the case be dismissed, with prejudice, and that it be awarded its costs and attorneys' fees in defending this action, plus such further relief as the Court deems just and proper



s/ William D. Britt, Jr.

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ATTORNEYS FOR DEFENDANT SOUTH  
CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL

October 23, 2019  
Columbia, South Carolina

|                                         |   |                                    |
|-----------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS       |
|                                         | ) | FIFTH JUDICIAL CIRCUIT             |
| COUNTY OF RICHLAND                      | ) |                                    |
|                                         | ) |                                    |
|                                         | ) | Case No. 2019-CP-40-4567           |
| Health Promotion Specialists, LLC,      | ) |                                    |
|                                         | ) |                                    |
| Plaintiff,                              | ) | <b>AMENDED COMPLAINT AND</b>       |
| vs.                                     | ) | <b>PETITION FOR EMERGENCY AND</b>  |
|                                         | ) | <b>PERMANENT INJUNCTIVE RELIEF</b> |
| South Carolina Department of Health     | ) |                                    |
| and Human Services, and                 | ) |                                    |
| South Carolina Department of Health and | ) |                                    |
| Environmental Control,                  | ) |                                    |
|                                         | ) |                                    |
| Defendants.                             | ) |                                    |

## INTRODUCTION

For more than two decades, there has been a concerted effort among a faction of licensed South Carolina dentists in private practice (hereafter “private dentists”), particularly those who are affiliated with the South Carolina Dental Association, to limit and restrict the dental hygiene work that licensed dental hygienists provide to public school children throughout the state. The work of the licensed dental hygienists dramatically reduces the incidence of oral disease among public school children, which increases their chances of reaching adulthood without diseased oral health and the invasive dental work that many private dentists provide (and from which they profit). The gist of these efforts involved lobbying, at considerable expense, for legislation that limited the services dental hygienists could provide in the public health setting, for the sole purpose of increasing the revenue that private dentists generate from their practices.

For many years, the South Carolina Board of Dentistry (hereafter the “Dental Board”), which is primarily comprised of licensed dentists who have the same interest in minimizing the scope of practice of dental hygienists in order to increase their own bottom line, has assisted these private dentists in their efforts to place limits on work dental hygienists can do in the public health

setting under general supervision of a licensed dentist. This is so even though dental hygienists are qualified to perform the work and even though the work can minimize or eliminate the need for intrusive dental reconstructive work, protect children, and save money. Of course, intrusive dental reconstructive work costs a lot of money, so private dentists prefer that patients do not get more than basic preventative dental care because a diseased mouth in a child (or adult) is a virtual goldmine for private dentists. And if a child with a diseased mouth receives Medicaid, there is certain payment for the work done by private dentists.

Most recently, the Defendants have undertaken efforts to further the agenda of the private dentists, and to assist the private dentists in their continued efforts to restrict the care provided by dental hygienists in the public health setting, for the same purpose of increasing the income of private dentists at the cost of public school children in the state as well as taxpayers.

At one point, the efforts of the Dental Board to interfere with the work of licensed dental hygienists in the state was so overbearing that, in 2003 the Federal Trade Commission (hereafter “FTC”) stepped in and filed a complaint for violation of federal law by the Dental Board. The FTC alleged that the Dental Board “restrained competition in the provision of preventative dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists.” After litigating the matter for more than four (4) years and the United States Supreme Court refusing to hear the case, the South Carolina Board of Dentistry entered into an agreement under the terms of which the Dental Board was required to notify the FTC prior to taking any action to promulgate. . . any proposed or final rule, regulation, policy. . . formal complaint in a disciplinary action, or other action of the Board relating to the provision by dental hygienists of preventative dental services in a public health setting. . . including but not limited to, an action concerning a dentist who authorizes, supervises,

or bills for the provision by dental hygienists of preventative dental services in a public health setting.” (FTC Order No. 9311 dated June 20, 2007). The Dental Board was subject to the FTC order for a period of ten (10) years. It expired in 2017<sup>1</sup>.

Plaintiff is not aware of any direct action the Dental Board has undertaken since 2017 (the expiration of the FTC order) to inhibit the practice of dental hygiene in the public health setting. However, the same cannot be said for the Defendants here. It appears that some private dentists are still working to make sure public-school children do not get preventative dental care in the schools, so public school children are much more likely to get caries (more commonly known as cavities) and other diseases of the mouth. More caries equals more money for private dentists.

These Defendants have taken up the cause and are taking steps to minimize the preventative health care that dental hygienists can do in the public schools. It appears that both Defendants are allowing themselves to be manipulated by the private dentists for the purpose of increasing the bottom line of those private dentists. The long-term health of public-school children in South Carolina is at risk as a result of actions of the Defendants which are being taken to enrich private dentists.

### **COMPLAINT.**<sup>2</sup>

1. Petitioner Health Promotions Specialists, LLC (hereafter “HPS”) is a corporate entity organized and existing under the laws of the State of South Carolina. HPS provides

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<sup>1</sup> To obtain antitrust immunity for conduct that might otherwise violate the federal antitrust laws, the state must clearly articulate its intent to displace competition in favor of regulation. See N.C. State Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015); FTC v. Phoebe Putney Health Systems Inc., 133 S.Ct. 1003 (2013). By entering into the agreement with the FTC, the Dental Board avoided litigation of these issues.

<sup>2</sup> HPS previously filed a similar suit prior to the effective date of the “Medicaid Bulletin” in the South Carolina Administrative Law Court (hereafter “ALC”) in an effort to prohibit the implementation of the “Medicaid Bulletin.” The ALC recently issued an order concluding it lacked jurisdiction to provide the relief HPS was seeking. See Order of Judge Robinson dated August 2, 2019.

preventative dental care and education to tens of thousands of school-aged children throughout the state based on an agreement between HPS and the South Carolina Department of Health and Environmental Services (hereafter “SCDHEC”), which operates a Public Health Dental Prevention Program (hereafter referred to as “DHEC PHDPP). That PHDPP provides preventative dental care and education to students in public schools of South Carolina.

2. On information and belief, Defendants South Carolina Department of Health and Environmental Control (hereafter “SCDHEC”) and South Carolina Department of Health and Human Services (hereafter “SCDHHS”) are agencies created by statute which operate as part of the executive branch of state government.
3. Defendant SCDHEC is “the sole advisor to the State in all questions related to public health within its limits.” S.C. Code Ann. Sec. 44-1-110. SCDHEC “shall target services in a public health setting to under-served populations” including educational institutions. S.C. Code Ann. Section 44-15-110(E).
4. Defendant SCDHEC is charged by statute with the duty to implement a targeted community program for dental health, education, screening and treatment referral in the public schools. S.C. Code Ann. Section 44-8-10.
5. Through its agreement with SCDHEC, HPS provides preventative dental care and education (hereafter “preventative dental care”) to students in the public schools, when any student’s parent authorizes the child to receive preventative dental care at school, during school hours to protect the health and welfare of the students of the public schools. Through its many years of operation and provision of preventative dental care through its agreement with SCDHEC, HPS is informed and believes it has provided preventative dental care to tens of

thousands of public-school children who might otherwise not receive any dental care during their childhood. On information and belief, the dental health of public-school children in South Carolina has significantly improved<sup>3</sup>.

6. Respondent South Carolina Department of Health and Human Services (hereafter “SCHHS”) is an agency created by the General Assembly of South Carolina for the purposes of administering Title XIX of the Social Security Act (Medicaid), including the Early Periodic Screening Diagnostic and Screening program and to coordinate and implement the South Carolina Cooperative Health Statistics Program pursuant of the Public Health Services Act. S.C. Code Ann. Section 44-6-30.
7. Among the statutory requirements for SCDHHS is its statutory mandate to “prepare and approve state and federal plans prior to submission to the appropriate authority as required by law for final approval or for state and federal funding, or both.” S.C. Code Ann. Section 44-6-40(1). On information and belief, any substantive changes to the SCDHHS plan requires the approval of the United States Department of Health and Human Services (USDHHS), Center for Medicare & Medicaid Services.
8. HPS files this action for declaratory relief, and in doing so seeks emergency relief from this Court to temporarily enjoin SCHHS from enforcing a “memorandum” issued to licensed dental providers that is contrary to the approved State Plan (see below) that governs Medicaid reimbursement for preventative dental health procedures in South Carolina for children who

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<sup>3</sup> A ten-year randomized study compared traditional amalgam restorations (fillings) that removed all decay to composite restorations over untreated decay. The results indicated that existing caries (cavity) removal does not have to be removed prior to filling. In fact, drilling away caries and replacing with amalgam fillings leads to significantly increase nerve exposure and to an increased risk of tooth abscess. Perhaps most importantly, the cost is for composite restorations in approximately half of the cost of amalgam restoration done by private dentists.

receive dental benefits through the South Carolina Medicaid Program and who are patients of HPS.

9. In addition, HPS seeks an order requiring defendant South Carolina Department of Health and Environmental Control (hereafter “SCDHEC”) to provide for preventative dental health care that minimizes the risk of caries that is consistent with the standard of care nationwide as it has been doing until the present school year for public-school children whose dental benefits are provided by Medicaid.
10. HPS requests this emergency relief preliminarily, while the merits of the declaratory action can proceed. HPS is informed and believes that the absence of comprehensive preventative health care to public school children, including those whose dental benefits are paid by Medicaid, is a harm for which no remedy can be provided. The public-school children whose dental disease is not prevented by the preventative measures that could be lawfully provided by licensed dental hygienists will suffer immediately and permanently, and in a manner that cannot be rectified after the fact if not stopped immediately.

#### **DEFENDANTS’ RECENT EFFORTS THAT HARM CHILDREN**

11. In April 2019, SCDHHS issued a “Medicaid Bulletin that went into effect on May 1, 2019, which was not authorized by the State Plan, and had not been properly adopted as a regulation pursuant to S.C. Code Ann. Section 1-23-111 (1976, as amended). **Exhibit A.**
12. The effect of the “Medicaid Bulletin” is to restrict the scope of preventative dental services that can be performed by licensed dental hygienists in the public-school setting, in violation of federal law and the standard of care. The “Medicaid Bulletin” requires that temporary or protective restorative services can only be provided to children “as a component of permanent

restorative care.” In other words, only private dentists can provide this “preventative” dental care, vitiating the goals of the Public Health Dental Prevention Program adopted by SCDHEC

13. On information and belief, SCDHHS did not seek an amendment to the State Plan as required by federal law prior to issuing the “Medicaid Bulletin.” Implementation of the regulation, without proper research, study, and public comment as required for regulations under state law will cause irreparable harm to the tens of thousands of children treated by HPS annually through the South Carolina Medicaid Program.
14. HPS has been asked by SCDHEC to sign an “agreement” which would require it to immediately begin to deviate from the standard of care by forcing HPS to include a provision that will prevent HPS from offering the full extent of primary preventative care that is mandated by the standard of care. It will also, coincidentally, drive public school children out of the school dental health program for preventative care and into the office of private dentists.
15. On information and belief, the essentially contemporaneous actions by the agency Defendants is not a coincidence.
16. On information and belief, the efforts of the two (2) agency Defendants are being influenced by private dentists in South Carolina. On information and belief, SCDHEC recently hired Raymond Lala, a dentist licensed only in Louisiana, to serve as SC State Dental Director. On information and belief, Lala was intimately involved in influencing the actions of the South Carolina Board of Dentistry which led to the FTC intervention and the conditions imposed by the FTC upon the Board’s actions through 2017.



**HISTORY OF PREVENTATIVE DENTAL HEALTH FOR  
CHILDREN IN SOUTH CAROLINA**

17. In 1987, the General Assembly expressly authorized licensed dental hygienists to provide primary preventative care that is reversible to patients in the public health setting. S.C. Code Ann. Section 40-15-110 (10).
18. In 2000, the General Assembly amended existing statutory provisions to permit licensed dental hygienists to “apply topical fluoride and . . . the application of sealants and oral prophylaxis” under specified conditions in school settings. S.C. Code Ann. Section 40-15-80(B) (1976 as amended).
19. Lastly, “licensed dental hygienists . . . within the public health system may perform other duties authorized by regulations of the State Board of Dentistry.” [*Id.* at (H)].
20. HPS also serves as an advocate for its patients, many of whom come from low-income areas of the state and who receive preventative dental care they would not otherwise not receive but for the services provided by HPS which enables them to receive preventative dental care in the public-school setting.

**CHILDREN ON MEDICAID – THE FIRST VICTIMS**

21. The students to whom HPS provides preventative dental care include a large percentage of children whose preventative dental care is paid through South Carolina Medicaid.
22. On information, SCDHHS has complied with its obligation to prepare the state plan for preventative dental care and education in public health settings by coordination with statutory assignment to SCDHEC, which “shall target services in a public health setting to under-

served populations” including in educational institutions. S.C. Code Ann. Section 44-15-110(E). Many, but not all, of those public-school children are on Medicaid.

23. On information and belief, SCDHHS has contracted out to a private vendor the process and procedure for payment of Medicaid benefit to providers who provide preventative dental service through the public health setting and it allows the private vendor to make substantive decisions directly affecting the health of Medicaid recipients. To the extent that the “Medicaid Bulletin” is the product of the private vendor, the delegation by SCDHHS of the right to make substantive decisions as to change in codes for payment and substantive changes to the dental care of Medicaid recipients is unlawful. *See Paragraph 11.*
24. SCDHHS is also charged by statute with the obligation to “formulate for consideration and promulgation criteria, standards and procedures that ensure assigned programs are administered effectively, equitably and economically in accordance with statewide policies and priorities. S.C. Code Ann. Section 44-6-40(5).
25. SCDHHS is charged with the obligation of creating and implementing a state plan for each program assigned to it and “also prepare resource allocation recommendation based on such plans.” S.C. Code Ann. Section 44-6-70. SCDHHS is required to have plans that pay “specific attention to... (a) Prevention measures as addressed in health and human services programs.” *Id.*
26. To the extent that any of the statutory obligations of SCDHHS has been delegated to a private vendor, such delegation is an unlawful delegation of executive power and should be declared unlawful.

27. As an approved provider of preventative dental health care in the public-school setting, HPS furthers the goals and efforts of the DHEC Preventative Health Dental Prevention Act (DHEC PHDPP) by providing services state-wide for public school students whose administrations elect to participate in the DHEC PHDPP for the benefit of its public-school students.
28. The DHEC PHDPP provides for contracts with public or private providers to provide preventative dental care in public settings to underserved populations which are eligible for participation in the DHEC PHDPP. HPS is among the vendors that carry out the implementation of the DHEC PHDPP.
29. The Division of Oral Health at SCDHEC reviews and monitors all aspects of the PHDPP, which preventative dental care is provided by HPS pursuant to statutory guidelines adopted by the General Assembly.
30. On information and belief, the recent efforts by SCDHEC to amend the status-quo by restricting the provision of preventative dental care to public school students are contrary to the Public Health Dental Prevention Program adopted by SCDHEC and in violation of federal and state law.

## **LEGAL CLAIMS**

### **First Cause of Action – Declaratory Judgment**

(As to both Defendants)

31. Both DHEC (Section 44-6-90) and SCDHHS (Section 44-1-70) are required to promulgate regulations for implementation of their respective programs, DHEC for establishing, staffing and monitoring the preventative dental care provided to eligible public institutions, and SCDHHS for implementing the allocation of state and federal resources allocated for providing services through the South Carolina Medically Indigent Assistance Act, S.C. Code

Ann. Section 44-6-135, which includes school-aged children of medically-indigent South Carolina families.

32. To the extent either Defendant asserts they are permitted to promulgate “policy” without complying with state or federal law, HPS disagrees. Both DHEC and SCDHHS are required to comply with statutory procedures of the Administrative Procedures Act in promulgating regulations.<sup>4</sup> S.C. Code Ann. Section 1-23-110 and 111. *See* S.C. Regs Chapter 61 and 126. The requirements for promulgating regulations include, *inter alia*, filing of proposed regulations with the South Carolina Legislative Council with a preamble, for purposes of notice, and public hearings to permit members of the public to participate in the decision-making prior to adoption of a regulation. *Id.*
33. The United States Department of Health and Human Services has recognized that “children covered by Medicaid have higher dental care utilization rates than do uninsured children... the Centers for Medicare and Medicaid Services (CMS), working in partnership with states, is committing to building upon recent progress in improving access to oral health care among children... enrolled in Medicaid.”<sup>5</sup> Participation by the States is key to achieving the goals of the Center for Medicaid and Medicare Services by ensuring that children covered by Medicaid are provided preventative dental care.<sup>6</sup>

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<sup>4</sup> The distinction between a “regulation” and an agency “policy” is the subject of judicial debate. *See e.g., South Carolina Department of Revenue v. Blue Moon of Newberry Inc.*, 397 S.C. 256, 725 S.E.2d 480 (2012).

<sup>5</sup> Keep Kids Smiling: Promoting Oral Health Through the Medicaid Benefit for Children and Adolescents, Early and Periodic Screening, Diagnostic and Treatment, September 2013. <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Dental-care.html>. “In 1967, Congress introduced the Medicaid benefit for children... to ensure that children receive the health they need at the time they need it – *the right care to the right child at the right time in the right setting*... States share responsibility for implementing the benefit.”

<sup>6</sup> In a recent report to the White House, the USDHHS stated that “State policies that restrict entry into provider markets can stifle innovative and more cost-effective ways to provide care while limiting choice and competition.” The report made recommendations to “the development of value-based payment models that offer flexibility and risk-

34. Federal law mandates a single state agency administer a state's Medicaid plan. 42 U.S.C. Section 1396a(5). SCDHHS is the state agency responsible for administering and supervising the state's Medicaid program. SCDHHS is not prohibited from coordination with other agencies to implement the provision of preventative dental care in the public health setting, which has been implemented primarily by DHEC through its agreements with providers such as HPS.
35. SCDHS has published a manual for implementation of dental preventative services (and other dental services) for recipients of Medicaid (hereafter "SC Dental Manual, July 1, 2018")<sup>7</sup>.
36. The SC Dental Manual provides that protective restoration services for children up to age 20 for teeth 1-32, A-T is covered by Medicaid with no pre-payment review and no prior authorization required, and authorizes payment for one protective restoration per tooth every 36 months, not provided on the same date as other specified services. (Page 138 of 329).
37. The South Carolina Board of Dentistry ruled on January 19, 2018, while acting pursuant to its authority granted by SC Code Ann. Section 44-5-110(H), stated that "therapeutic sealants and [preventative]<sup>8</sup> fillings, such as Atraumatic Restorative Technique, Interim Restorative Technique, and Caries Control Technique" constitute "primary preventative care that is reversible" and could therefore be performed by dental hygienists in public health settings in accordance with S. C. Code Ann. Section 44-15-110(A)(10). See Minutes of the Board of Dentistry meeting held January 19, 2018 at p. 6.

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based incentives for providers, especially without unduly burdening small or rural practices." Reforming America's Health Care System, USDHHS Report to the President 2018.

<sup>7</sup> South Carolina Health Connections (2018) <https://www.scdhhs.gov/internet/pdf/manuals/dental/Manual.pdf>

<sup>8</sup> The meeting minutes reflect a reference to "temporary" fillings, but the Board explicitly referenced and approved procedures of ART, IST, etc. involve *preventative* fillings.

38. The SC Dental Hygienists' Association obtained a grant and provided training to dental hygienists who work in South Carolina public health settings to provide therapeutic sealants and preventative fillings, including atraumatic restorative technique (ART) and intermediate restorative technique (IST) as part of the preventative dental care it provides to patients in the public health setting. The grant additionally trained the faculty at the dental hygiene schools across the state so that the technique is incorporated into the curriculum, and the graduates are prepared upon graduation for jobs in public health.
39. ART is a needle-less and drill-less treatment for tooth decay and the reduction of pain caused by caries in children's teeth. The process involves placing a clear liquid compound to a tooth followed the application of a glass ionomer over tooth decay. The treatment seals the affected tooth, which arrests the spread of disease in the tooth. The process has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014.
40. Pursuant to the authorization of the South Carolina Board of Dentistry and its agreement with SCDHEC, HPS began providing ART as part of its preventative dental care in school settings in August 2018. These preventative dental services are covered by Medicaid are assigned a specific, independent billing code, and to date SCDHHS has authorized payment for ART in the public-school setting. HPS has been able to offer ART therapy to more than 19,000 teeth for the more than 6,000 students treated with ART since the FY 2018-2019 school year began, thereby making a significant impact on the improvement of dental health among the medically-indigent students in South Carolina.
41. After approval of the South Carolina Dental Board for licensed dental hygienists to begin providing ART as part of the preventative care provided to students under general

supervision, and after extensive training, licensed dental hygienists with HPS began providing ART as part of its preventative dental care in school settings.

42. HPS is informed and believes that SCDHEC, through Raymond Lala and perhaps others, participated in the efforts of the private dentists to restrict the availability of ART through the public-school program and into the arms of private dentists.
43. On or about April 5, 2019, without following the procedure for adoption of regulations set forth under South Carolina law, SCDHHS issued a memorandum entitled “Bulletin” in which it advised that, effective May 1, 2019, SCDHHS would no longer pay for protective restoration such as ART to children receiving Medicaid who receive preventative dental care in the public health school setting by dental hygienists.
44. SCDHHS’ unilateral and unexplained decision, by withdrawing reimbursement completely for such applications, effectively bars protective restorations such as ART from being performed by licensed dental hygienists in the public-school setting, despite prior approval of the Board of Dentistry of such applications, and despite state policy and priority areas that favor and promote the *expansion* of provision of such services to Medicaid recipients in the school setting, not withdrawal from under-served children in the public schools of South Carolina.
45. The effect of this decision by SCDHHS means that Medicaid-eligible children will be able to receive protective restoration via ART only in the private setting of a dental office, exponentially increases the cost of the preventative restoration which, if done by licensed dental hygienists in the public-school program, saves the Medicaid hundreds of thousands of dollars annually, significantly impacts the funds available for payment of Medicaid benefits

for Medicaid-eligible students<sup>9</sup>, and drastically reduces the effectiveness of the public health program in the public schools. In essence, the unilateral action by SCDHHS denies preventative restoration services to children who need it most.

46. On information and belief, the decision by SCDHHS to stop payment for preventative restorations to Medicaid-eligible children in the public health setting by hygienists is arbitrary and capricious, was not made legally through the statutory procedure for enacting regulations, is violative of law, contradictory to public policy and priorities of this state, and places the dental health of Medicaid-eligible children at risk.
47. On information and belief, immediate and irreparable harm will result to Medicaid-eligible children whose parents have elected to obtain preventative restorations for their children through public-school based public health programs such as that provided by HPS if SCDHHS is permitted to deny payment for ART preventative restorations by hygienists in that public health setting.
48. On information and belief, the revision of the Medicaid reimbursement program for preventative dental care for children in the public health setting constitutes a regulation as defined by S.C. Code Ann. Section 1-23-10(4), which requires promulgation through the statutory procedure for enacting and amending regulations, as set forth in Section 1-23-40 through 60 and 1-23-110 *et seq.*

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<sup>9</sup> On information and belief, eliminating Medicaid payments by dental hygienists in the public health setting provided for in the South Carolina Dental Manual (D2940), and requiring the treatment to be done by traditional drilling and placement of amalgam fillings in private dental offices almost triples the cost to Medicaid of dental services which accomplish the same objective, *i.e.*, to prevent the spread of dental disease.



49. On information and belief, SCDHHS and/or its private contractor has failed to comply with the proper procedure for enacting or amending a regulation in accordance with S.C. Code Ann. Section 1-23-110 and 111, and as a consequence the “Medicaid Bulletin” which announces the intent of SCDHHS to eliminate the Medicaid reimbursement for preventative dental care involving protective restorations has been issued without proper investigation, study and deliberations, and decision by the General Assembly or any other person or entity.
50. On information, the change in procedure set forth in the Bulletin from SCDHHS and/or its private contractor is void and unenforceable, or should be declared void and unenforceable, and SCDHHS should be ordered to cease, *pendente lite* and permanently, refusing payment to providers in the public health setting for preventative restorations as authorized by the South Carolina Board of Dentistry and as currently authorized by the South Carolina Dental Manual.
51. HPS continued to comply with the standard of care for the public-school students for whom it was contracted by SCDHEC to provide preventative dental care after the “Medicaid Bulletin” went into effect and continued to provide the full range of dental preventative services available to its licensed hygienists. SCDHHS and/or its private contractor has refused to pay for the work performed by HPS for the balance of the 2018-19 school year.
52. SCDHHS and/or its private contractor should be ordered and required to pay for the dental preventative services that were provided by HPS under the terms of its then-existing mandate from SCDHEC.
53. Similarly, the efforts by SCDHEC to restrict the ability of the dental hygienists to provide new modalities such as ART through the preventative dental health program is an unlawful effort to restrict the availability of the full range of preventative dental care to children in the

public schools, and is designed to enrich the private dentists whose bidding is the foundation of these unlawful actions.

54. Additionally, the efforts by SCDHEC to restrict the ability of dental hygienists to provide preventative modalities to its patients, is in direct contravention of its statutory obligation to provide preventative dental care in public settings to underserved populations which are eligible for participation in the DHEC PHDPP.

**Second Cause of Action – Declaratory Judgment**  
(As to SCDHEC)

55. Plaintiff repeats and incorporates the allegations as set forth above as if repeated herein verbatim.
56. SCDHEC is a state agency created by statute that operates as part of the executive branch of state government. SCDHEC is charged by statute with the duty to, inter alia, implement a targeted community program for dental health, education, screening and treatment referral in the public schools. S.C. Code Ann. § 44-8-10.
57. HPS is a corporate entity that provides preventative dental care and education to school-aged children throughout the state pursuant to the terms of a Memorandum of Agreement (“MOA”) between HPS and the SCDHEC.
58. An MOA between the parties with an effective date of July 1, 2016, and with an initial term length of one-year is enclosed as **Exhibit B**. That agreement is hereafter referenced as the “2017 MOA.”
59. Section III(A) of the 2017 MOA allows for up to four additional one-year periods, which would, if completed, extend the 2017 contract through June 30, 2021.

60. Currently, the 2017 MOA continues in effect by and between the parties to present after repeated annual informal renewals by course of conduct were made following the initial potential termination date of June 30, 2017.
61. The parties continued to operate under the terms of the 2017 MOA without discussion of or amendment to those terms until April 2019. At that time, SCDHEC proposed a second MOA (the “2019 MOA”), a copy of which is enclosed as **Exhibit C**. The 2019 MOA was accepted by HPS, as indicated by the affixed signature of HPS’s CEO and Supervising Dentist on April 18, 2019 as appears on that exhibit, which was transmitted to SCDHEC immediately subsequent to its acceptance by HPS.
62. The acceptance via signature by HPS of the 2019 MOA was followed by performance of the parties under the terms of the 2019 MOA, which ratified the 2019 MOA and extended the potential full duration of the contractual relationship between the parties until 2023.
63. Despite HPS’ reliance and performance under the terms of the 2019 MOA, SCDHEC claims to have never executed its portion of the 2019 MOA, and has taken the position that its failure/refusal to do so rendered the 2019 MOA ineffective.
64. Even if the 2019 MOA were determined to have never become binding between the parties, neither the acknowledged offering of the 2019 MOA, nor the subsequent failure of that that potential superseding agreement to become binding on its own, constitute termination events under the terms of the 2017 MOA.
65. As such, even if the 2019 MOA is not deemed controlling as Plaintiff contends, it does not otherwise act to effectuate a termination of the 2017 MOA. Accordingly, the 2017 MOA therefore would remain in effect to date, and HPS’ continued provision of preventative dental

care throughout the state would be pursuant to, and subject to, the ongoing terms of the 2017 MOA.

66. The actions of SCDHEC subsequent to its claimed disclaimer/withdrawal/rejection of the 2019 MOA have included offering yet another version of an MOA (hereafter referenced as the “Revised MOA”) to HPS in August, 2019.
67. Just as the mere offering of the 2019 MOA failed to terminate the operation of the 2017 MOA, mere offering to the Revised MOA does not constitute a termination of the 2017 MOA. Likewise, the offer of the Revised MOA does not terminate an otherwise controlling and operative 2019 MOA as alleged by Plaintiff.
68. Further, the Revised MOA contains terms that are unlawful and improper, as they would have required the dental hygienists at HPS to falsify dental records and mandate an examination by a licensed dentist as a prerequisite to providing preventative dental care to its patients, which is contrary to the statutory mandates which govern the dental health program in public health settings. Such preventative care is specifically allowed for hygienists to complete within their professional discretion and licensure, and thus a restriction via compulsory agreement to terms unilaterally dictated by SCDHEC violates South Carolina law.
69. As a result, HPS’ rejection of the Revised MOA does not, and did not previously, constitute a termination trigger under the terms of the 2017 MOA, or any renewal thereof in the form of the 2019 MOA.
70. Moreover, any purported SCDHEC attempt at termination of the 2017 MOA or its renewal in the form of the 2019 MOA currently would constitute unlawful retaliation for rejection of the Revised MOA. Statements to the contrary are mere pretext to advance the unlawful terms

that SCDHEC is attempting to implement statewide, and should be rejected as against public policy.

71. Attached as **Exhibit D** is a copy of correspondence recently received by HPS from SCDHEC, which by its language makes clear that the purported written termination of the 2019 MOA<sup>10</sup> contained therein is expressly the result of HPS' refusal to accept the unlawful terms of the Revised MOA.
72. On information and belief, the actions by SCDHEC in attempting to include unlawful language and require falsified dental records as a term of the Revised MOA (and punishment for failure to agree to the same) is designed and intended to terminate the involvement and services of HPS and its dental hygienists in the targeted community program for dental health, education, screening and treatment referral in the public schools, which exclusion is contrary to law.
73. SCDHEC has unlawfully removed HPS's name from its list of authorized providers listed on its website, relying apparently on HPS refusal to sign and agree to the illegal terms of the Revised MOA.
74. The terms of the 2017 MOA, and 2019 MOA if deemed controlling, both provide for formal written notice of termination without cause and a resulting thirty (30) day period before such termination would be effective, which has not been afforded to HPS. Exhibit D is the first attempt by SCDHEC to issue such formal notice, but for the reasons stated herein, should be rejected as against public policy.

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<sup>10</sup> The referenced correspondence refers to what has been termed herein the 2019 MOA as the "March MOA" even though the referenced signing by representatives for HPS of the 2019 MOA occurred on April 18, 2019. Also, SCDHEC in its letter refers to what has been termed herein as the Revised MOA as the "2019/2020 MOA."

75. SCDHEC has compounded its unlawful action by communicating with school districts to represent the false statement that HPS has no current agreement in place with SCDHEC, while having taken no written action to terminate the existing 2017 MOA or 2019 MOA prior to Exhibit D issued today. Such communication by SCDHEC is an attempt to intentionally interfere with the contracts HPS has with various school districts in the state and to deprive students who are eligible for services under the targeted community program for dental health, education, screening and treatment referral in the public schools.

**Prayer for Attorney Fees**

76. On information and belief, the positions taken by the agency Defendants serve the interests of private dentists, do not further the interests of the state or the public, and are unlawful.
77. On information and belief, there is no substantial justification for the positions taken by the agency Defendants to assist private dentists in limiting the preventative dental services that can be provided by licensed dental hygienists as approved by the Board of Dentistry and as required by the standard of care.
78. HPS has incurred attorney's fees and costs in connection with its efforts to enforce compliance by the agency defendants with applicable law. HPS is informed and believes that the agency Defendants should be required to reimburse HPS for the costs of its attorney's fees and costs pursuant to S.C. Code Ann. Section 15-77-140.

WHEREFORE, Petitioner Health Promotions Specialists, LLC files this declaratory judgment action, seeking emergency relief from this Court in the following particulars:

- A. Enjoin, temporarily and permanently, Defendant SCDHHS from continuing its cessation of reimbursement for preventative dental health procedures performed by dental hygienists in South Carolina for children who receive dental benefits through the South Carolina Medicaid Program;
- B. Enjoin, temporarily and permanently, Defendant SCDHEC from implementing a restriction to Public Health Dental Prevention Program which has the effect of limiting provision of ART and other preventative dental treatments through the public school program for the economic benefit of private dentists, when the licensed dental hygienists are trained for this process, and the standard of care provides for this preventative service to be provided as part of a lower cost program available for public school students;
- C. Declaring the delegation by SCDHHS of responsibility of the right to make substantive decisions regarding dental preventative care for Medicaid recipients to a private contractor and to disguise such substantive changes as change in codes for payment and substantive changes to the dental care of Medicaid recipients to be unlawful;
- D. Enjoin, temporarily and permanently, Defendant SCDHEC from unlawfully delegating its responsibilities as set forth herein to a private contractor;
- E. Ordering and requiring SCDHHS to reimburse HPS for the costs of the full scope of preventative dental care provided to Medicaid recipients after issuance of the “Medicaid Bulletin” as was required by HPS’s contract with SCDHEC.
- F. Declaring the 2019 MOA by and between HPS and SCDHEC to be effective and binding between the parties;

- G. Alternatively, declaring the 2017 MOA by and between HPS and SCDHEC to be effective and binding between the parties;
- H. Declaring that termination of the existing contractual agreement between HPS and SCDHEC must be via written notice of termination by SCDHEC that contains:
  - a. Clear, lawful justification therefore that is separate and apart from HPS' refusal to accept the terms of the Proposed Amended MOA, and
  - b. Provision for a minimum of thirty days' notice prior to the effectiveness of the written notice;
- I. Ordering the Defendants to pay attorney fees to HPS for the bringing and prosecution of this action.
- J. And for such other and further relief as the court deems just and proper.

\_\_\_\_\_  
S/ Desa Ballard  
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ATTORNEYS FOR PETITIONER

November 22, 2019



**Exhibit A**

Henry McMaster GOVERNOR  
Joshua D. Baker DIRECTOR  
P.O. Box 8206 > Columbia, SC 29202  
[www.scdhhs.gov](http://www.scdhhs.gov)

April 5, 2019  
MB# 19-002

## MEDICAID BULLETIN

**TO: Dental Providers**

**SUBJECT: Temporary or Protective Restorative Services**

Effective for services rendered on or after May 1, 2019, the South Carolina Department of Health and Human Services (SCDHHS) will no longer reimburse for Current Dental Terminology (CDT) code D2940 (Protective Restoration) as a separate service. Reimbursement rates for restorative services will include the costs of providing temporary or protective fillings as a component of permanent restorative care.

For questions regarding this bulletin, please contact the DentaQuest Provider Service Center at (888) 307-6553.

Thank you for your continued support of the South Carolina Healthy Connections Medicaid program.

/s/  
Joshua D. Baker

# EXHIBIT 1



## MEMORANDUM OF AGREEMENT

## Exhibit B

BETWEEN

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

AND

HEALTH PROMOTION SPECIALISTS

## I. PURPOSE.

The South Carolina Department of Health and Environmental Control, Bureau of Maternal and Child Health, Division of Oral Health, (hereafter referred to as DHEC) and Health Promotion Specialists (hereafter referred to as MDD Provider) hereby enter into this Memorandum of Agreement (hereafter MOA) for the purpose of establishing a Public Health Dental Prevention Program (hereafter referred to as DHEC PHDPP) located in South Carolina public health settings, as defined in Section 40-15-110 of the S.C. Code of Laws, to provide dental assessment, evidence-based preventive dental interventions, and referrals for urgent dental needs.

## II. SCOPE OF SERVICES.

A. Responsibilities of DHEC. Under the terms of this MOA, DHEC will coordinate the PHDPP using public-private partnerships to deliver evidence-based preventive dental services in South Carolina public health settings to address the needs of priority populations identified by standard public health principles.

1. The DHEC Division of Oral Health will review written policies and procedures for all aspects of the program in accordance with the established South Carolina Department of Health and Environmental Control Public Health Dental Prevention Program Guidelines (DHEC PHDPP Guidelines) for that public health setting.
2. DHEC reserves the right to amend the DHEC PHDPP Guidelines as needed in accordance with state and federal law, as well as in accordance with standard public health recommendations. A copy of any finalized amendments will be mailed to all partners.
3. DHEC will maintain copy/copies of the completed Supervising Dentist and Standing Orders for Dental Hygienists and Assistants Forms.
4. DHEC will have no responsibility for clinical supervision of dental providers or for clinical services rendered by MDD Provider and its employees pursuant to this MOA.
5. DHEC will only approve Memoranda of Agreement with providers for practice in public health settings in accordance with S.C. Code Section 40 15 110(E) for which approved DHEC PHDPP Guidelines are currently in place.

B. Responsibilities of the Provider. Under the terms of this MOA, the MDD Provider will be responsible for delivering preventive dental services, as defined in the SC Dental Practice Act, in public health settings for priority populations for whom the MDD Provider has received individual written consents in accordance with the DHEC PHDPP Guidelines for that public health setting.

1. Eligibility for DHEC Public Health Dental Prevention Program:
  - a. Institutions and their sites, which are identified in Section 40-15-110(E) as a public health setting serving underserved populations, are eligible for participation in the DHEC PHDPP. The

priority population is defined by standard public health principles and specified by DHEC in the DHEC PHDPP Guidelines, Section 3.

- b. Provider agrees to provide services under this MOA in those public health settings for which guidelines have been established and approved by DHEC.
2. Provision of Care:
    - a. All members of the priority population in the public health settings must have a completed dental screening utilizing the DHEC approved dental screening tool and system prior to the delivery of preventive services. The results of the screening are to be documented by the MDD Provider and submitted to DHEC as a component of the documentation required under Section 5 of the DHEC PHDPP Guidelines.
    - b. All members of the priority population seen by a MDD Provider in a public health setting, will be referred to a dental home for needed follow up and continuity of dental care.
    - c. MDD Provider will give all members of the priority population **without** a dental home a list of practicing dentists within the city and/or geographic area where the person resides. MDD Provider will not discriminate against any practicing dentist within the specified area. All practices participating as Medicaid providers are to be identified on this listing.
    - d. MDD Provider shall have a referral and follow-up protocol in place for all members of the priority population in the public health setting identified with urgent dental needs in accordance with S.C. Code Section 40-15-172.
    - e. The supervising dentist, licensed to practice in South Carolina, is responsible at all times for clinical services provided by the MDD Provider through the mobile or portable dental operation.
    - f. The dentist billing for services or treatment provided by a dental hygienist in a public health setting is the provider of services and is clinically responsible for the care and treatment of the patient.
    - g. All members of the priority population in the public health setting identified with urgent needs must not receive preventive services by the MDD Provider before receiving treatment for the urgent conditions.
    - h. MDD Provider will comply with all applicable federal, state and local laws, regulations, ordinances and public health recommendations pertaining to infection control, exposure control and hazardous communications, including, but not limited to, Occupational Safety and Health Administration (OSHA), National Institute for Occupational Safety and Health (NIOSH) standards and CDC Infection Control Guidelines.
    - i. By signing this agreement, MDD Provider certifies that it will comply with all applicable federal, state and local laws, regulations and ordinances of the provisions of the South Carolina Dental Practice Act required to operate a mobile dental unit in a public health setting. (See S.C. Code Section 40-15-172).
  3. Supervision:
    - a. Prior to obtaining this MOA, the MDD Provider will enter into an agreement with a dentist, located and licensed in South Carolina and in good standing, to supervise dental hygienists and assistants performing services for the MDD Provider in accordance with the Dental Practice Act.

- b. MDD Provider will provide DHEC with a copy of the completed PHDPP Supervising Dentist and Standing Orders for Dental Hygienists and Dental Assistants Form. Completion of the form by the dentist acknowledges acceptance of supervision for the dental hygienists and dental assistants performing appropriate services for the MDD Provider in accordance with the Dental Practice Act.
  - c. In the event the agreement is terminated for any reason, MDD Provider must immediately notify DHEC and all services provided under this MOA must be suspended until a new agreement is fully executed between a supervising dentist and MDD Provider.
- 4. MOA Management:
  - a. MDD Provider will select settings for which they plan to provide services during the fiscal year. MDD Provider must submit a signed Public Health Setting Selection Acknowledgement Form initially and each fiscal year for the duration of this MOA. A copy of the form is provided with this MOA. An updated Public Health Setting Selection Acknowledgement Form must be submitted each time the MDD Provider adds a new public health setting for delivery of the preventive dental services.
  - b. MDD Provider will inform DHEC prior to entering into negotiations with any Institution defined as a public health setting for the planning and implementation of dental prevention services in that setting. Once an agreement has been executed between the MDD Provider and the Institution in the public health setting, a copy of the agreement must be sent to the DHEC, Division of Oral Health, 301 Gervais Street, Columbia, SC 29201. All MDD Provider's agreements will include a description of the relationship between the MDD Provider and DHEC, and be consistent with the requirements of the S.C. Dental Practice Act. DHEC shall be notified immediately of the termination of any agreements with Institutions classified as public health settings.
  - c. The MDD Provider shall not provide preventive dental services in any SC Institutions in a public health setting under this MOA until an effective agreement between the MDD Provider and the Institution in the public health setting is in place, and a copy of such agreement is received and acknowledged by the Division of Oral Health. The MDD Provider will receive a written acknowledgment by DHEC that a copy of the agreement between the MDD Provider and the Institution in the public health setting has been received and reviewed.
  - d. Noncompliance with any provisions of the South Carolina Dental Practice Act or with any section or requirement of the DHEC PHDPP Guidelines will result in immediate termination of this MOA.
- 5. Operations:
  - a. MDD Provider will conduct all necessary background checks on all employees operating at a public health setting site and comply with all the requirements of the Institution in the public health setting.
  - b. MDD Provider will verify and maintain credential files on each licensed provider and execute the appropriate Standing Orders for Dental Hygienists and Dental Assistants. MDD Provider will make credentials available to DHEC for audit and audit review as requested during regular working hours.
  - c. The Supervising Dentist agrees to the duties under the requirements of the South Carolina Dental Practice Act.

- d. MDD Provider agrees to be bound by the PHDPP requirements contained in the DHEC PHDPP Guidelines and any amendments. A copy of the DHEC PHDPP Guidelines is provided with this MOA. Any subsequent amendments will be provided, along with a notice, and require return of the signature page verifying the modification receipt.
  - e. MDD Provider must notify DHEC prior to entering a public health setting site for providing mobile delivery dental services. The MDD Provider will not enter a public health setting site for delivery of preventive dental services without Division of Oral Health acknowledgement of prior written notification. (See DHEC PHDPP Guidelines, Section 3).
  - f. MDD Provider is the owner of patient records. MDD Provider is responsible for compliance with state and federal privacy laws.
6. Public Health Surveillance:
- a. MDD Provider will provide annual (narrative and data) reports at the end of the fiscal year, specific to each of the public health settings that the MDD Provider served during that fiscal year. MDD Provider will submit specific data as required by DHEC utilizing the standardized and DHEC approved data submission tools and process. (See DHEC PHDPP Guidelines, Section 5.)
  - b. MDD Provider will cooperate with statewide oral health needs assessments for each specific population group or public health setting as designated by DHEC. (See DHEC PHDPP Guidelines, Section 4).
  - c. Non-compliance with the reporting requirements, or any other section of the DHEC PHDPP Guidelines, will result in termination of this MOA.

### III TERMS AND CONDITIONS:

#### A. EFFECTIVE DATES.

This MOA will be effective on July 1, 2016 or when all parties have signed, whichever is later, and will terminate on June 30, 2017. This MOA is renewable for four (4) additional one- year periods based on an annual review of the MDD Provider compliance with this MOA and the DHEC PHDPP Guidelines. No services may be provided under this MOA prior to the effective date of this MOA.

#### B. TERMINATION.

Either party may terminate this MOA by providing thirty (30) days written notice of termination to the other party.

1. DHEC funds for this MOA are payable from State and/or federal and/or other appropriations. If funds are not appropriated or otherwise available to DHEC to pay the charges or fund activities under this MOA, it shall terminate without any further obligation by DHEC upon written notice to Contracting Party. Unavailability of funds will be determined in DHEC's sole discretion. DHEC has no duty to reallocate funds from other programs or funds not appropriated specifically for the purposes of this MOA.
2. DHEC may terminate this MOA for cause, default, or negligence on the MDD Provider's part at any time without thirty days advance written notice. At its discretion, DHEC may allow MDD Provider a reasonable time to cure the default before termination only if the deficiencies do not directly impact patient safety or patient care and will be corrected within a reasonable period of time.

#### C. AMENDMENTS.

The MOA may only be amended by written agreement of all parties, which must be executed in the same manner as the MOA.



D. CONFIDENTIALITY.

MDD Provider will comply with all confidentiality obligations under federal and state laws and DHEC policies and requirements including but not limited to the Federal Educational Rights and Privacy Act, 20 U.S.C. §1232g, and the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-92, as amended, and regulations (45 CFR Parts 160 and 164), as applicable. Confidential information means information known or maintained in any form, whether recorded or not, consisting of protected health information, other health information, personal information, personal identifying information, confidential business information, and any other information required by law to be treated as confidential, designated as confidential by DHEC, or known or believed by MDD Provider or MDD Provider's employee or agent to be claimed as confidential or entitled to confidential treatment.

1. MDD Provider will not unless required to perform its responsibilities under this MOA or required by law (as determined by a court or other governmental body with authority):
  - a. access, view, use, or disclose confidential information without written authorization from DHEC;
  - b. discuss confidential information obtained in the course of its relationship with DHEC with any other person or in any location outside of its area of responsibility in DHEC; or
  - c. make any unauthorized copy of confidential information, or remove or transfer this information to any unauthorized location or media.
2. MDD Provider will direct any request it receives for confidential information obtained through performance of services under this MOA including a subpoena, litigation discovery request, court order, or Freedom of Information Act request, to the DHEC Contracts Manager and DHEC Office of General Counsel as soon as possible, and in every case within one business day of receipt. If MDD Provider discloses confidential information pursuant to a properly completed authorization or legal process, order, or requirement, MDD Provider must document the disclosure and make the documentation and authorization available for DHEC inspection and audit.
3. MDD Provider must ensure that its employees, agents, and subcontractors who may have access to DHEC confidential information are aware of and comply with these confidentiality requirements. MDD Provider must ensure that any release of confidential information is limited to the minimum necessary to meet its obligations under this agreement and applicable law. If MDD Provider is a business associate and will or may have access to any Protected Health Information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-92, as amended, and regulations (45 CFR Parts 160 and 164), the MDD Provider will sign and comply with DHEC's Business Associate Agreement (DHEC Form 0854) and protect PHI in compliance with the referenced HIPAA. DHEC may, in its discretion, require MDD Provider and MDD Provider's employees, agents, and subcontractors to sign DHEC Form #321A, the DHEC Contractor Confidentiality Agreement, to protect information contained in a particular DHEC program area.
4. MDD Provider must immediately notify the DHEC Compliance Officer at 803-898-3318 and the DHEC Contracts Manager of any unauthorized use or disclosure of confidential information received under this MOA. MDD Provider will promptly notify DHEC of any suspected or actual breach of security of an individual's personal identifying information under S.C. Code Section 1-11-490 and will assist DHEC in responding to the breach and fulfilling its notification obligations under applicable law, including S.C. Code Section 1-11-490.

5. MDD Provider obligations under this provision and any other agreements concerning confidentiality shall survive termination, cancellation, or expiration of the MOA.

E. **RECORDKEEPING, AUDITS, & INSPECTIONS.**

MDD Provider shall create and maintain adequate records to document all matters covered by this MOA. MDD Provider shall retain all such records for six (6) years after the end of the MOA period, and make records available for inspection and audit at any time DHEC deems necessary. If any litigation, claim, or audit has begun but is not completed at the end of the six-year period, or if audit findings have not been resolved at the end of the six-year period, the records shall be retained until all litigation, claim, or audit findings involving the records have been resolved and final action taken. MDD Provider shall allow DHEC to inspect facilities and locations where activities under this MOA are to be performed on reasonable notice. Unjustified failure to produce any records required under this paragraph may result in immediate termination of this MOA with no further obligation on the part of DHEC.

MDD Provider must dispose of records containing DHEC Confidential information in a secure manner such as shredding or incineration once the required retention period has ended. Confidential information means information known or maintained in any form, whether recorded or not, consisting of protected health information, other health information, personal information, personal identifying information, confidential business information, and any other information required by law to be treated as confidential, designated as confidential by DHEC, or known or believed by MDD Provider or MDD Provider's employee or agent to be claimed as confidential or entitled to confidential treatment.

F. **LIABILITY, NO AGENCY RELATIONSHIP.**

1. Neither party shall be liable for any claims, demands, expenses, liabilities and losses (including reasonable attorney's fees) which may arise out of any acts or failures to act by the other party, its employees or agents, in connection with the performance of services pursuant to this MOA. Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or authority to control or direct the activities of the other or the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party, unless expressly authorized in this MOA.
2. MDD Provider acknowledges and understands that DHEC is not liable for the acts or omissions of MDD Provider, the supervising dentist designated by MDD Provider, or any MDD Provider's hygienist providing services under this agreement. MDD Provider further agrees to hold DHEC harmless in the event of any action or claim arising from the provision of services, or the failure to provide services, under this MOA.

G. **NON-DISCRIMINATION.**

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in relation to activities carried out under this MOA on the grounds of race, religion, color, sex, age, national origin, disability, or any other basis prohibited by law. This includes the provision of language assistance services to individuals of limited English proficiency eligible for services provided by DHEC.

H. **DRUG FREE WORKPLACE.**

By signing this MOA, the MDD Provider certifies that it will comply with all applicable provisions of The Drug-free Workplace Act, S.C. Code of Laws Section 44-107-10 et seq., as amended.

I. **CHOICE OF LAW.**

The MOA, any dispute, claim, or controversy relating to the MOA and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules.

J. DISPUTES.

All disputes, claims, or controversies relating to the MOA shall be resolved in accordance with the South Carolina Procurement Code, S.C. Code, Section 11-35-10 et seq., to the extent applicable, or if inapplicable, claims shall be brought in the South Carolina Court of Common Pleas for Richland County or in the Court for the District of South Carolina, Columbia Division. By signing this MOA, the MDD Provider consents to jurisdiction in South Carolina and to venue pursuant to this MOA. MDD Provider agrees that any act by DHEC regarding the MOA is not a waiver of either sovereign immunity or immunity under the Eleventh Amendment of the United States Constitution, and is not a consent to jurisdiction of any court of agency of any other state.

K. PREVENTING AND REPORTING FRAUD, WASTE AND ABUSE.

DHEC has procedures and policies concerning the prevention and reporting of fraud, waste and abuse (FWA) in agency-funded programs, including but not limited to those funded by federal grants such as Medicaid. No agency employee, agent, or contractor shall direct, participate in, approve, or tolerate any violation of federal or State laws regarding FWA in government programs.

Federal law prohibits any person or company from knowingly submitting false or fraudulent claims or statements to a federally funded program, including false claims for payment or conspiracy to get such a claim approved or paid. The False Claims Act, 31 U.S.C. §3729-3733, and other "whistleblower" statutes include remedies for employees who are retaliated against in their employment for reporting violations of the Act or for reporting fraud, waste, abuse, or violations of law in connection with federal contracts or grants, or danger to public health or safety. Under State law, persons may be criminally prosecuted for false claims made for health care benefits, for Medicaid fraud, for insurance fraud, or for using a computer in a fraud scheme or to obtain money or services by false representations. Additional information regarding the federal and State laws prohibiting false claims and DHEC's policies and procedures regarding false claims may be obtained from the DHEC's Contracts Manager or Bureau of Business Management.

Any employee, agent, or contractor of DHEC who submits a false claim in violation of federal or State laws will be reported to appropriate authorities.

If MDD Provider, MDD Provider's agents or employees have reason to suspect FWA in DHEC programs, this information should be reported in confidence to DHEC. A report may be made by writing to the Office of Internal Audits, DHEC, 2600 Bull Street, Columbia, SC 29201; or by calling the DHEC's Fraud, Waste and Abuse Hotline at 803-896-0650 or toll-free at 1-866-206-5202. MDD Provider is required to inform MDD Provider's employees of the existence of DHEC's policy prohibiting FWA and the procedures for reporting FWA to the agency. MDD Provider must also inform MDD Provider's employees, in writing, of their rights and remedies under 41 U.S.C. §4712 concerning reporting FWA or violations of law in connection with federal contracts or grants, or danger to public health or safety, in the predominant native language of the workforce.

L. INSURANCE.

Each party will maintain professional, malpractice and general liability insurance, and may be required to provide the other party with satisfactory evidence of such coverage. Neither party will provide individual coverage for the other party's employees, with each party being responsible for coverage of its respective employees.

M. LICENSES.

During the term of this MOA, each party shall maintain its respective federal and State licenses, certifications, and accreditations required for the provision of services herein. The MDD Provider will immediately notify DHEC if a board, association, or other licensing authority takes any action to revoke



or suspend the license, certification, or accreditation of MDD Provider or MDD Provider's employees or agents providing or performing services under this MOA.

N. FINANCIAL RESPONSIBILITY.

Each party shall bear and be responsible solely for its own costs and expenses necessary to comply with this MOA.

O. COMPLIANCE WITH LAWS.

MDD Provider shall comply with all applicable laws and regulations in the performance of this MOA.

P. SEVERABILITY.

The invalidity or unenforceability of any provision of this MOA shall not affect the validity or enforceability of any other provision, which shall remain in full force and effect.

Q. ATTACHMENTS/ADDENDA.

Any attachments, addenda or other materials attached to the MOA are specifically incorporated into and made part of this MOA.

R. AUDITS.

DHEC may conduct an audit at any time, as deemed necessary, and if site visits or other information obtained by DHEC raise reasonable concern regarding compliance with conditions specified in this MOA. Any documents requested during an audit must be available for review, inspection and copying by DHEC. Unjustified failure to produce any documents or materials required under this agreement may result in immediate termination of this MOA with no further obligation on the part of DHEC.

AS TO DHEC

BY: Hekingeta Ayers  
Division of Oral Health, SCDHECDATE: 6-20-2016BY: E. A. De Santis  
E. A. De Santis  
Director  
Bureau of Maternal and Child HealthDATE: 7/21/2016BY: Francine Miller  
Francine Miller  
DHEC Contracts Manager  
DATE: 7-25-16

AS TO HEALTH PROMOTION SPECIALISTS

BY: Tammi O. Byrd  
Chief Executive OfficerDATE: 6/3/16BY: Wm Thig  
Supervising DentistDATE: 6/3/16

Contact Person: Tammi O. Byrd, RDH

Title: CEO/ Clinical Director

MAILING ADDRESS:  
125 Laurel Branch Way  
Columbia, SC 29212  
E-Mail: [tbyrd@hps-sc.com](mailto:tbyrd@hps-sc.com)  
Phone: (803) 348-2973  
Fax: (803) 407-7938TAX/EMPLOYER ID # 57-1108338

TYPE OF ENTITY (check one):

- ☐ Corporation  
☒ LLC  
☐ Partnership  
☐ Nonprofit organization  
☐ Government agency or political subdivision  
☐ Other Governmental body (specify)

If a corporation, LLC, or nonprofit organization:  
State of incorporation/organization:SC

Registered agent and address in South Carolina:

Tammi O. Byrd  
125 Laurel Branch Way  
Columbia, SC 29212

SCDLLR or other license #

0927



Catherine E. Heigel, Director

*Promoting and protecting the health of the public and the environment*

Please sign and retain a copy of this document for your records and return the original form with your signed Memorandum of Agreement:

"I have received a copy of the *South Carolina Department of Health and Environmental Control Public Health Dental Prevention Program Guidelines*, dated January 30, 2004, **revised March 30, 2016**. I have read and understand the Guidelines contents. I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines, and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective."

Tammi O. Byrd  
Signature

6-3-16  
Date

Tammi O. Byrd  
Chief Operating Officer

Health Promotion Specialists  
Organization or Company Name

Mace T. Koenig  
Signature

6-3-16  
Date

Mace T. Koenig  
Supervising Dentist

Health Promotion Specialists  
Organization or Company Name

2016-2017 DHEC PHDPP



Catherine E. Heigel, Director

*Promoting and protecting the health of the public and the environment*

## PUBLIC HEALTH SETTING SELECTION ACKNOWLEDGEMENT

Please sign and retain a copy of this document for your records and return the original form with your signed Memorandum of Agreement.

Select public health setting that your organization will serve this upcoming fiscal year. This form must be completed and submitted to DHEC each time a new public health setting is added for delivery of preventive dental services. A new form must also be submitted each fiscal year for the duration of the current effective Memorandum of Agreement.

DHEC currently has established and approved implementation of the Public Health Dental Prevention Program is the following public health setting(s):

**Select all that apply**

- ☐ SOUTH CAROLINA PUBLIC SCHOOL

  
Signature

6-3-16  
Date

Tammi O. Byrd  
Chief Operating Officer/Chief Executive Officer

Health Promotion Specialists  
Organization or Company Name

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • [www.scdhec.gov](http://www.scdhec.gov)

ROA 000123

## MEMORANDUM OF AGREEMENT

Exhibit C

BETWEEN

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

AND

HEALTH PROMOTION SPECIALISTS (HPS)

## I. PURPOSE.

The South Carolina Department of Health and Environmental Control, Bureau of Chronic Disease and Injury Prevention, Division of Oral Health (DHEC), and [Name of Provider] (MDD Provider) enter into this Memorandum of Agreement (MOA) for the purpose of cooperating in DHEC's Public Health Dental Prevention Program (DHEC PHDPP) to provide dental assessment, evidence-based preventive dental interventions, and referrals for urgent dental needs in South Carolina "public health settings" in accordance with the terms set forth below.

## II. SCOPE OF SERVICES.

A. Responsibilities of DHEC. Under the terms of this MOA, DHEC will coordinate the establishment of a public-private partnership with MDD Provider as part of the DHEC PHDPP to deliver evidence-based preventive dental services in South Carolina public health settings to address the needs of priority populations identified by DHEC using standard public health principles.

1. DHEC will develop guidelines for each approved Public Health Setting in which dental providers may provide services while participating in the DHEC PHDPP. These guidelines (DHEC PHDPP Guidelines) are intended to give dental providers clearly stated expectations and standards for participating in the DHEC PHDPP and will define the scope of services to be provided in each specific Public Health Setting. Receipt and acknowledgment by MDD Provider of approved DHEC PHDPP Guidelines are conditions precedent to MDD Provider providing services in a Public Health Setting under this MOA. For purposes of this MOA, a Public Health Setting is defined as a hospital, nursing home, long term care facility, rural or community health clinic, health facility operated by federal, state, county, or local governments, hospice, an educational institution, a bona fide charitable institution, or a mobile delivery program operated in one of these settings, that serves underserved populations. (See S.C. Code Ann. § 40-15-110(E)).
2. DHEC reserves the right to amend the DHEC PHDPP Guidelines. A copy of any finalized amendments will be mailed to MDD Provider.
3. DHEC will receive written policies and procedures submitted by MDD Provider pursuant to Section II.B.1.d below and review them for consistency with the DHEC PHDPP Guidelines.
4. DHEC will issue *Standing Orders for Dental Hygienists* and *Standing Orders for Dental Assistants* (the Standing Orders), which outline specific authorizations and define the scope of services for dental hygienists and dental assistants under this MOA. DHEC will distribute the *Standing Orders* to be reviewed and executed on behalf of MDD Provider and the Supervising Dentist (see Section II.B.4 below). The executed *Standing Orders* will be returned to DHEC. DHEC will maintain a copy of these fully executed *Standing Orders* received from the MDD Provider. These *Standing Orders* must be distributed and adopted by MDD Provider every year. MDD Provider shall not provide services until the then current *Standing Orders* are fully executed and returned to DHEC.
5. DHEC will receive, review, approve as appropriate, and acknowledge written agreements between MDD Provider and Public Health Settings as described in Section II.B.1 below.



6. DHEC will have no responsibility for clinical supervision of clinical services rendered under this MOA by MDD Provider, its supervising dentists, dental hygienists, employees, agents or contractors.

**B. Responsibilities of MDD Provider.** Under the terms of this MOA, MDD Provider will be responsible for delivering preventive dental services, consistent with the S.C. Dental Practice Act and as specified in the applicable DHEC PHDPP Guidelines and the Standing Orders, in Public Health Settings for priority populations.

**1. MOA Management:**

- a. Using DHEC's *Public Health Setting Selection Acknowledgment*, a copy of which is attached as Attachment A, MDD Provider will notify DHEC of the Public Health Settings for which it plans to provide services during each fiscal year (July 1 through June 30) the MOA is effective. MDD Provider must submit a signed *Public Health Setting Selection Acknowledgement* contemporaneously with the execution of this MOA and at each renewal thereafter. An updated *Public Health Setting Selection Acknowledgement* must be submitted each time MDD Provider requests approval of a new Public Health Setting for delivery of services under this MOA.
- b. MDD Provider shall enter into a written agreement with each Public Health Setting in which services are to be provided. MDD Provider shall not provide any services under this MOA until an effective written agreement with the Public Health Setting is executed and a copy of the written agreement is received and acknowledged by DHEC. MDD Provider shall provide a copy of each written agreement to SC DHEC, Division of Oral Health, c/o Alicia Johnston, 2100 Bull Street, Columbia, SC 29201, or by email to johnstal@dhec.sc.gov. All written agreements will include a description of the relationship between MDD Provider and DHEC and shall be consistent with the requirements of the S.C. Dental Practice Act and applicable DHEC PHDPP Guidelines. MDD Provider shall notify DHEC immediately of the termination of any written agreements with Public Health Settings.
- c. MDD Provider will inform DHEC prior to entering into negotiations with any Public Health Setting.
- d. MDD Provider will develop written policies and procedures that govern its provision of services under this MOA in each Public Health Setting in which services are provided. The policies and procedures shall be consistent with the applicable DHEC PHDPP Guidelines and fully comply with *Standing Orders*. MDD Provider shall submit the policies and procedures to DHEC for review and shall not provide any services in the Public Health Setting until the policies and procedures have been approved by DHEC in a confirmation email.

**2. Eligibility for participation in the DHEC PHDPP:**

- a. MDD Provider may only provide services under this MOA in Public Health Settings approved by DHEC serving underserved populations specified by DHEC in the DHEC PHDPP Guidelines, Section 3.
- b. MDD Provider agrees to only provide approved services under this MOA in those Public Health Settings for which DHEC PHDPP Guidelines have been established.

**3. Provision of Care:**

- a. MDD Provider shall not provide services under this MOA to anyone without first completing an individualized dental screening utilizing the DHEC-approved dental screening tool and system, which shall be provided to MDD Provider. MDD Provider shall document the results

of the screening and submit the results to DHEC as a component of the documentation required under Section 5 of the DHEC PHDPP Guidelines.

- b. MDD Provider shall refer everyone seen by the MDD Provider under this MOA to a licensed dentist for needed follow up and continuity of dental care with priority given to those with urgent dental needs.
  - c. For anyone seen by MDD Provider under this MOA who does not already have an established dentist-patient relationship, MDD Provider will provide a list of licensed practicing dentists within the city and/or geographic area where the person resides. MDD Provider will not discriminate against any practicing dentist within the specified area.
  - d. MDD Provider shall have a referral and follow-up protocol in place in accordance with S.C. Code Ann. § 40-15-172 for anyone seen by MDD Provider under this MOA who is identified with urgent dental needs.
  - e. Anyone identified with urgent dental needs must receive treatment for the urgent condition before receiving preventive services from MDD Provider.
  - f. The Supervising Dentist, described more fully in Section II.B.4 below, is responsible at all times for clinical services provided by MDD Provider under this MOA. In addition, a dentist billing for services for treatment provided by a dental hygienist under this MOA is considered the provider of services and is clinically responsible for the care and treatment of the patient pursuant to S.C. Code Ann. § 40-15-102(E). MDD Provider acknowledges that DHEC will not bill for any services provided by MDD Provider under this MOA.
  - g. MDD Provider will comply with all applicable federal, state and local laws, regulations, ordinances and public health recommendations pertaining to infection control, exposure control and hazardous communications, including, but not limited to, Occupational Safety and Health Administration (OSHA), National Institute for Occupational Safety and Health (NIOSH) standards and CDC Infection Control Guidelines.
  - h. MDD Provider certifies that it is solely responsible for ensuring that its supervising dentists, dental hygienists, dental assistants, employees, agents and contractors, and all others providing services under this MOA, are properly licensed and/or certified and perform services in compliance with all applicable federal, state and local laws, regulations and ordinances, including, but not limited to, the provisions of the S.C. Dental Practice Act for operating a mobile dental unit in a public health setting. (See S.C. Code Ann. § 40-15-172). MDD Provider further acknowledges that DHEC shall have no clinical responsibility whatsoever for any services provided under this MOA.
4. Supervision:
- a. As a condition precedent to entering into this MOA, MDD Provider will enter into a written agreement with a dentist (the Supervising Dentist), located and licensed in South Carolina and in good standing, to supervise dental hygienists and assistants performing services for MDD Provider under this MOA and to ensure that all such services are provided in accordance with the DHEC PHDPP Guidelines and the S.C. Dental Practice Act. A copy of the written agreement with the Supervising Dentist(s) will be provided to DHEC before MDD Provider performs services.
  - b. Prior to providing services under this MOA, MDD Provider will provide DHEC with a copy of the fully executed Standing Orders provided in the Program Guidelines. Completion of the forms by the Supervising Dentist acknowledges the scope of services to be provided and acceptance of supervision for the dental hygienists and dental assistants performing these

services for MDD Provider in accordance with the DHEC PHDPP Guidelines and S.C. Dental Practice Act.

- c. In the event the Supervising Dentist agreement is terminated for any reason, MDD Provider must immediately notify DHEC and suspend all services provided under this MOA until a new Supervising Dentist agreement and replacement executed, updated versions of the *Standing Orders* are fully executed by a Supervising Dentist and MDD Provider and a copy of such documents are provided to DHEC.
5. Operations:
- a. MDD Provider will conduct all background checks required by the Public Health Settings in which services are provided and comply with any and all other requirements of the Public Health Settings.
  - b. MDD Provider will verify and maintain credential files on each licensee providing services for the MDD Provider under this MOA and execute the appropriate *Standing Orders for Dental Hygienists and Dental Assistants*. MDD Provider will make credentials available to DHEC for audit and audit review as requested during regular working hours.
  - c. MDD Provider agrees to be bound by the DHEC PHDPP Guidelines and any amendments. Prior to providing services under this MOA, MDD Provider shall acknowledge receipt of the applicable DHEC PHDPP Guidelines. Any amendments will be provided by DHEC, along with a notice, to the MDD Provider, and will require return of a signed acknowledgement verifying receipt of the amendments.
  - d. The MDD Provider will not begin providing services in a Public Health Setting until at least one (1) business day after it has received DHEC's acknowledgement of delivery of the Site Entry form. . (See DHEC PHDPP Guidelines, Section 3).
  - e. All patients receiving services under this MOA shall be considered patients of MDD Provider, and MDD Provider is the owner of patient records. MDD Provider is responsible for knowledge of and compliance with all state and federal privacy laws governing patient records, protected health information and personally identifiable information.
6. Public Health Surveillance:
- a. MDD Provider will provide annual (narrative and data) reports at the end of the fiscal year specific to each of the Public Health Settings that the MDD Provider served during that fiscal year. MDD Provider will submit specific data as required by DHEC utilizing the standardized and DHEC-approved data submission tools and processes. (See DHEC PHDPP Guidelines, Section 5.)
  - b. MDD Provider will coordinate with statewide oral health needs assessments as designated by DHEC. (See DHEC PHDPP Guidelines, Section 4).
  - c. Non-compliance with the reporting requirements or any other section of the DHEC PHDPP Guidelines will result in termination of the MDD Provider's rights under this MOA as specified in Section III.B below.

### III. TERMS AND CONDITIONS:

#### A. EFFECTIVE DATES.

This MOA will be effective on July 1, 2018 or when all parties have signed, whichever is later, and will terminate on June 30, 2019 unless otherwise renewed. This MOA is renewable for four (4) additional one-year periods based on an annual review of the MDD Provider and its compliance with this MOA



and the DHEC PHDPP Guidelines. To be effective, a renewal must be acknowledged in writing by both parties. No services may be provided under this MOA prior to the effective date of this MOA.

**B. TERMINATION.**

Either party may terminate this MOA for any reason or for no reason by providing thirty (30) days written notice of termination to the other party.

1. If funds are not appropriated or otherwise made available to DHEC to pay for the expenses attributable to DHEC's activities under this MOA, the MOA shall terminate immediately without any further obligation by DHEC. Unavailability of funds will be determined in DHEC's sole discretion. DHEC has no duty to reallocate funds from other programs or from funds not appropriated specifically for the purposes of this MOA.
2. DHEC may terminate this MOA for cause, default, or negligence on the MDD Provider's part at any time without thirty (30) days advance written notice. At its discretion, DHEC may allow MDD Provider a reasonable time to cure the default before termination and/or require MDD Provider to suspend services provided under this MOA until the default is cured, but only if the deficiencies do not directly impact patient safety or patient care and will be corrected within a reasonable period of time.
3. Noncompliance with any provisions of the South Carolina Dental Practice Act, any other applicable laws or with any section or requirement of the DHEC PHDPP Guidelines will result in immediate termination of this MOA.

**C. AMENDMENTS.**

The MOA may only be amended by written agreement of all parties to the MOA, which must be executed in the same manner as the MOA.

**D. CONFIDENTIALITY.**

MDD Provider will comply with all confidentiality obligations under federal and state laws and DHEC policies and requirements including, but not limited to, the Federal Educational Rights and Privacy Act, 20 U.S.C. §1232g, and the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-92, as amended, and regulations (45 CFR Parts 160 and 164), as applicable. Confidential information means information known or maintained in any form, whether recorded or not, consisting of protected health information, other health information, personal information, personal identifying information, confidential business information, and any other information required by law to be treated as confidential, designated as confidential by DHEC, or known or believed by MDD Provider or MDD Provider's employees or agents to be claimed as confidential or entitled to confidential treatment.

1. MDD Provider will not, unless necessary to perform its responsibilities under this MOA or required by law (as determined by a court of competent jurisdiction or other governmental body with authority):
  - a. access, view, use, or disclose confidential information without written authorization from DHEC;
  - b. discuss confidential information obtained in the course of its relationship with DHEC with any other person or in any location outside of its area of responsibility in DHEC; or
  - c. make any unauthorized copy of confidential information or remove or transfer this information to any unauthorized location or media.
2. MDD Provider will direct any request it receives for confidential information obtained through performance of services under this MOA, including through a subpoena, litigation discovery request, court order, or Freedom of Information Act request, to the DHEC Contracts Manager and DHEC Office of General Counsel as soon as possible, and in every case within one business day of receipt.

If MDD Provider discloses confidential information pursuant to a properly completed authorization or legal process, order, or requirement, MDD Provider must document the disclosure and make the documentation and authorization available for DHEC inspection and audit.

3. MDD Provider must ensure that its supervising dentists, dental hygienists, dental assistants, employees, agents, and contractors who may have access to confidential information are aware of and comply with these confidentiality requirements. MDD Provider must ensure that any release of confidential information is limited to the minimum necessary to meet its obligations under this MOA and applicable law.
4. MDD Provider must immediately notify the DHEC Compliance Officer at 803-898-3318 and the DHEC Contracts Manager of any unauthorized use or disclosure of confidential information received under this MOA. MDD Provider will promptly notify DHEC of any suspected or actual breach of security of an individual's personal identifying information under S.C. Code § 1-11-490.
5. MDD Provider obligations under this provision and any other agreements concerning confidentiality shall survive termination, cancellation, or expiration of the MOA.

**E. RECORDKEEPING, AUDITS, & INSPECTIONS.**

MDD Provider shall create and maintain adequate records to document all matters covered by this MOA. MDD Provider shall retain all such records for six (6) years after the termination of the MOA and make records available for inspection and audit at any time DHEC deems necessary. If any litigation, claim, or audit has begun but is not completed at the end of the six-year period, or if audit findings have not been resolved at the end of the six-year period, the records shall be retained until all litigation, claim, or audit findings involving the records have been resolved and final action taken. MDD Provider shall allow DHEC to audit MDD Provider and to inspect facilities and locations where activities under this MOA are to be performed on reasonable notice. Unjustified failure to produce any records required under this paragraph may result in immediate termination of this MOA with no further obligation on the part of DHEC.

MDD Provider must dispose of records containing confidential information in a secure manner such as shredding or incineration once the required retention period has ended.

**F. LIABILITY, NO AGENCY RELATIONSHIP.**

1. Neither party shall be liable for any claims, demands, expenses, liabilities and losses (including reasonable attorney's fees) which may arise out of any acts or failures to act by the other party, its employees or agents, in connection with the performance of services pursuant to this MOA. Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or authority to control or direct the activities of the other or the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party, unless expressly authorized in this MOA.
2. MDD Provider acknowledges and understands that DHEC is not liable for the acts or omissions of MDD Provider, the Supervising Dentist designated by MDD Provider, or any of MDD Provider's hygienists, dental assistants, employees, agents or contractors providing services under this MOA. MDD Provider further agrees to indemnify and hold harmless DHEC, its officers, employees, agents, and representatives from and against any and all claims, loss, costs, penalties, fines, damages, expenses, including attorney's fees or liabilities arising out of, resulting from, or in connection with the services provided under this MOA.

**G. NON-DISCRIMINATION.**

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in relation to activities carried out under this MOA on the grounds of race, religion, color, sex, age, national origin, disability, or any other basis prohibited by law. This includes the provision of

language assistance services to individuals of limited English proficiency eligible for services provided by DHEC.

**H. DRUG FREE WORKPLACE.**

By signing this MOA, the MDD Provider certifies that it will comply with all applicable provisions of The Drug-free Workplace Act, S.C. Code Ann. § 44-107-10 et seq., as amended.

**I. CHOICE OF LAW.**

The MOA, any dispute, claim, or controversy relating to the MOA, and all the rights and obligations of the parties to the MOA shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules.

**J. DISPUTES.**

All disputes, claims, or controversies relating to the MOA shall be brought in the South Carolina Court of Common Pleas for Richland County or in the United States District Court for the District of South Carolina, Columbia Division. By signing this MOA, the MDD Provider consents to jurisdiction in South Carolina and to venue pursuant to this MOA. MDD Provider agrees that any act by DHEC regarding the MOA is not a waiver of either sovereign immunity or immunity under the Eleventh Amendment of the United States Constitution and is not a consent to jurisdiction of any court of agency of any other state.

**K. PREVENTING AND REPORTING FRAUD, WASTE AND ABUSE.**

DHEC has procedures and policies concerning the prevention and reporting of fraud, waste and abuse (FWA) in agency-funded programs, including but not limited to those funded by federal grants such as Medicaid. No DHEC employee, agent, or contractor shall direct, participate in, approve, or tolerate any violation of federal or State laws regarding FWA in government programs.

Federal law prohibits any person or company from knowingly submitting false or fraudulent claims or statements to a federally funded program, including false claims for payment or conspiracy to get such a claim approved or paid. The False Claims Act, 31 U.S.C. § 3729-3733, and other "whistleblower" statutes include remedies for employees who are retaliated against in their employment for reporting violations of the Act or for reporting fraud, waste, abuse, or violations of law in connection with federal contracts or grants, or danger to public health or safety. Under state law, persons may be criminally prosecuted for false claims made for health care benefits, for Medicaid fraud, for insurance fraud, or for using a computer in a fraud scheme or to obtain money or services by false representations. Additional information regarding the federal and state laws prohibiting false claims and DHEC's policies and procedures regarding false claims may be obtained from DHEC's Contracts Manager or Bureau of Business Management.

Any employee, agent, or contractor of DHEC who submits a false claim in violation of federal or state laws will be reported to appropriate authorities.

If MDD Provider, MDD Provider's agents or employees have reason to suspect FWA in DHEC programs, this information should be reported in confidence to DHEC. A report may be made by writing to the Office of Internal Audits, DHEC, 2600 Bull Street, Columbia, SC 29201; or by calling DHEC's Fraud, Waste and Abuse Hotline at 803-896-0650 or toll-free at 1-866-206-5202. MDD Provider is required to inform MDD Provider's employees of the existence of DHEC's policy prohibiting FWA and the procedures for reporting FWA to the agency. MDD Provider must also inform MDD Provider's employees, in writing, of their rights and remedies under 41 U.S.C. § 4712 concerning reporting FWA or violations of law in connection with federal contracts or grants, or danger to public health or safety, in the predominant native language of the workforce.

**L. INSURANCE.**

MDD Provider will maintain professional, malpractice and general liability insurance for its supervising dentists, dental hygienists, dental assistants, employees, agents and contractors providing services under this MOA and may be required to provide the other party with satisfactory evidence of such coverage.

**M. LICENSES.**

During the term of this MOA, MDD Provider shall maintain all necessary federal and state licenses, certifications, and accreditations required for the provision of services herein. The MDD Provider will immediately notify DHEC if a board, association, or other licensing authority takes any action to revoke or suspend the license, certification, or accreditation of MDD Provider or MDD Provider's supervising dentists, dental hygienists, dental assistants, employees, agents or contractors providing or performing services under this MOA.

**N. FINANCIAL RESPONSIBILITY.**

Each party shall bear and be responsible solely for its own costs and expenses necessary to comply with this MOA.

**O. COMPLIANCE WITH LAWS.**

MDD Provider shall comply with all applicable laws in the performance of this MOA.

**P. SEVERABILITY.**

The invalidity or unenforceability of any provision of this MOA shall not affect the validity or enforceability of any other provision, which shall remain in full force and effect.

**Q. ATTACHMENTS/ADDENDA.**

Any attachments, addenda or other materials attached to the MOA are specifically incorporated into and made part of this MOA.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

## SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL [Name of Provider]

BY: \_\_\_\_\_

Division of Oral Health, SCDHEC

DATE: \_\_\_\_\_

BY: \_\_\_\_\_

Virginie Daguise

Director

Bureau of Chronic Disease and Injury Prevention

DATE: \_\_\_\_\_

\_\_\_\_\_  
 Francine Miller  
 DHEC Contracts Manager

DATE: \_\_\_\_\_

BY: \_\_\_\_\_

Chief Executive Officer

DATE: \_\_\_\_\_

BY: \_\_\_\_\_

Supervising Dentist

DATE: \_\_\_\_\_

Contact Person:

Title:

MAILING ADDRESS:

E-Mail:

Phone: Fax:

TAX/EMPLOYER ID #

TYPE OF ENTITY (check one):

- ☐ Corporation  
☐ LLC  
☐ Partnership  
☐ Nonprofit organization  
☐ Government agency or political subdivision  
☐ Other Governmental body (specify)

If a corporation, LLC, or nonprofit organization:  
 State of incorporation/organization:

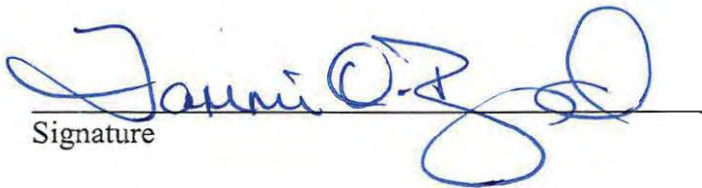
Registered agent and address in South Carolina:

SCDLLR or other license #



Please sign and retain a copy of this document for your records and return the original form with your signed Memorandum of Agreement:

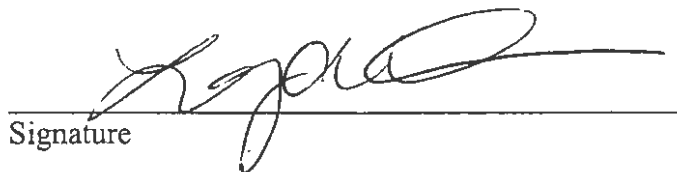
"I have received a copy of the *South Carolina Department of Health and Environmental Control Public Health Dental Prevention Program Guidelines*, dated January 30, 2004, **revised September 2018**. I have read and understand the Guidelines contents. I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective."

  
Signature

4-18-19  
Date

Tammi O. Byrd  
Chief Operating Officer

HPS  
Organization or Company Name

  
Signature

4-18-19  
Date

Lindsay Warren  
Supervising Dentist

HPS  
Organization or Company Name





Exhibit D

November 22, 2019

**VIA EMAIL AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Ms. Tammi O. Byrd  
Chief Executive Officer  
Health Promotion Specialists, LLC  
125 Laurel Branch Way  
Columbia, SC 29212

***RE: Public Health Dental Prevention Program***

Dear Ms. Byrd:

We have been notified by school districts that Health Promotion Specialists, LLC (HPS) contends it has a signed, executed contract with DHEC qualifying it to participate in DHEC's Public Health Dental Prevention Program. If that is HPS's contention, it is incorrect.

DHEC distributed a Memorandum of Agreement covering the 2019/2020 school year to all providers at an August 1, 2019, provider meeting, which HPS attended. The 2019/2020 Memorandum of Agreement contained recent changes from previous versions. In the August meeting, as well as in a subsequent letter to HPS and all other providers dated August 28, 2019, I clearly informed those present that until the 2019/2020 Memorandum of Agreement was signed and executed by both the provider and DHEC, no further services provided as part of DHEC's Public Health Dental Prevention Program were authorized. As of the date of this letter, HPS has not provided DHEC a signed version of that 2019/2020 MOA.

Rather, I understand HPS claims a Memorandum of Agreement signed by you on March 13, 2019 (the "March MOA"), is currently in effect and it is under that March MOA that HPS is providing dental services without general supervision in public schools and representing that HPS is an authorized participant in DHEC's Public Health Dental Prevention Program.

Although you signed the March MOA on behalf of HPS and submitted it to DHEC, DHEC never signed the HPS March MOA. That fact was made clear to you on August 2, 2019, in an email exchange with me. In the emails you asked about the 2019/2020

S.C. Department of Health and Environmental Control

2600 Bull Street, Columbia, SC 29201

(803) 898-3432

www.scdhec.gov

ROA 000134

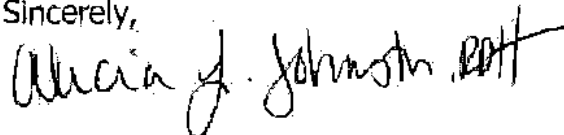
ELECTRONICALLY FILED - 2019 Nov 22 4:34 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4004567

Memorandum of Agreement and the status of the March MOA. In my response, I informed you that "[t]he previous [March] MOA was never executed by the agency. This [2019/2020 Memorandum of Agreement] is a new MOA that needs to be executed by providers and then by us. This new MOA replaces all previous versions."

If you contend DHEC signed the March MOA, I ask that you mail or email me a copy as soon as possible.

The March MOA was never fully executed. There is no current, fully executed and valid written agreement between HPS and DHEC allowing HPS to participate in DHEC's Public Health Dental Prevention Program. Nevertheless, **without waiving any rights to contest the validity of the March MOA, and reserving all rights to contest any assertion of validity of the March MOA by HPS or anyone else**, this letter serves as **notice of termination** of the March MOA, termination to be **effective December 31, 2019**, pursuant to Section III.B, which provides that "[e]ither party may terminate this MOA for any reason or for no reason by providing thirty (30) days written notice of termination to the other party."

Sincerely,



Alicia L. Johnston, RDH  
Prevention Coordinator  
Public Health Dental Prevention Program  
(803) 898-7471

cc: Desa Ballard, Esq. (via email only)  
William D. Britt, Jr., Esq. (via email only)



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and  
Human Services, and South Carolina  
Department of Health and Environmental  
Control,

Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-40-04567

**ANSWER TO AMENDED COMPLAINT  
OF DEFENDANT SOUTH CAROLINA  
DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL CONTROL**

Defendant South Carolina Department of Health and Environmental Control (DHEC),  
hereby answers the Amended Complaint herein as follows:

**FOR A FIRST DEFENSE**  
**(General Answer)**

1. Each and every allegation of the Amended Complaint not specifically admitted herein is denied.

2. The first and second paragraphs of the Introduction to the Amended Complaint are not directed at DHEC and do not require a response. To the extent any allegations are directed at DHEC and a response is required, DHEC denies the same.

3. DHEC denies the allegations contained in the third paragraph of the Introduction to the Amended Complaint.

4. In responding to the allegations contained in the fourth paragraph of the Introduction to the Amended Complaint, DHEC craves reference to FTC Order No. 9311 dated June 20, 2007, avers that the Order speaks for itself, and denies any allegations contained in the

fourth paragraph of the Introduction to the Amended Complaint that are contrary thereto or inconsistent therewith.

5. DHEC denies so much of the allegations contained in the fifth paragraph of the Introduction to the Amended Complaint as allege that DHEC has taken direct action since 2017 to inhibit the practice of dental hygiene in the public health setting. DHEC is without sufficient information or knowledge to form a belief as to the remaining allegations contained in the fifth paragraph of the Introduction to the Amended Complaint and, therefore, denies the same.

6. DHEC denies the allegations contained in the sixth paragraph of the Introduction to the Amended Complaint.

7. DHEC is without sufficient information or knowledge to form a belief as to so much of the allegations contained in paragraph 1 of the Amended Complaint as allege that Plaintiff is a corporate entity organized and existing under the laws of the State of South Carolina and provides preventative dental care and education to tens of thousands of school-aged children in South Carolina and, therefore, denies the same. DHEC denies so much of the allegations contained in paragraph 1 of the Amended Complaint as allege that Plaintiff has a current agreement with DHEC. DHEC admits the remaining allegations contained in paragraph 1 of the Amended Complaint.

8. DHEC admits the allegations contained in paragraph 2 of the Amended Complaint that are directed to DHEC.

9. In responding to the allegations contained in paragraph 3 of the Amended Complaint, DHEC craves reference to the two statutes cited by Plaintiff, S.C. Code Ann. § 44-1-110 and S.C. Code Ann. § 40-15-110(E), incorrectly cited as 44-15-110(E), avers that the statutes speak for themselves, and denies any allegations contained in paragraph 3 of the Amended Complaint that are contrary thereto or inconsistent therewith.

10. In responding to the allegations contained in paragraph 4 of the Amended Complaint, DHEC craves reference to the statute cited by Plaintiff, S.C. Code Ann. § 44-8-10 as well as the entirety of Chapter 8, Title 44, avers that the statutes speak for themselves and denies any allegations contained in paragraph 4 of the Amended Complaint that are contrary thereto or inconsistent therewith.

11. DHEC denies so much of the allegations contained in paragraph 5 of the Amended Complaint as allege that Plaintiff has a current agreement with DHEC through which it provides dental care and education to students in public schools. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the Amended Complaint and, therefore, denies the same.

12. DHEC avers that paragraphs 6, 7 and 8 of the Amended Complaint are not directed to it and that no response is required. In the event a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 6, 7 and 8 of the Amended Complaint and, therefore, denies the same.

13. DHEC admits so much of the allegations contained in paragraph 9 of the Amended Complaint as allege that Plaintiff is seeking an order for the relief requested. DHEC denies that Plaintiff is entitled to the relief requested and denies any allegations contained in paragraph 9 of the Amended Complaint as allege that DHEC's Public Health Dental Prevention Program (PHDPP) is inconsistent with or contrary to the standard of care.

14. DHEC denies the allegations contained in paragraph 10 of the Amended Complaint.

15. DHEC avers that paragraphs 11, 12 and 13 of the Amended Complaint are not directed to it and do not require a response. In the event a response is required, DHEC denies the same.

16. DHEC denies the allegations contained in paragraphs 14 and 15 of the Amended Complaint.

17. DHEC admits so much of the allegations contained in paragraph 16 of the Amended Complaint as allege that DHEC hired Raymond Lala, a dentist currently licensed only in Louisiana. DHEC denies the remaining allegations contained in paragraph 16 of the Amended Complaint. Further, DHEC avers that Dr. Lala is not the S.C. State Dental Director as alleged by Plaintiff, but is the Director of DHEC's Division of Oral Health.

18. In responding to the allegations contained in paragraph 17 of the Amended Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(A)(10), incorrectly identified as Section 40-15-110(10), avers that the statute speaks for itself, and denies any allegations contained in paragraph 17 that are contrary thereto or inconsistent therewith

19. In responding to the allegations contained in paragraph 18 of the Amended Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-80(B), avers that the statute speaks for itself, and denies any allegations contained in paragraph 18 that are contrary thereto or inconsistent therewith.

20. In responding to the allegations contained in paragraph 19 of the Amended Complaint, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(H), incorrectly cited as Section 44-15-80(H), avers that the statute speaks for itself, and denies any allegations contained in paragraph 19 that are contrary thereto or inconsistent therewith.

21. DHEC is without sufficient information or knowledge to form a belief as to the truth of so much of the allegations contained in paragraph 20 of the Amended Complaint as allege that Plaintiff serves as an advocate for its patients and, therefore, denies the same. DHEC admits so much of the allegations contained in paragraph 20 as allege that many of the patients served by

Plaintiff come from low-income areas of the state. DHEC denies the remaining allegations contained in paragraph 20 of the Amended Complaint.

22. DHEC admits the allegations contained in paragraph 21 of the Amended Complaint.

23. DHEC avers that paragraph 22 of the Amended Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge to form a belief as to SCDHHS's obligations and actions and, therefore, denies the same. For the remaining allegations contained in paragraph 22, DHEC craves reference to the statute cited, S.C. Code Ann. § 40-15-110(E), avers that the statute speaks for itself, and denies any allegations contained in paragraph 22 that are contrary to or inconsistent therewith.

24. DHEC avers that paragraph 23 of the Amended Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 23 and, therefore, denies the same.

25. In responding to the allegations contained in paragraphs 24 and 25 of the Amended Complaint, DHEC craves reference to the statutes cited, S.C. Code Ann. §§ 44-6-40(5) & 44-6-70, avers that they speak for themselves, and denies any allegations contained in paragraphs 24 and 25 that are contrary thereto or inconsistent therewith.

26. DHEC avers that paragraph 26 of the Amended Complaint is not directed to it and does not require a response. If a response is required, DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations and, therefore, denies the same.

27. DHEC admits so much of the allegations contained in paragraph 27 of the Amended Complaint as allege that providers enrolled in DHEC's PHDPP further the goals of DHEC's

PHDPP by providing services state-wide for public school students whose administrations elect to participate in the PHDPP for the benefit of its public school students. DHEC denies so much of the allegations contained in paragraph 27 as allege that Plaintiff is an approved provider in PHDPP. DHEC avers that Plaintiff has refused to sign the agreement necessary to become an approved provider in PHDPP.

28. DHEC denies so much of the allegations contained in paragraph 28 of the Amended Complaint as allege that Plaintiff is among the vendors that carry out the implementation of the DHEC PHDPP. DHEC avers that Plaintiff has refused to sign the agreement necessary to become an approved provider in the PHDPP. DHEC admits the remaining allegations contained in paragraph 28 of the Amended Complaint.

29. In responding to the allegations contained in paragraph 29 of the Amended Complaint, DHEC avers that its Division of Oral Health monitors compliance with its Memorandum of Agreement entered into between DHEC and providers for participation in the PHDPP, which allows approved providers to provide primary preventive care that is reversible in public health settings. DHEC further avers that Plaintiff is not an approved provider in its PHDPP program as Plaintiff has refused to sign the Memorandum of Agreement. DHEC denies any allegations contained in paragraph 29 of the Amended Complaint that are contrary to or inconsistent with these averments.

30. DHEC denies the allegations contained in paragraph 30 of the Amended Complaint.

31. DHEC denies the allegations contained in paragraph 31 of the Amended Complaint.

32. In responding to the allegations contained in paragraph 32 of the Amended Complaint, DHEC craves reference to the statutes cited, S.C. Code Ann. §§ 1-23-110 & -111,

averts that the statutes speak for themselves, and denies any allegations contained in paragraph 32, that are contrary thereto or inconsistent therewith.

33. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 33 of the Amended Complaint and, therefore, denies the same.

34. In responding to the allegations contained in paragraph 34 of the Amended Complaint, DHEC craves reference to the statute cited, 42 U.S.C. Section 1396a(5), avers that the statute speaks for itself, and denies any allegations contained in paragraph 34 that are contrary thereto or inconsistent therewith. DHEC admits so much of the allegations contained in paragraph 34 as allege that SCDHHS is the state agency responsible for administering and supervising the state's Medicaid program. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 34 and, therefore, denies the same.

35. In responding to the allegations contained in paragraphs 35 and 36 of the Amended Complaint, DHEC craves reference to the Dental Services Provider Manual cited in footnote 7 to the Amended Complaint, avers that the manual speaks for itself, and denies any allegations contained in paragraphs 35 and 36 that are contrary thereto or inconsistent therewith.

36. In responding to the allegations contained in paragraph 37 of the Amended Complaint, DHEC craves reference to the minutes from the meeting of the South Carolina Board of Dentistry of January 19, 2018, avers that the minutes speak for themselves, and denies any allegations contained in paragraph 37 that are contrary thereto or inconsistent therewith.

37. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 38 of the Amended Complaint and, therefore, denies the same.

38. DHEC is without sufficient information or knowledge to form a belief as to the truth of so much of the allegations contained in paragraph 39 of the Amended Complaint as allege that ART has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014 and, therefore, denies the same. DHEC admits the remaining allegations contained in paragraph 39 of the Amended Complaint.

39. DHEC denies so much of the allegations contained in paragraph 40 of the Amended Complaint as allege that Plaintiff has a current agreement with DHEC. DHEC admits so much of the allegations contained in paragraph 40 as allege that Plaintiff began providing ART in school settings in August, 2018. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 40 and, therefore, denies the same.

40. DHEC admits so much of the allegations contained in paragraph 41 of the Amended Complaint as allege that licensed dental hygienists with Plaintiff began providing ART as part of its preventative dental care in school settings. DHEC is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 41 and, therefore, denies the same.

41. DHEC denies the allegations contained in paragraph 42 of the Amended Complaint.

42. In responding to the allegations contained in paragraph 43 of the Amended Complaint, DHEC craves reference to the Medicaid Bulletin attached to the Amended Complaint



as Exhibit 1, avers that the Bulletin speaks for itself, and denies any allegations contained in paragraph 43 that is contrary thereto or inconsistent therewith.

43. DHEC avers that paragraphs 44, 45, 46, 47, 48, 49 and 50 of the Amended Complaint are not directed to it and that no response is required. To the extent a response is required, DHEC denies the same.

44. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 51 of the Amended Complaint and, therefore, denies the same.

45. DHEC denies the allegations contained in paragraphs 52, 53 and 54 of the Amended Complaint.

46. The answers to the allegations incorporated into paragraph 55 of the Amended Complaint are realleged as if set forth herein verbatim.

47. DHEC admits so much of the allegations contained in paragraph 56 of the Amended Complaint as allege that DHEC is a state agency created by statute that operates as part of the executive branch of state government. For the remaining allegations contained in paragraph 56, DHEC craves reference to the statute cited, S.C. Code Ann. § 44-8-10, avers that the statute speaks for itself, and denies any allegations contained in paragraph 56 that are contrary thereto or inconsistent therewith.

48. DHEC is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 57 of the Amended Complaint and, therefore, denies the same. DHEC avers that HPS does not have a current MOA with DHEC for the school year 2019-2020.

49. In responding to the allegations contained in paragraphs 58 and 59 of the Amended Complaint, DHEC craves reference to the document attached to the Amended Complaint as Exhibit B, avers that the document speaks for itself, and denies any allegations contained in paragraphs 58 and 59 that are contrary thereto or inconsistent therewith.

50. DHEC denies the allegations contained in paragraph 60 of the Amended Complaint.

51. In responding to the allegations contained in paragraph 61 of the Amended Complaint, DHEC avers that in or about March 2019, DHEC forwarded a revised MOA to HPS and all other providers, with effective dates of July 1, 2018 through June 30, 2019, and that HPS signed and returned the MOA to DHEC twice – once in March 2019 and again in April 2019. DHEC denies any allegations contained in paragraph 61 that are contrary to or inconsistent with these averments and specifically denies that DHEC and HPS continued to operate under the terms of the 2017 MOA without discussion of or amendment to those terms until April 2019.

52. DHEC denies the allegations contained in paragraph 62 of the Amended Complaint.

53. DHEC admits so much of the allegations contained in paragraph 63 of the Amended Complaint as allege that the MOA signed in both March and April 2019 by HPS was never signed by DHEC. DHEC denies the remaining allegations contained in paragraph 63 of the Amended Complaint.

54. DHEC denies the allegations contained in paragraphs 64 and 65 of the Amended Complaint.

55. In responding to the allegations contained in paragraph 66 of the Amended Complaint, DHEC avers that the MOA signed by HPS in both March and April 2019 had a termination date of June 30, 2019 with the option of renewing for up to four additional one-year periods subject to an annual review, that no annual review to renew that MOA was ever conducted,

but rather DHEC informed all providers in the DHEC PHDPP in a provider meeting in August 2019 that the MOA had been revised and that a new MOA must be executed by all providers in order to perform services in public schools under the DHEC PHDPP for the school year 2019-2020. DHEC further avers that all providers other than HPS signed the new MOA. DHEC denies any allegations contained in paragraph 66 that are contrary to or inconsistent with these averments.

56. DHEC denies the allegations contained in paragraphs 67, 68, 69, and 70 of the Amended Complaint.

57. In responding to the allegations contained in paragraph 71 of the Amended Complaint, DHEC craves reference to the letter attached to the Amended Complaint at Exhibit D, avers that the letter speaks for itself and denies any allegations contained in paragraph 71 that are contrary thereto or inconsistent therewith. DHEC specifically denies so much of the allegations contained in paragraph 71 as allege that the “Revised MOA” contains unlawful terms.

58. DHEC denies the allegations contained in paragraphs 72 and 73 of the Amended Complaint.

59. In responding to the allegations contained in paragraph 74 of the Amended Complaint, DHEC craves reference to the “2017 MOA” and the “2019 MOA,” avers that these documents speak for themselves, and denies any allegations contained in paragraph 74 that are contrary thereto or inconsistent therewith. DHEC denies so much of the allegations contained in paragraph 74 as allege that Exhibit D to the Amended Complaint is the first and only action taken by DHEC to terminate and/or not renew prior MOAs or that allege Exhibit D should be rejected as against public policy.

60. DHEC denies the allegations contained in paragraphs 75, 76, 77, and 78 of the Amended Complaint.

61. DHEC avers that footnotes 1-10 are not directed to it, do not fall within the requirements of Rule 8 of the South Carolina Rules of Civil Procedure and, therefore, do not require a response.

**FOR A SECOND DEFENSE**  
**(Failure to State a Cause of Action)**

62. The Amended Complaint fails to state facts sufficient to constitute a cause of action and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**  
**(Standing)**

63. The Amended Complaint should be dismissed because Plaintiff lacks standing.

**FOR A FOURTH DEFENSE**  
**(Justiciable Controversy)**

64. The Amended Complaint should be dismissed because no justiciable controversy exists.

**FOR A FIFTH DEFENSE**  
**(Ripeness)**

65. The Amended Complaint should be dismissed because the matter is not ripe for judicial review.

**FOR A SIXTH DEFENSE**  
**(Equity)**

66. Plaintiff's claims are barred, in whole or in part, by one or more of the doctrines of laches, estoppel, unclean hands, or waiver.

**FOR A SEVENTH DEFENSE**  
**(Substantial Justification)**

67. DHEC alleges that it and its agents and employees acted reasonably, in good faith, and with substantial justification at all times material herein, based on all relevant facts and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to attorney's fees.

**FOR AN EIGHTH DEFENSE**  
**(Reservation and non-waiver)**

68. DHEC reserves any additional and affirmative defenses as may be revealed or become available to it during the course of its investigation and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

**WHEREFORE**, having duly answered the Amended Complaint, Defendant South Carolina Department of Health and Environmental Control requests that the case be dismissed, with prejudice, and that it be awarded its costs and attorneys' fees in defending this action, plus such further relief as the Court deems just and proper

s/ William D. Britt, Jr.

---

William D. Britt, Jr., S.C. Bar # 16681  
Virginia S. Riley, S.C. Bar # 100435  
South Carolina Department of Health and  
Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
Phone: (803) 898-3350; Fax: (803) 898-3367  
brittwd@dhec.sc.gov  
rileyvs@dhec.sc.gov

ATTORNEYS FOR DEFENDANT SOUTH  
CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL

December 13, 2019  
Columbia, South Carolina

|                                         |   |                                      |
|-----------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS         |
|                                         | ) | FIFTH JUDICIAL CIRCUIT               |
| COUNTY OF RICHLAND                      | ) |                                      |
|                                         | ) |                                      |
|                                         | ) | Case No. 2019-CP-40-4567             |
| Health Promotion Specialists, LLC,      | ) |                                      |
|                                         | ) |                                      |
| Plaintiff,                              | ) | <b>STIPULATION OF DISMISSAL WITH</b> |
| vs.                                     | ) | <b>PREJUDICE</b>                     |
|                                         | ) |                                      |
| South Carolina Department of Health     | ) |                                      |
| and Human Services, and                 | ) |                                      |
| South Carolina Department of Health and | ) |                                      |
| Environmental Control,                  | ) |                                      |
|                                         | ) |                                      |
| Defendants.                             | ) |                                      |

The parties hereby agree to dismiss the Defendant South Carolina Department of Health and Human Services from this case with prejudice.

This action remains pending against Defendant South Carolina Department of Health and Environmental Control.

This action remains stayed pursuant to the trial court's order dated February 1, 2021.

S/ Desa Ballard  
Desa Ballard  
Attorney for Plaintiff

S/ Al Nickles  
W. Allen Nickles III  
Attorney for Defendant  
South Carolina Department of Health and  
Environmental Control

March 17, 2021

|                                         |   |                              |
|-----------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS |
|                                         | ) | FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND                      | ) |                              |
|                                         | ) |                              |
|                                         | ) | Case No. 2019-CP-40-04567    |
| Health Promotion Specialists, LLC,      | ) |                              |
|                                         | ) | <b>MOTION TO AMEND</b>       |
| Plaintiff,                              | ) | <b>AND SUPPLEMENT</b>        |
| vs.                                     | ) | <b>COMPLAINT</b>             |
|                                         | ) |                              |
| South Carolina Department of Health     | ) |                              |
| and Environmental Control, the South    | ) |                              |
| Carolina Dental Association, and one or | ) |                              |
| more John Does, unidentified current or | ) |                              |
| former agents of South Carolina         | ) |                              |
| Department of Health and Environmental  | ) |                              |
| Control,                                | ) |                              |
|                                         | ) |                              |
| Defendants                              | ) |                              |

Plaintiff Health Promotions Specialists, LLC (hereafter “HPS”) moves pursuant to Rule 15(a) and (c), SCRCP, for permission to file an amended and supplemental complaint which accomplishes the following:

1. Deletes prior defendant South Carolina Department of Health and Environment Control (“SCDHHS”, with whom Plaintiff has resolved all issues previously raised in this litigation);
2. Add additional facts and claims against existing Defendant South Carolina Department of Health and Environmental Control (“SCDHEC” or “DHEC”) which Plaintiff has become aware of since the filing of the initial complaint in this matter; and
3. Add supplemental claims to include additional defendants, which has become necessary based on developments that occurred after the filing of the original pleadings in this action.

In support thereof, HPS will show that the attached Proposed Amended and Supplemental Complaint forms the basis for all matters in dispute of which Plaintiff is aware as of the filing of this motion to amend and supplement.

On information and belief, discovery had barely begun against existing Defendants DHEC and DHHS when the action was stayed by order of the circuit court dated February 10, 2021 for a period of 120 days to allow Plaintiff to continue to litigate then-existing collateral administrative proceedings brought against Plaintiff by prior defendant DHHS. Plaintiff has concluded that matter with DHHS as was anticipated at the time Plaintiff requested the 120 days stay. On information and belief, the stay granted on February 10, 2021 expires on June 10, 2021.

Wherefore, having fully set forth the grounds for its motion to amend, HPS moves for an order permitting it to file and serve the Amended and Supplemental Complaint. **Exhibit A.**

While they are not yet parties to this action, Plaintiff's counsel is providing a courtesy copy of this filing to the proposed additional defendants.

s/ Desa Ballard  
Desa Ballard  
Harvey M. Watson III

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ATTORNEYS FOR PLAINTIFF

June 2, 2021





|                                         |   |                                                   |
|-----------------------------------------|---|---------------------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS                      |
|                                         | ) | FIFTH JUDICIAL CIRCUIT                            |
| COUNTY OF RICHLAND                      | ) |                                                   |
|                                         | ) |                                                   |
|                                         | ) | Case No. 2019-CP-40-04567                         |
| Health Promotion Specialists, LLC,      | ) |                                                   |
|                                         | ) |                                                   |
|                                         | ) | <b>THIRD<sup>1</sup></b>                          |
| Plaintiff,                              | ) | <b>AMENDED COMPLAINT</b>                          |
| vs.                                     | ) | <b>(Unfair Trade Practices, Civil Conspiracy,</b> |
|                                         | ) | <b>and Breach of Contract Accompanied by</b>      |
| South Carolina Department of Health     | ) | <b>a Fraudulent Act).</b>                         |
| and Environmental Control, the South    | ) |                                                   |
| Carolina Dental Association, and one or | ) |                                                   |
| more John Does, unidentified current or | ) |                                                   |
| former agents of South Carolina         | ) |                                                   |
| Department of Health and Environmental  | ) |                                                   |
| Control,                                | ) |                                                   |
|                                         | ) |                                                   |
| Defendants                              | ) |                                                   |

Plaintiffs allege and will introduce proof of the following in support of relief to which they are entitled against South Carolina Department of Health and Environmental Control (“SCDHEC” or “DHEC” hereafter), the South Carolina Dental Association and Rocky Napier, deceased.

1. In 1988, the General Assembly amended the Dental Practice Act, S.C. Code Section 40-15-10 to 380 to authorize, under certain restrictions, “dental hygienists to provide various oral health services in public settings, including schools.”
2. In 2000, the General Assembly amended the Dental practice Act to permit dental hygienists to perform oral sealants and topical fluoride in schools under a dentist’s “general supervision,” which required a licensed dentist to authorize and supervise the procedures but not to be present at the time the dental hygienists actually performed the preventative dental services.

<sup>1</sup> Prior claims included against the South Carolina Department of Health and Human Services (SCDHHS) have been resolved.

3. In 2003, Plaintiff Health Promotions Specialists (hereafter “HPS”) under the leadership of Plaintiff Tammi Byrd (hereafter “Ms. Byrd”) became the first company to contract with DHEC to provide dental preventative health care in public schools.
4. HPS is a corporate entity organized and existing under the laws of the State of South Carolina. Its principal place of business is Lexington County, but it provides preventative dental health services throughout the state through public school-based partnerships.
5. Plaintiff Ms. Byrd is the owner and chief executive officer of HPS, and has been personally involved in all events as described herein. She is a resident of Charleston County and Lexington County. Ms. Byrd has sustained several personal injury, emotional distress, financial loss and permanent loss of income as a direct and proximate result of the intentional, wrongful, bad faith and malicious actions of Defendants as described herein.
6. Defendant DHEC is an agency created by statute, the duties and responsibilities of which are established and limited by statute.
7. Defendant South Carolina Dental Association (hereafter “Dental Association”) is a private organization primarily composed of dentists in private practice in South Carolina, which engages in numerous activities including, *inter alia*, lobbying the South Carolina General Assembly and its members to enact legislation which benefits private dentists and their ability to benefit economically in private practice.
8. On information and belief, one or more of the John Doe defendants are current or former employees of SCDHEC who engaged in conduct outside the scope of their official duties, and which constituted actual fraud, actual malice, intent to harm for the purpose of

assisting in destroying HPS for the purpose of benefitting third parties, including members of the Dental Association and others, including private dentists.

9. On information and belief, Rocky Napier, a licensed South Carolina dentist and member of the Dental Association, has for decades objected to the work of HPS in the public schools and has involved himself in the work of public and private organizations, including DHEC and the Dental Association, to further the conspiracy described herein to damage and destroy HPS for the purpose of increasing the financial income of private dentists, including himself.
10. On information and belief, Defendant Napier had an ongoing narrative with many employees of public agencies responsible for regulating and implementing public health dental programs, and operated as a volunteer advocate in concert with others including officers and employees of DHEC in their joint efforts to damage and destroy the public health dental program in the public schools and HPS specifically.
11. Additionally, for many years the Dental Association, its officials and its members, have lobbied public officials and employees, including officials and employees at DHEC and other agencies, to impede the work dental hygienists can perform in public health settings, as part of Defendants' combined and continued efforts to damage HPS and the preventative dental care it provides in public schools so as to increase the financial income of private dentists in South Carolina.
12. For nearly twenty (20) years, HPS provided preventative dental care and education to tens of thousands of school-aged children throughout the state as a result of agreements between HPS and SCDHEC known as memoranda of agreement (MOAs).

13. The partnership between HPS and DHEC led the state in establishing dental care for public school children.
14. HPS quickly established itself as setting the standard for the preventative dental care that could be provided to public children through its high standards and superior knowledge of the needs and evolving preventative methodologies that provide the best outcome, both short and long-term, for children who are serviced by the DHEC program and private patients as well.
15. HPS's principal, Ms. Byrd, is imminently qualified and knowledgeable in the field of preventative dental care for children, and she has personally championed the fight for public school children for decades and the education of dental hygienists, using her own personal resources, knowledge and energy to participate in professional organizations and training for dental hygienists in the state. It is not an exaggeration to say that Ms. Byrd is a qualified expert in the field and a passionate advocate for children's dental health.
16. HPS's superior services, outstanding operation and quality control procedures under the leadership of Ms. Byrd spawned the establishment of a number of other practitioners, some of which also became providers in the public schools pursuant to the DHEC program, although none of which provided the quality of services provided by HPS.
17. Some of the programs spawned by the success of the DHEC school-based programs were owned by private dentists, who quickly saw the goldmine of work heretofore untapped for themselves and for other private practitioners,
18. As a result of this discovery of new sources of income, with guaranteed income as to children who are beneficiaries of Medicaid, the Dental Association, its officers, agent,

employees and members, including Rocky Napier, have conspired and actively undertaken to damage and destroy HPS and/or the public school program, and to misappropriate the services provided by HPS to increase their own income.

19. Defendants have for years and continue to engage in a conspiracy among themselves and unnamed others to appropriate the work undertaken by HPS for the exclusive work of the private dentists and for their own economic interest.
20. On information and belief, efforts of private third parties, including but not limited to the South Carolina Dental Association, its officials, employees and members, including but not limited to Rocky Napier continuously lobbied and eventually persuaded DHEC to view the services of dental hygienists in the public schools as an impediment to increasing the financial bottom line of private dentists.
21. On information and belief, officials and/or employees of DHEC submitted false information to the Board of Dentistry as part of the continuing and widespread efforts to damage and destroy the public school program and HPS.
22. Pressure from defendant Dental Association, its officials, lobbyists and its members, including Rocky Napier eventually convinced DHEC that private dentists, either individually or working with other agencies, could impede and eventually eliminate the ability of HPS to continue to function so that private dentists could take over that aspect of preventative dental work, solely for the purpose of the private financial interests of private dentists.
23. On information and belief, DHEC and/or John Does became a tool and an active participant in a continuing conspiracy by multiple individuals, including the named

Defendants, to destroy the public school dental program by preventing dental hygienists from performing much needed care, education and preventative treatment in general, and HPS specifically, in favor of having the services performed by private dentists both in and out of their offices, and to create other public-private partnerships that would enable dentists to misappropriate the dental hygiene program for themselves, to the detriment and destruction of HPS and the children it serves.

24. On information and belief, Amy Brock Martin, an employee of the Medical University of South Carolina, has contributed substantial material to the efforts of Defendants and provided research and materials to further the conspiracy of the Defendants to damage and destroy HPS in favor of public-private partnership that would enable private dentists to misappropriate the work done by HPS for themselves.
25. On information and belief, Amy Brock Martin is a public employee who has used her public position to benefit the interests of private dentists as a conspirator with the named Defendants.
26. The efforts of the Defendants culminated in the intentional and wrongful conduct of DHEC in 2019 in terminating HPS from the public school dental program as part of its ongoing conspiracy to misappropriate the HPS service model for the benefit of private dentists to increase the income of private dentists.
27. The conspiracy to damage and destroy HPS provides no benefit to children, but actually harms them because it is clear that many public school students in low income areas of South Carolina receive no other dental services other than those provided in the public schools. Many of the patients served by HPS grow into adults with the benefit of limited

oral disease as a result of the work done by HPS, reducing and in some cases eliminating the incentive of adults to seek services from private dentists as adults.

28. On information and belief, Defendants have been and continue to work among themselves to wrongfully, intentionally and unfairly damage and destroy HPS for the sole purpose of providing private dentists methods by which they can unfairly misappropriate to themselves the dental care of public school children including those with limited resources as well as private pay patients.
29. On information and belief, the efforts of Defendants Dental Association and Napier resulted in multiple individuals at DHEC becoming actively involved in the actual fraud, actual malice and intent to harm by private dentists, which DHEC agents, employees and officials were persuaded to assist in damaging and/or destroying HPS.
30. The efforts of all Defendants resulted in the 2019 wrongful, intentional and malicious termination of HPS by DHEC from the school-based public health dental prevention program, as well as the communication of false and fabricated information regarding HPS to multiple agencies and individuals, including the South Carolina Department of Health and Human Services (hereafter “SCDHHS” or “DHHS”) and many of the public schools for which HPS has been providing preventative dental services for decades.
31. Moreover, the intentional, wrongful, malicious, and bad faith actions of DHEC and the other Defendants and the methods by which DHEC undertook to wrongfully terminate HPS from the DHEC program and to provide false information regarding HPS’s status were intended to, and did cause, crippling financial damage and loss to HPS and unfairly benefitted third parties including members, officers and employees of the Defendant Dental Association.



32. As a result of the false, malicious, and bad faith information provided by DHEC to SCDHHS, the agency which administers the South Carolina Medicaid program, HPS sustained significant financial losses for services already performed under HPS's contracts with DHEC, as well as additional damages in the form of attorneys' fees, costs, loss of professional standing, all of which were done by Defendants with the intention of damaging and destroying HPS and Ms. Byrd and with the effect of benefitting private third parties, including members of the Dental Association solely for their private gain.
33. Because of her inextricable link to HPS and the advocacy for dental hygienists in South Carolina particularly, Ms. Byrd has sustained significant emotional distress and physical injury as a result of the actions of the Defendants, all of which was foreseeable by Defendants.
34. As a result of the false, malicious, and bad faith information provided by DHEC to South Carolina Department of Health and Human Services, with the aid, assistance and prompting of the Dental Association, its officials and its members, including Rocky Napier, DHEC intended to and did interfere with HPS's ability to be paid for work it had already performed for public school students in the state as a DHEC provider.
35. The actions of the Defendants required costly litigation by HPS with SCDHHS because DHEC would not acknowledge its improper actions. HPS eventually compromised funds due to it for services already performed and to defend an alleged debt by HPS due to SCDHHS as a direct and proximate of the false and misleading information provided to it by DHEC for the intended purpose of damaging and destroying HPS.



36. Ms. Byrd has been required to invest personal income and assets, as well as personal energy and commitment, to battling the damages caused by the Defendants conspiracy and unfair trade practices, and DHEC's breach of contract accompanied by a fraudulent act.
37. The intentional false, bad faith and malicious actions of Defendants, the resulting DHHS proceedings and further actions by DHEC following the HPS compromise have caused permanent financial damage to Ms. Byrd, including personal injury, emotional distress, loss of standing in the community.
38. As a direct and proximate result of the intentional and coordinated actions of the Defendants, Ms. Byrd has been forced to undertake employment in other fields in an effort to keep herself and her family solvent to date.
39. On information and belief, the actions of SCDHEC its officials and its members, including Rocky Napier, were undertaken, in part, to mine the knowledge, operations and success rate accomplished by HPS with the intention to misappropriate HPS's knowledge, methods and operations to itself for the purpose of Defendants, individually and with the assistance of others, to establish replacement programs to financially benefit third parties to the exclusion and extinction of HPS.
40. The ability of dental hygienists to perform preventative dental care services in any setting, including the public schools, has not been well-received among private dentists, the reasons for which are largely illusory, but has been chronicled in a series of litigation in state and federal courts, summarized at least in part in *Health Promotion Specialists v. South Carolina Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).<sup>2</sup>

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<sup>2</sup> Among the plethora of litigation arising from the ongoing efforts of public officials and private third parties, HPS brought suit against numerous individuals, as well as the Board of Dentistry and the Dental Association. As noted by

41. The Supreme Court's decision outlines the enactment by the Board of Dentistry of an emergency designed to curtail HPS from operating, which eventually led to an order of the Administrative Law Court which invalidated the emergency regulation in 2002.
42. In an effort to thwart the wrongful collusion of various individuals within the public and private dental industry in South Carolina who sought to and had harmed the dental hygiene program in South Carolina, individual hygienists and HPS in particular, the Federal Trade Commission (hereafter "FTC" entered into a Consent Agreement with the Board of Dentistry which required the Board of Dentistry to provide prior notice to the FTC prior to taking any Board action relating to the provision by dental hygienists of preventive dental hygiene services in a public setting through September 2017.
43. In January 2018, after examining the scientific data and historical performance of recognized more modalities<sup>3</sup> that could be provided by dental hygienists working in the public health as "primary preventative care that is reversible" as provided by S.C. Code Ann. Section 40-15-110(10), the Board of Dentistry defined services that were included, in the arsenal of preventive measures that could benefit public school students by dental hygienists working in the public schools, including specifically HPS.
44. The additional modalities approved by the Board of Dentistry expanded on the effectiveness of preventative care that can be provided through the dental hygienist

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the Supreme Court in its 2013 decision, the parties other than the Board of Dentistry reached settlements and were dismissed from the action. At the time of the Supreme Court's decision, only the Board of Dentistry remained a defendant in the original litigation.

<sup>3</sup> Minutes of the South Carolina Board of Dentistry reflect a unanimous vote by the Board on January 19, 2018, determining that new modalities for temporary restorative treatment such as Atraumatic Restorative Technique (ART), Interim Restorative Technique (IRT) and Caries Control Technique (CCT) constitute "primary preventative care that is reversible" and falls within the authority of dental hygienists working in the public health program (primarily public schools) in accordance with S.C. Code Ann. Section 40-15-110(10).

program in all public health settings, including the school setting, improving upon the effectiveness and duration of the preventative work done in the school setting and in many cases delaying the onset of caries or the development of existing caries on children's teeth. In short, children who have the benefit of preventative dental services through HPS and other school-based programs had healthier mouths as adults, which require far less restorative and lucrative work by private dentists.

45. The South Carolina Board of Dentistry ruled on January 19, 2018, while acting pursuant to its authority granted by SC Code Ann. Section 44-5-110(H), stated that "therapeutic sealants and [preventative]<sup>4</sup> fillings, such as Atraumatic Restorative Technique, Interim Restorative Technique, and Caries Control Technique"<sup>5</sup> constitute "primary preventative care that is reversible" and could therefore be performed by dental hygienists in public health settings in accordance with S. C. Code Ann. Section 44-15-110(A)(10). (See Minutes of the Board of Dentistry meeting held January 19, 2018 at p. 6).
46. The effect of the Board's decision was to broaden the scope of preventative dental work that HPS could perform in the school setting to include less intrusive and more long-term preventative work for school children, thus reducing the incidence of necessary restorative work for teeth as the former school children became adults.

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<sup>4</sup> The meeting minutes reflect a reference to "temporary" fillings, but the Board explicitly referenced and approved procedures of ART, IST, etc. involve *preventative* fillings.

<sup>5</sup> ART is a needle-less and drill-less treatment for tooth decay and the reduction of pain caused by caries in children's teeth. The process involves placing a clear liquid compound to a tooth followed the application of a glass ionomer over tooth decay. The treatment seals the affected tooth, which arrests the spread of disease in the tooth. The process has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014.

47. The decision by the Board of Dentistry was immediately condemned by private dentists and other financially interested parties, including Defendants herein as well as their agents, who sprang into action and undertook efforts to convince the Board to reverse its decision. Furthermore, DHEC, which provided initial support for the decision, reversed course after being lobbied by private dentists to do so.
48. When Defendants, individually and through agents including employees of DHEC were unsuccessful in obtaining the Board's cooperation to restrain the work now expanded work of dental hygienists in the school program, Defendants took a different approach.
49. Because research supported the expanded services, a combined effort by Defendants and others undertook affirmative actions to impede the payment to HPS specifically for performing the modern preventative dental work and to urge action to DHEC and other agencies to unfairly impede payment to HPS to delay, interfere and eventually prevent them from being paid to perform the advanced modalities and even the historically and relatively innocuous dental preventative care which has been provided for decades.
50. The purpose of this action by Defendants and others were undertaken intentionally, in bad faith and with malice to unfairly compete with and destroy HPS and to give private dentists an unfair advantage in limiting the ability of HPS and dental hygienists by limiting the payment structure under which these advanced modalities could be performed only by licensed dentists in private practice.
51. In August 2018, HPS notified DHHS that it would begin implementation of the new modalities as part of its work with the DHEC public school program.

52. Pursuant to the authorization of the South Carolina Board of Dentistry and through its agreement with SCDHEC, HPS began providing the advanced modalities as part of its preventative dental care in school settings in August 2018. These preventative dental services were covered by Medicaid in the cases of students who were beneficiaries of Medicaid.
53. HPS was unaware of the intentional and wrongful actions of Defendants its officials and its members, including Rocky Napier to disrupt its improved services to the students of the public schools.
54. As explained below, DHEC later falsely told DHHS that HPS did not have a current MOA in place for the dental services it had been providing, causing DHHS to suspend payment for services rendered by HPS, terminate HPS from the Medicaid program, and further causing DHHS to seek repayment for services HPS had already provided.
55. HPS had continued authority to provide services for the school year 2018-2019 through the MOA signed by HPS and its supervising dentist on June 3, 2016 and accepted by DHEC on July 26, 2016.
56. DHEC did not require a new MOA for the 2016-2017 or the 2017-2018 school year, and HPS continued to provide its services to public school students under the existing 2016 MOA, which remained in effect. DHEC instead sent an annual evaluation to HPS and requested data from HPS that DHEC used to fulfill obligations it had for grant monies it had received. HPS executed and returned the contract and provided the data that was requested, confirming its continued participation as a provider in the DHEC program.

57. Curiously, in April 2019, with less than a month left in the school year, DHEC belatedly sent an HPS executed an updated MOA for signature, which purported to be for a term commencing on July 1, 2018. The MOA included and incorporated reference to the DHEC Public Health Dental Prevention Program Guidelines dated January 20, 2004, revised September 2018. The guidelines revised in 2018 were consistent with the standard of care for dental hygienists and included guidelines that permitted HPS hygienists to provide the advanced modalities approved by the Board of Dentistry, which Defendants and others had attempted to reverse.
58. During the spring and summer of 2019, DHEC did not notify HPS that there were any issues or problems with its continued status of an approved DHEC provider and took no action of which HPS is aware to damage HPS.
59. In July 2019, HPS was asked to submit their annual data to DHEC, which they did.
60. In August 2019, HPS was invited to and participated in the DHEC provider information conference in August 2019, which it had done annually since it became a provider through the DHEC program.
61. In connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS, despite the continued existence and validity of the MOA signed in April 2019.
62. The new MOA included clinical guidelines (the “2019 guidelines”) which required HPS to falsify dental records in students who would benefit from the advanced modalities as part of preventative dental treatment. The 2019 guidelines required that, prior to performing an advanced modality on a student, a patient’s tooth would have to be falsely

identified inflamed or swollen and/or the child was in obvious pain in order to qualify for the advanced modality. However, the clinical guidelines also prohibited hygienists from doing any preventative work on a tooth that was inflamed or swollen and the only clinical guideline for a child with a tooth in that condition would require referral to a private dentist, with no preventative work being done for the patient.

63. HPS did not sign the new MOA, because the new clinical guidelines referenced in the 2019 MOA incorporated clinical guidelines that deviated from the proper standard of care for dental hygienists. More specifically, however, the clinical guidelines effected what Defendants had attempted to do through lobbying of the Board of Dentistry, which was to prevent hygienists from performing the advanced modalities as part of the public school program, reserving that work for private dentists.<sup>6</sup>
64. HPS notified DHEC that it objected to the clinical guidelines in that they required a deviation from the appropriate standard of care, and notified DHEC that it would continue to provide its services in accordance with the MOA signed in April, 2019, which did not require falsification of dental records and permitted the best available dental preventative modalities to be utilized for the highest quality of dental sealants for its patients and the longest and best outcomes for them.
65. HPS tried repeatedly to meet with officials at DHEC to explain the deviation from the standard of care required by the 2019 guidelines, but officials DHEC delayed and eventually refused to meet with HPS to discuss its objections to the 2019 guidelines.

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<sup>6</sup> At the same time, one other state agency had also taken action to restrict the ability of HPS to seek payment for providing the advanced modalities as part of the preventative clinical work performed in the public schools. The actions of the two agencies are further evidence of the conspiracy which forms the basis for relief in this action.

66. DHEC responded that the MOA signed in April 2019 was not in effect because DHEC had not signed it upon receipt from HPS, claiming HPS had not signed the 2018 annual review. This was demonstrably false information because HPS had signed the 2018 annual review, and DHEC had acknowledged HPS's participation as a provider in the Program for the 2018-2019 calendar year.
67. HPS communicated with DHEC representative Alicia Johnston and advised it was already operating under the April 2019 MOA and, alternatively, the prior MOA had automatically renewed to continue HPS's status as a provider under the DHEC program.
68. On November 22, 2019, DHEC sent a letter to HPS acknowledging there was a lack of clarity as to what MOA was in effect (although it did not acknowledge it was DHEC's fault for having created the confusion), DHEC gave HPS notice that it was terminating the April 2019 MOA (which had been signed with a retroactive date to June 2018). That meant that HPS's enrollment in the program would end after 16 years on December 31, 2019. On information and belief, DHEC's decision to terminate its contract with HPS was intentional, malicious and in bad faith, and was intended to continue to cater to the wishes of private third parties including, the Dental Association.
69. In conjunction with its intentional November 22, 2019 letter defendant John Doe, while employed by DHEC, acted outside the scope of his authority, intentionally and maliciously caused Victoria Ladd of DHEC on November 18, 2019 to falsely notify public school personnel across the state for which HPS has been providing preventative dental services for students that HPS was not operating legally in the schools because it did not have a dentist on-site. The school districts were also notified that HPS was no longer approved to perform services under the umbrella of the DHEC program. Neither statement was true.



70. This announcement was false in multiple respects and indicated a serious misunderstanding by DHEC of the parameters of work performed under the DHEC school-based program.
71. DHEC's counsel attempted to correct its false report to public schools around the state, but HPS had already been significantly damaged in that, in response to the November 18, 2019 communication from DHEC to public school personnel, numerous school districts had already terminated their association with HPS, which severely damaged HPS economically and by way of its reputation, which prior to that time had been unsurpassed among the public school community.
72. By way of further intentionally and maliciously harming HPS, one or more DHEC officials and/or one or more John Does intentionally provided false information to DHHS, advising that HPS had been operating without the authority of a DHEC MOA for several years, such that Medicaid payments to HPS over a period of time had been illegal.
73. As a direct and proximate result of the intentionally false statements made by agents of DHEC and/or one or more of the Defendant John Does, all of which were generated following years of efforts by the Defendant South Carolina Dental Association and Rocky Napier, HPS has been damaged significantly in that it had all Medicaid payments suspended, it was terminated from Medicaid, and it had to aggressively litigate with DHHS regarding purported Medicaid over payments and additional funds that DHHS sought to recover for payments already made, which matters were concluded confidentiality.
74. On information and belief, Defendants have coordinated efforts with one another to assist private dentists in their continued efforts to restrict the care that can be provided by dental

hygienists in the public health setting, for the same purpose of increasing the income of private dentists at the cost of public school children in the state as well as taxpayers.

75. As a direct and proximate result of the unfair and unlawful actions of Defendants and others as set forth herein, HPS has sustained permanent and substantial damage including loss of income, damage to its reputation, misappropriation of its business model, and most likely the destruction of its business, all of which was the intent of the conspiring Defendants and third parties.
76. As a direct and proximate result of the unfair and unlawful actions of Defendants and others, Byrd has sustained total and permanent personal injury, emotional distress, damage to her reputation and significant financial losses, which may be expected to be permanent and for which Defendants are legally responsible.

**FIRST CAUSE OF ACTION**  
(Unfair Trade Practices – against all Defendants)

77. Each and every factual allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
78. Each Defendant is a “person” within the definitions set forth in the South Carolina Unfair Trade Practices Act.
79. The provision of dental preventative services by private practitioners to individual consumers in South Carolina including school-aged children is trade and commerce within the definitions set forth in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. 39-5-10(b). Even though multiple state agencies license, regulate and interact and sometimes provide payments with respect to the provision of the provision of dental preventative services by private practitioners, the trade and commerce as between the

provider and the patient remains an act of trade and commerce solely as between the provider and the patient and exempts the actions complained of herein from the provisions of Section 39-5-40(a).

80. The General Assembly has recognized that the provision of dental services, including but not limited to the provision of preventative dental sealants in school-aged children is one that affects the public interest, in that statutes enacted by the General Assembly and regulations by state agencies necessarily affect the public interest. In the absence of the State's obligation to protect the public interest, the state would have no authority to regulate and govern the provision of the trade or commerce provided by private practitioners to citizens of the state.
81. The provision of dental services in South Carolina is trade and commerce that affects the public interest and as a result requires licensing and regulation by an agency of the state, in that the State requires certain qualifications for practitioners, levels of competency, continuing education and regulation for the purpose of protecting the public and the public interest.
82. The South Carolina Tort Claims Act does not provide protection from liability of any kind to private organizations or private persons, nor does it provide any protection from liability to an agency or any officer, agent or employee of an agency of the State if the conduct of the agency or the individual was not within the scope of official duties or when the conduct constitutes actual fraud, actual malice, or intent to harm, as is alleged here. S.C. Code Ann. Section 15-78-70.
83. At all times relevant to this action, certain officials or employees of DHEC were acting outside the scope of their duties as employees or agents of DHEC and their actions to

damage plaintiffs were intentional, constituted actual fraud, and were undertaken with malice toward the Plaintiffs with an intent to damage and/or destroy the Plaintiffs. However, since they were acting on behalf of DHEC and to further its political interests while also acting to serve the interests of private individuals such actions were the result of improper conspiratorial activity with private individuals and organizations, DHEC is responsible for the harm caused by those certain officials or employees of DHEC even though DHEC individually may have some form of statutory or common law immunity if acting alone, but not when engaged in a conspiracy and in allowing its individual agents to act outside the scope of their official duties for the intended purpose of harming and damaging private persons and companies.

84. As to those present or former officials or employees of DHEC who acted outside the scope of their duties as employees or agents of DHEC in perpetuating the wrongful conduct set forth herein, which actions constituted actual fraud, actual malice and intent to harm, those individuals are sued in their individual capacities as John Doe because the actual names of those individuals are not presently known to Plaintiffs. When the identities of those individuals is determined, Plaintiffs will move to substitute one or more John Doe defendants with the names of the individuals who bear personal responsibility for the damages sustained by Plaintiffs herein. The actions of those individuals are imputed to DHEC for purposes of liability, because even though the John Does were acting outside the scope of their legitimate authority, their actions were undertaken with the implied or express approval and/or ratification of DHEC as an agency, and liability therefore is imputed to the agency.

85. The intentional actions of the Defendants as alleged herein were, were intended to be and were known to be unfair actions in the act of trade or commerce, in that the action of the Defendants were intended to and did seek to and accomplish a manipulation of the procedures for providing dental sealants services to public school children provided by private practitioners.
86. Defendants herein engaged in unfair and deceptive acts in the conduct of the provision of dental sealants to school aged children by manipulating regulatory and discretionary actions which were intended to, and did, obstruct, impede and prevent dental hygienists in general and HPS in particular from being able to provide services for which they are trained, capable of and licensed to perform at a lower cost than having those services provide by private dentists as part of a comprehensive dental plan.
87. The court is asked to take judicial notice of peer-reviewed statistical studies that establish the preventative value of dental sealants of school-aged children, particularly in lower-income areas of the state, as well as statistical studies that establish and recognize based on actual data the likelihood that significant portions of the public in South Carolina will not obtain dental care in whole or in part as adults for a variety of reasons, such that the provision of dental sealants as school-aged children is very much an issue concern to the public health of citizens of the state.
88. Defendants herein have engaged in unfair and deceptive acts in impeding, preventing and misappropriating the business long conducted by Plaintiffs HPS and Byrd, the continued participation of dental hygienists in general and HPS specifically in providing dental sealants for public school students. On information and belief, Defendants acted not for any purpose of protecting the public interest, but instead to obstruct and eliminate viable

and valuable dental option for school aged children and forcing children's dental needs to be performed exclusively by private dental practitioners as part of a comprehensive dental plan that can only be provided by private dentists. On information and belief, Defendants acted for the sole economic benefit of the private dentists and for no improvement in the quality of dental sealants that is available to public school children, the effect of which is to cause significant harm to school-aged children across the state purely for the financial benefit of private dentists, and to harm, disable and destroy the business of HPS as established and lawfully operated under existing laws.

89. As a direct and proximate result of the coordinated and unfair trade practices of all Defendants and other not named parties, Plaintiffs HPS and Byrd have been significantly and permanently damaged, and both have suffered monetary and property loss as a direct and proximate result of the Defendants' unfair and deceptive acts.
90. The acts of the Defendants, including but not limited to DHEC and the Dental Association and its current, prior and former members thereof as set forth here and which form the basis for the relief sought by Plaintiffs herein was willful and knowing violations of Section 39-5-20 because they have both been here before. As a result, Defendants, including but not limited to DHEC and the Dental Associations and its current, prior and former members are liable for three times the actual damages sustained by Plaintiffs.
91. As a direct and proximate of the unfair trade practices engaged in by Defendants herein Plaintiffs have incurred substantial attorneys' fees in defending against the acts inflicted upon them by Defendants and are therefore entitled to an award of attorneys' fees and costs, both as to prior proceedings which they were forced to defend and litigate as well as in pursuing this action.

92. Plaintiffs are informed and believe they are entitled to a judgment in their favor against the Defendants, jointly and severally, for actual damages sustained by them, an award of treble the damages incurred, and an award of attorney's fees, all of which should be awarded as joint and several obligations of the Defendants herein.

**SECOND CAUSE OF ACTION**  
(Civil Conspiracy – against all Defendants)

93. Each and every factual allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
94. On information and belief, the named Defendants and other individuals combined efforts directly or indirectly for the purpose of injuring Plaintiffs. The fact that injury occurred to people other than the Plaintiff does not detract from the intent of the named Defendants to injure Plaintiffs.
95. On information and belief, the named Defendants and other individuals conspired among themselves and with third parties for the purpose of causing damages to Plaintiffs.
96. The acts as set forth above, and others not necessary to spell out in this pleading, constituted multiple and related overt acts in furtherance of the civil conspiracy, although some overt acts of some Defendants may not have been known to all Defendants at the same time. However, each named Defendant conspired with third parties including other Defendants for the purpose of causing damage to Plaintiffs.
97. As a direct and proximate result of the overt acts which occurred in combination among Defendants and others, Plaintiffs have sustained substantial financial losses, including fees and costs incurred in the defense of administrative proceedings that were caused by false information being provided by Defendant DHEC to SCDHHS and to others, as well as

losses from the damage and destruction of the ability of the Plaintiffs to carry out their profession, all of which acts were undertaken to enrich private individuals, including some of the named Defendants, including present, prior and former members of the Dental Association.

98. On information and belief, Defendant Rocky Napier continuously undertook overt acts in concert with named Defendants and others for the purpose of injuring Plaintiffs by engaging in multiple actions intended to destroy the school-based public dentistry program which benefitted thousands of South Carolina children, but more specifically was intended to and did proximately result in substantial financial losses to Plaintiffs.
99. The actual damages sustained by Plaintiffs as a direct and proximate result of the civil conspiracy and overt actions which accomplished the goal of the conspiracy by damaging and destroying Plaintiffs' business cannot be allocated among individual Defendants and as a result, an award of actual damages is sought jointly and severally against the Defendants for civil conspiracy for the damages sustained and which will continue to be sustained by Plaintiffs as a direct and proximate result of the civil conspiracy of the named Defendants and others.
100. On information and belief, Plaintiffs are entitled to a judgment in their favor for actual damages jointly and severally against the named Defendants.

### **THIRD CAUSE OF ACTION**

(Breach of Contract accompanied by a Fraudulent Act – against DHEC and John Does)

101. Each and every allegation set forth above is incorporated herein where relevant by reference as fully as if repeated herein verbatim.



102. Defendants DHEC and John Does breached duties it and they owed to Plaintiff HPS as a result of contracts between HPS and DHEC which remained in force and full effect through December 31, 2019 and would have remained in place longer but for the fraudulent acts of Defendants DHEC and the John Does.
103. The breach by Defendant DHEC was accompanied fraudulent intent and by multiple fraudulent actions, in that DHEC intentionally and with an intent to harm Plaintiffs provided false information to SCDHHS that resulted in damaging action taken by SCDHHS against Plaintiff HPS with the intent by DHEC of causing the financial loss to and failure of Plaintiff HPS, which goal was accomplished as a direct and proximate result of substantial financial loss to Plaintiffs from the actions of DHEC and the Defendant John Does.
104. Additionally, by way of further fraudulent actions, Defendant DHEC and/or the John Does intentionally provided false information to public school agents and employees regarding the legal status of HPS, which false information which false and fraudulent communication was intentional and malicious, and was intended to cause harm to Plaintiffs and did cause significant harm to Plaintiffs, both financial and reputational.
105. As a direct and proximate result of the acts of Defendants DHEC and John Does as set forth herein, Plaintiff sustained actual and consequential damages in an amount to be determined by the trier of fact.
106. Plaintiffs are entitled to an award of for actual damages sustained by them as a direct and proximate result of the breach of contract accompanied by multiple fraudulent acts by DHEC and/or the John Does, such award to be solely against DHEC because DHEC is

liable for the intentional torts of its active and former employees who effected the breach of contract and the fraudulent acts which accompanied it.

107. Because the intentional, wrongful and fraudulent nature of the acts of DHEC and the John Does, and the malicious and repeated nature of DHEC's misconduct toward Plaintiffs, Plaintiffs are informed that the circumstances present warrant an award of punitive damages against DHEC and the John Does as a result of their intentional and wrongful conduct, in an amount to be determined by the trier of fact sufficient to deter future similar conduct by others, both private and public, and to punish DHEC and the John Does for their outrageous behavior toward Plaintiffs.

#### **FOURTH CAUSE OF ACTION**

(Statutory Attorney fees by HPS – against DHEC only)

108. Each and every allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
109. This Court has jurisdiction over this matter pursuant to S.C. Code Ann. Section 15-77-50.
110. Through its actions as set forth herein, Plaintiff HPS has been required to contest action by DHEC and DHHS (the DHHS proceedings were the direct and proximate cause of the actions of DHEC and the John Doe defendants). As set forth above, DHEC acted without substantial justification in pressing its false claims that Plaintiff HPS had no contract with DHEC, in transmitting false information about HPS to those with which HPS had contracts, and in instigating administrative proceedings between HPS and SCDHHS using knowingly false information which cost tremendous funds in attorney's fees and costs to defend and compromise.

111. Defendant DHEC was not following a statutory or constitutional mandate in its actions directed against HPS but was instead acting in concert and in conspiracy with others to further the financial interests of private third parties, some of whom are Defendants in this action and who contributed to the action taken by DHEC against HPS for their own personal financial gain.
112. HPS has contracted to pay attorney's fees and costs for the prosecution of this action, just as it did to defend against the administrative litigation and action already taken by DHEC and DHHS.
113. HPS is informed and believes it is entitled to an award of attorneys' fees and costs against DHEC for the cost of defending against the prior actions of DHEC and DHHS taken against HPS (caused by DHEC) as well as the pursuit of this action, pursuant to S.C. Code Ann. Section 15-77-300.
114. HPS prays for an award of attorneys' fees and costs against DHEC for the actual attorneys' fees and costs incurred by it in defending against the actions of DHEC and DHHS, and in pursuing this action.
115. Plaintiffs preserve the right to amend or supplement this complaint and the prayer for relief based on misconduct discovered during the course of the litigation in this proceeding.

WHEREFORE, having fully set forth the grounds for relief sought herein, Plaintiffs pray for an order:

- A. Awarding actual damages in favor of Plaintiffs against all Defendants in accordance with the First Cause of Action, jointly and severally.

- B. Trebling the award of damages against Defendant DHEC as a result of the character of the improper and illegal action in which DHEC engaged for the intentional purpose of harming Plaintiffs.
- C. An award of attorneys' fees against Defendant DHEC in accordance with the First Cause of Action.
- D. An award of actual and punitive damages in favor of Plaintiffs against all Defendants jointly and severally under the Second Cause of Action.
- E. An award of actual and punitive damages in favor of Plaintiff against all Defendants jointly and severally under the Third Cause of action.
- F. An award of attorneys' fees and costs incurred by Plaintiff HPS in defending against action taken against it by DHEC and DHHS as well as those fees incurred by HPS in pursuit of this action.
- G. For an award of the costs of this action as permitted by statute.
- H. For an award of such other and further relief as the court deems just and proper based on applicable law, whether specifically prayed for herein or not.

Respectfully submitted,

s/ Desa Ballard  
Desa Ballard  
Harvey M. Watson III

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ATTORNEYS FOR PLAINTIFF

June 1, 2021

|                                         |   |                                         |
|-----------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS            |
|                                         | ) |                                         |
| COUNTY OF RICHLAND                      | ) |                                         |
|                                         | ) | Case No. 2019-CP-40-4567                |
|                                         | ) |                                         |
| Health Promotion Specialists, LLC,      | ) |                                         |
|                                         | ) |                                         |
| Plaintiff,                              | ) |                                         |
| vs.                                     | ) | <b>STIPULATION OF DISMISSAL</b>         |
|                                         | ) | (As to the South Carolina Department of |
| South Carolina Department of Health     | ) | Health and Human Services)              |
| and Human Services, and                 | ) |                                         |
| South Carolina Department of Health and | ) |                                         |
| Environmental Control,                  | ) |                                         |
|                                         | ) |                                         |
| Defendants.                             | ) |                                         |

Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, the Defendant, South Carolina Department of Health and Environment Control, stipulates to the dismissal of the Defendant South Carolina Department of Health and Human Services as a party in this civil action.

**BRUNER, POWELL, WALL & MULLINS, LLC**

s/Joey R. Floyd Date: July 7, 2021  
 Joey R Floyd, SC Bar No.: 68491  
 Post Office Box 61110  
 Columbia, South Carolina 29260  
 (803) 252-7693  
*Counsel for the Defendant,*  
*South Carolina Department of Health & Environmental Control*

|                                             |   |                                                   |
|---------------------------------------------|---|---------------------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS                      |
|                                             | ) | FIFTH JUDICIAL CIRCUIT                            |
| COUNTY OF RICHLAND                          | ) |                                                   |
|                                             | ) |                                                   |
|                                             | ) | Case No. 2019-CP-40-04567                         |
| Health Promotion Specialists, LLC,          | ) |                                                   |
|                                             | ) | <b>SUMMONS SECOND<sup>1</sup></b>                 |
| Plaintiff,                                  | ) | <b>AMENDED COMPLAINT</b>                          |
| vs.                                         | ) | <b>(Unfair Trade Practices, Civil Conspiracy,</b> |
|                                             | ) | <b>and Breach of Contract Accompanied by</b>      |
|                                             | ) | <b>a Fraudulent Act).</b>                         |
| South Carolina Department of Health and     | ) |                                                   |
| Environmental Control, the South Carolina   | ) |                                                   |
| Dental Association, Dr. Richard E. Boyd, as | ) |                                                   |
| Personal Representative of the Estate of    | ) |                                                   |
| Rocky Napier, and one or more John Does,    | ) |                                                   |
| unidentified current or former agents of    | ) |                                                   |
| South Carolina Department of Health and     | ) |                                                   |
| Environmental Control,                      | ) |                                                   |
|                                             | ) |                                                   |
| Defendants                                  | ) |                                                   |

**TO THE DEFENDANTS ABOVE NAMED:**

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the plaintiff's counsel at her office at 226 State Street, West Columbia, South Carolina 29169, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

**BALLARD & WATSON**

s/ Desa Ballard  
Desa Ballard (S.C. Bar No. 498)  
Harvey M. Watson III (S.C. Bar No. 74053)

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226 State Street  
West Columbia, South Carolina 29169

<sup>1</sup> Prior claims included against the South Carolina Department of Health and Human Services (SCDHHS) have been resolved.

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ATTORNEYS FOR PLAINTIFF

March 28, 2022

|                                             |   |                                                   |
|---------------------------------------------|---|---------------------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS                      |
|                                             | ) | FIFTH JUDICIAL CIRCUIT                            |
| COUNTY OF RICHLAND                          | ) |                                                   |
|                                             | ) |                                                   |
|                                             | ) | Case No. 2019-CP-40-04567                         |
| Health Promotion Specialists, LLC,          | ) |                                                   |
|                                             | ) |                                                   |
|                                             | ) | <b>SECOND<sup>1</sup></b>                         |
| Plaintiff,                                  | ) | <b>AMENDED COMPLAINT</b>                          |
| vs.                                         | ) | <b>(Unfair Trade Practices, Civil Conspiracy,</b> |
|                                             | ) | <b>and Breach of Contract Accompanied by</b>      |
|                                             | ) | <b>a Fraudulent Act).</b>                         |
| South Carolina Department of Health and     | ) |                                                   |
| Environmental Control, the South Carolina   | ) |                                                   |
| Dental Association, Dr. Richard E. Boyd, as | ) |                                                   |
| Personal Representative of the Estate of    | ) |                                                   |
| Rocky Napier, and one or more John Does,    | ) |                                                   |
| unidentified current or former agents of    | ) |                                                   |
| South Carolina Department of Health and     | ) |                                                   |
| Environmental Control,                      | ) |                                                   |
|                                             | ) |                                                   |
| Defendants                                  | ) |                                                   |

Plaintiffs allege and will introduce proof of the following in support of relief to which they are entitled against South Carolina Department of Health and Environmental Control (“SCDHEC” or “DHEC” hereafter), the South Carolina Dental Association and Rocky Napier, deceased.

1. In 1988, the General Assembly amended the Dental Practice Act, S.C. Code Section 40-15-10 to 380 to authorize, under certain restrictions, “dental hygienists to provide various oral health services in public settings, including schools.”
2. In 2000, the General Assembly amended the Dental practice Act to permit dental hygienists to perform oral sealants and topical fluoride in schools under a dentist’s “general supervision,” which required a licensed dentist to authorize and supervise the procedures but not to be present at the time the dental hygienists actually performed the preventative dental services.

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<sup>1</sup> Prior claims included against the South Carolina Department of Health and Human Services (SCDHHS) have been resolved.



3. In 2003, Plaintiff Health Promotions Specialists (hereafter “HPS”) under the leadership of Plaintiff Tammi Byrd (hereafter “Ms. Byrd”) became the first company to contract with DHEC to provide dental preventative health care in public schools.
4. HPS is a corporate entity organized and existing under the laws of the State of South Carolina. Its principal place of business is Lexington County, but it provides preventative dental health services throughout the state through public school-based partnerships.
5. Plaintiff Ms. Byrd is the owner and chief executive officer of HPS, and has been personally involved in all events as described herein. She is a resident of Charleston County and Lexington County. Ms. Byrd has sustained several personal injury, emotional distress, financial loss and permanent loss of income as a direct and proximate result of the intentional, wrongful, bad faith and malicious actions of Defendants as described herein.
6. Defendant DHEC is an agency created by statute, the duties and responsibilities of which are established and limited by statute.
7. Defendant South Carolina Dental Association (hereafter “Dental Association”) is a private organization primarily composed of dentists in private practice in South Carolina, which engages in numerous activities including, *inter alia*, lobbying the South Carolina General Assembly and its members to enact legislation which benefits private dentists and their ability to benefit economically in private practice.
8. On information and belief, one or more of the John Doe defendants are current or former employees of SCDHEC who engaged in conduct outside the scope of their official duties, and which constituted actual fraud, actual malice, intent to harm for the purpose of

assisting in destroying HPS for the purpose of benefitting third parties, including members of the Dental Association and others, including private dentists.

9. On information and belief, Rocky Napier, a licensed South Carolina dentist and member of the Dental Association, has for decades objected to the work of HPS in the public schools and has involved himself in the work of public and private organizations, including DHEC and the Dental Association, to further the conspiracy described herein to damage and destroy HPS for the purpose of increasing the financial income of private dentists, including himself.
10. On information and belief, Defendant Napier had an ongoing narrative with many employees of public agencies responsible for regulating and implementing public health dental programs, and operated as a volunteer advocate in concert with others including officers and employees of DHEC in their joint efforts to damage and destroy the public health dental program in the public schools and HPS specifically.
11. Additionally, for many years the Dental Association, its officials and its members, have lobbied public officials and employees, including officials and employees at DHEC and other agencies, to impede the work dental hygienists can perform in public health settings, as part of Defendants' combined and continued efforts to damage HPS and the preventative dental care it provides in public schools so as to increase the financial income of private dentists in South Carolina.
12. For nearly twenty (20) years, HPS provided preventative dental care and education to tens of thousands of school-aged children throughout the state as a result of agreements between HPS and SCDHEC known as memoranda of agreement (MOAs).

13. The partnership between HPS and DHEC led the state in establishing dental care for public school children.
14. HPS quickly established itself as setting the standard for the preventative dental care that could be provided to public children through its high standards and superior knowledge of the needs and evolving preventative methodologies that provide the best outcome, both short and long-term, for children who are serviced by the DHEC program and private patients as well.
15. HPS's principal, Ms. Byrd, is imminently qualified and knowledgeable in the field of preventative dental care for children, and she has personally championed the fight for public school children for decades and the education of dental hygienists, using her own personal resources, knowledge and energy to participate in professional organizations and training for dental hygienists in the state. It is not an exaggeration to say that Ms. Byrd is a qualified expert in the field and a passionate advocate for children's dental health.
16. HPS's superior services, outstanding operation and quality control procedures under the leadership of Ms. Byrd spawned the establishment of a number of other practitioners, some of which also became providers in the public schools pursuant to the DHEC program, although none of which provided the quality of services provided by HPS.
17. Some of the programs spawned by the success of the DHEC school-based programs were owned by private dentists, who quickly saw the goldmine of work heretofore untapped for themselves and for other private practitioners,
18. As a result of this discovery of new sources of income, with guaranteed income as to children who are beneficiaries of Medicaid, the Dental Association, its officers, agent,

employees and members, including Rocky Napier, have conspired and actively undertaken to damage and destroy HPS and/or the public school program, and to misappropriate the services provided by HPS to increase their own income.

19. Defendants have for years and continue to engage in a conspiracy among themselves and unnamed others to appropriate the work undertaken by HPS for the exclusive work of the private dentists and for their own economic interest.
20. On information and belief, efforts of private third parties, including but not limited to the South Carolina Dental Association, its officials, employees and members, including but not limited to Rocky Napier continuously lobbied and eventually persuaded DHEC to view the services of dental hygienists in the public schools as an impediment to increasing the financial bottom line of private dentists.
21. On information and belief, officials and/or employees of DHEC submitted false information to the Board of Dentistry as part of the continuing and widespread efforts to damage and destroy the public school program and HPS.
22. Pressure from defendant Dental Association, its officials, lobbyists and its members, including Rocky Napier eventually convinced DHEC that private dentists, either individually or working with other agencies, could impede and eventually eliminate the ability of HPS to continue to function so that private dentists could take over that aspect of preventative dental work, solely for the purpose of the private financial interests of private dentists.
23. On information and belief, DHEC and/or John Does became a tool and an active participant in a continuing conspiracy by multiple individuals, including the named

Defendants, to destroy the public school dental program by preventing dental hygienists from performing much needed care, education and preventative treatment in general, and HPS specifically, in favor of having the services performed by private dentists both in and out of their offices, and to create other public-private partnerships that would enable dentists to misappropriate the dental hygiene program for themselves, to the detriment and destruction of HPS and the children it serves.

24. On information and belief, Amy Brock Martin, an employee of the Medical University of South Carolina, has contributed substantial material to the efforts of Defendants and provided research and materials to further the conspiracy of the Defendants to damage and destroy HPS in favor of public-private partnership that would enable private dentists to misappropriate the work done by HPS for themselves.
25. On information and belief, Amy Brock Martin is a public employee who has used her public position to benefit the interests of private dentists as a conspirator with the named Defendants.
26. The efforts of the Defendants culminated in the intentional and wrongful conduct of DHEC in 2019 in terminating HPS from the public school dental program as part of its ongoing conspiracy to misappropriate the HPS service model for the benefit of private dentists to increase the income of private dentists.
27. The conspiracy to damage and destroy HPS provides no benefit to children, but actually harms them because it is clear that many public school students in low income areas of South Carolina receive no other dental services other than those provided in the public schools. Many of the patients served by HPS grow into adults with the benefit of limited

oral disease as a result of the work done by HPS, reducing and in some cases eliminating the incentive of adults to seek services from private dentists as adults.

28. On information and belief, Defendants have been and continue to work among themselves to wrongfully, intentionally and unfairly damage and destroy HPS for the sole purpose of providing private dentists methods by which they can unfairly misappropriate to themselves the dental care of public school children including those with limited resources as well as private pay patients.
29. On information and belief, the efforts of Defendants Dental Association and Napier resulted in multiple individuals at DHEC becoming actively involved in the actual fraud, actual malice and intent to harm by private dentists, which DHEC agents, employees and officials were persuaded to assist in damaging and/or destroying HPS.
30. The efforts of all Defendants resulted in the 2019 wrongful, intentional and malicious termination of HPS by DHEC from the school-based public health dental prevention program, as well as the communication of false and fabricated information regarding HPS to multiple agencies and individuals, including the South Carolina Department of Health and Human Services (hereafter “SCDHHS” or “DHHS”) and many of the public schools for which HPS has been providing preventative dental services for decades.
31. Moreover, the intentional, wrongful, malicious, and bad faith actions of DHEC and the other Defendants and the methods by which DHEC undertook to wrongfully terminate HPS from the DHEC program and to provide false information regarding HPS’s status were intended to, and did cause, crippling financial damage and loss to HPS and unfairly benefitted third parties including members, officers and employees of the Defendant Dental Association.

32. As a result of the false, malicious, and bad faith information provided by DHEC to SCDHHS, the agency which administers the South Carolina Medicaid program, HPS sustained significant financial losses for services already performed under HPS's contracts with DHEC, as well as additional damages in the form of attorneys' fees, costs, loss of professional standing, all of which were done by Defendants with the intention of damaging and destroying HPS and Ms. Byrd and with the effect of benefitting private third parties, including members of the Dental Association solely for their private gain.
33. Because of her inextricable link to HPS and the advocacy for dental hygienists in South Carolina particularly, Ms. Byrd has sustained significant emotional distress and physical injury as a result of the actions of the Defendants, all of which was foreseeable by Defendants.
34. As a result of the false, malicious, and bad faith information provided by DHEC to South Carolina Department of Health and Human Services, with the aid, assistance and prompting of the Dental Association, its officials and its members, including Rocky Napier, DHEC intended to and did interfere with HPS's ability to be paid for work it had already performed for public school students in the state as a DHEC provider.
35. The actions of the Defendants required costly litigation by HPS with SCDHHS because DHEC would not acknowledge its improper actions. HPS eventually compromised funds due to it for services already performed and to defend an alleged debt by HPS due to SCDHHS as a direct and proximate of the false and misleading information provided to it by DHEC for the intended purpose of damaging and destroying HPS.

36. Ms. Byrd has been required to invest personal income and assets, as well as personal energy and commitment, to battling the damages caused by the Defendants conspiracy and unfair trade practices, and DHEC's breach of contract accompanied by a fraudulent act.
37. The intentional false, bad faith and malicious actions of Defendants, the resulting DHHS proceedings and further actions by DHEC following the HPS compromise have caused permanent financial damage to Ms. Byrd, including personal injury, emotional distress, loss of standing in the community.
38. As a direct and proximate result of the intentional and coordinated actions of the Defendants, Ms. Byrd has been forced to undertake employment in other fields in an effort to keep herself and her family solvent to date.
39. On information and belief, the actions of SCDHEC its officials and its members, including Rocky Napier, were undertaken, in part, to mine the knowledge, operations and success rate accomplished by HPS with the intention to misappropriate HPS's knowledge, methods and operations to itself for the purpose of Defendants, individually and with the assistance of others, to establish replacement programs to financially benefit third parties to the exclusion and extinction of HPS.
40. The ability of dental hygienists to perform preventative dental care services in any setting, including the public schools, has not been well-received among private dentists, the reasons for which are largely illusory, but has been chronicled in a series of litigation in state and federal courts, summarized at least in part in *Health Promotion Specialists v. South Carolina Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).<sup>2</sup>

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<sup>2</sup> Among the plethora of litigation arising from the ongoing efforts of public officials and private third parties, HPS brought suit against numerous individuals, as well as the Board of Dentistry and the Dental Association. As noted by



41. The Supreme Court's decision outlines the enactment by the Board of Dentistry of an emergency designed to curtail HPS from operating, which eventually led to an order of the Administrative Law Court which invalidated the emergency regulation in 2002.
42. In an effort to thwart the wrongful collusion of various individuals within the public and private dental industry in South Carolina who sought to and had harmed the dental hygiene program in South Carolina, individual hygienists and HPS in particular, the Federal Trade Commission (hereafter "FTC" entered into a Consent Agreement with the Board of Dentistry which required the Board of Dentistry to provide prior notice to the FTC prior to taking any Board action relating to the provision by dental hygienists of preventive dental hygiene services in a public setting through September 2017.
43. In January 2018, after examining the scientific data and historical performance of recognized more modalities<sup>3</sup> that could be provided by dental hygienists working in the public health as "primary preventative care that is reversible" as provided by S.C. Code Ann. Section 40-15-110(10), the Board of Dentistry defined services that were included, in the arsenal of preventive measures that could benefit public school students by dental hygienists working in the public schools, including specifically HPS.
44. The additional modalities approved by the Board of Dentistry expanded on the effectiveness of preventative care that can be provided through the dental hygienist

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the Supreme Court in its 2013 decision, the parties other than the Board of Dentistry reached settlements and were dismissed from the action. At the time of the Supreme Court's decision, only the Board of Dentistry remained a defendant in the original litigation.

<sup>3</sup> Minutes of the South Carolina Board of Dentistry reflect a unanimous vote by the Board on January 19, 2018, determining that new modalities for temporary restorative treatment such as Atraumatic Restorative Technique (ART), Interim Restorative Technique (IRT) and Caries Control Technique (CCT) constitute "primary preventative care that is reversible" and falls within the authority of dental hygienists working in the public health program (primarily public schools) in accordance with S.C. Code Ann. Section 40-15-110(10).

program in all public health settings, including the school setting, improving upon the effectiveness and duration of the preventative work done in the school setting and in many cases delaying the onset of caries or the development of existing caries on children's teeth. In short, children who have the benefit of preventative dental services through HPS and other school-based programs had healthier mouths as adults, which require far less restorative and lucrative work by private dentists.

45. The South Carolina Board of Dentistry ruled on January 19, 2018, while acting pursuant to its authority granted by SC Code Ann. Section 44-5-110(H), stated that "therapeutic sealants and [preventative]<sup>4</sup> fillings, such as Atraumatic Restorative Technique, Interim Restorative Technique, and Caries Control Technique"<sup>5</sup> constitute "primary preventative care that is reversible" and could therefore be performed by dental hygienists in public health settings in accordance with S. C. Code Ann. Section 44-15-110(A)(10). (See Minutes of the Board of Dentistry meeting held January 19, 2018 at p. 6).
46. The effect of the Board's decision was to broaden the scope of preventative dental work that HPS could perform in the school setting to include less intrusive and more long-term preventative work for school children, thus reducing the incidence of necessary restorative work for teeth as the former school children became adults.

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<sup>4</sup> The meeting minutes reflect a reference to "temporary" fillings, but the Board explicitly referenced and approved procedures of ART, IST, etc. involve *preventative* fillings.

<sup>5</sup> ART is a needle-less and drill-less treatment for tooth decay and the reduction of pain caused by caries in children's teeth. The process involves placing a clear liquid compound to a tooth followed the application of a glass ionomer over tooth decay. The treatment seals the affected tooth, which arrests the spread of disease in the tooth. The process has more than 40 years of supporting research and was approved for use by the United States Food and Drug Administration in 2014.

47. The decision by the Board of Dentistry was immediately condemned by private dentists and other financially interested parties, including Defendants herein as well as their agents, who sprang into action and undertook efforts to convince the Board to reverse its decision. Furthermore, DHEC, which provided initial support for the decision, reversed course after being lobbied by private dentists to do so.
48. When Defendants, individually and through agents including employees of DHEC were unsuccessful in obtaining the Board's cooperation to restrain the work now expanded work of dental hygienists in the school program, Defendants took a different approach.
49. Because research supported the expanded services, a combined effort by Defendants and others undertook affirmative actions to impede the payment to HPS specifically for performing the modern preventative dental work and to urge action to DHEC and other agencies to unfairly impede payment to HPS to delay, interfere and eventually prevent them from being paid to perform the advanced modalities and even the historically and relatively innocuous dental preventative care which has been provided for decades.
50. The purpose of this action by Defendants and others were undertaken intentionally, in bad faith and with malice to unfairly compete with and destroy HPS and to give private dentists an unfair advantage in limiting the ability of HPS and dental hygienists by limiting the payment structure under which these advanced modalities could be performed only by licensed dentists in private practice.
51. In August 2018, HPS notified DHHS that it would begin implementation of the new modalities as part of its work with the DHEC public school program.

52. Pursuant to the authorization of the South Carolina Board of Dentistry and through its agreement with SCDHEC, HPS began providing the advanced modalities as part of its preventative dental care in school settings in August 2018. These preventative dental services were covered by Medicaid in the cases of students who were beneficiaries of Medicaid.
53. HPS was unaware of the intentional and wrongful actions of Defendants its officials and its members, including Rocky Napier to disrupt its improved services to the students of the public schools.
54. As explained below, DHEC later falsely told DHHS that HPS did not have a current MOA in place for the dental services it had been providing, causing DHHS to suspend payment for services rendered by HPS, terminate HPS from the Medicaid program, and further causing DHHS to seek repayment for services HPS had already provided.
55. HPS had continued authority to provide services for the school year 2018-2019 through the MOA signed by HPS and its supervising dentist on June 3, 2016 and accepted by DHEC on July 26, 2016.
56. DHEC did not require a new MOA for the 2016-2017 or the 2017-2018 school year, and HPS continued to provide its services to public school students under the existing 2016 MOA, which remained in effect. DHEC instead sent an annual evaluation to HPS and requested data from HPS that DHEC used to fulfill obligations it had for grant monies it had received. HPS executed and returned the contract and provided the data that was requested, confirming its continued participation as a provider in the DHEC program.

57. Curiously, in April 2019, with less than a month left in the school year, DHEC belatedly sent an HPS executed an updated MOA for signature, which purported to be for a term commencing on July 1, 2018. The MOA included and incorporated reference to the DHEC Public Health Dental Prevention Program Guidelines dated January 20, 2004, revised September 2018. The guidelines revised in 2018 were consistent with the standard of care for dental hygienists and included guidelines that permitted HPS hygienists to provide the advanced modalities approved by the Board of Dentistry, which Defendants and others had attempted to reverse.
58. During the spring and summer of 2019, DHEC did not notify HPS that there were any issues or problems with its continued status of an approved DHEC provider and took no action of which HPS is aware to damage HPS.
59. In July 2019, HPS was asked to submit their annual data to DHEC, which they did.
60. In August 2019, HPS was invited to and participated in the DHEC provider information conference in August 2019, which it had done annually since it became a provider through the DHEC program.
61. In connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS, despite the continued existence and validity of the MOA signed in April 2019.
62. The new MOA included clinical guidelines (the “2019 guidelines”) which required HPS to falsify dental records in students who would benefit from the advanced modalities as part of preventative dental treatment. The 2019 guidelines required that, prior to performing an advanced modality on a student, a patient’s tooth would have to be falsely

identified inflamed or swollen and/or the child was in obvious pain in order to qualify for the advanced modality. However, the clinical guidelines also prohibited hygienists from doing any preventative work on a tooth that was inflamed or swollen and the only clinical guideline for a child with a tooth in that condition would require referral to a private dentist, with no preventative work being done for the patient.

63. HPS did not sign the new MOA, because the new clinical guidelines referenced in the 2019 MOA incorporated clinical guidelines that deviated from the proper standard of care for dental hygienists. More specifically, however, the clinical guidelines effected what Defendants had attempted to do through lobbying of the Board of Dentistry, which was to prevent hygienists from performing the advanced modalities as part of the public school program, reserving that work for private dentists.<sup>6</sup>
64. HPS notified DHEC that it objected to the clinical guidelines in that they required a deviation from the appropriate standard of care, and notified DHEC that it would continue to provide its services in accordance with the MOA signed in April, 2019, which did not require falsification of dental records and permitted the best available dental preventative modalities to be utilized for the highest quality of dental sealants for its patients and the longest and best outcomes for them.
65. HPS tried repeatedly to meet with officials at DHEC to explain the deviation from the standard of care required by the 2019 guidelines, but officials DHEC delayed and eventually refused to meet with HPS to discuss its objections to the 2019 guidelines.

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<sup>6</sup> At the same time, one other state agency had also taken action to restrict the ability of HPS to seek payment for providing the advanced modalities as part of the preventative clinical work performed in the public schools. The actions of the two agencies are further evidence of the conspiracy which forms the basis for relief in this action.

66. DHEC responded that the MOA signed in April 2019 was not in effect because DHEC had not signed it upon receipt from HPS, claiming HPS had not signed the 2018 annual review. This was demonstrably false information because HPS had signed the 2018 annual review, and DHEC had acknowledged HPS's participation as a provider in the Program for the 2018-2019 calendar year.
67. HPS communicated with DHEC representative Alicia Johnston and advised it was already operating under the April 2019 MOA and, alternatively, the prior MOA had automatically renewed to continue HPS's status as a provider under the DHEC program.
68. On November 22, 2019, DHEC sent a letter to HPS acknowledging there was a lack of clarity as to what MOA was in effect (although it did not acknowledge it was DHEC's fault for having created the confusion), DHEC gave HPS notice that it was terminating the April 2019 MOA (which had been signed with a retroactive date to June 2018). That meant that HPS's enrollment in the program would end after 16 years on December 31, 2019. On information and belief, DHEC's decision to terminate its contract with HPS was intentional, malicious and in bad faith, and was intended to continue to cater to the wishes of private third parties including, the Dental Association.
69. In conjunction with its intentional November 22, 2019 letter defendant John Doe, while employed by DHEC, acted outside the scope of his authority, intentionally and maliciously caused Victoria Ladd of DHEC on November 18, 2019 to falsely notify public school personnel across the state for which HPS has been providing preventative dental services for students that HPS was not operating legally in the schools because it did not have a dentist on-site. The school districts were also notified that HPS was no longer approved to perform services under the umbrella of the DHEC program. Neither statement was true.

70. This announcement was false in multiple respects and indicated a serious misunderstanding by DHEC of the parameters of work performed under the DHEC school-based program.
71. DHEC's counsel attempted to correct its false report to public schools around the state, but HPS had already been significantly damaged in that, in response to the November 18, 2019 communication from DHEC to public school personnel, numerous school districts had already terminated their association with HPS, which severely damaged HPS economically and by way of its reputation, which prior to that time had been unsurpassed among the public school community.
72. By way of further intentionally and maliciously harming HPS, one or more DHEC officials and/or one or more John Does intentionally provided false information to DHHS, advising that HPS had been operating without the authority of a DHEC MOA for several years, such that Medicaid payments to HPS over a period of time had been illegal.
73. As a direct and proximate result of the intentionally false statements made by agents of DHEC and/or one or more of the Defendant John Does, all of which were generated following years of efforts by the Defendant South Carolina Dental Association and Rocky Napier, HPS has been damaged significantly in that it had all Medicaid payments suspended, it was terminated from Medicaid, and it had to aggressively litigate with DHHS regarding purported Medicaid over payments and additional funds that DHHS sought to recover for payments already made, which matters were concluded confidentiality.
74. On information and belief, Defendants have coordinated efforts with one another to assist private dentists in their continued efforts to restrict the care that can be provided by dental



hygienists in the public health setting, for the same purpose of increasing the income of private dentists at the cost of public school children in the state as well as taxpayers.

75. As a direct and proximate result of the unfair and unlawful actions of Defendants and others as set forth herein, HPS has sustained permanent and substantial damage including loss of income, damage to its reputation, misappropriation of its business model, and most likely the destruction of its business, all of which was the intent of the conspiring Defendants and third parties.
76. As a direct and proximate result of the unfair and unlawful actions of Defendants and others, Byrd has sustained total and permanent personal injury, emotional distress, damage to her reputation and significant financial losses, which may be expected to be permanent and for which Defendants are legally responsible.

**FIRST CAUSE OF ACTION**  
(Unfair Trade Practices – against all Defendants)

77. Each and every factual allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
78. Each Defendant is a “person” within the definitions set forth in the South Carolina Unfair Trade Practices Act.
79. The provision of dental preventative services by private practitioners to individual consumers in South Carolina including school-aged children is trade and commerce within the definitions set forth in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. 39-5-10(b). Even though multiple state agencies license, regulate and interact and sometimes provide payments with respect to the provision of the provision of dental preventative services by private practitioners, the trade and commerce as between the

provider and the patient remains an act of trade and commerce solely as between the provider and the patient and exempts the actions complained of herein from the provisions of Section 39-5-40(a).

80. The General Assembly has recognized that the provision of dental services, including but not limited to the provision of preventative dental sealants in school-aged children is one that affects the public interest, in that statutes enacted by the General Assembly and regulations by state agencies necessarily affect the public interest. In the absence of the State's obligation to protect the public interest, the state would have no authority to regulate and govern the provision of the trade or commerce provided by private practitioners to citizens of the state.
81. The provision of dental services in South Carolina is trade and commerce that affects the public interest and as a result requires licensing and regulation by an agency of the state, in that the State requires certain qualifications for practitioners, levels of competency, continuing education and regulation for the purpose of protecting the public and the public interest.
82. The South Carolina Tort Claims Act does not provide protection from liability of any kind to private organizations or private persons, nor does it provide any protection from liability to an agency or any officer, agent or employee of an agency of the State if the conduct of the agency or the individual was not within the scope of official duties or when the conduct constitutes actual fraud, actual malice, or intent to harm, as is alleged here. S.C. Code Ann. Section 15-78-70.
83. At all times relevant to this action, certain officials or employees of DHEC were acting outside the scope of their duties as employees or agents of DHEC and their actions to

damage plaintiffs were intentional, constituted actual fraud, and were undertaken with malice toward the Plaintiffs with an intent to damage and/or destroy the Plaintiffs. However, since they were acting on behalf of DHEC and to further its political interests while also acting to serve the interests of private individuals such actions were the result of improper conspiratorial activity with private individuals and organizations, DHEC is responsible for the harm caused by those certain officials or employees of DHEC even though DHEC individually may have some form of statutory or common law immunity if acting alone, but not when engaged in a conspiracy and in allowing its individual agents to act outside the scope of their official duties for the intended purpose of harming and damaging private persons and companies.

84. As to those present or former officials or employees of DHEC who acted outside the scope of their duties as employees or agents of DHEC in perpetuating the wrongful conduct set forth herein, which actions constituted actual fraud, actual malice and intent to harm, those individuals are sued in their individual capacities as John Doe because the actual names of those individuals are not presently known to Plaintiffs. When the identities of those individuals is determined, Plaintiffs will move to substitute one or more John Doe defendants with the names of the individuals who bear personal responsibility for the damages sustained by Plaintiffs herein. The actions of those individuals are imputed to DHEC for purposes of liability, because even though the John Does were acting outside the scope of their legitimate authority, their actions were undertaken with the implied or express approval and/or ratification of DHEC as an agency, and liability therefore is imputed to the agency.

85. The intentional actions of the Defendants as alleged herein were, were intended to be and were known to be unfair actions in the act of trade or commerce, in that the action of the Defendants were intended to and did seek to and accomplish a manipulation of the procedures for providing dental sealants services to public school children provided by private practitioners.
86. Defendants herein engaged in unfair and deceptive acts in the conduct of the provision of dental sealants to school aged children by manipulating regulatory and discretionary actions which were intended to, and did, obstruct, impede and prevent dental hygienists in general and HPS in particular from being able to provide services for which they are trained, capable of and licensed to perform at a lower cost than having those services provide by private dentists as part of a comprehensive dental plan.
87. The court is asked to take judicial notice of peer-reviewed statistical studies that establish the preventative value of dental sealants of school-aged children, particularly in lower-income areas of the state, as well as statistical studies that establish and recognize based on actual data the likelihood that significant portions of the public in South Carolina will not obtain dental care in whole or in part as adults for a variety of reasons, such that the provision of dental sealants as school-aged children is very much an issue concern to the public health of citizens of the state.
88. Defendants herein have engaged in unfair and deceptive acts in impeding, preventing and misappropriating the business long conducted by Plaintiffs HPS and Byrd, the continued participation of dental hygienists in general and HPS specifically in providing dental sealants for public school students. On information and belief, Defendants acted not for any purpose of protecting the public interest, but instead to obstruct and eliminate viable

and valuable dental option for school aged children and forcing children's dental needs to be performed exclusively by private dental practitioners as part of a comprehensive dental plan that can only be provided by private dentists. On information and belief, Defendants acted for the sole economic benefit of the private dentists and for no improvement in the quality of dental sealants that is available to public school children, the effect of which is to cause significant harm to school-aged children across the state purely for the financial benefit of private dentists, and to harm, disable and destroy the business of HPS as established and lawfully operated under existing laws.

89. As a direct and proximate result of the coordinated and unfair trade practices of all Defendants and other not named parties, Plaintiffs HPS and Byrd have been significantly and permanently damaged, and both have suffered monetary and property loss as a direct and proximate result of the Defendants' unfair and deceptive acts.
90. The acts of the Defendants, including but not limited to DHEC and the Dental Association and its current, prior and former members thereof as set forth here and which form the basis for the relief sought by Plaintiffs herein was willful and knowing violations of Section 39-5-20 because they have both been here before. As a result, Defendants, including but not limited to DHEC and the Dental Associations and its current, prior and former members are liable for three times the actual damages sustained by Plaintiffs.
91. As a direct and proximate of the unfair trade practices engaged in by Defendants herein Plaintiffs have incurred substantial attorneys' fees in defending against the acts inflicted upon them by Defendants and are therefore entitled to an award of attorneys' fees and costs, both as to prior proceedings which they were forced to defend and litigate as well as in pursuing this action.

92. Plaintiffs are informed and believe they are entitled to a judgment in their favor against the Defendants, jointly and severally, for actual damages sustained by them, an award of treble the damages incurred, and an award of attorney's fees, all of which should be awarded as joint and several obligations of the Defendants herein.

**SECOND CAUSE OF ACTION**  
(Civil Conspiracy – against all Defendants)

93. Each and every factual allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
94. On information and belief, the named Defendants and other individuals combined efforts directly or indirectly for the purpose of injuring Plaintiffs. The fact that injury occurred to people other than the Plaintiff does not detract from the intent of the named Defendants to injure Plaintiffs.
95. On information and belief, the named Defendants and other individuals conspired among themselves and with third parties for the purpose of causing damages to Plaintiffs.
96. The acts as set forth above, and others not necessary to spell out in this pleading, constituted multiple and related overt acts in furtherance of the civil conspiracy, although some overt acts of some Defendants may not have been known to all Defendants at the same time. However, each named Defendant conspired with third parties including other Defendants for the purpose of causing damage to Plaintiffs.
97. As a direct and proximate result of the overt acts which occurred in combination among Defendants and others, Plaintiffs have sustained substantial financial losses, including fees and costs incurred in the defense of administrative proceedings that were caused by false information being provided by Defendant DHEC to SCDHHS and to others, as well as

losses from the damage and destruction of the ability of the Plaintiffs to carry out their profession, all of which acts were undertaken to enrich private individuals, including some of the named Defendants, including present, prior and former members of the Dental Association.

98. On information and belief, Defendant Rocky Napier continuously undertook overt acts in concert with named Defendants and others for the purpose of injuring Plaintiffs by engaging in multiple actions intended to destroy the school-based public dentistry program which benefitted thousands of South Carolina children, but more specifically was intended to and did proximately result in substantial financial losses to Plaintiffs.
99. The actual damages sustained by Plaintiffs as a direct and proximate result of the civil conspiracy and overt actions which accomplished the goal of the conspiracy by damaging and destroying Plaintiffs' business cannot be allocated among individual Defendants and as a result, an award of actual damages is sought jointly and severally against the Defendants for civil conspiracy for the damages sustained and which will continue to be sustained by Plaintiffs as a direct and proximate result of the civil conspiracy of the named Defendants and others.
100. On information and belief, Plaintiffs are entitled to a judgment in their favor for actual damages jointly and severally against the named Defendants.

### **THIRD CAUSE OF ACTION**

(Breach of Contract accompanied by a Fraudulent Act – against DHEC and John Does)

101. Each and every allegation set forth above is incorporated herein where relevant by reference as fully as if repeated herein verbatim.

102. Defendants DHEC and John Does breached duties it and they owed to Plaintiff HPS as a result of contracts between HPS and DHEC which remained in force and full effect through December 31, 2019 and would have remained in place longer but for the fraudulent acts of Defendants DHEC and the John Does.
103. The breach by Defendant DHEC was accompanied fraudulent intent and by multiple fraudulent actions, in that DHEC intentionally and with an intent to harm Plaintiffs provided false information to SCDHHS that resulted in damaging action taken by SCDHHS against Plaintiff HPS with the intent by DHEC of causing the financial loss to and failure of Plaintiff HPS, which goal was accomplished as a direct and proximate result of substantial financial loss to Plaintiffs from the actions of DHEC and the Defendant John Does.
104. Additionally, by way of further fraudulent actions, Defendant DHEC and/or the John Does intentionally provided false information to public school agents and employees regarding the legal status of HPS, which false information which false and fraudulent communication was intentional and malicious, and was intended to cause harm to Plaintiffs and did cause significant harm to Plaintiffs, both financial and reputational.
105. As a direct and proximate result of the acts of Defendants DHEC and John Does as set forth herein, Plaintiff sustained actual and consequential damages in an amount to be determined by the trier of fact.
106. Plaintiffs are entitled to an award of for actual damages sustained by them as a direct and proximate result of the breach of contract accompanied by multiple fraudulent acts by DHEC and/or the John Does, such award to be solely against DHEC because DHEC is



liable for the intentional torts of its active and former employees who effected the breach of contract and the fraudulent acts which accompanied it.

107. Because the intentional, wrongful and fraudulent nature of the acts of DHEC and the John Does, and the malicious and repeated nature of DHEC's misconduct toward Plaintiffs, Plaintiffs are informed that the circumstances present warrant an award of punitive damages against DHEC and the John Does as a result of their intentional and wrongful conduct, in an amount to be determined by the trier of fact sufficient to deter future similar conduct by others, both private and public, and to punish DHEC and the John Does for their outrageous behavior toward Plaintiffs.

#### **FOURTH CAUSE OF ACTION**

(Statutory Attorney fees by HPS – against DHEC only)

108. Each and every allegation set forth above is incorporated herein where relevant as fully as if repeated herein verbatim.
109. This Court has jurisdiction over this matter pursuant to S.C. Code Ann. Section 15-77-50.
110. Through its actions as set forth herein, Plaintiff HPS has been required to contest action by DHEC and DHHS (the DHHS proceedings were the direct and proximate cause of the actions of DHEC and the John Doe defendants). As set forth above, DHEC acted without substantial justification in pressing its false claims that Plaintiff HPS had no contract with DHEC, in transmitting false information about HPS to those with which HPS had contracts, and in instigating administrative proceedings between HPS and SCDHHS using knowingly false information which cost tremendous funds in attorney's fees and costs to defend and compromise.

111. Defendant DHEC was not following a statutory or constitutional mandate in its actions directed against HPS but was instead acting in concert and in conspiracy with others to further the financial interests of private third parties, some of whom are Defendants in this action and who contributed to the action taken by DHEC against HPS for their own personal financial gain.
112. HPS has contracted to pay attorney's fees and costs for the prosecution of this action, just as it did to defend against the administrative litigation and action already taken by DHEC and DHHS.
113. HPS is informed and believes it is entitled to an award of attorneys' fees and costs against DHEC for the cost of defending against the prior actions of DHEC and DHHS taken against HPS (caused by DHEC) as well as the pursuit of this action, pursuant to S.C. Code Ann. Section 15-77-300.
114. HPS prays for an award of attorneys' fees and costs against DHEC for the actual attorneys' fees and costs incurred by it in defending against the actions of DHEC and DHHS, and in pursuing this action.
115. Plaintiffs preserve the right to amend or supplement this complaint and the prayer for relief based on misconduct discovered during the course of the litigation in this proceeding.

WHEREFORE, having fully set forth the grounds for relief sought herein, Plaintiffs pray for an order:

- A. Awarding actual damages in favor of Plaintiffs against all Defendants in accordance with the First Cause of Action, jointly and severally.

- B. Trebling the award of damages against Defendant DHEC as a result of the character of the improper and illegal action in which DHEC engaged for the intentional purpose of harming Plaintiffs.
- C. An award of attorneys' fees against Defendant DHEC in accordance with the First Cause of Action.
- D. An award of actual and punitive damages in favor of Plaintiffs against all Defendants jointly and severally under the Second Cause of Action.
- E. An award of actual and punitive damages in favor of Plaintiff against all Defendants jointly and severally under the Third Cause of action.
- F. An award of attorneys' fees and costs incurred by Plaintiff HPS in defending against action taken against it by DHEC and DHHS as well as those fees incurred by HPS in pursuit of this action.
- G. For an award of the costs of this action as permitted by statute.
- H. For an award of such other and further relief as the court deems just and proper based on applicable law, whether specifically prayed for herein or not.

Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR PLAINTIFF

March 28, 2022

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, the South Carolina Dental Association, Dr. Richard E. Boyd, as personal representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-40-04567

**NOTICE OF MOTION AND  
MOTION TO DISMISS PLAINTIFF'S  
CLAIMS AGAINST SOUTH CAROLINA  
DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL CONTROL  
Rule 12(b)(6), SCRPC**

**TO: DESA BALLARD, ESQUIRE, AND HARVEY M. WATSON III, ESQUIRE,  
ATTORNEYS FOR THE PLAINTIFF**

**YOU WILL PLEASE TAKE NOTICE** that the Defendant, South Carolina Department of Health and Environmental Control ("DHEC"),<sup>1</sup> hereby gives notice that in 10 days hereafter, or as soon thereafter as is convenient to the Court and Counsel, its Counsel will move before the Presiding Judge for an Order pursuant to Rule 12(b)(6), SCRPC, dismissing all of the Plaintiff's claims against DHEC.<sup>2</sup>

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<sup>1</sup> To the extent that the allegations of Plaintiff's Second Amended Complaint may be construed to have allegations against current and former agents/employees of DHEC, this Motion to Dismiss is intended to be filed on behalf of DHEC's current and former employees, along with DHEC (i.e. a responsive pleading). The caption of the Second Amended Complaint references "current or former Agents;" but, the allegations in Paragraph 8 of the Second Amended Complaint reference "current or former employees of SCDHEC" and makes no reference to "agents" as styled in the caption.

<sup>2</sup> To the extent that Ms. Tammi Byrd, who is not captioned as a Plaintiff, but is referenced in the Second Amended Complaint at Paragraphs 3 and 5 as "Plaintiff" is a claimant in this case, this motion is intended to apply to her claims as well.

This motion is based upon the following:

1. The Plaintiff, Health Promotions Specialists, LLC (“HPS”) entered into certain contracts (referred to herein, and in the Plaintiff’s Second Amended Complaint, as “Contracts” or “Memorandums of Agreement”) with DHEC, that enabled HPS to perform its services as a provider in the Public Health Dental Prevention Program (“PHDPP”), as contemplated in S.C. Code Ann. § 40-15-110. See ¶¶ 3 and 12 of Plaintiff’s Second Amended Complaint.
2. The Plaintiff’s services rendered under the PHDPP were those of dental hygienist services.
3. DHEC is a state agency. See S.C. Code Ann. § 44-1-20.
4. As a part of HPS’s participation in the PHDPP, HPS worked in various public schools and provided its services to children under the Public Health Dental Prevention Program.
5. DHEC has been charged by the Legislature to administer the preventive care under the PHDPP pursuant to S.C. Code Ann. § 40-15-110. The services rendered by participants of the PHDPP are to “be performed under the direction of” DHEC’s State Dental Coordinator. S.C. Code Ann. § 40-15-110.
6. As the Plaintiff notes in Paragraph 61 of its Amended Complaint, DHEC presented a new contract/Memorandum of Agreement for all participants in the PHDPP in August 2019. DHEC specifically advised all participants in the PHDPP program, including HPS, that if they (the participants) wanted to continue operating under the PHDPP program, a new contract (i.e., Memorandum of Agreement) would have to be signed in August of 2019.

7. HPS refused to sign the August 2019 Memorandum of Agreement because HPS contends that it objected to DHEC's clinical guidelines. See ¶ 63 of Plaintiff's Second Amended Complaint.
8. HPS alleges in its Second Amended Complaint: "HPS notified DHEC that it objected to the clinical guidelines . . . and notified DHEC that it would continue to provide its services in accordance with the MOA signed in April 2019." See ¶¶ 63–64 of Plaintiff's Second Amended Complaint.
9. In other words, in August 2019, HPS made a conscious decision to subvert the South Carolina Statute (i.e., the PHDPP) and usurp DHEC's statutory obligation to administer the PHDPP. See ¶¶ 63–64 of Plaintiff's Second Amended Complaint.
10. The Plaintiff's Second Amended Complaint fails to state facts sufficient to constitute a cause of action against DHEC and should be dismissed pursuant to Rule 12(b)(6), SCRCP.
11. Based on the Plaintiff's pleadings, the Plaintiff's claims are expressly barred by:
  - a. The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*
  - b. The South Carolina Unfair Trades Practices Act, specifically S.C. Code Ann. § 39-5-40(a).
  - c. The existing case law of this State, including *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (2013) and *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430 (2009).
  - d. The illegality of HPS's actions in continuing to provide services under the PHDPP after refusing to sign the 2019 contract / Memorandum of

Agreement due to its “objection” to DHEC’s clinical guidelines.

- e. To the extent that Plaintiff intended to allege that DHEC conspired with its own agents or employees, DHEC would cite to such cases as *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010), which holds that employees or directors of an entity cannot conspire with that entity in their official capacity. In reference to Plaintiff’s claims for attorney’s fees, DHEC would cite to the South Carolina Tort Claims Act, *supra*, which is the exclusive civil remedy for governmental torts and precludes the award of attorney’s fees under normal circumstances. See *Knoke v. S.C. Dep’t of Parks, Recreation & Tourism*, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996).

As such, DHEC seeks an Order dismissing all claims against DHEC in this civil action. This motion is supported by, and/or will be supported by, the pleadings filed of record, the applicable law, the records on file herein and a Memorandum of Law as may be received by the Court.

Respectfully submitted,

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*Attorneys for DHEC*

April 4, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2019-CP-40-04567

Health Promotion Specialists, LLC,

Plaintiff,

v.

South Carolina Department of Health and  
Environmental Control,  
The South Carolina Dental Association, Dr.  
Richard E. Boyd, as Personal Representative  
of the Estate of Rocky Napier, and  
one or more John Does, unidentified current or  
former agents of South Carolina Department  
of Health and Environmental Control,

Defendants.

**DEFENDANT SOUTH CAROLINA DENTAL  
ASSOCIATION'S MOTION TO DISMISS  
THE PLAINTIFF'S COMPLAINT**

**TO: DESA BALLARD, ESQUIRE AND HARVEY M. WATSON, III, ESQUIRE,  
ATTORNEYS FOR PLAINTIFF, AND TO THE PLAINTIFF ABOVE NAMED:**

PLEASE TAKE NOTICE that Defendant South Carolina Dental Association (hereinafter, "SCDA"), by and through its undersigned counsel, and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, will move before the Presiding Judge of the Richland County Court of Common Pleas at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order dismissing the Plaintiff's Complaint against the SCDA for failure to state a claim upon which relief can be granted. Specifically, Plaintiff's claims under the South Carolina Unfair Trade Practices Act and for civil conspiracy must be dismissed because Plaintiff has not alleged facts sufficient to constitute a cause of action.

1) Plaintiff's claim under the South Carolina Unfair Trade Practices Act ("SCUTPA") cannot prevail against the SCDA because Plaintiff has failed to allege that the SCDA was engaged in "trade or commerce" for purposes of the Act. The SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are



hereby declared unlawful.” S.C. Code Ann. § 39-5-20(a) (emphasis added). The SCUTPA defines “trade” and “commerce” as “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” *Id.* at § 39-5-10(b). In *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), a case involving the same Plaintiff as in the current matter, the Supreme Court dismissed Plaintiff’s SCUTPA claim against the South Carolina Board of Dentistry, this state’s regulatory authority for dentists and dental hygienists, because the Board’s action did not fall within the definition of “trade or commerce” under the Act. Likewise, here, there are no allegations that the SCDA’s alleged actions constitute “trade or commerce” under the SCUTPA.

2) Plaintiff’s civil conspiracy claim cannot prevail against the SCDA for several reasons. First, Plaintiff has failed to allege that the SCDA’s main purpose was to harm the Plaintiff. Instead, Plaintiff repeatedly alleges that SCDA intended to increase the profits of its members, which does not satisfy the intent-to-harm element of a civil conspiracy claim. Second, Plaintiff has failed to allege that the SCDA “committed an unlaw act or a lawful act by unlawful means.” *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). Plaintiff alleges that the SCDA lobbied public officials “to increase the financial income of private dentists of South Carolina.” (Compl. ¶ 11). But this act is neither unlawful nor nefarious. Third, Plaintiff’s civil conspiracy claim is based on a recitation of the same allegations used to support Plaintiff’s other three causes of action: SCUTPA, breach of contract, and attorney’s fees. However, to prevail, Plaintiff must plead facts that are separate and independent from the allegedly wrongful act used to support other claims. Finally, Plaintiff’s conspiracy claim must fail because, by

Plaintiff's own admission, some Defendants were unaware that a conspiracy was taking place to begin with. (See Compl. ¶ 96). Knowledge is a prerequisite to a civil conspiracy claim, and there cannot be a conspiracy unless the co-conspirators agreed to act in concert to achieve a specific harm.

This Motion is based on the pleadings, applicable law and any Memorandum in Support of its Motion to Dismiss to be filed prior to the hearing hereon.

Respectfully submitted this 28th day of April, 2022.

**MURPHY & GRANTLAND, P.A.**

*s/E. Raymond Moore, III*

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*Attorneys for Defendant South Carolina Dental  
Association*

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Health Promotion Specialists, LLC, )  
)  
Plaintiff, )  
)  
vs. )

Civil Action No. 2019-CP-40-04567

South Carolina Department of )  
Health and Human Services, The )  
South Carolina Dental Association, )  
Dr. Richard E. Boyd, as Personal )  
Representative of the Estate of )  
Rocky Napier, and one or more )  
John Does, unidentified current or )  
former agents of South Carolina )  
Department of Health and )  
Environmental Control, )  
)  
Defendants. )

**NOTICE OF MOTION AND MOTION**  
**TO DISMISS OF DEFENDANT, DR.**  
**RICHARD E. BOYD AS PERSONAL**  
**REPRESENTATIVE OF THE ESTATE**  
**OF DR. ROCKY NAPIER**

TO: DESA BALLARD, ESQUIRE, AND HARVEY M. WATSON III, ESQUIRE, OF  
BALLARD & WATSON, ATTORNEYS FOR THE ABOVE-NAMED  
PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE THAT the defendant, Dr. Richard E. Boyd,  
as Personal Representative of the Estate of Rocky Napier (“Dr. Boyd as Personal Representative”),  
by and through the undersigned attorneys, will move before the Presiding Judge of the Court of  
Common Pleas for Richland County at 10:00 a.m. on the tenth (10<sup>th</sup>) day after service hereof, or  
as soon as counsel may be heard, for an Order dismissing plaintiff’s<sup>1</sup> Second Amended Complaint<sup>2</sup>  
against this defendant pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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<sup>1</sup> To the extent that Ms. Tammi Byrd, who is not identified in the caption of the Second Amended Complaint as a named plaintiff but is referenced in Paragraphs 3 and 5, is intended to be a claimant in this case, this motion applies to her claims as well.

<sup>2</sup> The Second Amended Complaint in this matter was filed over two years after the initial Complaint and after years of litigation involving the underlying claims and issues. To the extent applicable, this defendant incorporates the factual history and existing case law developed on this

The Second Amended Complaint, which was filed on March 28, 2022, alleges two (2) causes of action against the defendant, Dr. Boyd as Personal Representative, for 1) Unfair Trade Practices and 2) Civil Conspiracy based upon the alleged actions taken by the decedent, Dr. Napier,<sup>3</sup> a well-respected dentist in South Carolina, who died on March 7, 2021. The basis of this Motion is multi-fold. As a preliminary and fundamental matter, the plaintiff's claims against the Estate of Dr. Rocky Napier are barred by the applicable statute of limitations. See S.C. Code Ann. §§ 62-3-802 to 803. Dr. Napier died on March 7, 2021. As the plaintiff did not previously present a claim against the Estate and did not previously file any action against Dr. Napier, his Estate, and/or Dr. Boyd as Personal Representative, the filing of the Second Amended Complaint on March 28, 2022, was untimely and barred by the statute of limitations. See S.C. Code Ann. §62-3-802 ("All claims against a decedent's estate which arose before the death of the decedent ... are barred against the estate [and] the personal representative ... unless presented within ... one year after the decedent's death.").

Further, both of plaintiff's two (2) causes of action against this defendant fall within a recognized exception to South Carolina's survivability statute and, therefore, are barred as a matter of law against the Estate of Dr. Napier and the defendant, Dr. Boyd as Personal

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issue as a basis for barring plaintiff's claims in the Second Amended Complaint, including Health Promotion Specialist, LLC v. S.C. Bd. Of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013).

<sup>3</sup> As discussed herein, this defendant maintains that the alleged actions are not sufficient to state a claim pursuant to either cause of action. Aside from alleging that Dr. Napier is a licensed dentist and member of the Dental Association, the only other allegation regarding Dr. Napier's actions is that he "operated as a volunteer advocate" and "had involved himself in the work of public and private organizations, including DHEC and the Dental Association." Pl.'s Second Am. Compl. ¶¶9-10. Based upon these allegations, should Dr. Napier be deemed to have been working with and at the behest of DHEC and/or the Dental Association the defendant, Dr. Boyd as Personal Representative, expressly reserves the right to assert, as applicable, either the protections of The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., or caselaw establishing that a civil conspiracy can only exist among separate entities. See Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982).

Representative. South Carolina courts have recognized that the state’s “general survivability statute has a wide ambit” but with certain exceptions. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96–97 (2002). Specifically, the statute reads as follows:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90.

However, the South Carolina Supreme Court has created certain exceptions to the survivability statute.” Ferguson, 349 S.C. at 563, 564 S.E.2d at 97. As applicable to this matter, “South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.” Id. (citing Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941) (a cause of action for fraud for an apparent cancellation of an insurance policy did not survive plaintiff’s death)). “[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. ... [T]he difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justify[es] excepting fraud from the survival statute.” Fairecloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991) (recognizing that the “South Carolina Supreme Court has persisted in recognizing an exception to survivability for claims of slander, malicious prosecution, and fraud”). See also, S.C. Code Ann. § 19-11-20; Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997) (explaining that S.C. Code Ann. § 19-11-20 “prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest ... [based on] the principle that it is against public policy to allow a witness thus interested to testify

as to such matters when such testimony, if untrue, cannot be contradicted”)(superseded by statute on other grounds).

In applying this common law exception, the Supreme Court has looked to the plaintiff’s theory and “normal legal connotation” of fraud, as opposed to merely the plaintiff’s “label[ ]” of actions as “unfair, misleading, or deceptive.” See Ferguson, 349 S.C. at 564-65, 564 S.E.2d at 97 (holding that a cause of action under the Dealers Action “was based upon a theory of fraud and deceit” because the “essence” of plaintiff’s allegation was that the defendant “misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices”).

In the present case, both of plaintiff’s causes of action against the Estate of Dr. Napier purportedly arise from the alleged fraudulent or deceitful actions of the decedent, Dr. Napier, which are denied. See Pl.’s Second Am. Compl. ¶29 (alleging “actual fraud, actual malice and intent to harm”). The Second Amended Complaint references Dr. Rocky Napier approximately ten (10) times throughout one hundred fifteen (115) paragraphs with no basis in fact to support the claims. Plaintiff alleges that these actions were made in furtherance of the alleged civil conspiracy and form the basis of plaintiff’s cause of action for Civil Conspiracy. See Pl.’s Am. Compl. ¶98 (“Defendant Rocky Napier continuously undertook overt acts in concert with named Defendants and others for the purpose of injuring Plaintiffs[.]”). Further, regarding plaintiff’s claim for Unfair Trade Practices, the plaintiff repeatedly alleges that the defendants, “engaged in unfair and deceptive acts[.]” See Pl.’s Second Am. Compl. ¶¶86, 88, and 91.

Moreover, the nature and essential elements of each of plaintiff’s causes of action against this defendant involve elements of deceit or of fraud, which can be “defined in accordance with its normal legal connotation as including: a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not

made honestly and in good faith; and an intentional failure to disclose a material fact.” Ferguson, 349 S.C. at 564–65, 564 S.E.2d at 97. See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012) (“To recover in an action under the SCUTPA, a plaintiff must show... the defendant engaged in an *unfair or deceptive act* [.]”)(emphasis added). See also, Pardis v. Charleston Cty. Sch. Dist., 433 S.C. 562, 574, 861 S.E.2d 744, 780 (2021)(“[A] plaintiff asserting a civil conspiracy claim must establish ...[the defendant] commit[ted] an *unlawful act* or a lawful act by *unlawful means*[.]” (emphasis added)).

As a third basis for this Motion, the plaintiff has failed to allege facts sufficient to constitute a cause of action against defendant, Dr. Boyd as Personal Representative, for both of plaintiff’s two (2) causes of action against this defendant. First, the plaintiff has failed to alleged facts sufficient to state a cause of action pursuant to S.C. Code Ann. 39-5-10(b) (1976), the South Carolina Unfair Trade Practices Act (alternatively SCUTPA). “To recover in an action under the SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affects the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).”). RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012).

The plaintiff<sup>4</sup> has failed to allege facts that this defendant’s decedent, Dr. Napier, was engaged in the conduct of trade or commerce. As provided in the SCUTPA, “trade” and “commerce” are defined terms that include the “advertising, offering for sale, sale or distribution

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<sup>4</sup> To the extent Ms. Tammi Byrd, who is not identified in the caption as a plaintiff, but is referenced in Paragraphs 3 and 5 of plaintiff’s Second Amended Complaint, her alleged “personal injury” is not recoverable under SCUTPA. See Reynolds v. Ryland Group, Inc., 340 S.C. 331, 337 n.1, 531 S.E.2d 917, 921 n.1 (2000) (noting that “[t]he Massachusetts act is broader than ours in that it permits recovery for personal injury, as well as loss of money or property”).

of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate[.]” Instead, the acts of which plaintiff complains arise out of Dr. Napier’s alleged membership in “the Dental Association” and his conduct “as a volunteer advocate” which do not fall within the definition of trade or commerce. Pl.’s Second Am. Compl. ¶¶9-10.

Further, given that the decedent, Dr. Napier, passed away on March 7, 2021, his alleged actions are not capable of repetition. “An impact on the public interest may be shown if the acts or practices have the potential for repetition.” Hollman v. Woolfson, 683 S.E.2d 495, 499 (2009). Without the possibility of repetition, the plaintiff has alleged the public impact as to the alleged actions of Dr. Napier only in conclusory and speculative terms. “South Carolina courts have consistently rejected speculative claims of adverse public impact and require evidentiary proof of such effects.” Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502 (4th Cir. 1992). See also, Jefferies v. Phillips, 316 S.C. 523, 527 (Ct. App. 1994) (“Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a ‘speculative [claim] of adverse public impact’ and that will not suffice for a recovery under the UTPA.”).

Similarly, the plaintiff has also failed to allege facts to sufficient to state a claim for civil conspiracy. “[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.” Pardis, 433 S.C. at 574, 861 S.E.2d at 780. Therefore, a claim for civil conspiracy must “plead an overt act in furtherance of the agreement.” Id.



Plaintiff's civil conspiracy claims as against this defendant fail because plaintiff has failed to allege any alleged wrongdoing by Dr. Napier that could support a claim for conspiracy. Moreover, the plaintiff has not alleged or identified any overt action undertaken by Dr. Napier in furtherance of the alleged agreement. Compare Pl.'s Second Am. Compl. ¶98. Thus, the plaintiff has not pled the required elements of a claim for civil conspiracy. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009)(“A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint.”); Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (Ct. App. 1981) (finding that a cause of action which did “no more than incorporate the prior allegations and then allege the existence of a civil conspiracy” fails to state a cause of action).

Finally, set forth above, this defendant maintains that the plaintiff has failed to allege facts sufficient to constitute a cause of action against defendant, Dr. Boyd as Personal Representative, for both of plaintiff's two (2) causes of action against this defendant. Further, the plaintiff's two (2) causes of action fall within a recognized exception to South Carolina's survivability statute. Nevertheless, to the extent this Court would find that plaintiff has alleged a cause of action against the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and that such cause of action has survived the death of Dr. Napier, which is denied, this defendant would assert that any such claim is untimely pursuant to S.C. Code Ann. §62-3-804, et seq.

This Motion will be supported by a memorandum, affidavits, and/or the applicable law that will be filed prior to or at the time of the hearing in this matter. Given the nature of this Motion, consultation with the opposing party was not necessary.

Respectfully submitted,

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Representative of the Estate of Rocky Napier

Columbia, South Carolina

April 29, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2019-CP-40-04567

Health Promotion Specialists, LLC,

Plaintiff,

v.

South Carolina Department of Health and  
Environmental Control,  
The South Carolina Dental Association, Dr.  
Richard E. Boyd, as Personal Representative  
of the Estate of Rocky Napier, and  
one or more John Does, unidentified current or  
former agents of South Carolina Department  
of Health and Environmental Control,

Defendants.

**DEFENDANT SOUTH CAROLINA DENTAL  
ASSOCIATION'S MEMORANDUM IN  
SUPPORT OF ITS MOTION TO DISMISS  
THE PLAINTIFF'S COMPLAINT**

Defendant South Carolina Dental Association ("SCDA") hereby submits this Memorandum in Support of its Motion to Dismiss. For the reasons below, Plaintiff's claims against the SCDA must be dismissed because Plaintiff has not alleged facts sufficient to constitute a cause of action under the South Carolina Unfair Trade Practices Act or for civil conspiracy.

**SUMMARY**

Plaintiff filed this lawsuit in 2019 after it was terminated from the Public Health Dental Prevention Program (the "Program") by the South Carolina Department of Health and Environmental Control ("DHEC") for failing to comply with the Program's rules and regulations. Recently, Plaintiff amended the Complaint to add SCDA as a party and alleging against it claims based on the South Carolina Unfair Trade Practices Act and civil conspiracy. However, the Complaint's allegations do not support either claim against SCDA and should be dismissed.

As a preliminary matter, Plaintiff was terminated from the Program by DHEC – not the SCDA – and therefore, Plaintiff's true grievance lies against DHEC. The SCDA is merely a non-

profit entity that serves its dentist-members in South Carolina. Through the Dental Practices Act, the General Assembly tasked DHEC with regulating the Program, and it was DHEC's decision to terminate Plaintiff for willfully refusing to comply with the Program's rules. The SCDA does not control DHEC's decision making, nor does Plaintiff allege such.

Plaintiff's claim based on the South Carolina Unfair Trade Practices Act ("SCUTPA") cannot prevail because the SCDA was not engaged in "trade or commerce" as required by the Act. Not once does Plaintiff allege any facts to support the trade or commerce requirement. The SCDA does not sell, distribute, or advertise goods or services of any kind – all of which are defined as "trade or commerce" under the Act. Therefore, Plaintiff's SCUTPA claim does not apply.

Further, Plaintiff's civil conspiracy claim cannot prevail for several reasons. First, Plaintiff has failed to allege that the SCDA's main purpose was to harm the Plaintiff, an essential element of a civil conspiracy claim. Instead, Plaintiff repeatedly alleges that SCDA intended to increase the profits of its members, which does not satisfy the intent-to-harm requirement. Second, Plaintiff has failed to allege that the SCDA committed an "overt act" in furtherance of an "unlawful act or lawful act by unlawful means" to harm the Plaintiff. The only overt act that the SCDA allegedly committed was to lobby public officials "to increase the financial income of private dentists of South Carolina." (Compl. ¶ 11). However, even if true, this is neither unlawful nor nefarious. In fact, the *Noerr-Pennington* doctrine provides the SCDA (and the public in general) with an unfettered right under the First Amendment to lobby the government for any purpose, regardless of intent.

Finally, Plaintiff's civil conspiracy claim cannot prevail because it is based on a recitation of the same allegations used to support Plaintiff's other three causes of action: SCUTPA, breach of contract, and attorney's fees. To prevail, Plaintiff's conspiracy claim must allege facts that are

separate and independent from the allegedly wrongful conduct used to support its other claims. This pleading requirement is intended to prevent Plaintiff from receiving a double recovery arising out of a single, isolated harm. Therefore, Plaintiff's civil conspiracy claim must be dismissed.

### **RELEVANT FACTS**

Plaintiff is a for-profit business that provides dental hygiene services to various public schools in South Carolina. (2nd Amd. Compl. ¶ 3). In 1988, the Dental Practices Act authorized dental hygienists, like Plaintiff, to provide oral health services in public school, but the General Assembly tasked DHEC with implementing and monitoring the Public Health Dental Prevention Program that oversees and regulates those dental hygienists performing the work. (*Id.* at ¶¶ 1, 6; *see also* S.C. Code Ann. § 40-15-110(a)(10)). For two decades, Plaintiff worked in the Program regulated by DHEC, and during that time, DHEC and Plaintiff entered into several Memoranda of Agreement ("MOAs"), which set forth DHEC's standards and operations for the Program. (2<sup>nd</sup> Amd. Compl. ¶ 12). SCDA was never a part of the MOAs entered between DHEC and Plaintiff, nor does Plaintiff allege such.

Prior to the 2020–21 school year, DHEC produced a new MOA for *all* members of the Program to execute, including Plaintiff. (*Id.* at ¶ 57). Plaintiff admits that it voluntarily refused to sign the new MOA because Plaintiff objected to DHEC's guidelines. (*Id.* at ¶¶ 61, 63). Plaintiff's refusal appears conscious and willful; Plaintiff admits that it notified DHEC that it objected to the guidelines and that it would continue to provide health services in South Carolina's public schools pursuant to the outdated MOA. (*Id.* at ¶ 64). DHEC must have disagreed, as it terminated Plaintiff from the Program for failing to enter the new MOA for the upcoming school year. (*Id.* at ¶ 68). SCDA did not terminate Plaintiff from the Program, but rather, DHEC made

that decision after Plaintiff failed to comply with the Program's rules and regulations and by refusing to enter the current MOA.

On August 16, 2019, Plaintiff filed this lawsuit against DHEC and the South Carolina Department of Health and Human Services ("DHHS") only. The original Complaint alleged that DHHS administered the South Carolina Medicaid program, which compensates providers like Plaintiff for services it provides in public schools. (*Id.* at ¶¶ 32–35). Plaintiff's claims against DHHS appear to have arisen out of DHHS' suspension of Medicaid payments to Plaintiff for what DHHS believed to be "illegal" or fraudulent conduct on behalf of Plaintiff. (*Id.* at ¶¶ 32, 72–73). However, Plaintiff has resolved its claims against DHHS pursuant to a confidential settlement agreement. Thereafter, Plaintiff amended the Complaint to add SCDA as a party.

### **STANDARD OF REVIEW**

"Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Baird v. Charleston Cty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "The motion must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997). While the Court must consider the facts in a light most favorable to the Plaintiff, only well-pled facts are entitled to a presumption of truth. *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) ("A demurrer admits facts well pleaded in a complaint but does not admit conclusions of law."). On a 12(b)(6) motion, the court is required to presume all well-pled facts, not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010).

#### **I. Plaintiff's claim under the SCUTPA cannot prevail because Plaintiff has failed to allege that the SCDA was acting within "trade or commerce."**

The SCUTPA provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are hereby declared unlawful.” S.C. Code Ann. § 39-5-20(a) (emphasis added). In *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) (hereinafter “*HPS I*”) – a case involving the same Plaintiff, represented by the same counsel, and involving facts similar to the current matter – the Supreme Court explained that the words “trade or commerce” applies to the advertisement, sale, or distribution of services or property. But here, Plaintiff has not alleged that the SCDA was involved in any such transactions.

In *HPS I*, the Plaintiff filed a SCUTPA claim against the South Carolina Board of Dentistry, this state’s regulatory authority for dentists and dental hygienists, arising out of the Board’s enactment of an emergency regulation addressing the authorization required for Plaintiff to perform certain procedures in school settings. *Id.* at 626 n.1, 743 S.E.2d at 809 n.1. The Board moved to dismiss Plaintiff’s claim, arguing that it was not acting within “trade or commerce” when it enacted the emergency regulation. The trial court granted the Board’s motion, and the Supreme Court affirmed, holding that the Board’s action – promulgating a regulation – did not fall within the SCUTPA’s definition of “trade or commerce” because it did not include the “advertisement, sale, or distribution of services or property within a business context.” *Id.* at 639, 743 S.E.2d at 816. Even though the regulation impacted Plaintiff’s business, the Board’s regulatory actions still did not qualify as “trade or commerce” under the Act.

In *HPS I*, the Supreme Court explained that: “To recover in an action under the [SCUTPA], the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s).” *Id.* at

638, 743 S.E. 2d at 816. The SCUTPA defines “trade” and “commerce” as “*the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State*” *Id.* at 638–39, 743 S.E.2d at 816 (citing S.C. Code Ann. § 39-5-10(b)) (emphasis added). The Supreme Court made it clear that “the General Assembly intended for the SCUTPA to apply to *business or consumer transactions*,” *id.* at 639, 743 S.E.2d at 816 (emphasis added), and therefore, even if the Board’s regulatory action impacted Plaintiff’s business, the Board’s conduct did not qualify as “trade or commerce” under the SCUTPA because it did not involve the “advertisement, sale, or distribution of services or property within a business context.” *Id.*

Similarly, in the current case, Plaintiff has failed to allege facts showing that the SCDA acted within “trade or commerce” to satisfy the SCUTPA. The SCDA is a nonprofit company organized in this state;<sup>1</sup> it does not advertise, sale, or distribute services or property within a business context, nor does Plaintiff allege such. In *HPS I*, the Supreme Court stated that, “by its very definition, ‘trade or commerce’ involves ‘*every business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic*,’” *Id.* (citing Black’s Law Dictionary (9th ed. 2009)) (emphasis added). But in this case, there are no facts alleging that the SCDA acted in the “sale, barter, exchange, or traffic” or goods or services

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<sup>1</sup> The SCDA is listed as a “nonprofit” entity on the Secretary of State’s website (Exh. A), and at this stage, this Court may take judicial notice of information posted on government websites. See Rule 201(f), SCRE (“Judicial notice may be taken at any stage of the proceeding.”); *Bey v. Seymour*, No. CV 3:14-2858-SB-BM, 2014 WL 11531783, at \*1 n.1 (D.S.C. Nov. 6, 2014) (holding that the Court may take judicial notice of information listed on the South Carolina Secretary of State’s website).



for profit, and as such, the allegations in Plaintiff's Complaint fall well-short of satisfying the definition of trade or commerce under the SCUTPA.

Finally, the SCDA anticipates that Plaintiff will argue that the SCUTPA should apply because the SCDA's alleged lobbying efforts impacted trade or commerce. But this argument would be wholly without merit. As stated in *HPS I*, promulgating a regulation does not qualify as "trade or commerce" under the Act because it did not involve the advertisement, sale, or distribution of services or property, and therefore, if promulgating a regulation does not qualify, then neither does *lobbying* for said regulation. For these reasons, Plaintiff's SCUTPA claim cannot prevail against the SCDA as a matter of law.

## **II. Plaintiff has failed to plead facts supporting a claim for civil conspiracy.**

Recently, in *Paradis v. Charleston Cty. Sch. Dist.*, the Supreme Court affirmed that "a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). Here, the Complaint lacks well-pled facts establishing these elements, and therefore, Plaintiff's civil conspiracy claim against SCDA must be dismissed.

### **A) Plaintiff has failed to allege that SCDA acted for the purpose of harming the Plaintiff.**

The second element of a civil conspiracy claim consists of two separate prongs. To prevail, Plaintiff must allege that SCDA conspired to commit an (1) unlawful act or (2) a lawful act by unlawful means. *Id.* at 574, 861 S.E.2d at 780. As to the first prong, Plaintiff fails to allege any well-pled facts to support a claim that SCDA committed an unlawful act. *Id.* Plaintiff repeatedly makes vague and conclusory assertions that SCDA acted unlawfully, but such allegations are not

entitled to a presumption of truth because they are not well-pled. As explained by the Court of Appeals, Plaintiff “cannot transform an unsupported proposition of law into a statement of fact merely by stating that they are informed and believe it to be so.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. at 635, 699 S.E.2d at 705; *Cf. Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (holding that the plaintiff failed to allege well-pled facts in a breach of contract case when the plaintiff failed to produce the contract or aver to the substance of the instrument in the pleadings). Simply, Plaintiff has failed to allege that SCDA committed an unlawful act and, therefore, cannot satisfy the first prong.

Plaintiff also fails to meet the second prong because it has not alleged that SCDA committed “a lawful act by unlawful means,” which requires considering the SCDA’s intent behind its alleged conduct.<sup>2</sup> To satisfy this requirement, Plaintiff must allege that the “object” of the conspiracy “is to ruin or damage the business of another.” *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) (overruled on other grounds) (emphasis added). The “principal purpose” of the conspiracy must be to harm the Plaintiff, as opposed to something else, like generating profits as alleged in the Complaint. *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (overruled on other grounds).

Plaintiff repeatedly admits that the SCDA acted “solely” for the purpose of increasing profits for its member-dentists, which falls well-short of satisfying the intent-to-harm requirement for a civil conspiracy claim. (Compl. ¶ 11, 32). It is one thing for a person to pursue profits, which is not actionable, but it is another thing for a person to maliciously act for the purpose of destroying

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<sup>2</sup> “Since civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis.” *Paradis*, 433 S.C. at 574 n.9, 861 S.E.2d at 780 n.9.

another's business. The pursuit of profits does not satisfy the intent-to-harm requirement, even if doing so incidentally impacts a competitor financially. As explained in *Paradis*:

In our free-enterprise economy, we encourage entrepreneurs to use aggressive tactics to seize competitive advantage, create jobs for our people, and build value for our communities. For these efforts, entrepreneurs rightfully expect to earn handsome profits. Participants in this healthy competition use every lawful tactic at their disposal. Those who lose out are understandably envious, and often angry. But, actions that conform to the law – even when motivated by anger or an intent to harm – must not be the basis of civil liability.

433 S.C. at 583, 861 S.E.2d at 785 (J. Few, concurring in part and dissenting in part). The Fourth Circuit Court of Appeals follows the same logic, explaining: “That increased profits for one enterprise may come at the expense of a competitor is a fact of life in a market economy. We cannot, however, simultaneously encourage competitors to compete and hold them liable in tort whenever they do so successfully.” *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993). District courts in this state also agree. As explained by Judge Norton: “Where, for example, alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie.” *Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2021 WL 4711408, at \*3 (D.S.C. Oct. 8, 2021).

As shown directly below, Plaintiff repeatedly alleges that SCDA acted to pursue profits for its members, which fails to satisfy the intent-to-harm requirement. According to the Complaint, SCDA acted:

- “...so as to increase the financial income of private dentists in South Carolina.” (Compl. ¶ 11).
- “...to increase their own income.” (Compl. ¶ 18).
- “...for their own economic interest.” (Compl. ¶ 19).
- “...solely for the purpose of the private financial interests of private dentists.” (Compl. ¶ 22) (emphasis added).
- “...solely for their private gain.” (Compl. ¶ 32) (emphasis added).

Assuming SCDA acted to increase the profits of its members, this fact, alone, is not actionable.

Since civil conspiracy is an intentional tort, Plaintiff must show that the SCDA acted for the primary purpose of harming the Plaintiff. *Allegro, Inc. v. Scully*, 418 S.C. at 32, 791 S.E.2d at 144 (“The primary inquiry in civil conspiracy is whether the *principal purpose* of the combination is to injure the plaintiff.”) (emphasis added); *Pye v. Est. of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (The essential consideration in civil conspiracy is...whether *the primary purpose* or object of the combination is to injure the plaintiff.”) (emphasis added). Therefore, at this stage, the Court must determine whether the Complaint alleges that SCDA acted for the predominate purpose of harming the Plaintiff or for some other goal, like pursuing profits for its members. But as listed above, Plaintiff repeatedly alleges that SCDA acted “*solely for the purpose* of increasing the private financial income of private dentists.” (See, e.g., Compl. ¶ 22) (emphasis added). Although the Complaint broadly alleges that SCDA acted to harm Plaintiff, the Complaint undisputedly alleges that SCDA acted “for the purpose” of increasing the profits of its members. (*Id.*). Clearly then, any harm caused to Plaintiff is incidental to the principal/primary goal of pursuing profits, and therefore, a civil conspiracy claim cannot stand against SCDA as alleged.

The SCDA’s pursuit of profits for its members does not make it liable for conspiracy, even if that pursuit caused incidental harm to a competitor like the Plaintiff. In *BCD, LLC v. BMW Mfg. Co.*, the plaintiff (a developer) filed suit against BMW Manufacturing Co. alleging that it conspired with Clemson University to halt the construction of a project that culminated into Clemson University’s Graduate Engineering Center (“GEC”). 360 F. App’x 428 (4th Cir. 2010). During the initial phases of the project, Clemson approached the plaintiff and BMW with the idea of constructing the GEC to include a wind tunnel. *Id.* at 431. While the plaintiff expressed interest in the idea, BMW proposed an alternative solution, which did not include a wind tunnel. *Id.* The

plaintiff urged Clemson to use its property for the GEC, but BMW emphasized a need to separate the state-funded GEC from the privately funded wind tunnel involving the plaintiff. *Id.* at 432. Ultimately, Clemson declined to commit itself to using plaintiff's property, and as a result, plaintiff filed a lawsuit alleging that BMW launched a series of efforts to kill the plaintiff's project because BMW was dissatisfied with its lack of control over the development of the wind tunnel. *Id.*

The Fourth Circuit disagreed, holding that the plaintiff's theory was insufficient to support a conspiracy claim. The court held: "The record indicates that BMW was motivated by its desire to establish the GEC, which in and of itself does not imply an explicit desire to damage [the plaintiff's] business. The only harm that BMW may have intended to cause [the plaintiff] was the incidental harm to a competitor that is necessarily part of all legitimate business competition." *Id.* at 437. "That increased benefits for one entity may come at the expense of a competing entity is merely a fact of life in a market economy." *Id.*

The Fourth Circuit's reasoning from *BCD v. BMW* applies equally to this case. Like BMW, who was motivated by its desire to establish the GEC, the SCDA in this case was allegedly motivated by the "sole purpose" of pursuing profits for its members. Even though incidental harm may come to Plaintiff's business by way of competition, that does not mean that SCDA acted for the primary purpose of harming Plaintiff. In a market economy, incidental harm is not the same as intentional harm; they are mutually exclusive.

It is important to highlight what is alleged in this case and what is not. On one hand, the Complaint undisputedly and repeatedly alleges that the SCDA acted for the sole purpose of pursuing profits for its members. But on the other hand, the Complaint does *not* allege that SCDA acted solely – or even predominantly – for the purpose of harming Plaintiff. Although Plaintiff alleges that the SCDA intended to harm it, Plaintiff also alleges that the SCDA acted solely to

pursue profits, and because conspiracy is an intentional tort, the Court must consider the primary/principal purpose of the SCDA's alleged conduct. Here, the Complaint falls short by failing to allege facts to support the intent-to-harm element of a conspiracy claim and, therefore, must be dismissed as a result.

**B) Plaintiff has failed to allege well-pled facts showing that SCDA committed an “overt act” in furtherance of a conspiracy, and to the extent Plaintiff's claims rely on SCDA's alleged lobbying efforts, the SCDA is protected by the *Noerr-Pennington* doctrine.**

Our Supreme Court has said that the “gravamen” of a civil conspiracy claim is the damage resulting to the plaintiff from an “overt act” done pursuant to a common design. *Paradis*, 433 S.C. at 568, 861 S.E.2d at 777. But here, the only “overt act” that SCDA allegedly committed was to lobby public officials “to increase the financial income of private dentists of South Carolina.” (Compl. ¶ 11). Even if true, this allegation fails to satisfy the elements of a civil conspiracy claim.

First, there is nothing unlawful or nefarious about lobbying the government to promote a person's social or fiscal beliefs, much like there is nothing wrong with a person protesting for change or casting his/her vote for a political candidate, the outcome of which may impact another's financial interests. Of course, there are wrongful ways to promote change – such as through fraud, violence, duress, slander, sabotage, undue influence, bribery, intimidation, and threats. See *Charles v. Texas Co.*, 192 S.C. 82, 5 S.E.2d 464, 472 (1939); *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). But none these acts have been sufficiently alleged against SCDA.<sup>3</sup> Lobbying the government is not conduct that is actionable in

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<sup>3</sup> Plaintiff broadly alleges that SCDA acted with “actual fraud,” (Compl. ¶ 29) but Plaintiff failed to plead this allegation with particularity as required by the South Carolina Rules of Civil Procedure, and, therefore, it is not entitled to a presumption of truth at this stage. See Rule 9, SCRPC (requiring that fraud be plead with particularity); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) (“[O]n a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true.”).

tort, and Plaintiff has failed to allege anything but vague and conclusory allegations to support its claim that SCDA acted for an unlawful purpose.

Further, the SCDA's alleged lobbying efforts are protected by the *Noerr-Pennington* doctrine, which grants First Amendment immunity to those who engage in activities such as petitioning or lobbying the government, regardless of their intent or purpose. See *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003).<sup>4</sup> Judge Anderson succinctly described the doctrine as follows:

The First Amendment of the Constitution of the United States guarantees the right to petition the government for redress. The *Noerr-Pennington* doctrine protects this right by immunizing parties from liability for efforts to seek relief from the government. The actor's motivation for trying to influence the government is irrelevant, as *Noerr-Pennington* protects any concerted effort to influence public officials regardless of intent or purpose. The immunity applies even if the means employed can be termed unethical. *Noerr-Pennington* immunity also protects requests that would lead public officials to take official action that will harm or eliminate competition.

*BCD, LLC v. BMW Mfg. Co., LLC*, No. 6:05-CV-2152-GRA, 2008 WL 304878, at \*12 (D.S.C. Jan. 31, 2008), aff'd, 360 F. App'x 428 (4th Cir. 2010). “The *Noerr-Pennington* doctrine protects attempts to influence virtually all types of governmental entities,” *id.* at \*13, and therefore, Plaintiff's allegation that the SCDA lobbied DHEC falls squarely within the doctrine. Further, the doctrine applies “universally” to business torts like the one alleged in this case, *IGEN v. Roche*, 335 F.3d at 310, including Plaintiff's civil conspiracy claim. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S. Ct. 1344, 1351 (1991) (holding that “[t]here is no such

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<sup>4</sup> The doctrine arose out of two decisions from the United States Supreme Court: *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961) and *United Mineworkers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965).

conspiracy exception” to *Noerr-Pennington* immunity); *BCD v. BMW*, No. 6:05-CV-2152-GRA, 2008 WL 304878, at \*13 (“The doctrine also applies to conspiracy claims.”).

Members of the public, including the SCDA, are not co-conspirators with the government just because they lobby for their individual interests. This principle is embodied in *Angus v. Burroughs*, where our Supreme Court held that an employee terminated by Horry County could not maintain a conspiracy claim against members of the public who allegedly conspired with the County to discredit and have her terminated. 368 S.C. 167, 628 S.E.2d 261 (2006). There, the plaintiff alleged that the Myrtle Beach Herald (a newspaper) and Burroughs & Chapin Co. (a commercial developer) conspired with the County after the plaintiff objected to several of the developer’s projects. *Id.* at 169, 628 S.C. at 262. The plaintiff alleged that the conspiracy included incentives to County Council members and the publication of articles discrediting her. *Id.*

But the Supreme Court disagreed, stating: “In our democratic society, a public official is answerable to the public; *members of the public are not third-party interlopers.*” *Id.* at 170, 628 S.E.2d at 262 (emphasis added). Similarly, in this case, the SCDA and other members of the public cannot be co-conspirators or “interlopers,” as considered in *Angus*, with a governmental entity like DHEC. DHEC and its officials were tasked by the General Assembly with overseeing the Program, and DHEC made the unilateral decision to terminate Plaintiff for failing to enter the most recent MOA. Although DHEC may be answerable to the public for the actions it takes, the SCDA and other members of the public are not liable as a conspirator for DHEC’s decisions. This reasoning makes sense. As a result, Plaintiff’s civil conspiracy claim must be dismissed.

**C) Plaintiff’s civil conspiracy claim is based on the same facts that Plaintiff uses to support its other claims for relief, and therefore, Plaintiff’s civil conspiracy claim cannot prevail.**



Plaintiff's civil conspiracy claim cannot prevail because it is based on a recitation of the same allegations used to support Plaintiff's other three causes of action: (1) SCUTPA, (2) breach of contract, and (3) attorney's fees. To prevail, "one must plead additional acts in furtherance of the conspiracy *separate and independent from other wrongful acts alleged in the complaint*, and the failure to properly plead such acts will merit the dismissal of the claim." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115–16, 682 S.E.2d 871, 875 (Ct. App. 2009) (overruled on other grounds by *Paradis*) (emphasis added).<sup>5</sup> "Stated another way, where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Coker v. Norwich Com. Grp., Inc.*, No. CV 3:20-03071-MGL, 2021 WL 4037472, at \*6 (D.S.C. Sept. 3, 2021); *see also Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action.").

In *Jinks v. Sea Pines Resort, LLC*, the court dismissed the plaintiff's civil conspiracy claim because it was based on the same recitation of facts used to support her other claims (breach of contract and nuisance). No. 9:21-CV-00138-DCN, 2021 WL 4711408, at \*4 (D.S.C. Oct. 8, 2021).

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<sup>5</sup> In *Paradis*, the Court abolished the requirement that a plaintiff plead special damages, which originated following *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981). Therefore, the decisions that pre-date *Paradis* have been overruled to the extent they adopted a "special damages" requirement. However, *Paradis* affirmed that the court in *Todd* "correctly concluded [that] the civil conspiracy claim failed as a matter of law" where the "only wrongful acts alleged were those for which damages had already been sought" and "the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim." *Paradis*, 433 S.C. at 573, 861 S.E.2d at 780. Therefore, today, for Plaintiff to prevail in its civil conspiracy claim, Plaintiff must still plead facts separate from those used to support its other claims for relief.

There, the court noted that “[a]ll of these allegations are specifically incorporated by reference into [the plaintiff’s] causes of action for breach of contract and nuisance. The amended complaint fails to allege a single independent and separate act taken by [the defendant] in furtherance of the alleged conspiracy that does not also serve as the basis for [the plaintiff’s] other causes of action. At most, [the plaintiff’s] civil conspiracy cause of action merely summarizes the same acts that also serve as the bases for the other claims in the civil conspiracy cause of action.” *Id.* at \*4.

Here, like in *Jinx*, Plaintiff’s conspiracy claim is based on the same facts that Plaintiff uses to support its other claims for relief. Plaintiff’s conspiracy claim, which begins on page 23 of the Complaint and at Paragraph 93, starts by stating that Plaintiff incorporates “each and every factual allegation” previously alleged in the Complaint. (Compl. ¶ 93). The court in *Jinx* dismissed Plaintiff’s conspiracy claim when it incorporated the same broad allegations previously cited to in the pleadings. Just two paragraphs later, Plaintiff alleges that its conspiracy claim is based on “[t]he acts as set forth above, and others not necessary to spell out in this pleading....” (Compl. ¶ 96).<sup>6</sup> Clearly, Plaintiff’s use of the phrase “the acts as set forth above” is a reference to the prior 92 allegations that also form the basis for Plaintiff’s other claims. Plaintiff failed to allege any independent, over act that is not already incorporated into Plaintiff’s other claims for relief, and therefore, Plaintiff’s claim cannot prevail.

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<sup>6</sup> Plaintiff’s testament that certain allegations are “not necessary to spell out in this pleading” makes Plaintiff’s claim fatal as a matter of law because, at the motion to dismiss stage, only well pled facts are given a presumption of truth. Plaintiff cannot rest on legal conclusions and unsupported propositions. *See, e.g., Red Oak Lands, Inc. v. Lane*, 268 S.C. 631, 634, 235 S.E.2d 718, 719 (1977) (“Legal conclusions are not well-pleaded and are not facts sufficient to constitute a cause of action.”).

## **CONCLUSION**

Plaintiff's claim based on the SCUTPA should be dismissed because Plaintiff has not alleged facts sufficient to show that SCDA was acting in "trade or commerce." Further Plaintiff's civil conspiracy claim must be dismissed because Plaintiff failed to allege that SCDA's predominate purpose was to harm it as opposed to generating profits for its members; there is nothing wrongful or nefarious with lobbying the government for a particular interest, and moreover, SCDA's lobbying efforts are protected by the *Noerr-Pennington* doctrine; and finally, Plaintiff's conspiracy claims are merely a recitation of the other allegations used to support its other claims for relief. For these reasons, this Court should dismiss SCDA from the Complaint.

**MURPHY & GRANTLAND, P.A.**

*s/ Cordes B. Kennedy*

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*Attorneys for Defendant South Carolina Dental  
Association*

## SOUTH CAROLINA DENTAL ASSOCIATION

### Corporate Information

**Entity Type:** Nonprofit

**Status:** Good Standing

**Domestic/Foreign:** Domestic

**Incorporated State:** South Carolina

### Important Dates

**Effective Date:** 12/10/1869

**Expiration Date:** N/A

**Term End Date:** N/A

**Dissolved Date:** N/A

### Registered Agent

**Agent:** JOHN P. LATHAM

**Address:** 120 STONEMARK LANE  
COLUMBIA, South Carolina 29210

### Official Documents On File

| Filing Type   | Filing Date |
|---------------|-------------|
| Amendment     | 06/25/2010  |
| Incorporation | 12/10/1869  |



## Certificate of Electronic Notification

### Recipients

**Rebecca Laffitte** - Notification transmitted on 09-01-2022 04:12:18 PM.

**Joey Floyd** - Notification transmitted on 09-01-2022 04:12:19 PM.

**Desa Ballard** - Notification transmitted on 09-01-2022 04:12:19 PM.

**Haley Saxby** - Notification transmitted on 09-01-2022 04:12:22 PM.

**Virginia Riley** - Notification transmitted on 09-01-2022 04:12:21 PM.

**Timothy Thompson** - Notification transmitted on 09-01-2022 04:12:22 PM.

**William Britt** - Notification transmitted on 09-01-2022 04:12:21 PM.

**Edward Moore** - Notification transmitted on 09-01-2022 04:12:18 PM.

**Cordes Kennedy** - Notification transmitted on 09-01-2022 04:12:20 PM.

**Rachel Hutchens** - Notification transmitted on 09-01-2022 04:12:20 PM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

NOTICE OF ELECTRONIC FILING [NEF]

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**A filing has been submitted to the court RE:** 2019CP4004567

**Official File Stamp:** 09-01-2022 04:11:57 PM

**Court:** CIRCUIT COURT

Common Pleas

Richland

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al

**Document(s) Submitted:** Memo/Memo in Support

- Exhibit/Filing of Exhibits

**Filed by or on behalf of:** Cordes Baxter Kennedy

This notice was automatically generated by the Court's auto-notification system.

-

**The following people were served electronically:**

Rebecca Laffitte for Richlard E Boyd Pr, Estate Of Rocky Napier

Timothy C. Thompson for Richlard E Boyd Pr, Estate Of Rocky Napier

Haley Michele Saxby for Richlard E Boyd Pr, Estate Of Rocky Napier

Rachel Moore Hutchens for Richlard E Boyd Pr, Estate Of Rocky Napier

Edward Raymond Moore, III for South Carolina Dental Association

Cordes Baxter Kennedy for South Carolina Dental Association

William Donald Britt, Jr.

Virginia Sheftall Riley

Desa Ballard for Health Promotion Specialists Llc  
Joey Randell Floyd for South Carolina  
Department Of Health And Environmental Contro

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

John Doe

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Health Promotion Specialists, LLC, )  
Plaintiff, )

Civil Action No. 2019-CP-40-04567

vs. )

**MEMORANDUM IN SUPPORT OF**  
**MOTION TO DISMISS OF**  
**DEFENDANT, DR. RICHARD E.**  
**BOYD AS PERSONAL**  
**REPRESENTATIVE OF THE ESTATE**  
**OF DR. ROCKY NAPIER**

South Carolina Department of )  
Health and Human Services, The )  
South Carolina Dental Association, )  
Dr. Richard E. Boyd, as Personal )  
Representative of the Estate of )  
Rocky Napier, and one or more )  
John Does, unidentified current or )  
former agents of South Carolina )  
Department of Health and )  
Environmental Control, )  
Defendants. )

The defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier (“Dr. Boyd as Personal Representative”), by and through the undersigned attorneys, hereby submits this memorandum in support of its Motion<sup>1</sup> to Dismiss plaintiff’s<sup>2</sup> Second Amended Complaint<sup>3</sup> against this defendant pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

<sup>1</sup> This Memorandum incorporates and relies upon all arguments made in this defendant’s pending Motion to Dismiss and reiterates arguments herein for the court’s reference.

<sup>2</sup> To the extent that Ms. Tammi Byrd, who is not identified in the caption of the Second Amended Complaint as a named plaintiff but is referenced in Paragraphs 3 and 5, is intended to be a claimant in this case, this motion applies to her claims as well.

<sup>3</sup> The Second Amended Complaint in this matter was filed over two years after the initial Complaint and after years of litigation involving the underlying claims and issues. To the extent applicable, this defendant incorporates the factual history and existing case law developed on this issue as a basis for barring plaintiff’s claims in the Second Amended Complaint, including Health Promotion Specialist, LLC v. S.C. Bd. Of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013).



## **BACKGROUND**

Plaintiff filed the present lawsuit on August 16, 2019 and, later, filed a First Amended Complaint on November 22, 2019, naming South Carolina Department of Health and Human Services (“SCDHH”) and South Carolina Department of Health and Environmental Control (“DHEC”) as defendants arising from plaintiff’s participation and ultimate termination from the South Carolina Public Health Dental Prevention Programs. Plaintiff ultimately resolved its claims against SCDHH,

Subsequently, on March 28, 2022, the plaintiff filed a Second Amended Complaint asserting claims against two newly named defendants, including Dr. Richard E. Boyd at Personal Representative of the Estate of Rocky Napier, for 1) Unfair Trade Practices and 2) Civil Conspiracy based upon the alleged actions taken by the decedent, Dr. Napier,<sup>4</sup> a well-respected dentist in South Carolina, who died on March 7, 2021.<sup>5</sup> Dr. Richard E. Boyd was subsequently

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<sup>4</sup> As discussed herein, this defendant maintains that the alleged actions are not sufficient to state a claim pursuant to either cause of action. Nevertheless, per the allegations and as reserved in defendant’s motion filed on April 29, 2022, should Dr. Napier be deemed to have been working with and at the behest of DHEC and/or the Dental Association the defendant, Dr. Boyd as Personal Representative, expressly reserves the right to assert, as applicable, either the protections of The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., or caselaw establishing that a civil conspiracy can only exist among separate entities. See Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982).

<sup>5</sup> A copy of Dr. Napier’s Death Certificate can be made available to the Court to confirm Dr. Napier’s date of death. While this Court must generally limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, this Court may take judicial notice of other matters of public record filed with the South Carolina state courts in considering this Motion to Dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice”). Matters of public record are appropriate for judicial notice. *Sec’y of State for Defence v. Tremble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”).

appointed as Personal Representative of Dr. Napier's Estate on March 16, 2021. Plaintiff alleges that, during his lifetime, Dr. Napier "operated as a volunteer advocate" and "had involved himself in the work of public and private organizations, including DHEC and the Dental Association." Pl.'s Second Am. Compl. ¶¶9-10.

### **STANDARD**

"Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of the complaint." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). Indeed, "[i]t is a well-settled principle that[,] in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint." Charleston Cty. Sch. Dist. v. Harrell, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." Brown v. Theos, 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999) (quoting Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)).

### **ARGUMENT**

The basis of this Motion is multi-fold. As set forth below, this defendant maintains that the plaintiff has failed to allege facts sufficient to constitute a cause of action against defendant, Dr. Boyd as Personal Representative of the Estate of Dr. Napier, for both of plaintiff's two (2) causes of action against this defendant. Further, the plaintiff's two (2) causes of action fall within a recognized exception to South Carolina's survivability statute. Nevertheless, to the extent this Court would find that plaintiff has alleged a cause of action against the defendant, Dr. Richard

E. Boyd, as Personal Representative of the Estate of Dr. Napier, and that such cause of action has survived the death of Dr. Napier, which is denied, this defendant would assert that any such claim is untimely pursuant to S.C. Code Ann. §62-3-804, et seq.

I. Plaintiff's Claims Are Time Barred

As a preliminary and fundamental matter, the plaintiff's claims against the Estate of Dr. Rocky Napier are barred by statute. S.C. Code Ann. § 62-3-803(a) provides that "[a]ll claims against a decedent's estate which arose before the death of the decedent ... are barred against the estate [and] the personal representative ... unless presented" within "one year after the decedent's death." See Moultis v. Degen, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983) (holding that claims against the estate "includes tort claims as well as liquidated claims of creditors").

Functioning as a "special statute of limitations," the Supreme Court of South Carolina has expounded on the application of S.C. Code Ann. § 62-3-803 as a nonclaim statute "to take away the right of recovery when a claimant fails to present his or her claims as provided in the statute." In re Est. of Hover, 407 S.C. 194, 206, 754 S.E.2d 875, 881-81 (2014). As a nonclaim statute, S.C. Code Ann. § 62-3-803 "is in the nature of, and is similar to, a statute of limitations, in that it prevents the enforcement of stale demands," but it is "broader" in its operation. Id. at 881 (internal citations omitted). As such, the Supreme Court has instructed that the statute should be strictly applied "as it is mandated by our rules of statutory construction" and to "effectuate[ ] the purpose of the nonclaim statute, which is to expedite and resolve claims against a decedent's estate with finality." Id.

Dr. Napier died on March 7, 2021. Prior to filing the Second Amended Complaint on March 28, 2022, the plaintiff did not previously present a claim against the Estate and did not previously file any action against Dr. Napier, his Estate, and/or Dr. Boyd as Personal

Representative.<sup>6</sup> This Court need not even consider that plaintiff had ample opportunity to bring such claims in the years since filing its initial Complaint. Hover, 754 S.E.2d at 884 (“[E]quitable considerations are not a factor in the claims-barring analysis.”). Instead, applying the strict application of S.C. Code Ann. §62-3-802 instructed by the Supreme Court, the plaintiff’s claims are barred. See Id. (“The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.”)(quoting 51 Am.Jur.2d Limitation of Actions § 3 (2011)).

## II. Plaintiff’s Claims Do Not Survive the Death of Decedent, Dr. Napier

Second, plaintiff’s two (2) causes of action against this defendant fall within a recognized exception to South Carolina’s survivability statute and, therefore, are barred as a matter of law against the Estate of Dr. Napier and the defendant, Dr. Boyd as Personal Representative.<sup>7</sup> South Carolina courts have recognized that the state’s “general survivability statute has a wide ambit” but with certain exceptions. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96–97 (2002). Specifically, the statute reads as follows:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90.

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<sup>6</sup> As September 9, 2022, the Aiken County Probate Court has no records of any creditor claims filed against the Estate of Dr. Napier with File No. 2021ES020331.

<sup>7</sup> The arguments made herein are identical to the arguments set forth in defendant’s Motion to Dismiss filed April 29, 2022 but are recounted for the Court’s reference.

However, the South Carolina Supreme Court has created certain exceptions to the survivability statute.” Ferguson, 349 S.C. at 563, 564 S.E.2d at 97. As applicable to this matter, “South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.” Id. (citing Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941) (a cause of action for fraud for an apparent cancellation of an insurance policy did not survive plaintiff’s death)). “[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. ... [T]he difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justify[ing] excepting fraud from the survival statute.” Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991) (recognizing that the “South Carolina Supreme Court has persisted in recognizing an exception to survivability for claims of slander, malicious prosecution, and fraud”). See also, S.C. Code Ann. § 19-11-20; Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997) (explaining that S.C. Code Ann. § 19-11-20 “prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest ... [based on] the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted”)(superseded by statute on other grounds).

In applying this common law exception, the Supreme Court has looked to the plaintiff’s theory and “normal legal connotation” of fraud, as opposed to merely the plaintiff’s “label[ ]” of actions as “unfair, misleading, or deceptive.” See Ferguson, 349 S.C. at 564-65, 564 S.E.2d at 97 (holding that a cause of action under the Dealers Action “was based upon a theory of fraud and deceit” because the “essence” of plaintiff’s allegation was that the defendant “misled

him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices”).

In the present case, both of plaintiff’s causes of action against the Estate of Dr. Napier purportedly arise from the alleged fraudulent or deceitful actions of the decedent, Dr. Napier, which are denied. See Pl.’s Second Am. Compl. ¶29 (alleging “actual fraud, actual malice and intent to harm”). The Second Amended Complaint references Dr. Rocky Napier approximately ten (10) times throughout one hundred fifteen (115) paragraphs with no basis in fact to support the claims. Plaintiff alleges that these actions were made in furtherance of the alleged civil conspiracy and form the basis of plaintiff’s cause of action for Civil Conspiracy. See Pl.’s Am. Compl. ¶98 (“Defendant Rocky Napier continuously undertook overt acts in concert with named Defendants and others for the purpose of injuring Plaintiffs[.]”). Further, regarding plaintiff’s claim for Unfair Trade Practices, the plaintiff repeatedly alleges that the defendants, “engaged in unfair and deceptive acts[.]” See Pl.’s Second Am. Compl. ¶¶86, 88, and 91.

Moreover, the nature and essential elements of each of plaintiff’s causes of action against this defendant involve elements of deceit or of fraud, which can be “defined in accordance with its normal legal connotation as including: a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.” Ferguson, 349 S.C. at 564–65, 564 S.E.2d at 97. See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012) (“To recover in an action under the SCUTPA, a plaintiff must show... the defendant engaged in an *unfair or deceptive act* [.]”)(emphasis added). See also, Pardis v. Charleston Cty. Sch. Dist., 433 S.C. 562, 574, 861 S.E.2d 744, 780 (2021)(“[A] plaintiff asserting a civil conspiracy claim must establish ...[the defendant] commit[ted] an *unlawful act* or a lawful act by *unlawful means*[.]” (emphasis added).

### III. Plaintiff has Failed to Plead Facts Supporting Causes of Action

Finally, the plaintiff has failed to allege facts sufficient to constitute a cause of action against defendant, Dr. Boyd as Personal Representative, for both of plaintiff's two (2) causes of action against this defendant.<sup>8</sup> First, the plaintiff has failed to allege facts sufficient to state a cause of action pursuant to S.C. Code Ann. 39-5-10(b) (1976), the South Carolina Unfair Trade Practices Act (alternatively SCUTPA). "To recover in an action under the SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affects the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).". RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012).

The plaintiff<sup>9</sup> has failed to allege facts that this defendant's decedent, Dr. Napier, was engaged in the conduct of trade or commerce. As provided in the SCUTPA, "trade" and "commerce" are defined terms that include the "advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate[.]" Instead, the acts of which plaintiff complains arise out of Dr. Napier's alleged membership in "the Dental Association" and his conduct "as a volunteer advocate" which do not fall within the definition of trade or commerce. Pl.'s Second Am. Compl. ¶¶9-10.

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<sup>8</sup> The arguments made herein are identical to the arguments set forth in defendant's Motion to Dismiss filed April 29, 2022 but are recounted for the Court's reference.

<sup>9</sup> To the extent Ms. Tammi Byrd, who is not identified in the caption as a plaintiff but is referenced in Paragraphs 3 and 5 of plaintiff's Second Amended Complaint, is determined to be a party, her alleged "personal injury" is not recoverable under SCUTPA. See Reynolds v. Ryland Group, Inc., 340 S.C. 331, 337 n.1, 531 S.E.2d 917, 921 n.1 (2000) (noting that "[t]he Massachusetts act is broader than ours in that it permits recovery for personal injury, as well as loss of money or property").

Further, given that the decedent, Dr. Napier, passed away on March 7, 2021, his alleged actions are not capable of repetition. “An impact on the public interest may be shown if the acts or practices have the potential for repetition.” Hollman v. Woolfson, 683 S.E.2d 495, 499 (2009). Without the possibility of repetition, the plaintiff has alleged the public impact as to the alleged actions of Dr. Napier only in conclusory and speculative terms. “South Carolina courts have consistently rejected speculative claims of adverse public impact and require evidentiary proof of such effects.” Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502 (4th Cir. 1992). See also, Jefferies v. Phillips, 316 S.C. 523, 527 (Ct. App. 1994) (“Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a ‘speculative [claim] of adverse public impact’ and that will not suffice for a recovery under the UTPA.”).

Similarly, the plaintiff has also failed to allege facts sufficient to state a claim for civil conspiracy. “[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.” Pardis, 433 S.C. at 574, 861 S.E.2d at 780. Therefore, a claim for civil conspiracy must “plead an overt act in furtherance of the agreement.” Id.

Plaintiff’s civil conspiracy claims as against this defendant fail because plaintiff has failed to allege any alleged wrongdoing by Dr. Napier that could support a claim for conspiracy. Moreover, the plaintiff has not alleged or identified any overt action undertaken by Dr. Napier in furtherance of the alleged agreement. Compare Pl.’s Second Am. Compl. ¶98. Thus, the plaintiff has not pled the required elements of a claim for civil conspiracy. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009)(“A claim



for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint.”)(overruled by Paradis on separate grounds); Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (Ct. App. 1981) (finding that a cause of action which did “no more than incorporate the prior allegations and then allege the existence of a civil conspiracy” fails to state a cause of action)(overruled by Paradis on separate grounds).

### **CONCLUSION**

As set forth above, this defendant maintains that the plaintiff’s claims are time barred by S.C. Code Ann. §62-3-804, et seq. and fall within recognized exceptions to South Carolina’s survivability statute. Nevertheless, to the extent this Court would find that plaintiff’s claims are timely and have survived the death of Dr. Napier, which is denied, the plaintiff has failed to allege a cause of action against the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier. Therefore, the Court should dismiss plaintiff’s claims against the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier.

*Signature on Next Page*

Respectfully submitted,

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Columbia, South Carolina

September 9, 2022

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, the South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S MEMORANDUM IN  
SUPPORT OF ITS MOTION TO  
DISMISS**

This is an extraordinary situation that involves a Plaintiff with a substantial and significant history of litigation. In the case of *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (2013), the same Plaintiff in the present action, Health Promotion Specialists, LLC (“HPS”), engaged in twelve (12) years of litigation (from initial filing to the issuance of the reported opinion from the South Carolina Supreme Court). From 2001 – 2013, HPS was in a pitched battle in three different venues with various Defendants,<sup>1</sup> including the State Board of Dentistry, regarding an emergency regulation passed by the Board of Dentistry. Incidentally, HPS was represented by the same lawyer during its twelve years of battle with the Board of Dentistry as in the case at hand.

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<sup>1</sup> The state court action was accompanied by a federal court action and a Federal Trade Commission Complaint.

The Defendant, South Carolina Department of Health and Environmental Control (“DHEC”), hereby submits this Memorandum in Support of its Motion to Dismiss the claims of HPS against DHEC.

### **PROCEDURAL HISTORY**

HPS initiated this civil action on August 16, 2019. The first complaint was titled *Complaint and Petition for Emergency and Permanent Injunct Relief* and asserted claims seeking a Declaratory Judgment, emergency relief and a prayer for attorneys’ fees. It also included claims against the South Carolina Department of Health and Human Services. On November 22, 2019 (without leave of Court and without consent of all parties), HPS filed an *Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*, again asserting claims for Declaratory Judgment and a prayer for attorneys’ fees. HPS filed a Motion to Amend on June 2, 2021, which was ultimately granted by the trial court on March 24, 2022. HPS titled its amended pleading as *Second Amended Complaint*.<sup>2</sup> The Second Amended Complaint dropped HPS’s request for a Declaratory Judgment and added three tort claims against DHEC, along with a claim for attorneys’ fees. It also included numerous claims against three newly added defendants. Once HPS filed its Second Amended Complaint, all parties, including DHEC, filed Rule 12 Motions seeking a dismissal of HPS’s claims.

### **FACTUAL BACKGROUND**

The basic facts underlying this dispute, as it relates to DHEC, arise out of HPS’s provision of services (dental hygiene services) to various public schools through DHEC’s Public Health Dental Prevention Program (the “Dental Program” or “PHDPP”). The Dental Program was established through the South Carolina Dental Practice Act 2003, with DHEC’s role including

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<sup>2</sup> When HPS filed its Motion to Amend, HPS captioned the amended pleading as “Third Amended Complaint.”

coordination of a public health dental prevention program using public-private partnerships to deliver preventive dental services in public health settings, such as schools, that address the needs of priority populations using standard public health principles. HPS's provision of services through the Dental Program is based on the Dental Services Act, S.C. Code Ann. § 40-15-110(A)(10). In accordance with that section, a provider of dental hygiene services may be exempted from the general supervision requirements of the Dental Practice Act so long as it contracts with DHEC. In accordance with the Dental Services Act, DHEC is responsible for directing the dental services in the public health setting, although the Act does not require that DHEC's director of the Dental Program or a licensed dentist be present when any public health dental program services are provided. DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program.

The vast majority of patients served by HPS, at all times relevant hereto, were public school children, who were Medicaid beneficiaries. Medicaid payments are administered, exclusively, by the South Carolina Department of Health and Human Services ("DHHS"), an original defendant in the current action. Unbeknownst to DHEC, DHHS opened an investigation into HPS's billing in the April 2019 timeframe. DHHS initially determined/alleged that HPS had improperly billed DHHS in excess of \$2,000,000.00. During the course of its investigation, DHHS contacted DHEC and requested documents relating to HPS's participation in DHEC's Dental Program. After DHEC provided documents to DHHS, the \$2,000,000.00 problem for HPS was reduced to just over \$600,000. DHHS initiated an Administrative Review and during that Administrative review, HPS and DHHS engaged in discovery at the agency level (DHHS). Ultimately, HPS and DHHS presented their respective positions to a DHHS hearing officer in an administrative hearing in

January of 2021. However, before a decision was rendered by the hearing officer, DHHS and HPS entered into a settlement agreement (a “walk-away” settlement).

One of the primary issues associated with the DHHS administrative review involved HPS’s billing practices for a procedure known as atraumatic restorative treatment, or “ART.” In 2018, the South Carolina Board of Dentistry authorized dental hygienists to address tooth decay (cavities or caries) through ART in a “general supervision” environment, i.e., HPS could perform ART. This particular treatment was applicable to HPS’s services in the public health setting because HPS operated under the general supervision provision of the Dental Services Act when it delivered its services through the DHEC Dental Program. DHEC was not involved in the Board of Dentistry’s decision to approve this procedure. In summary, ART was performed by HPS in the DHEC Dental Program, and HPS billed DHHS for ART. On April 5, 2019, DHHS issued a Medicaid Bulletin advising all Medicaid dental providers about changes to reimbursements relating to protective services. Based on HPS’s allegations throughout this litigation and in the DHHS hearings, HPS took issue with DHHS’s decision regarding reimbursements (HPS battled with DHHS regarding reimbursements for services provided by HPS to Medicaid beneficiaries for nearly two years before HPS and DHHS entered into a settlement where both sides agreed to simply walk-away). Medicaid reimbursement issues are strictly within the purview of DHHS; DHEC does not have any authority over what DHHS will or will not reimburse a provider for in the Medicaid setting.

DHEC is charged with the responsibility of administering the Public Health Dental Prevention Program to ensure that persons electing to deliver services under the “general supervision” statutory framework of the Dental Services Act contract with DHEC to deliver those services in the public health setting. Otherwise, a dental hygienist would need to have a licensed dentist provide general supervision when providing services. In performing its obligations, DHEC

contracts with providers by entering into Memorandums of Agreement (“MOAs”), which incorporate specific guidelines established by DHEC. In accordance with the plain language of the statute, the providers who choose to provide services through the DHEC Dental Program must perform “under the direction of the Department of Health and Environmental Control State Dental Coordinator.” DHEC’s Dental program operates using MOAs with providers and the providers follow the guidelines provided by DHEC. The guidelines are modified from time to time by DHEC to implement the Dental Program.

HPS knows and understands the process of the MOA and guidelines because HPS had been operating in the Dental Program for several years prior to 2019. It is undisputed that HPS refused to sign the August 2019 MOA with DHEC, which would have enabled HPS to deliver its services through the DHEC Dental Program for the 2019-2020 school year. HPS maintains that it objected to certain provisions of the guidelines (i.e. HPS did not agree with DHEC’s guidelines) and HPS has previously taken the position (before the DHHS hearing officer) that a prior MOA was still effective. To be clear, HPS took issue with DHEC’s requirement, in the DHEC guidelines, that HPS refer a patient to a dentist if ART is performed on a patient. HPS does not believe that it should be required to refer a patient to a dentist if it performed ART on a patient. Basically, HPS contends that it either has the ability to negotiate the guidelines of DHEC’s Dental Program or, perhaps alternatively, that it could unilaterally modify DHEC’s guidelines.

HPS fails to acknowledge that in order to deliver its services through the DHEC Dental Program, it must enter into a contract with DHEC and perform under the direction of DHEC’s State Dental Coordinator, in accordance with the plain language of the statute (S.C. Code Ann. § 40-15-110). This requirement would include abiding by the guidelines issued by DHEC since DHEC is responsible for administering the DHEC Dental Program.

Without diving into the mental gymnastics of HPS's allegations that a prior MOA was in effect, it is wholly undisputed that HPS refused to sign the August 2019 MOA (see paragraph 63 of HPS's Second Amended Complaint). HPS made an affirmative decision in August of 2019 that it would not sign the August 2019 Memorandum of Agreement. In spite of HPS's refusal to sign the MOA, HPS continued delivering its services in public schools without a licensed dentist providing general supervision and without a contract/MOA with DHEC, which is in direct contradiction of S.C. Code Ann. § 40-15-110.

Instead of ceasing its operations or modifying its method of delivering services (as a result of its refusal to enter into a statutorily required contract), HPS filed a lawsuit against DHEC and DHHS on August 16, 2019, for emergency and permanent injunctive relief regarding the MOA. By taking this action, HPS planned to continue its operations under the DHEC Dental Program by using the tip of a sword (i.e., this lawsuit) to (1) leverage/force DHEC to allow HPS to continue its operations in the DHEC Public Health Dental Prevention Program and (2) leverage/force DHHS to continue reimbursements to HPS for HPS's services during the 2019-2020 school year.

When HPS filed this lawsuit, HPS was under investigation by DHHS for issues associated with its billings. In March of 2021, HPS settled all claims with DHHS (the administrative claims asserted by DHHS and HPS's claims asserted against DHHS in this civil action). In effect, DHHS and HPS entered into a "walk-away" settlement where both sides walked away from all disputes and signed general releases to release one another. As a result of the walk-away settlement, HPS accomplished one of its goals in filing this civil action, i.e., HPS received Medicaid reimbursements for the 2019-2020 school year and the settlement agreement allowed HPS to keep all Medicaid funds that it had collected in the 2019-2020 school year.



The Second Amended Complaint does not identify DHHS as a Defendant because DHHS and HPS entered into a settlement. The Second Amended Complaint asserts tort claims (unfair trade practices, civil conspiracy, and breach of contract accompanied by a fraudulent act), along with a claim for attorneys' fees under S.C. Code Ann. § 15-77-300. For the reasons outlined in this Memorandum, DHEC seeks a dismissal of the claims asserted by HPS against DHEC. In particular, (1) the tort claims asserted by HPS against DHEC cannot be maintained by HPS, (2) this Court lacks subject matter Jurisdiction, (3) illegality and (4) S.C. Code Ann. § 40-15-110, *et al.*, does not give rise to a private cause of action.

### **LAW AND ARGUMENTS**

#### **I. The Plaintiff cannot sustain the “new” tort causes of action against DHEC.**

The Plaintiff cannot sustain causes of action against DHEC because the causes of action are expressly barred/precluded by statute and/or subject to defenses which preclude HPS from any recovery. *See Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (2013).<sup>3</sup>

##### **a. SC Unfair Trade Practices Act**

The SCUTPA is intended to prevent unfair methods of competition and unfair or deceptive acts. S.C. Code Ann. § 39-5-20. This act can only be applied to those persons or entities engaged in commerce. S.C. Code Ann. § 39-5-10. As a preliminary matter, DHEC is a state agency and is not involved in commerce. Moreover, the SCUTPA has an express exclusion for regulatory bodies. S.C. Code Ann. § 39-5-40(a). Because DHEC is a regulatory agency, Plaintiff cannot sustain a SCUTPA cause of action against DHEC.

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<sup>3</sup> Notably, the same Plaintiff and same Counsel argued these same claims to the Trial Court on a Motion to Amend in 2004 (Judge Keesley) in a different case, against the S.C. Dental Board, and the Motion to Amend was denied based on the futility of the causes of action. In similar fashion, HPS took issue with the SC Dental Board's operations a governing / regulatory body and filed suit against the S.C. Dental Board.

This same Plaintiff and same counsel have attempted to sustain this same cause of action against another state agency, the S.C. Board of Dentistry, in a civil action. The S.C. Supreme Court held that because the Board of Dentistry was a state agency and made regulatory decisions it could not be sued for a violation of the SCUTPA. *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 639, 743 S.E. 2d 808, 816 (2013). In the *Board of Dentistry* case, this same Plaintiff sued the S.C. Dental Board alleging that an emergency regulation to require a clinical exam by a supervising dentist before a dental hygienist could perform a procedure violated the SCUTPA. *Id.* at 628. The SC Supreme Court determined that only persons or entities involved in trade or commerce could be sued for violating the SCUTPA. *Id.* at 639. In summary, the Supreme Court held that a SCUTPA cause of action could not be sustained against a state agency, i.e., the SC Board of Dentistry.

DHEC is a state agency, tasked with administering the Public Health Dental Prevention Program, in accordance with the Dental Services Act. The MOAs and accompanying guidelines are created by DHEC to regulate the services performed by dental hygienists in accordance with the Dental Practices Act. DHEC is a state agency and the regulatory body for the provision of dental services in the public health setting. DHEC is not engaged in trade or commerce. As such, Plaintiff's cause of action for violation of the SCUTPA against Defendant DHEC fails as a matter of law.

**b. Civil Conspiracy**

Civil conspiracy requires the combination or agreement of two or more persons to commit an unlawful act or a lawful act by unlawful means, together with the commission of an overt act in furtherance of the agreement, and with damages proximately resulting to the plaintiff. *Paradise*

*v. Charleston Cty. Sch. Dist.*, No. 28030, 2021 S.C. LEXIS 56 (2021). The Plaintiff alleges that because of this alleged conspiracy, the Plaintiff experienced a loss.

The South Carolina Tort Claims Act expressly states that a governmental entity is not liable for a loss from administrative action or inaction. S.C. Code Ann. § 15-78-60(2). A governmental entity is not liable for any enforcement or compliance with any policy or regulation. S.C. Code Ann. 15-78-60(4). Government entities or employees are immune from a loss caused by exercises of discretion or judgment by employees in performing their duties. S.C. Code Ann. 15-78-60(5). Additionally, a government employee who commits a tort within the scope of his official duty is protected by the SC Tort Claims Act. S.C. Code Ann. § 15-78-70(a). Furthermore, a government agency is not liable if an employee commits a tort when acting outside of the scope of his official duties, or if he acts to commit fraud, malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

Notably, paragraph 83 of the Plaintiff's Second Amended Complaint alleges that certain employees were acting outside of their scope of employment when committing this tort, and, at the same time, were operating inside the scope of their employment as agents of DHEC. These allegations, in the same paragraph of Plaintiff's Second Amended Complaint, are diametrically at odds with one another and are impossible. Either an employee committed a tort in the scope of their official duties and would be immune from suit or the employee committed a tort outside the scope of their duties or with one of the other exceptions and is personally liable for their actions. Regardless, under either scenario, the SCTCA provides DHEC with immunity.

**c. Breach of Contract Accompanied by a Fraudulent Act**

Plaintiff will be unable to sustain a cause of action against DHEC for breach of contract accompanied by a fraudulent act because: (1) it is undisputed that HPS did not sign the 2019-2020

MOA and (2) Plaintiff has failed to plead fraud with particularity and the complaint lacks satisfaction of necessary elements.

It is completely undisputed that HPS failed to sign the 2019-2020 MOA, which is the only basis for HPS's breach of contract. Breach of contract accompanied by a fraudulent act requires a breach of a contract, the breach must be accompanied with a fraudulent intention, and the breach must be accompanied by a fraudulent act. *Maro v. Lewis*, 389 S.C. 216, 223, 697, S.E. 2d 684, 688 (Ct. App. 2010). The Plaintiff cannot establish the elements for this cause of action against DHEC; therefore, this cause of action fails, as a matter of law.

**d. Statutory Attorney's Fees**

Plaintiff cannot sustain a cause of action against DHEC for statutory attorney's fees under S.C. Code Ann. § 15-77-300. To recover attorney's fees under the statute a court must find that the agency acted without substantial justification in pressing its claim against the party. S.C. Code Ann. § 15-77-300(A)(1) (emphasis added). HPS cannot provide any evidence that DHEC pressed any claim against HPS. In fact, to the contrary, HPS filed this lawsuit and asserted claims against DHEC when HPS refused to sign the August 2019 MOA (i.e., the contract to perform the dental hygiene services in accordance with the Dental Services Act). In fact, contrary to pressing a claim against HPS, DHEC provided documents to DHHS that ultimately reduced the alleged overpayment (as alleged by DHHS) from \$2,000,000.00 to roughly \$600,000.00. In other words, DHEC did not press any claim(s) against HPS and took no adversarial action against HPS. DHEC did insist that HPS comply with the statute and execute a MOA/contract so that HPS could deliver its services under the DHEC Public Health Dental Prevention Program; but, only after HPS refused to sign the MOA/contract.

To the extent HPS was forced to defend itself against DHHS, HPS could have, if it would have so desired, pursued DHHS for its attorneys' fees and costs that it may claim was unwarranted or unjust. But, as noted herein, HPS elected to settle its disputes/claim(s) with DHHS by executing a release with DHHS. Presumably, HPS intends to try and hold DHEC responsible for attorneys' fees it allegedly incurred in connection with claims pressed by DHHS. HPS's attempt to sustain a cause of action for attorney's fees under this statute against DHEC also fails as a matter of law.

## **II. Illegality**

HPS refused to execute a MOA/contract with DHEC in August of 2019 to deliver its services under the DHEC Public Health Dental Prevention Program as required by the Dental Services Act. Notwithstanding that fact, it is undisputed that HPS continued to deliver services to public school as if it was still operating under the DHEC Dental Program. HPS's claim arises out of and stems from HPS's delivery of its services, which it delivered without a MOA/contract in place with DHEC, in direct contradiction of the Dental Services Act.

It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. *Torts* § 12 (1954). This rule applies at both law and in equity and whether the cause of action is in contract or in tort. 1A C.J.S. *Actions* § 29. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993)

HPS cannot recover damages as a result of its own unlawful act of delivering services without a contract in place with DHEC, as required by S.C. Code Ann. § 40-15-110. As such, HPS's claim(s) are barred as a matter of law. The statutes and caselaw demonstrate that HPS cannot perform under the DHEC Public Health Dental Prevention Program without operating in accordance with the statute. Therefore, the Plaintiff's Second Amended Complaint should be dismissed.

**III. There is no statutory basis which gives rise to a private cause of action against Defendant DHEC.**

A private right of action can exist when it has not been expressly provided by statute; however, it may only be created by implication if such a statute was created for the special benefit of a private party. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 121, 678, S.E.2d 430, 433 (2009). A statute cannot be created for the special benefit of a private party if its purpose is to aid society and the public in general. *Id.*

In the present case, the statute (commonly known as the Dental Practices Act) which regulates the practice of dentistry and dental hygiene, S.C. Code Ann. §40-15-10 *et al.*, is expressly designed to aid society and the public in general. Further, section 40-15-110(A)(10) is specifically designed to allow for dental services in the public health setting. The Dental Practices Act does not expressly provide for a private right of action. DHEC's regulation of such services promotes the health and welfare of the citizens of South Carolina and cannot be interpreted to have been created for the special benefit of a private party. As such, Plaintiff does not have an implied private right of action against DHEC, and HPS is unable to maintain any causes of action against DHEC.

**CONCLUSION**

HPS cannot maintain any of the causes of action against DHEC and all claims against DHEC should be dismissed for the reasons set forth herein.

Respectfully submitted,

**BRUNER POWELL WALL & MULLINS, LLC**

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*Attorneys for DHEC*

September 9, 2022  
Columbia, South Carolina

|                                             |   |                                  |
|---------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS     |
|                                             | ) | FIFTH JUDICIAL CIRCUIT           |
| COUNTY OF RICHLAND                          | ) |                                  |
|                                             | ) |                                  |
|                                             | ) | Case No. 2019-CP-40-04567        |
| Health Promotion Specialists, LLC,          | ) |                                  |
|                                             | ) |                                  |
| Plaintiff,                                  | ) |                                  |
| vs.                                         | ) |                                  |
|                                             | ) | <b>PLAINTIFF’S MEMORANDUM IN</b> |
| South Carolina Department of Health and     | ) | <b>OPPOSITION TO DEFENDANTS’</b> |
| Environmental Control, the South Carolina   | ) | <b>MOTION TO DISMISS</b>         |
| Dental Association, Dr. Richard E. Boyd, as | ) |                                  |
| Personal Representative of the Estate of    | ) |                                  |
| Rocky Napier, and one or more John Does,    | ) |                                  |
| unidentified current or former agents of    | ) |                                  |
| South Carolina Department of Health and     | ) |                                  |
| Environmental Control,                      | ) |                                  |
|                                             | ) |                                  |
| Defendants                                  | ) |                                  |

This matter comes before the Court on Defendants’ Motion pursuant to SCRCP 12(b)(6) to dismiss the Plaintiff’s action. Plaintiff submits the following in opposition to Defendants’ Motions to dismiss and the memorandum in support of those motions submitted by Defendants South Carolina Department of Health and Environmental Control (hereafter “DHEC”) and Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier (hereafter “Dr. Boyd as Personal Representative”).

### **STANDARD**

“A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” See *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *Stiles*, 318 S.C. at 300, 457 S.E.2d at 602-03; see also *Baird*, 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper). “In deciding whether the trial court

properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.” *Flateau v. Harrelson*, 584 S.E.2d 413, 415 (S.C. App. 2003). “If the facts and inferences drawn from the facts alleged in complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper.” *Spence v. Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

### **ARGUMENT**

Defendants argue that this action should be dismissed pursuant to SCRCP 12(b)(6) for failure to state a cause of action upon which relief can be granted. Plaintiff asserts that the facts alleged, and inferences deduced therefrom are sufficient to establish the causes of action set forth against all Defendants.

#### **A. Unfair Trade Practices**

Defendant DHEC argues that it is exempt from The South Carolina Unfair Trade Practices Act (SCUPTA) as it is a regulatory state agency. SCUPTA defines trade and commerce as “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b) (emphasis added). As set forth in Plaintiff’s complaint, the provision of dental preventive services by private practitioners to individual consumers in South Carolina including school-aged children is trade and commerce within the definitions set forth in the South Carolina Unfair Trade Practices Act. Regarding Dr. Boyd as Personal Representative, Dr. Napier’s conduct through the Dental Association falls within the definition of trade and commerce as his membership necessarily supported the conspiracy in which the South Carolina



Dental Association engaged, as did Dr. Napier's own active involvement in attempting to prevent the provision of advanced preventative dental services by Plaintiff as part of the public health dental program which provided dental services directly to a subpopulation of the people of South Carolina.

### **B. Civil Conspiracy**

A civil conspiracy is defined as "a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010). Plaintiff has set forth sufficient facts to establish a cause of action for civil conspiracy against all Defendants in this case.

Plaintiff specifically alleged that Dr. Napier, in concert with the other Defendants, knowingly engaged in overt acts intended to damage or destroy the school-based public dentistry program for the purpose of injuring the Plaintiff. These acts are alleged to be intentional and did result in substantial financial losses to Plaintiff. Since the allegations of the Amended Complaint have to be assumed to be true at the Rule 12(b)(6) stage, Plaintiff asserts that it has sufficiently pled the required elements to support an action for civil conspiracy against Dr. Napier and survive a 12(b)(6) motion.

Defendant DHEC asserts that it is immune from liability under The South Carolina Tort Claims Act. The South Carolina Tort Claims Act does not provide protection from liability of any kind to private organizations or private persons, nor does it provide any protection from liability to an agency or an officer, agent or employee of an agency of the State if the conduct of the agency or the individual was not within the scope of official duties when the conduct constitutes actual fraud, actual malice, or intent to harm. S.C. Code Ann § 15-78-70(b). Plaintiff has specifically

alleged that certain employees of DHEC were acting outside the scope of their duties as employees or agents of DHEC and their actions to damage plaintiff were intentional, constituted actual fraud, and were undertaken with malice toward the Plaintiff with an intent to damage and/or destroy the Plaintiff. Accordingly, the South Carolina Tort Claims Act does not provide Defendant DHEC with immunity as a matter of law. Moreover, factual issues developed in discovery will enable the fact finder to determine whether the individual agents were or were not acting within the scope of their authority as state actors when they engaged in acts which they personally intended to harm Plaintiff.

### **C. Breach of Contract Accompanied by a Fraudulent Act**

Plaintiff has set forth sufficient facts to maintain an action for breach of contract accompanied by a fraudulent act against Defendant DHEC. Plaintiff's complaint lays out with particularity each element required for breach of contract and fraud. See Pl.'s Second Am. Compl. ¶¶51-73. While it is not disputed that Plaintiff did not sign the 2019-2020 MOA/contract, this was solely due to confusion caused by DHEC's gross negligence in maintaining updated contract records, as detailed in the amended complaint. Additionally, Plaintiff had continued authority to provide services for the school year 2018-2019 through the MOA signed by Plaintiff on June 3, 2016 and accepted by DHEC on July 26, 2016.

### **CONCLUSION**

For the reasons set forth more fully in the Second Amended Complaint and above, in addition to the argument to be presented by counsel at the hearing in the matter, Plaintiff respectfully requests an order denying Defendants' Motions to Dismiss.

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Respectfully submitted,

s/ Haley Hubbard  
Desa Ballard (S.C. Bar No. 498)  
Harvey M. Watson III (S.C. Bar No. 74053)  
Haley Hubbard (S.C. Bar No. 103195)

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**ATTORNEYS FOR PLAINTIFF**

September 12, 2022

|                                             |   |                                      |
|---------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS         |
|                                             | ) | FIFTH JUDICIAL CIRCUIT               |
| COUNTY OF RICHLAND                          | ) |                                      |
|                                             | ) |                                      |
|                                             | ) | Case No. 2019-CP-40-04567            |
| Health Promotion Specialists, LLC,          | ) |                                      |
|                                             | ) |                                      |
| Plaintiff,                                  | ) |                                      |
| vs.                                         | ) |                                      |
|                                             | ) | <b>PLAINTIFF'S SUPPLEMENTAL</b>      |
| South Carolina Department of Health and     | ) | <b>MEMORANDUM IN OPPOSITION TO</b>   |
| Environmental Control, the South Carolina   | ) | <b>DEFENDANTS' MOTION TO DISMISS</b> |
| Dental Association, Dr. Richard E. Boyd, as | ) |                                      |
| Personal Representative of the Estate of    | ) |                                      |
| Rocky Napier, and one or more John Does,    | ) |                                      |
| unidentified current or former agents of    | ) |                                      |
| South Carolina Department of Health and     | ) |                                      |
| Environmental Control,                      | ) |                                      |
|                                             | ) |                                      |
| Defendants                                  | ) |                                      |

Plaintiff hereby supplements its Memorandum in Opposition to Defendants' Motion to Dismiss. Plaintiff adopts the arguments set forth in the original Memorandum in Opposition. For the reason stated in the original memorandum and the reasons below, the Defendants' Motion to Dismiss by all Defendants should be denied.

### **STANDARD**

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." See *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *Stiles*, 318 S.C. at 300, 457 S.E.2d at 602-03; see also *Baird*, 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper). "In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Flateau v. Harrelson*,

584 S.E.2d 413, 415 (S.C. App. 2003). “If the facts and inferences drawn from the facts alleged in complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper.” *Spence v. Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

## **ARGUMENT**

### **I. DEFENDANT’S CONDUCT IS NOT PROTECTED BY THE NOERR-PENNINGTON DOCTRINE.**

Defendants DHEC and SCDA both argue that their lobbying efforts are protected by the Noerr-Pennington doctrine. While the Noerr-Pennington doctrine does provide immunity to those who engage in activities such as petitioning or lobbying the government, regardless of their intent or purpose, “it does not immunize every concerted activity that is genuinely intended to influence governmental action.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988). Other courts have found that “attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of Noerr.” *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass’n*, 663 F.2d 253, 214 U.S. App. D.C. 76 (D.C. Cir. 1981).

The Noerr-Pennington doctrine protects the First Amendment right to petition, yet “however broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehood.” *Whelan v. Abel*, 48 F.3d 1247, 310 U.S. App. D.C. 396 (D.C. Cir. 1995). “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’...If the end result is unlawful, it matters not that the means used in violation may be lawful.” *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 515, 92 S. Ct.

at 614. Even if *Noerr-Pennington* is generally applicable, the Defendants' conduct is not protected from liability because the Defendants' lobbying efforts, although successful, resulted in action by a state agency based on false and material misrepresentations.

As set forth in the Complaint, when the Board of Dentistry expanded the type of preventative services that dental hygienists like Plaintiff could provide, private dentists, such as Dr. Napier, SCDA and its members, and agents of DHEC took intentional and concerted efforts to lobby the Board to change its decision and interfere with Plaintiff's practice. Immunity does not extend to lobbying ostensibly directed toward influencing governmental action that is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Thus, while genuine petitioning is immune from antitrust liability, sham petitioning is not. See *BE&K Constr. Co. v. NLRB* 563 U.S. at 530-31, 122 S.Ct. 2390 (2002). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring governmental action." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L.Ed.2d 382 (1991). The Federal Trade Commission has already sanctioned the Board of Dentistry for its anti-competitive actions for the same exact conduct that Defendants engaged in here, *i.e.*, attempting it use legitimate regulatory functions to gain an unlawful advantage in a private business enterprise. 135 S.Ct 1101, 191 L.Ed2d 35. Now that the Board is complying with the law, the named Defendants are continuing the same exact efforts by attempting to force DHHS and DHEC to regulate Plaintiff out of business. That conduct is not protected.

Here, the actions of the Defendants were undertaken in bad faith and not with genuine intent to influence governmental action. Rather, the Defendants' sole purpose in lobbying was to

impede the payment to Plaintiff specifically for performing the preventative dental work that was permitted by the Board of Dentistry, require such a high reimbursement or disgorgement as to bankruptcy Plaintiff, and directly interfere with Plaintiff's to conduct business through the program. When Defendants' efforts failed to convince the Board of Dentistry to change its decision, Defendants resorted to other means to impede Plaintiff's ability to be paid through the program. This scheme culminated with DHEC making knowingly false statements both to DHHS and public schools participating in the program regarding Plaintiff's contracts with DHEC which led Plaintiff to enter costly litigation with DHHS and suffer significant financial loss, effectively destroying Plaintiff's practice.

Further, false statements are not immunized by the First Amendment right to petition, nor are false statements immunized by the *Noerr-Pennington* doctrine. *See Hand Held Prods., Inc. v. Code Corp.* (D. S.C. 2017) (holding that the *Noerr-Pennington* doctrine does not immunize knowingly false statement to a competitor's customers).<sup>1</sup> It should follow that intentional and knowingly false statements disseminated by a state agency to DHHS, the agency responsible for remitting payment to Plaintiff for its services, do not enjoy immunity under the First Amendment or the *Noerr-Pennington* doctrine, especially when those false statements are the proximate cause of significant injury.

## II. DEFENDANT DHEC BREACHED ITS CONTRACT WITH PLAINTIFF

DHEC incorrectly maintains that it is not liable for breach of contract accompanied by fraudulent act because there was no valid contract in effect. Plaintiff provided services through the

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<sup>1</sup> While the facts of this case are not on point with the allegations here, Plaintiff provides it for reference as its holding stands for the central argument that regardless of how expansive the protections of the First Amendment are, there are limitations on First Amendment immunity. *See, Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031(1942)(upholding law prohibiting "fighting words"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (holding that false statements of fact receive limited shelter from the First Amendment); *BE & K Constr. Co.*, 563 U.S. at 530-31, 122 S.Ct. 2390 (2002) ("False statements are not immunized by the First Amendment right to freedom of speech").

program for years under the initial MOA signed in 2016. In its argument, DHEC focuses on Plaintiff's failure to sign the August MOA and ignores the fact that Plaintiff had the continued authority to provide services under an existing MOA. On November 22, 2019, after Plaintiff did not sign the August MOA, DHEC gave Plaintiff notice that it was terminating the April 2019 MOA effective December 31, 2019. This is the same MOA under which Plaintiff advised DHEC that it would continue operating when Plaintiff initially declined to sign the August MOA. It is illogical that DHEC can claim that no contract existed and thus it cannot be found liable for breach of contract when DHEC in fact terminated the existing April 2019 MOA. If there was no valid contract, there would be no reason for DHEC to notify Plaintiff of its termination.

**III. PLAINTIFF'S CLAIMS AGAINST DEFENDANT DR. RICHARD E. BOYD, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF ROCKY NAPIER ARE NOT TIME BARRED**

Defendant Napier asserts that Plaintiff's claims are time barred pursuant to S.C. Code Ann. 62-3-803(a) which provides that "all claims against a decedent's estate which arose before the death of the decedent...are barred against the estate [and] the personal representative...unless presented" within "one year after the decedent's death." However, this section is not within the Title and Chapter that applies to statutes of limitations generally. The statute clearly applies only to claims that could be made and adjudicated in probate court. The probate court is not a constitutional court; it is a creature of statute, and therefore the powers and limitations granted related to its procedures do not have general application. South Carolina Constitution, Article V, Section 12 (matters testamentary and of administration are vested in the General Assembly); *Seels as PR v. Smalls*, Op.No. 28103 (South Carolina Supreme Court, August 3, 2022); See also *Kosciusko v. Parham*, 428 S.C. 481, 836 S.E.2d 362 (Ct.App. 2019) (referring to the family court as a statutory court and therefore of limited jurisdiction).



#### IV. PLAINTIFF'S CLAIMS PRESENT NOVEL ISSUES NOT APPROPRIATE FOR DISPOSITION UNDER 12(B)(6)

The issues raised in this action, specifically as it relates to the application of the *Noerr-Pennington* doctrine to the factual scenario presented, present novel questions of law that should not considered for disposition at this stage of litigation. As a general rule, courts are reluctant to decide important questions of novel impression on a motion to dismiss before the parties have had an opportunity to fully develop the factual record. *See, Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001); *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82 (2015). Instead, a novel issue is best decided in light of the testimony to be adduced at trial. *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980).

#### CONCLUSION

For the reasons set forth in Plaintiff's initial memorandum in opposition to motion to dismiss and as supplemented by the memorandum above, Plaintiff prays for an order denying Defendants' Motions to Dismiss.

Respectfully submitted,

s/ Haley Hubbard  
Desa Ballard (S.C. Bar No. 498)  
Harvey M. Watson III (S.C. Bar No. 74053)  
Haley Hubbard (S.C. Bar No. 103195)

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**ATTORNEYS FOR PLAINTIFF**

September 23, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2019-CP-40-04567

Health Promotion Specialists, LLC,

Plaintiff,

v.

South Carolina Department of Health and Environmental Control,  
 The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

**DEFENDANT SOUTH CAROLINA DENTAL ASSOCIATION'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE PLAINTIFF'S COMPLAINT**

Defendant South Carolina Dental Association ("SCDA") hereby submits this Supplemental Memorandum in Support of its Motion to Dismiss Plaintiff's Second Amended Complaint ("Complaint") in response to Plaintiff's Supplemental Memorandum in Opposition to the SCDA's Motion to Dismiss filed September 23, 2022 ("Plaintiff's Supp. Memo"). For the reasons below, the claims against the SCDA must be dismissed because Plaintiff has not alleged facts sufficient to constitute a cause of action under the UTPA or for civil conspiracy and because those claims are barred by the First Amendment and *Noerr-Pennington* doctrine.

**REPLY ARGUMENT**

**I. Plaintiff's Claims are not Viable Based on Application of State Law.**

As an initial matter, Plaintiff failed to respond to the arguments that state law bars its claims against the SCDA (SCDA Motion to Dismiss pp 1-3 filed April 28, 2022 and Memo in Support filed September 1, 2022 pp 4-12). Rather, Plaintiff responds only to the arguments that the First Amendment bars its claims as expressed in the *Noerr-Pennington* doctrine (Plaintiff's Supp.

Memo, pp. 2-4). However, as argued in SCDA's prior filings and as argued at the hearing, Plaintiff's claims do not survive under state law, much less under First Amendment scrutiny.

First, Plaintiff's claim against the SCDA based on the UTPA cannot prevail because the SCDA was not engaged in "trade or commerce" as required by the Act. See *Health Promotion Specialists, LLC, v. S.C. Board of Dent.*, 403 S.C. 623, 743 S.E.2d 808 (2013) ("*HPS I*"). Plaintiff has failed to allege any facts to support the "trade or commerce" requirement. The SCDA does not sell, distribute, or advertise goods or services of any kind – all of which are defined as "trade or commerce" under the Act and its lobbying activities are not activities in "trade or commerce." Therefore, the SCUTPA cannot apply to the SCDA.

Second, Plaintiff's civil conspiracy claim cannot prevail against the SCDA because Plaintiff has failed to allege that the SCDA's main purpose was to harm the Plaintiff, an essential element of a civil conspiracy claim. Instead, Plaintiff repeatedly alleges that SCDA intended to increase the profits of its members, which does not satisfy the intent-to-harm requirement of this claim. Further, Plaintiff has failed to allege that the SCDA committed an "overt act" in furtherance of unlawful or nefarious conduct intended to harm the Plaintiff. The only overt act that the SCDA allegedly committed was to lobby public officials "to increase the financial income of private dentists of South Carolina." (Compl. ¶ 11). However, this is neither an unlawful act nor a lawful act performed via unlawful means. See *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).<sup>1</sup>

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<sup>1</sup> Clarifying the elements of civil conspiracy as: (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *Id.*

## II. Plaintiff's Claims Cannot Survive First Amendment Scrutiny.

While Plaintiff argues that the *Noerr-Pennington* doctrine does not mandate dismissal, it nevertheless acknowledges the immunity provided under the doctrine, then fails to set forth any allegation against the SCDA that would avoid application of the doctrine.

At the hearing on this matter, counsel for the plaintiff argued that *Noerr-Pennington* did not apply to bar the claims because the alleged lobbying efforts were *successful*. Understandably puzzled by this position, the Court allowed counsel 10 days to present authority for such a novel proposition. Finding no authority for the position taken at the hearing, Plaintiff now postulates that the doctrine does not apply if the lobbying efforts are a “*sham*.” (Plaintiff’s Supp. Memo p 3). However, the very allegation that the alleged lobbying efforts were *successful* belies the argument that they were a *sham*. The very definition of the term “sham” offered by the Plaintiff (taken in part from the case argued at the hearing and in SCDA’s initial Memo, *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991)), involves a defendant whose activities are “not genuinely aimed at procuring governmental action.” (Plaintiff’s Supp. Memo at p. 3). Here, Plaintiff has both pled and argued before the Court that the lobbying efforts *were intended to and did result* in government action. Indeed, if the well pled allegations in the Complaint are accurate, as they are presumed to be, then various state agencies involved took action at the behest of the SCDA, as alleged and as counsel argued at the September 13<sup>th</sup> hearing. Therefore, by definition, these efforts could not constitute a “sham.” At the very least, there is simply no allegation in the Complaint that the SCDA’s lobbying was a sham; rather the allegations are that the SCDA acted to pursue profits, which is not a “sham” basis for lobbying under the cases cited by Plaintiff.

Plaintiff’s Supplemental Memo argues that the “Defendants’ sole purpose in lobbying was to impede ... payment to Plaintiff ...”; however, the Complaint makes clear that the **sole** purpose

was “for the benefit of private dentists.” (Second Am. Compl. ¶¶ 11, 18, 19, 22, 26, 28, 32). This alleged motive - again, taken as true - does not render the activities a sham, but rather genuine in both their alleged goal and the alleged result.

Finally, Plaintiff’s argument makes a thinly veiled reference to unprotected lobbying such as bribery, corruption and “misrepresentation (in the adjudicatory process)” (Plaintiff’s Supp. Memo at p 2). However, there are no allegations of any such activities on behalf of SCDA. Plaintiff’s Complaint refers to “false” statements that were made about it in 19 of the 115 paragraphs of the Complaint. However, not one of these 19 paragraphs attribute or allege false statements made by the SCDA to any agency or entity it allegedly lobbied.<sup>2</sup>

**III. The Issues Raised are not “Novel” and the Claims against the SCDA Should be Dismissed at the Stage.**

Plaintiff argues that the issues raised are “novel” and therefore not subject to Rule 12(b)(6) dismissal. (Plaintiff’s Supp. Memo at p. 6). However, these issues are not novel at all. The state law issues have been evaluated and adjudicated by the Supreme Court against this very Plaintiff in *HPS I*, and the Supreme Court recently clarified the issues and elements of a common law civil conspiracy claim in *Paradis*. Neither claim is viable as a matter of established state law.

Further, the issues of First Amendment immunity and *Noerr-Pennington* immunity are far from novel, having been recognized in Constitutional jurisprudence since the 1960s with continued application over the years including the *Omni Outdoor* case decided in 1991. The immunities provided by the First Amendment cannot reasonably be considered “novel.” Instead, the claims should be dismissed at this stage to avoid the chilling effect it might have on organizations that lobby on issues of public importance.

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<sup>2</sup> See Second Am. Compl, ¶¶ 21, 30, 31, 32, 24, 35, 37, 54, 62, 66, 69, 70, 71, 72, 73, 97, 103, 104, and 110.

### **CONCLUSION**

Based on the foregoing and arguments raised in the instant Motion to Dismiss and prior Memorandum in Support of Motion to Dismiss (filed September 1, 2022), Plaintiff's Second Amended Complaint should be dismissed as to the South Carolina Dental Association.

### **MURPHY & GRANTLAND, P.A.**

*s/E. Raymond Moore, III*

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, the South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S REPLY TO PLAINTIFF'S  
SECOND MEMORANDUM IN  
OPPOSITION**

In Reply to the Plaintiff's Second Memorandum in Opposition, the South Carolina Department of Health and Environmental Control ("DHEC") would show the following:

**I. Plaintiff has failed to explain how *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (2013) does not bar Plaintiff's causes of action against DHEC.**

The Plaintiff has filed two Memorandums in Opposition to the SCRCP Rule 12(b)(6) Motions to Dismiss and suggested in its most recent filing that the claims asserted in this civil action present "novel issues." In spite of the Plaintiff's claim that this case presents novel issues, the Plaintiff has completely failed to address the case of *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 640, 743 S.E. 2d 808, 916-817 (2013) (Holding that "Health Promotion [Specialists, LLC] could not sustain a cause of action for a violation of the SCUTPA as the [South Carolina Board of Dentistry's] promulgation of the Emergency Regulation was not an action 'in the conduct of any trade or commerce.'")



The Plaintiff has not even attempted to distinguish this case from the facts at hand. The reason why the Plaintiff has failed to address this case is because the South Carolina Supreme Court opinion is a total bar to the Plaintiff's claims against DHEC.

**II. The Plaintiff's "mental gymnastics" to resurrect a prior Memorandum of Agreement fail as a matter of law.**

It is undisputed that HPS refused to sign the August 2019 MOA with DHEC because the Plaintiff objected to DHEC's guidelines. See Paragraph 63 of the Plaintiff's Second Amended Complaint. The Plaintiff also correctly alleges in Paragraph 61 of its Second Amended Complaint that "[i]n connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS." In other words, the Plaintiff admits and acknowledges that DHEC was not renewing any prior Memorandum of Agreement. Instead, DHEC required a new contract (i.e., a new MOA) in August 2019. When analyzing a breach of contract accompanied by a fraudulent act cause of action, the first requirement is the existence of a contract. HPS admits, in its Second Amended Complaint, that it did not have a meeting of the minds with DHEC regarding the terms of the August 2019 MOA. As such, the breach of contract accompanied by a fraudulent act fails as a matter of law because the Plaintiff cannot satisfy the first element, i.e., the existence of a contract.

The Plaintiff's position on which MOA was effective in August of 2019 (after HPS refused to sign the August 2019 MOA) has "changed" over time. The Plaintiff alleges in its most recent pleading, the Second Amended Complaint, that the 2018-2019 Memorandum of Agreement (signed in April 2019), is the operable MOA. See paragraph 61 of Plaintiff's Second Amended Complaint.<sup>1</sup> But, the Plaintiff has indicated in both of its recently filed Memoranda (filed 9/12/22

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<sup>1</sup> The April 2019 MOA (2018 – 2019 school year) and the June 2016 MOA (2016-2017 school year) were filed as attachments to the Plaintiff's Amended pleading (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019.

and 9/23/22) in opposition to the Rule 12(b)(6) Motions that HPS was operating under the 2016 MOA. See Page 4 of HPS Memorandum in Opposition filed on September 12, 2022, and Pages 4-5 of the Plaintiff's Supplemental Memorandum filed on September 23, 2022.

The Plaintiff's arguments regarding the prior MOAs are fatal because:

- a. The April 2019 MOA specifically notes that: (1) it terminates on June 30, 2019, (2) it is "renewable," if both parties execute a renewal "in writing," and (3) for any renewal, the provider, HPS, has to comply with DHEC's Guidelines. Notably, the MOA does not say "automatically renewed," indicating that additional action would have been required, a renewal "acknowledged in writing by both parties," in order to renew the April 2019 MOA.
- b. The 2016 MOA specifically notes that: (1) it terminates on June 30, 2017, (2) it is "renewable" and requires all amendments to be in writing, and (3) for any renewal, the provider, HPS, has to comply with DHEC's Guidelines. Again, the MOA does not say "automatically renewed," which means that additional action would have been required to renew the MOA.
- c. HPS also executed an acknowledgement of receipt of the PHDPP Guidelines<sup>2</sup> in connection with the 2016 MOA and the April 2019 MOA. The Acknowledgment (both the 2016 and 2019 acknowledgement) states, in relevant part:

I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective." (emphasis by DHEC)

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<sup>2</sup> The Acknowledgments, 2016 and 2019, are attached to Plaintiff's Amended pleading (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019.

Under the 2016 and 2019 MOAs, HPS was bound by the DHEC guidelines (and any future modifications). To reiterate, in Paragraphs 63 and 64 of the Plaintiff's Amended Complaint, HPS admits that it found DHEC's Guidelines to be objectionable. To participate in the program under the prior MOAs, HPS agreed to be bound by the DHEC guidelines. In light of HPS's objections to the to the DHEC Guidelines in August of 2019, that would preclude the prior MOAs from being renewed because there was no meeting of the minds.

In summary, HPS alleges it was operating under a prior MOA, while at the same time, openly admitting that it would not comply with DHEC's Guidelines in August of 2019. Both MOAs state that the MOAs are one-year terms that are "renewable" and require "compliance with ... the DHEC PHDPP Guidelines."

**III. Plaintiff's claims against DHEC fail because, by its own admissions, HPS's underlying acts were unlawful.**

HPS admits that it refused to sign the August 2019 MOA and admits that it objected to DHEC's Guidelines; but, at the same time, HPS continued delivering its services in public schools without a licensed dentist providing general supervision and without a contract/MOA with DHEC, which is in direct contradiction of S.C. Code Ann. § 40-15-110. HPS's claims arise out of and stem from HPS's delivery of its services, which were delivered without a MOA/contract in place with DHEC, in direct contradiction of the Dental Services Act.

"It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. *Torts* § 12 (1954). This rule applies at both law and in equity and whether the cause of action is in contract or in tort." 1A C.J.S. *Actions* § 29. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993).

HPS cannot recover damages as a result of its own unlawful act of delivering services without a contract in place with DHEC, as required by S.C. Code Ann. § 40-15-110. As such, HPS's claim(s) are barred as a matter of law.

As an aside, the Plaintiff makes reference to the November 22, 2019, DHEC letter<sup>3</sup> in its Supplemental Memorandum. The Plaintiff fails to point out that the DHEC letter correctly notates that all providers were required to sign a new MOA in August of 2019. In other words, the August 2019 meeting was not a "renewal" conference. All providers were given a new MOA in August of 2019 and were required to execute the new MOA, if the providers elected to continue participating in the program.

In November of 2019, after HPS refused to sign the August 2019 MOA, HPS was still actively visiting schools and operating as if it were still contracted with DHEC. DHEC had no choice, in November of 2019, but to make it absolutely clear to HPS that HPS was no longer in the program since it refused to sign the August 2019 MOA. And, as noted in the letter, DHEC specifically reserved its rights to contest any assertion by HPS of the validity of prior MOA.

**IV. Plaintiff's claim for attorney's fees fails because DHEC has never "pressed a claim" against HPS as required by S.C. Code Ann. § 15-77-300.**

The Plaintiff's claim for attorneys' fees fails, as a matter of law. DHEC has never "pressed a claim" under S.C. Code Ann. § 15-77-300, and HPS cannot show that DHEC has pressed a claim against HPS. To recover attorney's fees under the statute, a court must find that the agency acted without substantial justification in **pressing its claim against the party**. S.C. Code Ann. § 15-77-300(A)(1) (emphasis added). HPS cannot provide any evidence that DHEC pressed any claim against HPS. In fact, to the contrary, HPS filed this lawsuit and has asserted claims against DHEC

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<sup>3</sup> The November 22, 2019 letter from DHEC to HPS is attached to Plaintiff's Amended pleading (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019

when HPS, by its own admission, refused to sign the August 2019 MOA (i.e., the contract to perform the dental hygiene services in accordance with the Dental Services Act).

**V. Plaintiff's claims fail because the S.C. Dental Practices Act does not provide a private right of action.**

A private right of action can exist when it has not been expressly provided by statute; however, it may only be created by implication if such a statute was created for the special benefit of a private party. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 121, 678, S.E.2d 430, 433 (2009). A statute cannot be created for the special benefit of a private party if its purpose is to aid society and the public in general. *Id.* The Dental Practices Act does not expressly provide for a private right of action. DHEC's regulation of such services promotes the health and welfare of the citizens of South Carolina and cannot be interpreted to have been created for the special benefit of a private party. As such, Plaintiff does not have an implied private right of action against DHEC, and HPS is unable to maintain any causes of action against DHEC.

**CONCLUSION**

HPS cannot maintain any of the causes of action against DHEC, and all claims against DHEC should be dismissed for the reasons set forth herein.

Respectfully submitted,

**BRUNER POWELL WALL & MULLINS, LLC**

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September 27, 2022  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Health Promotion Specialists, LLC, )  
Plaintiff, )  
vs. )

Civil Action No. 2019-CP-40-04567

**MEMORANDUM IN SUPPORT OF**  
**MOTION TO DISMISS DEFENDANT,**  
**DR. RICHARD E. BOYD AS**  
**PERSONAL REPRESENTATIVE OF**  
**THE ESTATE OF DR. ROCKY**  
**NAPIER**

South Carolina Department of )  
Health and Human Services, The )  
South Carolina Dental Association, )  
Dr. Richard E. Boyd, as Personal )  
Representative of the Estate of )  
Rocky Napier, and one or more )  
John Does, unidentified current or )  
former agents of South Carolina )  
Department of Health and )  
Environmental Control, )  
Defendants. )

The defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier (“Dr. Boyd as Personal Representative”), by and through the undersigned attorneys, hereby submits this supplemental memorandum in response to Plaintiff’s Supplemental Memorandum in Opposition filed September 23, 2022 (“Plaintiff’s Supp. Memo”). For the reasons set forth below,<sup>1</sup> plaintiff’s claims against Dr. Boyd as Personal Representative should be dismissed because they are time barred by S.C. Code Ann. §62-3-804, et seq. and the death of Dr. Rocky Napier.

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<sup>1</sup> This Memorandum incorporates and relies upon all arguments made in this defendant’s pending Motion to Dismiss and Memorandum in Support (filed September 9, 2022).

I. Plaintiff's Claims are Barred by S.C. Code Ann. §62-3-804, et seq.

Plaintiff's claims against the Estate of Dr. Rocky Napier are time barred by statute. S.C. Code Ann. § 62-3-803(a) provides that "[a]ll claims against a decedent's estate which arose before the death of the decedent ... are barred against the estate [and] the personal representative ... unless presented" within "one year after the decedent's death." Plaintiff's initial Memorandum in Opposition (filed September 12, 2022) did not address the argument made on behalf of the defendant, Dr. Richard Boyd as Personal Representative of the Napier Estate, that the plaintiff's claims against the Estate are barred by S.C. Code Ann. § 62-3-803(a). The absence of any argument is significant. Plaintiff's Supplemental Memorandum briefly discusses S.C. Code Ann. § 62-3-803, but, without citing relevant supporting authority, incorrectly concludes that this statute is not applicable to the present case.

In support of its position, plaintiff asserts, first, that S.C. Code Ann. § 62-3-803 "is not within the Title and Chapter that applies to statutes of limitations generally." See Plaintiff's Supp. Memo at 5. While this assertion is correct, the statute still acts to time-bar plaintiff's claims. As set forth more fully in this defendant's Memorandum, S.C. Code Ann. § 62-3-803 is a nonclaim statute or "special statute of limitations." In re Est. of Hover, 407 S.C. 194, 206, 754 S.E.2d 875, 881-81 (2014). It is a second time limitation on claims against an estate in addition to any other applicable statutes of limitation. See S.C. Code Ann. § 62-3-803(a)(limiting "[a]ll claims against a decedent's estate which arose before the death of the decedent ... if not barred earlier by another statute of limitations or nonclaim statute"). Therefore, S.C. Code Ann. § 62-3-803, acts to "take away the right of recovery when a claimant fails to present his or her claims as provided in the statute." Id. As a nonclaim statute, S.C. Code Ann. § 62-3-803 "is in the nature of, and is similar to, a statute of limitations, in that it prevents the enforcement of stale demands," but it is "broader"

in its operation. Id. at 881 (internal citations omitted). “The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.” Id. at 884.

Plaintiff next asserts that S.C. Code Ann. § 62-3-803(a) “applies only to claims that could be made and adjudicated in probate court.” See Plaintiff’s Supp. Memo at 5. This contention contradicts the plain language of the statute itself. S.C. Code Ann. § 62-3-803(a) expressly applies to “[a]ll claims against a decedent’s estate which arose before the death of the decedent, including claims ... founded on contract, tort, or other legal basis[.]” The statute is inclusive and applies to all claims arising from all “legal basis,” expressly including tort actions, which are civil causes actions outside the jurisdiction of the probate court. See also, Moulitis v. Degen, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983) (holding that claims against the estate “includes tort claims as well as liquidated claims of creditors”).

Moreover, the plaintiff has cited no authority supporting the position that S.C. Code Ann. § 62-3-803(a) should be interpreted in any manner other than its plain meaning. See In re Est. of Hover, 407 S.C. 194, 206, 754 S.E.2d 875, 881-81 (2014) (instructing that S.C. Code Ann. § 62-3-803(a) should be strictly applied “as it is mandated by our rules of statutory construction” and to “effectuate[ ] the purpose of the nonclaim statute, which is to expedite and resolve claims against a decedent's estate with finality”). Instead, plaintiff’s sole support for this conclusion is that the probate court is a court of limited jurisdiction and, therefore, its “*procedures* do not have general application.” Id. (emphasis added). Respectfully, S.C. Code Ann. § 62-3-803(a) does not relate to the procedures<sup>2</sup> of the probate court, and the South Carolina Probate Code certainly has

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<sup>2</sup> Plaintiff’s use of the term procedure is not clarified or defined. See S.C. Code Ann. § 62-1-304 (South Carolina Rules of Civil Procedure govern formal proceedings before the probate court).



effect outside matters within the jurisdiction of the probate court. Plaintiff cites to two cases and to the South Carolina Constitution for the fact that the probate court – like the family court – is a court of limited jurisdiction. That fact is not disputed. See S.C. Code Ann. §62-1-302. However, the fact that the probate court is a court of limited jurisdiction does not mean that the entire South Carolina Probate Code – specifically S.C. Code Ann. § 62-3-803 – is only applicable to matters pending before the probate court. The plaintiff has not identified – and cannot identify – any authority to this point. See S.C. Code Ann. §62-1-302(a)(1)(“[T]he circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court[.]”

In summary, S.C. Code Ann. § 62-3-803(a), as a non-claim statute, “is distinct from the statute of limitations and is a self-contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period.” Haney v. Kavoukjian, No. 2:19-CV-2098-RMG, 2021 WL 3190401, at \*10 (D.S.C. July 27, 2021) (internal citations omitted). In the present matter, the applicable prescribed period was one year following the death of Dr. Napier. Dr. Napier died on March 7, 2021. Prior to filing the Second Amended Complaint on March 28, 2022, the plaintiff did not previously present a claim against the Estate and did not previously file any action against Dr. Napier, his Estate, and/or Dr. Boyd as Personal Representative. Therefore, pursuant to S.C. Code Ann. §62-3-802, the plaintiff’s claims are time-barred as a matter of law against the Estate of Dr. Napier and the defendant, Dr. Boyd as Personal Representative.

## II. Plaintiff’s Claims are Barred by the Death of Decedent, Dr. Napier

As a secondary matter, Plaintiff has failed to respond to the argument that plaintiff’s two (2) causes of action against the defendant, Dr. Boyd as Personal Representative, are also time barred by the death of the decedent, Dr. Rocky Napier. In the present case, both of plaintiff’s

causes of action against this defendant – for civil conspiracy and Unfair Trade Practices – purportedly arise from the alleged fraudulent or deceitful actions of the decedent, Dr. Napier, which are denied. See Pl.’s Second Am. Compl. ¶29 (alleging “actual fraud, actual malice and intent to harm”). Moreover, as set forth more fully in the present Motion and previously filed Memorandum, the nature and essential elements of each cause of action against this defendant involve elements of deceit or of fraud. Therefore, both causes of action against this defendant fall within a recognized exception to South Carolina’s survivability statute. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96–97 (2002) (“South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.”). As Dr. Rocky Napier died on March 7, 2021, plaintiff’s claims for civil conspiracy and Unfair Trade Practices are barred as a matter of law against the Estate of Dr. Napier and the defendant, Dr. Boyd as Personal Representative.

### **CONCLUSION**

Based on the foregoing and on the arguments raised in the present Motion to Dismiss and previously filed Memorandum in Support of Motion to Dismiss (filed September 9, 2022), Plaintiff’s Second Amended Complaint should be dismissed as to the defendant, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and the Estate of Dr. Napier.

*(Signature page to follow.)*

Respectfully submitted,

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September 29, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Case No.: 2019-CP-40-04567

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, the South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

**SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S NOTICE OF MOTION  
AND MOTION FOR  
RECONSIDERATION  
(Rule 59(e), SCRCP)**

**TO: DESA BALLARD, ESQUIRE AND HARVEY M. WATSON III, ESQUIRE,  
ATTORNEYS FOR THE PLAINTIFF**

**YOU WILL PLEASE TAKE NOTICE** that the Defendant, South Carolina Department of Health and Environmental Control ("DHEC"),<sup>1</sup> hereby gives notice that in 10 days hereafter, or as soon thereafter as is convenient to the Court and Counsel, its Counsel will move before the Honorable Jocelyn Newman, pursuant to Rule 59(e), for Reconsideration of her *Order Granting in Part and Denying in Part South Carolina Department of Environmental Control's Motion to Dismiss Pursuant to Rule 12(b), SCRCP*, entered on September 11, 2023 ("the Order"). In particular, DHEC intends to request that Judge Newman revisit, and reconsider, her ruling because the remaining two causes of action should be dismissed, as a matter of law, based on the Pleadings and the existing law of this State.

<sup>1</sup> To the extent that the allegations of Plaintiff's Second Amended Complaint may be construed to have allegations against current and former agents/employees of DHEC, this Motion is intended to be filed on behalf of DHEC's current and former employees, along with DHEC (i.e. a responsive pleading). The caption of the Second Amended Complaint references "current or former Agents;" but, the allegations in Paragraph 8 of the Second Amended Complaint reference "current or former employees of SCDHEC" and makes no reference to "agents" as styled in the caption.

The Plaintiff's claim for Unfair Trade Practices fails, as a matter of law, because (a) the Unfair Trade Practices statute (S.C. Code § 39-5-40(a), exemption for transactions administered by any regulatory body under statutory authority) expressly precludes an Unfair Trade Practices Act claim against DHEC and (b) the Tort Claims Act (S.C. Code Ann. § 15-78-60(2)) bars the Plaintiff from pursuing an Unfair Trade Practices Act.

The Plaintiff's claim for Breach of Contract Accompanied by a Fraudulent Act fails, as a matter of law, because the Plaintiff has admitted in its allegations that it refused to sign the 2019 Memorandum of Agreement ("MOA") that would have enabled the Plaintiff to continue providing its services under the Dental Services Act. If there is no contract, the Plaintiff cannot establish the first element, i.e. the existence of a contract, and there can be no cause of action for Breach of Contract accompanied by a Fraudulent Act.

As such, DHEC seeks an Order dismissing all claims against DHEC in this civil action. This motion is supported by, and/or will be supported by, the pleadings filed of record, all documents of record, the applicable law, the records on file herein and a Memorandum of Law as may be received by the Court.

Respectfully submitted,

**BRUNER POWELL WALL & MULLINS, LLC**

s/ Joey R. Floyd

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September 21, 2023

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, the South Carolina Dental Association, Dr. Richard E. Boyd, as personal representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-40-04567

**SOUTH CAROLINA DEPARTMENT OF  
HEALTH & ENVIRONMENTAL  
CONTROL'S ANSWER TO  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT**

Defendant, South Carolina Department of Health and Environmental Control ("DHEC"),<sup>1</sup> hereby answers the Plaintiff's Second Amended Complaint (Plaintiff's Second Amended Complaint is referred to herein as "Complaint")<sup>2</sup> herein as follows:

**FOR A FIRST DEFENSE**  
(General Answer)

1. Each and every allegation of the Plaintiff's Complaint not specifically admitted herein is denied.

<sup>1</sup> To the extent that the allegations of Plaintiff's Second Amended Complaint may be construed to have allegations against current and former agents/employees of DHEC, this Answer is intended to be filed on behalf of DHEC's current and former employees, along with DHEC. The caption of the Second Amended Complaint references "current or former Agents;" but, the allegations in Paragraph 8 of the Second Amended Complaint reference "current or former employees of SCDHEC" and makes no reference to "agents" as styled in the caption.

<sup>2</sup> Certain claims of the Plaintiff have been dismissed by way of DHEC's Rule 12(b)(6) Motion. Notwithstanding that fact, DHEC is providing its responses to the claims herein. DHEC has also filed a Motion for Reconsideration to dismiss the remaining claims of the Plaintiff.

2. Paragraphs 1, 2, 3 and 4 of the Complaint are not directed towards DHEC and do not make any allegations against DHEC. To the extent that Paragraphs 1, 2, 3 and 4 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
3. DHEC is without sufficient information to admit or deny the first and second sentences in Paragraph 5 of the Complaint; therefore, the allegations therein are denied and strict proof is demanded thereof. DHEC denies the allegations in the third sentence of Paragraph 5 of the Complaint.
4. DHEC admits the allegations in Paragraph 6 that allege DHEC is a state agency created by statute. DHEC craves reference to the various statutes regarding the duties and responsibilities of DHEC. To the extent that there are additional allegations in Paragraph 6, said allegations are denied and strict proof is demanded thereof.
5. Paragraph 7 does not make any allegations against DHEC and the allegations therein are not directed towards DHEC. To the extent that Paragraph 7 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
6. DHEC denies the allegations of Paragraph 8 of the Complaint and demands strict proof thereof.
7. DHEC denies the allegations of Paragraphs 9, 10 and 11 of the Complaint regarding the allegations against DHEC.
8. DHEC admits a portion of the allegations in Paragraph 12, to the extent that Paragraph 12 alleges HPS has, for a number of years, operated under the South Carolina Public Health Dental Prevention Program (“PHDPP”) by executing, and/or entering into, Memorandums of Agreement with DHEC. To the extent that Paragraph 12 may be construed to have

additional allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

9. DHEC denies the allegation in Paragraph 13 that alleges HPS and DHEC were in a “partnership.” DHEC craves reference to the executed Memorandum of Agreement regarding the rights and obligations of HPS and DHEC in connection with HPS’s provision of services to public school children under the PHDPP. To the extent that Paragraph 13 may be construed to have additional allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
10. Paragraph 14 does not make any allegations against DHEC. To the extent that Paragraph 14 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
11. Paragraph 15 does not make any allegations against DHEC. To the extent that Paragraph 15 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Furthermore, DHEC denies the Plaintiff’s contentions in Paragraph 15 that Ms. Byrd is a “qualified expert” and demands strict proof thereof.
12. Paragraph 16 does not make any allegations against DHEC. To the extent that Paragraph 16 may be construed to have additional allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
13. Paragraph 17 does not make any allegations against DHEC. To the extent that Paragraph 17 may be construed to have additional allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Furthermore, DHEC has no financial interests or financial obligations to dentists or dental hygienists who choose to participate in the PHDPP.



14. Paragraph 18 does not make any allegations against DHEC. To the extent that Paragraph 18 may be construed to have additional allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Furthermore, DHEC has no financial interests or financial obligations to dentists or dental hygienists who choose to participate in the PHDPP.
15. DHEC denies the allegations of Paragraph 19, 20, 21, 22, 23, and 24 and DHEC demands strict proof thereof.
16. Paragraph 25 does not make any allegations against DHEC. To the extent that Paragraph 25 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
17. DHEC denies the allegations of Paragraph 26 and would further show that HPS terminated itself by virtue of its admitted refusal to sign a Memorandum of Agreement to continue performing its work under the PHDPP.
18. Paragraph 27 does not make any allegations against DHEC. To the extent that Paragraph 27 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
19. DHEC denies the allegations of Paragraph 28 and DHEC demands strict proof thereof.
20. DHEC denies the allegations of Paragraph 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 and DHEC demands strict proof thereof.
21. Paragraphs 40, 41, 42, 43, 44, 45 and 46 (including the footnotes referenced therein) do not make any allegations against DHEC. To the extent that Paragraphs 40, 41, 42, 43, 44, 45 and 46 (including the footnotes referenced therein) may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

22. DHEC denies the allegations of Paragraphs 47, 48, 49 and 50 and DHEC demands strict proof thereof.
23. Paragraph 51 does not make any allegations against DHEC. To the extent that Paragraph 51 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.
24. Paragraph 52 does not make any allegations against DHEC. To the extent that Paragraph 52 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Furthermore, any allegations regarding Medicaid and payment for services to Medicaid beneficiaries are not matters within discretion of DHEC. All matters of payment for services rendered to Medicaid beneficiaries lie exclusively with the South Carolina Department of Health and Human Services (DHHS).
25. DHEC denies the allegations of Paragraph 53 and demands strict proof thereof.
26. DHEC denies the allegations of Paragraphs 54 and 55 and demands strict proof thereof.
27. DHEC denies the allegations of Paragraph 56 to the extent that HPS attempts to interpret and/or determine what agreement(s) govern the relationship between DHEC and HPS. DHEC craves reference to the signed documents executed by HPS and DHEC. To the extent that the allegations in Paragraph 56 differ and/or are contrary to the written agreements/Memorandums of Agreement between HPS and DHEC, said allegations are denied. Furthermore, the remaining allegations in Paragraph 56, if any, are denied.
28. DHEC admits that portion of Paragraph 57 that alleges DHEC sent HPS a new contract, i.e. a new Memorandum of Agreement (“MOA”) in the March / April of 2019 timeframe (which expired, by its terms, on June 30, 2019) and HPS executed the MOA. DHEC also admits that the April 2019 MOA incorporated the guidelines dated January 20, 2004,

revised September 2018. DHEC craves reference to the actual signed MOA and the Guidelines to the extent that any allegations differ and/or are contrary to the MOA and Guidelines. Paragraph 57 does not make any additional allegations against DHEC. To the extent that Paragraph 57 may be construed to have additional, or other, allegations against DHEC, all other allegations are denied and strict proof is demanded thereof.

29. DHEC denies the allegations of Paragraph 58. Furthermore, DHEC would show that DHEC advised all participants in the PHDPP program that a new MOA would have to be signed in August of 2019 for the 2019-2020 school year, which included the revisions to the aforementioned Guidelines. Moreover, the April 2019 MOA term ended on June 30, 2019.

30. Paragraph 59 does not make any allegations against DHEC. To the extent that Paragraph 59 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

31. Paragraph 60 does not make any allegations against DHEC. To the extent that Paragraph 60 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Notwithstanding the fact that there are no allegations against DHEC in Paragraph 60, DHEC acknowledges that HPS's representatives were present at the mandatory PHDPP participant meeting in August of 2019.

32. DHEC admits the allegation of Paragraph 61 that alleges all participants in the PHDPP were presented with a new contract (Memorandum of Agreement) in the August 2019 meeting. DHEC denies the remaining allegations of Paragraph 61 and demands strict proof thereof.

33. DHEC denies the allegations of Paragraph 62 and demands strict proof thereof. DHEC

craves reference to the actual 2019 guidelines that were published by DHEC in accordance with DHEC's statutory and regulatory obligations of the PHDPP.

34. DHEC admits HPS's allegations in Paragraph 63 that allege HPS refused to sign the August 2019 MOA. DHEC denies the remaining allegations of Paragraph 63, including the footnote to Paragraph 63.
35. DHEC admits the allegations of HPS in Paragraph 64 to the extent that HPS advised DHEC that HPS intended to continue performing its services without a MOA in place in direct contrast to the PHDPP statute, which requires an agreement to be in place for service providers, like HPS, to provide services under the PHDPP. DHEC denies the remaining allegations of Paragraph 64.
36. DHEC denies the allegations of Paragraph 65 and would further show that HPS elected to file suit against DHEC and DHHS in an effort to circumvent the PHDPP to continue performing services without a MOA in place between HPS and DHEC.
37. DHEC denies the allegations in Paragraph 66 and craves reference to the actual signed documents in place between HPS and DHEC.
38. Paragraph 67 does not make any allegations against DHEC. To the extent that Paragraph 67 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof. Furthermore, DHEC would show that HPS was repeatedly advised after the August 2019 PHDPP provider meeting that a new MOA would have to be executed if HPS elected to continue providing its services under the PHDPP for the 2019-2020 school year.
39. DHEC admits the allegations of Paragraph 68 that alleges DHEC sent a letter to HPS. DHEC denies HPS's interpretations and extrapolations in Paragraph 68. Furthermore,

DHEC admits that HPS refused to execute the August 2019 MOA. To the extent that there are additional allegations in Paragraph 68, said allegations are denied and strict proof is demanded thereof.

40. DHEC denies the allegations of Paragraphs 69, 70, 71, 72, 73, 74, 75 and 76.

41. Paragraph 77 does not make any allegations against DHEC. To the extent that Paragraph 77 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

42. DHEC denies the allegations of Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91 and 92.

43. Paragraph 93 does not make any allegations against DHEC. To the extent that Paragraph 93 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

44. DHEC denies the allegations of Paragraphs 94, 95, 96, 97, 98, 99 and 100.

45. Paragraph 101 does not make any allegations against DHEC. To the extent that Paragraph 101 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

46. DHEC denies the allegations of Paragraphs 102, 103, 104, 105, 106 and 107.

47. Paragraph 108 does not make any allegations against DHEC. To the extent that Paragraph 108 may be construed to have allegations against DHEC, said allegations are denied and strict proof is demanded thereof.

48. DHEC denies the allegations of Paragraphs 109, 110, 111, 112, 113, 114 and 115.

**FOR A SECOND DEFENSE**  
(Failure to State a Cause of Action)

49. The Complaint fails to state facts sufficient to constitute a cause of action against DHEC

and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**  
(Subject Matter Jurisdiction)

50. This Court has a lack of jurisdiction over the subject matter and should therefore be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

**FOR A FOURTH DEFENSE**  
(Failure to Exhaust Administrative Remedies)

51. The Plaintiff has failed to exhaust its Administrative Remedies pursuant to SC Code 44-1-60; therefore, this civil action should be dismissed as a result of the Plaintiff's Failure to exhaust its administrative remedies.

**FOR A FIFTH DEFENSE**  
(Standing)

52. The Complaint should be dismissed because Plaintiff lacks Standing.

**FOR A SIXTH DEFENSE**  
(Justiciable Controversy)

53. The Complaint should be dismissed because no justiciable controversy exists.

**FOR A SEVENTH DEFENSE**  
(Ripeness)

54. The Complaint should be dismissed because the matter is not ripe for judicial review.

**FOR AN EIGHTH DEFENSE**  
(Equity)

55. The Plaintiff's claims are barred, in whole or in part, by one or more of the doctrines of laches, estoppel, unclean hands or waiver.

**FOR A NINTH DEFENSE**  
(Substantial Justification)

56. DHEC alleges that it, and its agents/employees, acted reasonably, in good faith and with

substantial justification at all times relevant hereto, based on all relevant facts and circumstances known by them at the time they acted. Accordingly, HPS is not entitled to attorney's fees.

**FOR A TENTH DEFENSE**

(SC Tort Claims Act, SC Code § 15-78-10, et. seq.)

57. Plaintiff's claims are barred by the SC Tort Claims Act, SC Code § 15-78-10, et. seq.

**FOR AN ELEVENTH DEFENSE**

(Illegality)

58. Once HPS refused to execute the MOA with DHEC, HPS's actions were illegal and in direct contravention of the PHDPP. As such, the illegality of HPS's acts bar HPS from any recovery against DHEC.

**FOR A TWELFTH DEFENSE**

(No Private Cause of Action)

59. The PHDPP, SC Code § 40-15-110 does not provide for a private cause of action to be asserted against DHEC. Any claim(s) asserted by the Plaintiff arise out of HPS's participation in the PHDPP. As such, the claims against DHEC should be summarily dismissed.

**FOR A THIRTEENTH DEFENSE**

(Reservation and Incorporation)

60. DHEC reserves any additional and/or affirmative defenses that may be revealed or become available to it during the course of its investigation and/or discovery in this case.

61. DHEC incorporates the defense asserted by other Defendants in this civil action that may be applicable to DHEC.

**FOR A FOURTEENTH DEFENSE**

(Express Prohibition on Causes of Action by Existing Case Law)

62. The Plaintiff's Causes of Action are expressly prohibited by existing South Carolina case

law.

**FOR A FIFTEENTH DEFENSE**

(Statutory Exemptions to UTPA and Statutory Defenses)

63. The Unfair Trade Practices Act provides an express exemption in SC Code § 39-5-40(a).

64. DHEC is not engaged in trade or commerce as contemplated in the Unfair Trade Practices Act.

65. DHEC is not subject to the Unfair Trade Practices Act based on the Common Law of this State.

**FOR A SIXTEENTH DEFENSE**

(Failure to Plead with Specificity)

66. The Plaintiff has failed to plead Breach of Contract accompanied by a fraudulent act with specificity. The failure to plead with specificity is fatal to the cause of action.

**FOR A SEVENTEENTH DEFENSE**

(Release)

67. The Plaintiff has released any claim(s) that it may have had, if any, against DHEC.

**FOR AN EIGHTEENTH DEFENSE**

(Misrepresentation)

68. The Plaintiff's misrepresentations preclude the Plaintiff from any recovery in this matter.

**FOR A NINETEENTH DEFENSE**

(No Punitive Damages)

69. The South Carolina Tort Claims Act (SC Code § 15-78-10, et. seq.) expressly bars and precludes the Plaintiff from the recovery of punitive damages.



WHEREFORE, having duly answered the Second Amended Complaint, DHEC requests that the case be dismissed, with prejudice, and that it be awarded its costs and attorneys' fees in defending this action, plus such other and further relief as the Court deems just and proper.

Respectfully submitted,

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September 22, 2023

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S<sup>1</sup> MEMORANDUM IN  
SUPPORT OF ITS MOTION FOR  
RECONSIDERATION**

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Reconsider* this Court's Order Granting in Part and Denying in Part DHEC's Motion to Dismiss, Pursuant to Rule 12(b)(6), SCRCPP (referred to herein as "the Order"), which was entered on September 11, 2023. Plaintiff did not appeal this Court's Order; therefore, the Court's rulings are the law of the case.

The aforementioned Order dismissed all causes of action against DHEC, with the exception of (1) Unfair Trade Practices and (2) Breach of Contract Accompanied by a Fraudulent Act. For the reasons set forth in this memorandum, these remaining two causes of action should be dismissed, which would conclude this civil action in its entirety.

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<sup>1</sup> To the extent necessary, this Order of Dismissal shall also dismiss the Plaintiff's purported claims against "one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control" as identified in Plaintiff's caption.

## FACTS

The following facts are taken verbatim from this Court’s Order filed September 11, 2023. Because Plaintiff failed to appeal this Court’s Order, the Court’s rulings, including the following facts, are the law of the case. See *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“[A]n unappealed ruling is the law of the case and requires affirmance.”) (citations omitted). See also *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, “right or wrong, is the law of this case and requires affirmance.”).

The basic facts underlying this dispute, based on the Plaintiff’s pleadings,<sup>2</sup> arise out of HPS’s provision of dental hygiene services to various public schools, some of which took place through DHEC’s Public Health Dental Prevention Program (also referred to as the “Dental Program”).

DHEC administers the Dental Program pursuant to Section 40-15-110 of the Dental Services Act. Providers who participate in the Dental Program must perform services “under the direction of the Department of Health and Environmental Control State Dental Coordinator,” but without the requirement that a “licensed dentist be present.” S.C. Code Ann. 40-15-110(A)(10).

To participate in the Dental Program and take advantage of this provision, a provider must be “employed within or contracted through” DHEC. *Id.* To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement (“MOAs”) with providers, which incorporate specific guidelines established by the Department. (See Paragraph 12 of Plaintiff’s Second

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<sup>2</sup> In accordance with Rule 10(c), SCRPC, the pleadings include copies of documents attached to the pleadings as exhibits to the pleading. Notably, the Plaintiff’s Amended Complaint included copies of the Memorandum of Agreement between DHEC and HPS covering July 1, 2016 – June 30, 2017 (executed by DHEC and HPS in 2016), the Memorandum of Agreement covering July 1, 2018 – June 30, 2019 (executed by HPS in April of 2019) and a letter from DHEC to HPS dated November 22, 2019.

Amended Complaint.) The guidelines are modified from time to time by DHEC. **The MOAs terminate after one year; but, can be renewed in writing by both parties** (See, e.g., Exhibit C to Plaintiff's First Amended Complaint, pp. 4-5, ¶ III.A., reading that "[t]his MOA is renewable for four (4) additional one-year periods based on an annual review of the MDD Provider and its compliance with this MOA and the DHEC PHDPP Guidelines. To be effective, **a renewal must be acknowledged in writing by both parties.**") Additional emphasis added by DHEC.

HPS knows and understands the process of the MOA and guidelines because HPS had been operating in the program for nearly 20 years prior to 2019. (See Paragraph 12, of Plaintiff's Second Amended Complaint.) In August 2019, HPS was invited to and participated in the DHEC provider information conference, which it had done annually. (See Paragraph 60 of Plaintiff's Second Amended Complaint.) In connection with the August 2019 provider conference, DHEC presented a new MOA to HPS for the 2019-2020 school year. (See Paragraph 61 of Plaintiff's Second Amended Complaint.) However, HPS refused to sign the new MOA. (See Paragraph 63 of Plaintiff's Second Amended Complaint). **HPS admits that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines.** (See Paragraph 64 of Plaintiff's Second Amended Complaint, emphasis by DHEC.)

In spite of HPS's decision to refuse to sign the MOA, HPS continued delivering its services in public schools **without a contract/MOA with DHEC**, in direct contradiction of S.C. Code Ann. § 40-15-110. (See Paragraph 69 of Plaintiff's Second Amended Complaint.)<sup>3</sup> Additional emphasis added by DHEC.

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<sup>3</sup> HPS admits in its pleadings that it continued to operate in the public schools under the program through the use of mental gymnastics to "argue" that HPS was somehow operating under some prior MOA. (See Paragraph 67 of Plaintiff's Second Amended Complaint.) Notably, HPS alleges in its Second Amended Complaint that HPS was operating under the April 2019 MOA (See Paragraph 67); but, in its Memorandum in Opposition to DHEC's Motion to Dismiss, HPS alleged that HPS was operating under the June 3, 2016 MOA (Plaintiff's Memorandum in Opposition, filed 11/12/22, p. 4).

Instead of signing the August 2019 MOA, ceasing its operations under the Dental Program, or modifying its method of delivering services (as a result of its refusal to enter into a statutorily required contract), HPS filed a lawsuit against DHEC and the South Carolina Department of Health and Human Services (“DHHS”) on August 16, 2019.

The South Carolina Department of Health and Human Services was an original Defendant in the first Complaint filed by Plaintiff. While no longer a party to this civil action, the prior claims involving DHHS provides some additional background as to why this civil action was filed. The vast majority of school children served by HPS were Medicaid beneficiaries. (Paragraphs 5 and 21 of Plaintiff’s First Amended Complaint.) DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program. (See Paragraph 6, 23 and 34 of Plaintiff’s First Amended Complaint.) DHHS has exclusive administrative responsibility for Medicaid payments. (See Paragraphs 8 and 10 of Plaintiff’s First Amended Complaint.) DHHS was a primary payor for the services rendered by HPS to the public school children who were Medicaid beneficiaries.

As outlined in the Plaintiff’s First Amended Complaint (See Paragraph 37-44 of Plaintiff’s First Amended Complaint), HPS took issue with DHHS’s decision to stop paying HPS for a procedure known as atraumatic restorative treatment, or “ART.” On April 5, 2019, DHHS issued a Medicaid Bulletin advising all Medicaid dental providers about changes to reimbursements relating to protective services. (See Paragraph 43 of Plaintiff’s First Amended Complaint and Exhibit 1 attached to Plaintiff’s First Amended Complaint).

The Plaintiff alleges in Paragraph 73 of the Second Amended Complaint that HPS had to engage in “aggressive litigation with DHHS” regarding Medicaid overpayments and also notes that that the DHHS “matters were concluded confidentiality.” During the hearing on DHEC’s

Motion, it was noted that the settlement between DHHS and HPS (which is subject to FOIA and Plaintiff's Counsel acknowledged) was a "walk-away" settlement where both sides simply walked away. Thereafter, DHHS was dismissed from this civil action.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

### **REMAINING CAUSES OF ACTION**

#### **I. The SC Unfair Trade Practices Act Cause of Action ("SCUTPA").**

The Plaintiff cannot sustain this tort cause of action against DHEC because this cause of action is expressly barred/precluded by statute and/or subject to defenses which preclude HPS from any recovery.

**a. Expressly barred by statute.**

The SCUTPA is intended to prevent unfair methods of competition and unfair or deceptive acts. S.C. Code Ann. § 39-5-20. This act can only be applied to those persons or entities engaged in commerce. S.C. Code Ann. § 39-5-10. DHEC is a state agency and is not involved in commerce. Moreover, the SCUTPA has an express exclusion for regulatory bodies. S.C. Code Ann. § 39-5-40(a), provides as follows:

Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law. (emphasis by DHEC)

As this Court has noted in its prior Order, “DHEC administers the Dental Program pursuant to Section 40-15-110 of the Dental Services Act.” (Order, p. 2). In other words, DHEC is the regulatory body charged with administering the Dental Program, as contemplated by the Dental Services Act. Since DHEC is a regulatory body in the context of the Dental Services Act, Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC. As such, the Plaintiff’s cause of action for SCUTPA against DHEC fails as a matter of law.

**b. DHEC is not engaged in “Trade” or “Commerce.”**

The SCUTPA defines “Trade” and “Commerce,” S.C. Code Ann. § 39-5-10(b) as follows:

"Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

DHEC did not, through the Dental Program, engage in “Trade” or “Commerce.” It provided no services to anyone. All services relevant to this matter were provided by HPS. See Order, p. 3 (“In spite of HPS’s decision to refuse to sign the MOA, HPS continued delivering its services in public schools without a contract/MOA with DHEC, in direct contradiction of S.C. Code Ann. § 40-15-110.”) Neither did DHEC pay for any services provided. Payments were, instead, administered by the Department of Health and Human Services (DHHS). See Order, p. 4 (“DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program . . . . DHHS has exclusive administrative responsibility for Medicaid payments . . . . DHHS was a primary payor for the services rendered by HPS to the public school children who were Medicaid beneficiaries.”)

In summary, DHEC is not and was not engaging in “Trade” or “Commerce,” which means that DHEC cannot be pursued for an “unfair trade practice” as contemplated in the SCUTPA.

**c. Expressly barred by case law.**

This same Plaintiff and same counsel have previously attempted and failed to sustain this same cause of action against another state agency in a prior civil action.<sup>4</sup> In *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (2013) the same Counsel that is representing HPS in the present matter filed a lawsuit on behalf of HPS against the S.C. Board of Dentistry alleging that an emergency regulation to require a clinical exam by a supervising dentist before a dental hygienist could perform a procedure violated the SCUTPA.. *Id.* at 628. The SC Supreme Court determined that only persons or entities involved in trade or commerce could be sued for violating the SCUTPA., *Id.* at 639. According to the Supreme Court,

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<sup>4</sup> Notably, the same Plaintiff and same Counsel argued these same claims to a different Trial Court on a Motion to Amend in the 2007 timeframe (Judge Keesley) in a different case, against the S.C. Dental Board.



because the Board of Dentistry was a state agency and made regulatory decisions, it could not be sued for a violation of the SCUTPA. *Id.* at 639.

Again, to reiterate, DHEC is a state agency, tasked with the obligation of serving as the regulatory body to administer the Public Health Dental Prevention Program in accordance with the Dental Services Act. The MOAs and accompanying guidelines are created by DHEC to regulate the services performed by dental hygienists in accordance with the Dental Practices Act. And, furthermore, DHEC is not engaged in trade or commerce. As such, Plaintiff's cause of action for violation of the SCUTPA against Defendant DHEC fails as a matter of law.

## II. Breach of Contract Accompanied by a Fraudulent Act.

Breach of contract accompanied by a fraudulent act requires a breach of a contract, the breach must be accompanied with a fraudulent intention, and the breach must be accompanied by a fraudulent act. *Maro v. Lewis*, 389 S.C. 216, 223, 697, S.E. 2d 684, 688 (Ct. App. 2010). Plaintiff cannot sustain a cause of action against Defendant DHEC for breach of contract accompanied by a fraudulent act because it is undisputed that HPS did not have a contract or agreement with DHEC.

As noted in this Court's prior Order, "[t]o participate in the Dental Program . . . a provider must be 'employed within or contracted through' DHEC. To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement ('MOAs') with providers . . . ." See Order, p. 2. "The MOAs terminate after one year; but, can be renewed in writing by both parties." See Order, p. 2. Although "HPS knows and understands the process of the MOA . . . because HPS had been operating in the program for nearly 20 years prior to 2019 . . . **HPS admits that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines.**" See Order, p. 3. (Paragraph 64 of Plaintiff's Second Amended Complaint, emphasis by DHEC.) Instead of

signing the August 2019 MOA, “HPS continued delivering its services in public schools **without a contract/MOA with DHEC . . .**” See Order, p. 3 (emphasis added).

To prevail on a cause of action for breach of contract accompanied by a fraudulent act, a plaintiff must first prove that a contract exists. It is the law of this case that HPS did not have a contract or agreement with DHEC, but instead continued delivering its services without one in direct contradiction of S.C. Code Ann. § 40-15-110. See Order, p. 3. If there is no contract, and the Plaintiff has admitted that it refused to sign the 2019 contract (i.e. the August 2019 MOA), there can be no cause of action for breach of contract accompanied by a fraudulent act.

Based on this Court’s prior Order, HPS cannot allege that it was operating under a prior MOA, while at the same time, openly admitting that it would not comply with DHEC’s Guidelines in August of 2019. Since the Plaintiff cannot point to an existing contract and, in fact admits that it refused to sign the 2019 contract, the Plaintiff’s cause of action for Breach of Contract accompanied by a fraudulent act fails as a matter of law.

### **III. Illegality**

HPS has admitted in its Second Amended Complaint that it refused to sign the August 2019 MOA and admits that it objected to DHEC’s Guidelines. But, at the same time, HPS continued delivering its services in public schools without a licensed dentist providing general supervision and “without a contract/MOA with DHEC, which is in direct contradiction of S.C. Code Ann. § 40-15-110.” See Order, p. 3. HPS’s claims arise out of and stem from HPS’s delivery of its services, which were delivered without the statutorily required MOA/contract in place with DHEC, in violation of South Carolina law.

“It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. *Torts* § 12 (1954). This rule

applies at both law and in equity and whether the cause of action is in contract or in tort.” 1A C.J.S. *Actions* § 29. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993).

HPS cannot recover damages as a result of its own unlawful act of delivering services without a contract in place with DHEC, as required by S.C. Code Ann. § 40-15-110. As such, HPS’s claim(s) are barred as a matter of law. As noted herein, the Plaintiff has admitted in its pleadings that it did not sign the 2019-2020 Memorandum of Agreement due to objections that it had with the DHEC guidelines. (See Paragraphs 63-64 of Plaintiff’s Second Amended Complaint.)

The Plaintiff also made reference to the November 22, 2019, DHEC letter<sup>5</sup> in its Supplemental Memorandum. Notably, the DHEC letter corroborates some of the Plaintiff’s allegations in that it states “until the 2019/2020 Memorandum of Agreement was signed and executed by both the provider and DHEC, no further services provided as part of DHEC’s Public Health Dental Prevention Program were authorized.” In other words, the August 2019 meeting was not a “renewal” conference. All providers were given a new MOA in August of 2019 and were required to execute the new MOA, if the providers elected to continue participating in the program.

In November of 2019, after HPS refused to sign the August 2019 MOA, HPS was still actively visiting schools and operating as if it were still contracted with DHEC. DHEC had no choice, in November of 2019, but to make it absolutely clear to HPS that HPS was no longer in the program since it refused to sign the August 2019 MOA. As noted in the letter, DHEC specifically reserved its rights to contest any assertion by HPS of the validity of any prior MOA.

#### **IV. There is no statutory basis which gives rise to a private cause of action against Defendant DHEC.**

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<sup>5</sup> The November 22, 2019 letter from DHEC to HPS is attached to Plaintiff’s Amended pleading (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019

A private right of action can exist when it has not been expressly provided by statute; however, it may only be created by implication if such a statute was created for the special benefit of a private party. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 121, 678, S.E.2d 430, 433 (2009). A statute cannot be created for the special benefit of a private party if its purpose is to aid society and the public in general. *Id.*

In the present case, the statute (commonly known as the Dental Practices Act) which regulates the practice of dentistry and dental hygiene, S.C. Code Ann. §40-15-10 *et al.*, is expressly designed to aid society and the public in general. The Dental Practices Act does not expressly provide for a private right of action. DHEC's regulation of such services promotes the health and welfare of the citizens of South Carolina and cannot be interpreted to have been created for the special benefit of a private party. As such, Plaintiff does not have an implied private right of action against DHEC and HPS is unable to maintain any causes of action against DHEC.

### **CONCLUSION**

HPS cannot maintain any of the causes of action against DHEC, and all claims against DHEC are hereby dismissed for the reasons set forth herein.

Respectfully submitted,

**BRUNER POWELL WALL & MULLINS, LLC**

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*Attorneys for DHEC*

December 6, 2023

|                                         |   |                                    |
|-----------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS       |
|                                         | ) | FIFTH JUDICIAL CIRCUIT             |
| COUNTY OF RICHLAND                      | ) |                                    |
|                                         | ) |                                    |
|                                         | ) | Case No. 2019-CP-40-4567           |
| Health Promotion Specialists, LLC,      | ) |                                    |
|                                         | ) |                                    |
| Plaintiff,                              | ) | <b>MEMORANDUM IN OPPOSITION TO</b> |
| vs.                                     | ) | <b>DEFENDANT DHEC'S MOTION FOR</b> |
|                                         | ) | <b>CONSIDERATION</b>               |
| South Carolina Department of Health     | ) |                                    |
| and Human Services, and                 | ) |                                    |
| South Carolina Department of Health and | ) |                                    |
| Environmental Control,                  | ) |                                    |
|                                         | ) |                                    |
| Defendants.                             | ) |                                    |

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's (hereafter "DHEC") Motion to Reconsider this Court's order issued on September 11, 2023, granting in part and denying in part DHEC's Motion to Dismiss. Plaintiff submits the following in opposition to the Motion to Reconsider. For the reasons set forth below, Defendant DHEC's Motion to Reconsider should be denied and the remaining causes of action against DHEC should be allowed to proceed on the merits.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338, S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v.*

*Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 673, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

## **ARGUMENT**

### **I. Law of the Case**

DHEC incorrectly asserts that the facts set forth in the Court’s order dated September 11, 2023, are the law of the case because Plaintiff did not appeal the order. See *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“[A]n unappealed ruling is the law of the case and requires affirmance.”). However, once DHEC filed its Motion to Reconsider on September 21, 2023, the time was stayed for Plaintiff to appeal or take any action. Rule 59(f), SCRPC provides that “the time for appeal *for all parties* shall be stayed by a timely motion under this Rule and shall run from the receipt of written notices of entry of the order granting or denying such motions.” (Emphasis added). See also *Nexstar Media Group Inc. v. Davis Roofing*, 431 S.C. 593, 600, 848 S.E.2d 597, 601 (Ct. App. 2020). S.C. Code Section 14-3-330(1) allows a party to appeal from any intermediate judgment or order in a case when the party appeals from a final judgment. Thus, Plaintiff is not required to appeal the Court’s Order until there is a final judgment which will occur once the Court rules on the instant Motion to Reconsider.

Further, the Court must apply the same standard of review in reconsidering its ruling on DHEC's Motion to Dismiss which requires the Court to base its ruling solely on the allegations set forth in the complaint.

## **II. DHEC's conduct is not exempt from the South Carolina Unfair Trade Practices Act or the South Carolina Tort Claims Act.**

Defendant DHEC argues that it is exempt from The South Carolina Unfair Trade Practices Act ("SCUPTA") because it is not engaged in trade or commerce, and it is a regulatory agency that is exempt from liability under SCUPTA. SCUPTA defines trade and commerce as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (emphasis added). As set forth in Plaintiff's complaint, the provision of dental preventive services by private practitioners to individual consumers in South Carolina including school-aged children is trade and commerce within the definitions set forth in the South Carolina Unfair Trade Practices Act.

Further, the South Carolina Tort Claims Act does not provide protection from liability to an agency or any office, agent, or employee of an agency of the State if the conduct of the agency or the individual was not within the scope of official duties or when the conduct constitutes actual fraud, actual malice, or intent to harm, as is alleged in the complaint. S.C. Code Ann. Section 15-78-70(b). The South Carolina Tort Claims Act sets forth forty (40) specific exceptions to the waiver of immunity, however it does not contain an intentional tort exception. Here, Plaintiff has alleged that certain officials, employees, or agents of DHEC committed intentional torts against

Plaintiff including civil conspiracy, violation of SCUPTA, and breach of contract accompanied by a fraudulent act. In both remaining causes of action, Plaintiff has alleged that DHEC and its agents or employees participated in conduct that constitutes actual fraud and actual malice with an intent to harm Plaintiff's business. If these allegations are taken as true, which the Court must do under the standard of review, Plaintiff has pled facts sufficient to establish that DHEC's conduct was fraudulent and malicious, thus precluding DHEC from claiming immunity from suit pursuant to SCUPTA or the South Carolina Tort Claims Act.

### **III. Breach of Contract Accompanied by a Fraudulent Act.**

To recover for breach of contract accompanied by a fraudulent act, "a plaintiff must establish: (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996). "The fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Perry v. Green*, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct.App.1993).

DHEC contends that Plaintiffs cannot sustain a cause of action for breach of contract accompanied by a fraudulent act because there was no contract or MOA between Plaintiff and DHEC. This claim is false. Notwithstanding the August 2019 MOA, which Plaintiff did not sign, Plaintiff had the continued authority to provide services under the June 2016 MOA which was accepted by DHEC on July 26, 2016. (See Second Amended Complaint, ¶ 55-56). The terms for that contract included a termination date of June 30, 2017, although it was subject renewal up to four (4) additional one-year periods. As set forth in the Complaint, DHEC did not require a new MOA for the 2017-2018 or the 2018-2019 school year. Plaintiff maintains that the June 2016 MOA automatically renewed, as it had during the 2017-2018 and 2018-2019 terms, to continue Plaintiff's



status as a provider under the DHEC program for the 2019-2020 term.

Alternatively, Plaintiff had the authority to operate and provide services through the MOA executed in April 2019 which was valid through December 31, 2019. After signing the MOA and submitting it to DHEC, DHEC never indicated to Plaintiff that there were any issues or problems with its status as an approved provider under the DHEC Public Health Dental Prevention Program. After Plaintiff declined to sign the August 2019 MOA, DHEC gave Plaintiff notice that it was terminating the April 2019 MOA effective December 31, 2019. This is the same MOA under which Plaintiff advised DHEC that it would continue operating when Plaintiff initially declined to sign the August MOA. It is illogical that DHEC can claim that no contract existed and thus it cannot be found liable for breach of contract when DHEC in fact terminated the existing April 2019 MOA. If there was no valid contract, there would be no reason for DHEC to notify Plaintiff of its termination.

#### **IV. Plaintiff's claims are not barred by the doctrine of illegality.**

DHEC asserts that Plaintiff cannot recover damages in this action based on Plaintiff's failure to sign the August 2019 MOA. As discussed above, at the time Plaintiff was providing services there was still a valid MOA in place, executed in 2016, which authorized Plaintiff to continue providing services for the 2019-2020 term. Under the terms of the 2016 MOA, the MOA was renewable for four (4) additional one-year periods and had been customarily renewed the following two years. Alternatively, Plaintiff had authority to operate and provide services through the MOA executed in April 2019. Under either theory, there existed a valid contract with DHEC enabling Plaintiff to deliver services as required by S.C. Code Ann. Section 40-15-110 notwithstanding Plaintiff's failure to sign the 2019 MOA. Therefore, DHEC's argument that Plaintiff's claims are barred by the doctrine of illegality must fail.

**CONCLUSION**

For the reasons set forth above, Plaintiff HPS respectfully requests and order from this Court denying DHEC's Motion to Reconsider.

Respectfully submitted,

s/ Haley Hubbard  
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Harvey M. Watson III (S.C. Bar No. 74053)  
Haley Hubbard (S.C. Bar No. 103195)

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**ATTORNEYS FOR PLAINTIFF**

December 29, 2023

|                                         |   |                                   |
|-----------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS      |
|                                         | ) | FIFTH JUDICIAL CIRCUIT            |
| COUNTY OF RICHLAND                      | ) |                                   |
|                                         | ) |                                   |
|                                         | ) | Case No. 2019-CP-40-4567          |
| Health Promotion Specialists, LLC,      | ) |                                   |
|                                         | ) |                                   |
| Plaintiff,                              | ) | <b>MOTION TO RECONSIDER ORDER</b> |
| vs.                                     | ) | <b>GRANTING DEFENDANT DHEC'S</b>  |
|                                         | ) | <b>MOTION TO RECONSIDER</b>       |
| South Carolina Department of Health     | ) |                                   |
| and Human Services, and                 | ) |                                   |
| South Carolina Department of Health and | ) |                                   |
| Environmental Control,                  | ) |                                   |
|                                         | ) |                                   |
| Defendants.                             | ) |                                   |

Pursuant to Rule 59(e), SCRPC, Plaintiff Health Promotion Specialists, LLC (hereafter “HPS”) seeks reconsideration of this Court’s Order granting Defendant DHEC’s Motion to Reconsider which was filed December 10, 2024, in the above-captioned matter. In support thereof, HPS will show:

1. The Court erred in granting DHEC’s Motion to Reconsider and dismissing the remaining causes of action for violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”) and Breach of Contract Accompanied by Fraudulent Act.
2. The Court erred in finding that Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC pursuant to S.C. Code Ann. § 39-5-49(a). While Plaintiff does not dispute that DHEC is a regulatory body, the South Carolina Tort Claims Act does not provide protection from liability to an agency or any office, agent, or employee of an agency of the State if the conduct of the agency or the individual was an intentional tort or other intentional misconduct, which was not within the scope of official duties or when the conduct constitutes actual fraud, actual malice, or intent to harm, as is alleged in the complaint. S.C. Code Ann. § 15-78-70(b). The Complaint specifically alleges that certain

officials, employees, or agents of DHEC committed intentional torts against Plaintiff, including violation of SCUTPA and breach of contract accompanied by a fraudulent act, and further alleges that DHEC and its agents or employees participated in conduct that constitutes actual fraud and actual malice with an intent to harm Plaintiff's business. (See Second Amended Complaint, ¶8). Under the standard of review for a motion to dismiss pursuant to Rule 12(b)(6), SCRCF, these allegations must be presumed to be true. As such, Plaintiff has pled facts sufficient to establish that DHEC's conduct was fraudulent and malicious, thus defeating any exemption from suit or liability provided under SCUTPA or the South Carolina Tort Claims Act. For those reasons, the Court erred in finding that Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC and dismissing the claim.

3. The Court erred in finding that at all times relevant to these proceedings, DHEC acted under its authority as a regulatory body in administering its Dental Program and did not engage in "Trade" or "Commerce" as defined under SCUTPA. Trade and commerce is defined as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (Emphasis added). As set forth in the Complaint, it is not disputed that DHEC, through its Public Health Dental Prevention Program, partnered with Plaintiff and other providers to distribute preventive dental care services in public health settings, including public schools. (Second Amended Complaint, ¶¶ 3-4, 5, 12-13, 16). Additionally, as pleaded, it is undisputed that Plaintiff provided services for which it was entitled to payment under

DHEC's Dental Prevention Program. Public school students received these services, however, Plaintiff did not receive payment because of direct and wrongful conduct of the South Carolina Department of Health and Human Services. The provision of dental preventive services by private practitioners to individual consumers in South Carolina, made possible only through DHEC's Dental Prevention Program, is clearly "Trade" and "Commerce" within the definitions set forth in the South Carolina Unfair Trade Practices Act.

4. The Court erred in dismissing Plaintiff's cause of action against DHEC for breach of contract accompanied by a fraudulent act and erred in finding that no contract existed between Plaintiff and DHEC for the 2019-2020 school year. Notwithstanding the August 2019 MOA, which Plaintiff did not sign, Plaintiff had the continued authority to provide services under the June 2016 MOA which was accepted by DHEC on July 26, 2016. (See Second Amended Complaint, ¶¶ 55-56). The terms for that contract included a termination date of June 30, 2017, although it was subject to renewal up to four (4) additional one-year periods based on completion and documented receipt of the required data submission for the previous academic year. As set forth in the Complaint, DHEC did not require a new MOA for the 2017-2018 or the 2018-2019 school years, and Plaintiff continued to provide services to public school students under the existing 2016 MOA, which remained in effect. (Id. at ¶56). For example, Plaintiff submitted data to DHEC for the 2016-2017 academic year, and the MOA renewed until June 2, 2018. Plaintiff then submitted data to DHEC for the 2017-2018 academic year, and DHEC acknowledged in writing that the MOA was considered renewed until June 2, 2019. It is undisputed and as pleaded that DHEC used that data provided by Plaintiff to obtain funding for continuation of the Dental

Prevention Program. Alternatively, Plaintiff had the authority to operate and provide services through the MOA Plaintiff executed in April 2019 which was valid through December 31, 2019. This is the same MOA under which Plaintiff advised DHEC that it would continue operating when Plaintiff initially decline to sign the August 2019 MOA. (Id. at ¶64). When Plaintiff declined to signed the August 2019 MOA, DHEC gave Plaintiff notice that it was terminating the April 2019 MOA effective December 31, 2019. (Id. at ¶ 68). It is error to conclude that no contract existed between Plaintiff and DHEC for the 2019-2020 school year when DHEC notified Plaintiff that it was terminating the April 2019 MOA, which otherwise would have been valid through June 2, 2020. If there was no valid contract, there would be no reason for DHEC to notify Plaintiff of its termination. Accordingly, the Court erred in finding that no contract existed between Plaintiff and DHEC for the 2019-2020 school year and further erred in dismissing Plaintiff's claim against DHEC for breach of contract accompanied by a fraudulent act when Plaintiff's complaint sufficiently pled the existence of a valid contract in addition to the other required elements to establish the claim.

For the reasons set forth above, HPS respectfully seeks reconsideration of the Court's order.

Respectfully submitted,

s/ Haley Hubbard  
Desa Ballard (S.C. Bar No. 498)  
Harvey M. Watson III (S.C. Bar No. 74053)  
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December 20, 2024

**ATTORNEYS FOR PLAINTIFF**

RECEIVED

Mar 26 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY  
JOCELYN NEWMAN, CIRCUIT COURT JUDGE  
Case No. 2019-CP-40-04567

Health Promotion Specialists, LLC, .....Appellant,

v.

South Carolina Department of Health and Environmental  
Control, The South Carolina Dental Association,  
Dr. Richard E. Boyd, as Personal Representative of the  
Estate of Rocky Napier, and one or more John Does,  
Unidentified current or former agents of South Carolina  
Department of Health and Environmental Control, Defendants,

of which South Carolina Department of Health and Environmental  
Control, LLC are the, ..... Respondents.

NOTICE OF APPEAL

Appellant Health Promotion Specialists, LLC (hereafter “Appellant”) appeals from the trial court’s (1) Order Granting in Part and Denying in Part South Carolina Department of Mental Health and environmental Control’s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCF that was filed on September 11, 2023, which was received by Appellants on September 11, 2023. Appellants also appeal from the trial court’s (2) Order Granting South Carolina Department of Health and Environmental Control’s Motion to Reconsider Order and Order of Dismissal of Plaintiff’s Remaining Claims Pursuant to Rule 12(b)(6), SCRCF that was filed December 10, 2024, which was received by Appellants on December 10, 2024. Appellants also appeal from the trial court’s (3) Form 4 Order filed February 25, 2025, which was received by Appellants on February 25, 2025.

Respectfully submitted,

s/ Haley Hubbard

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ATTORNEY FOR RESPONDENTS



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

RECEIVED

Mar 26 2025

SC Court of Appeals

**ORDER GRANTING IN PART AND  
DENYING IN PART SOUTH CAROLINA  
DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL CONTROL'S  
MOTION TO DISMISS PURSUANT TO  
RULE 12(B)(6), SCRCF**

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Dismiss* all causes of action asserted against DHEC by Plaintiff Health Promotion Specialists, LLC (HPS) in its Second Amended Complaint. DHEC filed its *Motion* pursuant to Rule 12(b)(6), SCRCF, arguing that Plaintiff failed to state facts sufficient to constitute a cause of action. In furtherance of its *Motion*, DHEC submitted a Memorandum in Support. Plaintiff HPS filed a Memorandum in Opposition. The Court held a hearing on September 13, 2022, and the parties were represented at the hearing by counsel. After hearing arguments, the Court gave Plaintiff ten (10) days to provide to the Court case law supporting its position and ten (10) days after for DHEC to respond. On September 23, 2022, Plaintiff submitted a Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss. In reply, DHEC filed a Supplemental Memorandum in Support on September 27, 2022. The Court considered the *Motion*, memoranda, pleadings, applicable law, and all arguments

presented at the hearing. For the reasons that follow, this Court grants Defendant DHEC's *Motion to Dismiss* in its entirety.

### **FACTUAL BACKGROUND**

The basic facts underlying this dispute, based on the Plaintiff's pleadings,<sup>1</sup> arise out of HPS's provision of dental hygiene services to various public schools, some of which took place through DHEC's Public Health Dental Prevention Program (also referred to as the "Dental Program").

DHEC administers the Dental Program pursuant to Section 40-15-110 of the Dental Services Act. Providers who participate in the Dental Program must perform services "under the direction of the Department of Health and Environmental Control State Dental Coordinator," but without the requirement that a "licensed dentist be present." S.C. Code Ann. 40-15-110(A)(10).

To participate in the Dental Program and take advantage of this provision, a provider must be "employed within or contracted through" DHEC. *Id.* To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement ("MOAs") with providers, which incorporate specific guidelines established by the Department. (See Paragraph 12 of Plaintiff's Second Amended Complaint.) The guidelines are modified from time to time by DHEC. The MOAs terminate after one year; but, can be renewed in writing by both parties (See, e.g., Exhibit C to Plaintiff's First Amended Complaint, pp. 4-5, ¶ III.A., reading that "[t]his MOA is renewable for four (4) additional one-year periods based on an annual review of the MDD Provider and its

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<sup>1</sup> In accordance with Rule 10(c), SCRCP, the pleadings include copies of documents attached to the pleadings as exhibits to the pleading. Notably, the Plaintiff's Amended Complaint included copies of the Memorandum of Agreement between DHEC and HPS covering July 1, 2016 – June 30, 2017 (executed by DHEC and HPS in 2016), the Memorandum of Agreement covering July 1, 2018 – June 30, 2019 (executed by HPS in April of 2019) and a letter from DHEC to HPS dated November 22, 2019.

compliance with this MOA and the DHEC PHDPP Guidelines. To be effective, a renewal must be acknowledged in writing by both parties.”)

HPS knows and understands the process of the MOA and guidelines because HPS had been operating in the program for nearly 20 years prior to 2019. (See Paragraph 12, of Plaintiff’s Second Amended Complaint.) In August 2019, HPS was invited to and participated in the DHEC provider information conference, which it had done annually. (See Paragraph 60 of Plaintiff’s Second Amended Complaint.) In connection with the August 2019 provider conference, DHEC presented a new MOA to HPS for the 2019-2020 school year. (See Paragraph 61 of Plaintiff’s Second Amended Complaint.) However, HPS refused to sign the new MOA. (See Paragraph 63 of Plaintiff’s Second Amended Complaint). HPS admits that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraph 64 of Plaintiff’s Second Amended Complaint.)

In spite of HPS’s decision to refuse to sign the MOA, HPS continued delivering its services in public schools without a contract/MOA with DHEC, in direct contradiction of S.C. Code Ann. § 40-15-110. (See Paragraph 69 of Plaintiff’s Second Amended Complaint.)<sup>2</sup>

Instead of signing the August 2019 MOA, ceasing its operations under the Dental Program, or modifying its method of delivering services (as a result of its refusal to enter into a statutorily required contract), HPS filed a lawsuit against DHEC and the South Carolina Department of Health and Human Services (“DHHS”) on August 16, 2019.

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<sup>2</sup> HPS admits in its pleadings that it continued to operate in the public schools under the program through the use of mental gymnastics to “argue” that HPS was somehow operating under some prior MOA. (See Paragraph 67 of Plaintiff’s Second Amended Complaint.) Notably, HPS alleges in its Second Amended Complaint that HPS was operating under the April 2019 MOA (See Paragraph 67); but, in its Memorandum in Opposition to DHEC’s Motion to Dismiss, HPS alleged that HPS was operating under the June 3, 2016 MOA (Plaintiff’s Memorandum in Opposition, filed 11/12/22, p. 4).

The South Carolina Department of Health and Human Services was an original Defendant in the first Complaint filed by Plaintiff. While no longer a party to this civil action, the prior claims involving DHHS provides some additional background as to why this civil action was filed. The vast majority of school children served by HPS were Medicaid beneficiaries. (Paragraphs 5 and 21 of Plaintiff's First Amended Complaint.) DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program. (See Paragraph 6, 23 and 34 of Plaintiff's First Amended Complaint.) DHHS has exclusive administrative responsibility for Medicaid payments. (See Paragraphs 8 and 10 of Plaintiff's First Amended Complaint.) DHHS was a primary payor for the services rendered by HPS to the public school children who were Medicaid beneficiaries.

As outlined in the Plaintiff's First Amended Complaint (See Paragraph 37-44 of Plaintiff's First Amended Complaint), HPS took issue with DHHS's decision to stop paying HPS for a procedure known as atraumatic restorative treatment, or "ART." On April 5, 2019, DHHS issued a Medicaid Bulletin advising all Medicaid dental providers about changes to reimbursements relating to protective services. (See Paragraph 43 of Plaintiff's First Amended Complaint and Exhibit 1 attached to Plaintiff's First Amended Complaint).

The Plaintiff alleges in Paragraph 73 of the Second Amended Complaint that HPS had to engage in "aggressive litigation with DHHS" regarding Medicaid overpayments and also notes that that the DHHS "matters were concluded confidentiality." During the hearing on DHEC's Motion, it was noted that the settlement between DHHS and HPS (which is subject to FOIA and Plaintiff's Counsel acknowledged) was a "walk-away" settlement where both sides simply walked away. Thereafter, DHHS was dismissed from this civil action.

### **PROCEDURAL HISTORY**

HPS initiated this civil action on August 16, 2019,<sup>3</sup> asserting claims against two parties (South Carolina Department of Health and Human Services and South Carolina Department of Health and Environmental Control). Those claims included declaratory judgment, a request for temporary and permanent injunction, and prayer for attorney's fees under "S.C. Code Ann. § 15-77-140" (No section "15-77-140" exists in the South Carolina Code of Laws. Presumably, HPS intended to cite to section 15-77-300).

On November 22, 2019, HPS filed an Amended Complaint<sup>4</sup> without filing a Motion to Amend and without leave of Court. HPS's First Amended Complaint included a claim for declaratory judgment, temporary and permanent injunction, and a prayer for attorney's fees, again under "S.C. Code Ann. § 15-77-140."

On March 17, 2021, HPS voluntarily dismissed the South Carolina Department of Health and Human Services from the civil action.

On March 28, 2022, HPS filed its Second Amended Complaint, this time with leave of Court. HPS's Second Amended Complaint added two Defendants to the civil action, eliminated claims for declaratory judgment and temporary and permanent injunction, and asserted three new tort claims against DHEC (unfair trade practices, civil conspiracy, and breach of contract accompanied by a fraudulent act), along with a statutory claim for attorneys' fees pursuant to SC Code § 15-77-300.

DHEC filed its Rule 12(b)(6) Motion on April 5, 2022, and submitted its Memorandum in Support. HPS submitted its Memorandum in Opposition (before the hearing). A hearing on the

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<sup>3</sup> The Plaintiff's initial pleading was styled as "Complaint and Petition for Emergency and Permanent Injunct [sic] Relief."

<sup>4</sup> The Plaintiff's first amended pleading was styled as "Amended Complaint and Petition for Emergency and Permanent Injunctive Relief."

Defendants' Motion to Dismiss was held on September 13, 2022. The issues relating to DHEC's Motion to Dismiss have been extensively briefed, articulated and argued by the parties in this civil action.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

### **RULING**

#### **I. The Plaintiff cannot sustain a Civil Conspiracy cause of action against Defendants DHEC.**

##### **a. Civil Conspiracy**

Civil conspiracy requires the combination or agreement of two or more persons, to commit an unlawful act or a lawful act by unlawful means, together with the commission of an overt act in furtherance of the agreement, and with damages proximately resulting to the plaintiff. *Paradise v. Charleston Cty. Sch. Dist.*, No. 28030, 2021 S.C. LEXIS 56 (2021). The Plaintiff alleges that because of this alleged conspiracy, the Plaintiff experienced a loss.

The South Carolina Tort Claims Act expressly states that a governmental entity is not liable for a loss from administrative action or inaction. S.C. Code Ann. 15-78-60(2). A governmental entity is not liable for any adoption, enforcement, or compliance with any policy or regulation. S.C. Code Ann. 15-78-60(4). Government entities or employees are immune from a loss caused by exercises of discretion or judgment by employees in performing their duties. S.C. Code Ann. 15-78-60(5). Furthermore, a government employee who commits a tort within the scope of his official duty is protected by the SC Tort Claims Act. S.C. Code Ann. §15-78-70(a). Additionally, a government agency is not liable if an employee commits a tort when acting outside of the scope of his official duties, or if he acts to commit fraud, malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

Notably, paragraph 83 of the Plaintiff's Second Amended Complaint alleges that certain employees were acting outside of their scope of employment when committing this tort, and, at the same time, were operating inside the scope of their employment as agents of DHEC. These allegations, in the same paragraph of Plaintiff's Second Amended Complaint, are diametrically at odds with one another. Either an employee committed a tort in the scope of their official duties and would be immune from suit or the employee committed a tort outside the scope of their duties or with one of the other exceptions and is personally liable for their actions. Regardless, under either scenario, the SCTCA provides DHEC with immunity.

The United States Supreme Court case of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991) also provides some guidance on the facts at hand. The Plaintiff's allegations, taken at face value, suggest that DHEC's regulations were implemented (or perhaps were enforced) and caused harm to Plaintiff. The United States Supreme Court stated that "virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners." *City of Columbia* at 1352. In other words, there is no conspiracy for governmental entities enacting and/or enforcing regulations.

For these reasons, the Plaintiff has failed to state facts sufficient to constitute a cause of action against DHEC for civil conspiracy, and such claim fails as a matter of law.

**b. Statutory Attorney's Fees**

Plaintiff cannot sustain a cause of action against DHEC for statutory attorney's fees under S.C. Code Ann. § 15-77-300. To recover attorney's fees under the statute a court must find that the agency acted without substantial justification in **pressing its claim against the party**. S.C. Code Ann. § 15-77-300(A)(1) (emphasis added). HPS did not provide any evidence that DHEC pressed any claim against HPS. In fact, to the contrary, HPS filed this lawsuit and asserted claims against DHEC when HPS refused to sign the August 2019 MOA (i.e., the contract to perform the dental hygiene services in accordance with the Dental Services Act). DHEC has not pressed any claim(s) against HPS. DHEC did insist that HPS comply with the statute and execute a MOA/contract in August of 2019 so that HPS could deliver its services under the DHEC Public Health Dental Prevention Program. However, HPS refused to sign the August 2019 MOA/contract.

To the extent HPS was forced to defend itself against DHHS, HPS could have, if it would have so desired, pursued DHHS for its attorneys' fees and costs that it may claim was unwarranted



or unjust. But, HPS elected to settle its disputes/claim(s) with DHHS by executing a release with DHHS. HPS cannot sustain a cause of action for attorney's fees under this statute against DHEC for attorneys' fees it could have claimed against DHHS, and this cause of action fails as a matter of law.

### **CONCLUSION**

HPS cannot maintain a cause of action against DHEC for Civil Conspiracy or Statutory Attorney's Fees and therefore those claims are hereby DISMISSED and DHEC's "MOTION TO DISMISS" is GRANTED IN PART for the reasons set forth herein.

Defendant DHEC's "MOTION TO DISMISS" is DENIED IN PART as it relates to Health Promotion Specialist's claims under S.C. Unfair Trade Practices Act and Breach of Contract Accompanied by a Fraudulent Act.

**~ Signature page of Judge follows ~**



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman

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ROA 000345

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

**ORDER GRANTING SOUTH  
CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL'S MOTION TO  
RECONSIDER AND ORDER OF  
DISMISSAL OF PLAINTIFF'S  
REMAINING CLAIMS, PURSUANT TO  
RULE 12(B)(6), SCRCP<sup>1</sup>**

**RECEIVED**

**Mar 26 2025**

**SC Court of Appeals**

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Reconsider*. DHEC's Motion to Reconsider, filed on September 21, 2023, requested that this Court revisit its September 11, 2023, *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP*. More specifically, DHEC requested that the Court re-visit the causes of action that were not dismissed in the September 11, 2023, Order. Having reviewed the pleadings, the filings and the memoranda submitted by the parties, this Court has determined that the remaining causes of action asserted by Plaintiff (Unfair Trade Practices and Breach of Contract Accompanied by a Fraudulent Act) should also be dismissed. This Court adopts and incorporates the Factual Background, Procedural History

<sup>1</sup> To the extent necessary, this Order of Dismissal shall also dismiss the Plaintiff's purported claims against "one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control" as identified in Plaintiff's caption.

and Ruling from its *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCF*, filed on September 11, 2023, as if set forth verbatim.

### **STANDARD OF REVIEW**

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

## **RULING**

### **I. Plaintiff cannot sustain an Unfair Trade Practices Act (“SCUTPA”) claim against DHEC.**

The SCUTPA is intended to prevent unfair methods of competition and unfair or deceptive acts. S.C. Code Ann. § 39-5-20 (emphasis added). “To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). However, the Act has an express exclusion for regulatory bodies, which provides as follows:

Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

S.C. Code Ann. § 39-5-40(a).

DHEC is the regulatory body charged through Section 40-15-110 of the South Carolina Code of Laws with administering its Public Health Dental Prevention Program (“Dental Program”). All alleged actions or transactions of DHEC occurred within the context of its administration of the Dental Program. As such, this Court finds that Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC.

In addition, the SCUTPA can only be applied to those persons or entities engaged in trade or commerce. S.C. Code Ann. § 39-5-10. The SCUTPA defines “Trade” and “Commerce,” as follows:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or missed, and any other article, commodity or thing of value wherever situate, and shall include any

trade or commerce directly or indirectly affecting the people of this State.

S.C. Code Ann. § 39-5-10(b). “[T]rade or commerce’ involves ‘[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic.’” *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (citing Black's Law Dictionary (9th ed.2009)); and *Bretton v. State Lottery Comm'n*, 41 Mass.App.Ct. 736, 673 N.E.2d 76, 78–79 (1996)). “By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.” *Id.*

DHEC is a state agency. It provided no services to anyone and engaged in no business or consumer transactions. To the contrary, all services relevant to this matter were provided by PLAINTIFF, and all payments for services were administered by the Department of Health and Human Services. As a result, this Court finds that at all times relevant to these proceedings, DHEC acted under its authority as a regulatory body in administering its Dental Program and did not engage in “Trade” or “Commerce.” For this additional reason, Plaintiff’s cause of action for violation of the SCUTPA fails, as a matter of law.

This is not the first time Plaintiff has attempted and failed to sustain this same cause of action against a state agency. In *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013), the same counsel that is representing Plaintiff HPS in the present matter filed a lawsuit on behalf of HPS against the S.C. Board of Dentistry alleging that its emergency regulation imposing restrictions on dental hygienists’ work in school settings violated the SCUTPA. The South Carolina Supreme Court found that as the Board of Dentistry’s sole action was the promulgation of an emergency regulation, even if that action was found to be unfair, it did not fall within the definition of “trade or commerce” and “did not involve

advertisement, sale, or distribution of services or property within a business context.” *Id.* The Supreme Court concluded that because the Board of Dentistry was a state agency exercising its regulatory authority, HPS could not sustain a cause of action against it for violation of the SCUTPA. 403 S.C. at 640, 743 S.E.2d at 816-817.

DHEC is a state agency, tasked with administering the Public Health Dental Prevention Program in accordance with the Dental Services Act. The subject MOAs and accompanying guidelines are created by DHEC to regulate the services performed by dental hygienists in accordance with the Dental Practices Act. DHEC is not engaged in trade or commerce. For the reasons stated above, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff fails to state a valid claim for relief for violation of the SCUTPA against DHEC.

**II. Plaintiff cannot sustain a cause of action for Breach of Contract Accompanied by a Fraudulent Act against DHEC.**

“To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with fraudulent intent; and (3) the breach was accompanied by a fraudulent act.” *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E. 2d 684, 688 (Ct. App. 2010) (citations omitted). First and foremost, a contract must exist between the parties.

To participate in DHEC’s Dental Program, a provider must be employed within or contracted through DHEC. S.C. Code Ann. § 40-15-110(A)(10). To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement (MOAs) with providers. The MOAs, which Plaintiff attached to the pleadings, by their own terms terminate after one year, but can be renewed in writing by both parties.

Plaintiff knows and understands the process of the MOA for participating in the Dental Program because Plaintiff had been operating in the Dental Program for nearly 20 years prior to 2019. Based solely upon the pleadings, Plaintiff admits that DHEC advised all attendees at an August 2019 provider information conference, which Plaintiff attended, that a new MOA would be required for the school year 2019-2020. (See Paragraph 61 of the Plaintiff's Second Amended Complaint.) Plaintiff alleges in Paragraph 61 of its Second Amended Complaint that "[i]n connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS." Plaintiff admits that it did not have a meeting of the minds with DHEC regarding the terms of the August 2019 MOA and that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraphs 62, 63, and 64 of Plaintiff's Second Amended Complaint.)

Considering solely the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, this Court finds that no contract existed between Plaintiff HPS and DHEC for the school year 2019-2020.

Despite the language in all prior MOAs terminating the agreements after one year absent a writing signed by both parties, despite Plaintiff's acknowledgment that DHEC instructed providers that signing the 2019 MOA would be required, and despite Plaintiff's refusal to sign the 2019 MOA, Plaintiff argues that for the 2019-2020 school year it operated under either the 2016 MOA or the April 2019 MOA. Plaintiff's arguments fail due to the following:

- a. By its specific terms, the April 2019 MOA:<sup>2</sup> (1) terminates on June 30, 2019, (2) is "renewable" only if both parties execute a renewal "in writing," and (3) for any renewal, the provider, HPS, has to comply with DHEC's Guidelines. Notably, the

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<sup>2</sup> Attached to Plaintiff's First Amended Complaint (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019.



MOA does not “automatically renew,” indicating that additional action would have been required – a renewal “acknowledged in writing by both parties” – in order to renew the April 2019 MOA. The parties did not sign any renewal.

- b. By its specific terms, the 2016 MOA:<sup>3</sup> (1) terminates on June 30, 2017, (2) is “renewable” and requires all amendments to be in writing, and (3) for any renewal, the provider, HPS, has to comply with DHEC’s Guidelines. Again, the MOA does not “automatically renew,” which means that additional action would have been required to renew the MOA. The parties did not sign any renewal.
- c. Plaintiff also executed an acknowledgement of receipt of the PHDPP Guidelines<sup>4</sup> in connection with the 2016 MOA and the April 2019 MOA. The acknowledgments (both the 2016 and 2019 acknowledgement) state, in relevant part:

I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective.” (emphasis by DHEC)

Under the 2016 and 2019 MOAs, Plaintiff was bound by the DHEC guidelines (and any future modifications). To reiterate, in Paragraphs 63 and 64 of the Plaintiff’s Second Amended Complaint, Plaintiff admits that it objected to DHEC’s Guidelines. To participate in the Dental Program under the prior MOAs, Plaintiff agreed to be bound by the DHEC guidelines. In light of

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<sup>3</sup> Attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

<sup>4</sup> The Acknowledgments, 2016 and 2019, are attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

Plaintiff's objections to the DHEC Guidelines in August of 2019, Plaintiff's own admissions preclude the prior MOAs from being renewed because there was no meeting of the minds.

In summary, HPS cannot allege that it was operating under a prior MOA, while at the same time, openly admitting that it would not comply with DHEC's Guidelines in August of 2019. Both MOAs state that the MOAs are one-year terms that are "renewable" and require "compliance with . . . the DHEC PHDPP Guidelines." Plaintiff also openly admits that it refused to sign the 2019-2020 contract. Without a contract, Plaintiff cannot establish the first element – "breach of contract" – to prove Breach of Contract Accompanied by a Fraudulent Act.

For these reasons, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff has failed to state facts sufficient to constitute a cause of action for breach of contract accompanied by a fraudulent act against DHEC. As such Plaintiff's claim for breach of contract accompanied by a fraudulent act against DHEC fails as a matter of law.

### **CONCLUSION**

For the reasons set forth herein, Plaintiff cannot maintain a cause of action against DHEC for an Unfair Trade Practice under the SCUPTA, nor can the Plaintiff maintain an action against DHEC for Breach of Contract Accompanied by a Fraudulent Act. Based on this Court's prior Order dated September 11, 2023, and this Order, DHEC's Motion for Reconsideration is hereby granted, and all causes of action against DHEC are now dismissed.

IT IS SO ORDERED.

**~ Signature page of Judge follows ~**



Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al  
**Case Number:** 2019CP4004567  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman

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## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF Richland  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP4004567

Health Promotion Specialists Llc  
PLAINTIFF(S)

South Carolina Department Of Health And Environmental Control et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded;  
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider (filed on 12/20/24) is DENIED.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

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Richland Common Pleas

**Case Caption:** Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al

**Case Number:** 2019CP4004567

**Type:** Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2025-02-25 11:36:09 page 3 of 3

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|                               |   |                       |
|-------------------------------|---|-----------------------|
| STATE OF SOUTH CAROLINA       | ) |                       |
|                               | ) | COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND            | ) | 2019-CP-40-04567      |
|                               | ) |                       |
|                               | ) |                       |
|                               | ) |                       |
|                               | ) |                       |
| HEALTH PROMOTION SPECIALISTS, | ) |                       |
| LLC,                          | ) |                       |
| PLAINTIFF,                    | ) |                       |
|                               | ) |                       |
| vs.                           | ) | TRANSCRIPT OF RECORD  |
|                               | ) |                       |
| SOUTH CAROLINA DEPARTMENT OF  | ) |                       |
| HEALTH AND ENVIRONMENTAL      | ) |                       |
| CONTROL, ET AL,               | ) |                       |
| DEFENDANTS.                   | ) |                       |
|                               | ) |                       |

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September 13, 2022  
Columbia, South Carolina

B E F O R E:

THE HONORABLE JOCELYN NEWMAN, JUDGE.

A P P E A R A N C E S:

DESA BALLARD, ESQ.  
Attorney for the Plaintiff

RAY MOORE, ESQ.  
JOEY FLOYD, ESQ.  
Attorney for the Defendants

Proceedings recorded via DCRP  
Transcribed by Penny M. Johnson

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)



P R O C E E D I N G S

1  
2 THE COURT: I know there are several pending motions to  
3 dismiss. There's also the motion for complex case  
4 designation. Are we prepared to argue all of the motions  
5 today, as in should I start with motions to dismiss and then  
6 determine whether it's complex or do you want me to  
7 determine whether it's complex, assign it to a judge and  
8 then that judge, whoever it may be, can tend to the motions  
9 to dismiss. What's your preference?

10 MS. BALLARD: Your Honor, I don't want to speak for  
11 anybody else, but I think it's pretty obvious it's a complex  
12 case. So there's no opposition from the Plaintiff to having  
13 it so designated.

14 That being said, we don't object, of course, to you  
15 designating it to yourself and going head and hearing the  
16 motions.

17 MR. MOORE: Your Honor, Ray Moore, on behalf of the  
18 South Carolina Dental Association, we're prepared to go  
19 forward today or if it's Your Honor's preference with the  
20 complex case Judge however you prefer.

21 THE COURT: So let's do this --

22 Oh, go ahead.

23 MR. FLOYD: I just always wanted to say, what he said.

24 THE COURT: Logistically, for my benefit, I will first  
25 hear the motions. I will then either take them under

1       advisement, whatever I do, but -- or rule on them. I will  
2       then designate it complex and then figure out a judge so  
3       that it does not necessarily have to be me. Yeah, I want to  
4       talk to the other judges and see who's available. I've got  
5       a lot going on. And it may be me, we'll see, but I will, at  
6       least, decide these motions and we'll figure out who the  
7       judge is.

8             All right. Looking at y'all, who's starting?

9             MR. FLOYD: Your Honor, Joey Floyd here. I represent  
10       the South Carolina Department of Health and Environmental  
11       Control. There are three motions to dismiss. I'll start on  
12       behalf of DHEC if it pleases the Court?

13            THE COURT: Yes, sir.

14            MR. FLOYD: Your Honor, again, Joey Floyd, here on  
15       behalf of the South Carolina Department of Health and  
16       Environmental Control. And just to give you just a little  
17       bit of procedural background, this original lawsuit was  
18       filed back on August the 16th, 2019. An amended complaint  
19       was filed on November 22nd, 2019. Then there was a second  
20       amended complaint filed this year, March 24th, 2022.

21            First of all, let's talk about who's not here. The  
22       Department of Health and Human Services, they were  
23       originally one of the parties in the civil action.  
24       Unbeknownst to DHEC, the Department of Health and Human  
25       Services opened an investigation into HPS, which is Health

1 Promotion Specialists, the Plaintiff in this case, in April  
2 of 2019 before this lawsuit was filed. We found this out  
3 subsequent to this lawsuit being filed.

4 DHHS investigated HPS over the course of a couple of  
5 years related to Medicaid funds, overbilling and that sort  
6 of stuff. DHHS was involved because they administer the  
7 Medicaid funds here in the State of South Carolina.

8 I'll come back to that in a minute, but just to give  
9 her an overview of the public health dental prevention  
10 program, it's -- the public health dental prevention program  
11 is created by statute, South Carolina Code 40-15-110(a)(2),  
12 and that statute allows dental hygienists to perform  
13 preventative-type measures in a public health setting.

14 I would say the majority of these patients, the folks  
15 who participate in this program or seen are Medicaid  
16 beneficiaries in the public school. It really enables the  
17 public health system to touch these children that --  
18 primarily, children, it's public school kids that may never  
19 see a dentist and they may never seek out preventative care.  
20 A dentist is not on site under this program. The key  
21 provision in this statute is that it requires the provider  
22 to have a contract with DHEC to provide those services.

23 So in general terms, you know, you think of  
24 preventative screenings, such as cleanings, fluorides,  
25 sealants and all of those types of stuff. And that's one of

1 the issues that we'll get into in just a moment as well.  
2 Just, basically, trying to prevent a dental emergency in the  
3 future.

4 HPS, and I'm going to refer to them as HPS, Health  
5 Promotion Specialists as HPS. They were a provider under  
6 this statute and they contracted with DHEC for a number of  
7 years. Their model included visiting public schools and  
8 performing this same type of preventative care. DHEC has no  
9 role and plays no part in HPS's billing. They don't tell  
10 them how to bill, they don't tell them who to bill, when to  
11 bill, nothing. That is all DHHS, that falls under that  
12 umbrella. And DHHS is also responsible for paying HPS.

13 There's been a lot of banter, as I'm sure you've seen  
14 in some of the pleadings about these memorandums of  
15 agreement. DHEC has a number of providers under this  
16 program, just like HPS. It's handled the same way by using  
17 these memorandums of agreement.

18 The contracts incorporate guidelines. DHEC has  
19 established and DHEC is charged by the legislature and the  
20 statute to come up with administering this program. And the  
21 guidelines provide parameters for the providers so that,  
22 essentially, a highway. They stay between the lines and  
23 this is what you can do and this is what you need to do when  
24 you're confronted with this situation. And particular, it  
25 relates to the need to refer a patient to a dentist if they

1 believe it to be a dental emergency. They take issue with  
2 some of those things in the guidelines in the most recently  
3 guidelines and we'll, again, get to that in just a moment.

4 In 2018, the Board of Dentistry approved a procedure  
5 known as atraumatic restorative treatment. I'm not going to  
6 go into all the details and I'll do the best I can, but a  
7 technical explanation would be it is a mechanism through  
8 which they could provide cavity treatment by putting a glass  
9 iometer -- I'm not going to pretend to be able to explain  
10 that. All I know is it arrest the cavity decay and  
11 supposedly the children are not going to have to deal with a  
12 dental emergency and that sort of stuff. That's, generally,  
13 the theory behind ART. Some people say it's a third world  
14 county type treatment, some people say it's modern and all  
15 that sort of stuff. But for all intents and purposes, it  
16 was improved for HPS to do that sort of thing in 2018.

17 In 2019, the DHHS, again, charged with billing, issued  
18 a Medicaid bulletin that said we're not going to pay for  
19 this anymore. In August of 2019, DHEC had a meeting with  
20 all providers -- and this is alleged, by the way, in the  
21 Plaintiff's amended complaint in Paragraphs 60 and 61. They  
22 had a meeting with all the providers and said okay, we have  
23 to sign a new MOA if you want to continue under the program.  
24 And HPS refused to sign it.

25 When they started this investigation, they being DHHS,

1 in the April 2019 timeframe, they initially concluded that  
2 HPS had overbilled two million dollars for their services.  
3 DHHS contacted DHEC, they got copies of documents and that  
4 amount was subsequently reduced to \$600,000.

5 They went through an evidentiary hearing, DHHS and HPS,  
6 and before a decision was rendered, they entered into a  
7 walk-away settlement. DHHS dropped its claim, HPS dropped  
8 its claim in this civil action. Nobody had a recovery.  
9 Again, that's why DHHS is not here. And, again, HPS in its  
10 memorandum and in its pleadings admit that they didn't sign  
11 this 2019 memorandum, which is the 2019-20 school year.  
12 That's what that was intended to cover. They not only said  
13 we're not going to sign it, but we're also going to continue  
14 to provide services, which was in direct conflict with the  
15 statute.

16 I'm not sure which -- what they're going to say as to  
17 what agreement they were operating under. Their pleadings  
18 say that they were operating under a 2019, April of 2019  
19 agreement. Their memorandum says we were doing that or  
20 under the 2016. Both of these agreements are actually filed  
21 in the record.

22 May I approach, Your Honor?

23 THE COURT: Yes, sir.

24 MS. BALLARD: Your Honor, I would just ask that since  
25 this is a 12(b)(6) that these not be made exhibits to the

1 motion.

2 MR. FLOYD: They're part of the pleadings, Your Honor.  
3 They're part of the record and they can be considered for a  
4 12(b)(6) motion.

5 MS. BALLARD: Well, we disagree with that, but just for  
6 the record.

7 THE COURT: Yes, ma'am.

8 Mr. Floyd, continue.

9 MR. FLOYD: Under the 2016 memorandum, if you will, you  
10 will see that I have a blue line, I have a blue sticky note  
11 there and the first page there, it says in Paragraph 2 that  
12 DHEC reserves the right to amend guidelines in accordance  
13 with state and federal law, so they sort of reserve the  
14 right to do that.

15 The first pink sticky note in the 2016 agreement after  
16 the blue sticky note tells us that the memorandum agreement  
17 was effective on July 1, 2016, and it expired -- this is in  
18 numbered paragraph 3A, it terminates on June 30th, 2017.  
19 And then it says MOA is renewable, not renewed, renewable  
20 for four additional one-year periods based on an annual  
21 review and a number of other things.

22 The next sticky note in the 2016 MOA attached to their  
23 first amended complaint has a little signature there of HPS,  
24 and it says that they understand their participation as a  
25 provider, they're bound by the program requirements as set

1       forth in the guidelines and incorporated by reference in  
2       this agreement.

3               So if they're arguing that they are somehow operating  
4       under this 2016 agreement, they're either -- I think they're  
5       ignoring the basic principles of contract because it  
6       terminates on its face as of June 30th, 2017. It's not  
7       renewable -- it's renewable, not renewed. Even if we did  
8       somehow think that this was renewed, it requires compliance  
9       with the guidelines.

10              Just to reiterate, Rule 10 of the South Carolina Rules  
11       of Civil Procedure say that the pleadings that adopt  
12       exhibits, Rule 10(c), I believe it is, are considered part  
13       of the pleadings. And fourth, they acknowledge that they  
14       are bound by the DHEC guidelines.

15              Flipping over now to the 2018, which is the second  
16       sticky note, and the first pink sticky note, this was signed  
17       in April of 2019. And on Page 4 of 9 of that particular  
18       MOA, it says on its face that it will terminate on June  
19       30th, 2019 unless otherwise renewed. Again, it's renewable  
20       for four additional one-year periods.

21              Following on to the next page, to be effective, a  
22       renewal must be acknowledged in writing by both parties.  
23       Notice nothing else was signed after this particular MOA.  
24       In fact, the pleadings allege -- Paragraph 63 and 64 of the  
25       second amended complaint specifically allege that they did



1 not sign the new clinical guidelines because they objected  
2 to the guidelines.

3 So I think it would be best now, Your Honor, if I may  
4 to sort of go through each cause of action to outline how  
5 and why each of these causes of action fails.

6 The first one is Unfair Trade Practices.

7 May I approach, Your Honor?

8 THE COURT: Yes, sir.

9 MR. FLOYD: And this is the case that I provided to you  
10 as well in my e-mail. It says Health Promotion Specialists.  
11 A little unique situation here, we have the same plaintiff  
12 and the same lawyer asserting the same cause of action in  
13 this case as they did in Health Promotion Specialists vs.  
14 The South Carolina Board of Dentistry. DHEC, like the Board  
15 of Dentistry, is a state agency and it's not involving  
16 commerce. It's a regulatory agency. More on that in just a  
17 moment.

18 It's acting in accordance with the public health dental  
19 prevention program. For that reason, DHEC can't be held  
20 liable under the unfair trade practices act. This case is  
21 on all fours as it relates, at least, to the Unfair Trade  
22 Practices Act. I would submit to you that it covers them  
23 all, but, at least, for purposes of that.

24 Next, is civil conspiracy. These claims are expressly  
25 precluded by the Tort Claims Act. And it so happens, there

1 is a United States Supreme Court case that I came across.

2 May I approach, Your Honor?

3 THE COURT: Yes, sir.

4 MR. FLOYD: From right here in Columbia, South  
5 Carolina, dating back to 1991. It talks about governments  
6 taking action and perceived conspiracies. If you read that  
7 case carefully, Your Honor, it will, basically, explain in  
8 detail about every regulation that's passed and about every  
9 law that's passed. It stifles competition one way or the  
10 other. In fact, every day that that legislature is in  
11 session, there are people down there, lobbyists, lobbying  
12 legislatures to try and conspire to change the laws, to  
13 change regulations to make it more favorable for their  
14 clients.

15 That case was about two outdoor advertising companies.  
16 One company had a grip on the Columbia market, the other  
17 company wanted to move in. The City of Columbia passed a  
18 lot of ordinances. The affected party said whoa, whoa,  
19 whoa, this is stifling competition. You're killing me.  
20 You're pushing me out. The key inquiry in that case, you'll  
21 see, is was the government acting within the scope of its  
22 designated authority. And the answer was yes.

23 So the question we have in this case is no different.  
24 Was DHEC acting within the scope of its authority? DHEC is  
25 charged by the legislature to administer this public health

1 dental prevention program under the statute. For that  
2 reason, DHEC can't be liable for civil conspiracy.

3 Next, we have breach of contract accompanied by a  
4 fraudulent act. The first critical element here is a  
5 contract. They have admitted in their pleadings that they  
6 didn't sign the 2019/2022 MOA. There are no written  
7 amendments alleged. They can't make -- they can't satisfy  
8 the first checkmark. There is no contract. So that cause  
9 of action fails as a matter of law.

10 Last, they've made a claim for attorney's fees, which  
11 is unusual to me because, typically, you move for fees after  
12 an agency has aggrieved a party. In this case, DHEC did  
13 nothing. DHEC was simply sued whenever they refused to sign  
14 an MOA that they disagreed with, the guidelines. And now  
15 they're suing seeking their attorney's fees. There was no  
16 claim pressed by DHEC against HPS. They decided that they  
17 wouldn't sign the MOA. When they made that decision, they  
18 couldn't participate in the program. But they did, they  
19 kept providing services without a contract, which segues  
20 into my next defense, which is that of illegality.

21 They readily admit they didn't sign the MOA. They  
22 readily admit they kept providing services. So the actions  
23 they were taking were in direct contravention of the  
24 statute. You have to have a contract if you are going to  
25 participate in this program. And our case law is well

1 developed and I have it in my memo. You can't recover for  
2 your illegal acts. The action that they took was illegal.  
3 So they should be barred from any recovery against DHEC.

4 Last --

5 May I approach, Your Honor?

6 THE COURT: Yes, sir.

7 MR. FLOYD: The case of Dema vs. Tenet Physician  
8 Services. This case stands for the proposition that no  
9 private cause of action exist. If you read this case  
10 carefully, it talks about the CON Act case. Some doctors  
11 and some hospitals were suing each other trying to get a  
12 private cause of action to arise out of a statute. Well, a  
13 statute is designed to benefit the public, not -- there is  
14 no implied right of action against anyone in this statute.

15 For these reasons and for what I've briefed in our  
16 memo, we believe all of HPS's causes of action fail as a  
17 matter of law and we asked that you dismiss all the claims  
18 against DHEC.

19 THE COURT: Yes, ma'am.

20 MS. BALLARD: Do you want me to respond individually?

21 THE COURT: Yeah, it's easier for me to keep u.

22 MS. BALLARD: Thank you very much, Your Honor. Desa  
23 Ballard and Haley Hubbard representing HPS. Mr. Floyd made  
24 several references to how long I've been involved in the  
25 case, all of which are wrong, but I did handle that appeal

1 in 2013.

2 I would point out to the Court that this is a Rule  
3 12(b)(6) and everything that is alleged in the complaint is  
4 assumed to be true for purposes of this hearing. Your  
5 Honor, the allegations of the complaint are that HPS had  
6 contracts with DHEC for a number of years, it was a total of  
7 20 years, but the ones in question are the ones that have  
8 been discussed by Mr. Floyd starting in 2016.

9 DHEC was kind of sloppy in the way they didn't every  
10 year renew their contracts. Sometimes they just did a  
11 review and said hey, you're doing great, just keep going.  
12 And sometimes they would ask to be signed in the middle of  
13 the year. It was very erratic.

14 So at one point, DHEC reported to DHHS, this is alleged  
15 in the complaint, that HPS had not had a contract with DHEC  
16 for some period of time. That is what triggered the action  
17 by DHHS to seek reimbursement of funds that had been paid as  
18 far back as 2018. I thought it was a little bit earlier  
19 than that, but, clearly, they were seeking reimbursement of  
20 funds that had been paid to HPS while everyone agrees there  
21 was a contract in effect. And that litigation went on and  
22 on and on through the administrative process.

23 I'm surprised to find that Mr. Floyd says there was a  
24 walk-away settlement. All I know is there was a settlement  
25 that was confidential, so I don't know what the terms of it

1 were and I wonder how he does. This was a settlement  
2 between HPS and DHHS. He's got no right to know about that.  
3 We'll be looking into that, I can assure you.

4 As a result of DHEC's false statements to DHHS, DHHS  
5 started this years long attempt to recover back money that  
6 had been paid to HPS and stopped paying money for the health  
7 preventive services, the dental preventive services that HPS  
8 were continuing to provide to the public school students  
9 through agreements with the individual public schools.

10 The way the DHEC program worked, Your Honor, is that  
11 DHEC supervised the program. They had contracts or what's  
12 called memorandum of agreement with different providers.  
13 HPS was the first, but it spawned more. And then each  
14 provider would -- I don't want to say contract, but they  
15 would offer their services to various schools or school  
16 districts. So it was an agreement between the schools and  
17 the school districts and HPS for HPS to come in and provide  
18 the services for the students with the permission of the  
19 parents.

20 What happened when DHEC falsely told DHHS that HPS had  
21 not had a contract was practically financially destructive  
22 of HPS's business. It's a little hard to focus on exactly  
23 how that happened because it happened at the same time Covid  
24 happened and schools were closing and all of that was  
25 happening at the same time, but HPS litigated with DHHS for

1 quite some period of time and reached an agreement of some  
2 sort that we don't know the nature of and I don't know how  
3 Mr. Floyd does. So they continue now through a different  
4 structure to continue to provide services to the public  
5 school children, although they don't work through an  
6 agreement with DHEC anymore. They have another method that  
7 they have established through the dental health program that  
8 allows them to work not through DHEC doing the same thing it  
9 does.

10 But as Mr. Floyd indicated, there were millions of  
11 dollars that were being fought over. HPS had been a  
12 flourishing business, that came to a screeching halt. That  
13 happened solely because DHEC falsely claimed that HPS had  
14 not had a contract with DHEC since -- they varied, sometimes  
15 they said 2017, sometimes they said 2018. But what they  
16 said was enough for DHHS to come and say oh, well, we get to  
17 get all this money back from HPS because they weren't  
18 working under a contract. So we have to assume whatever the  
19 terms of the settlement were, they were because it was a  
20 confidential settlement.

21 But the Unfair Trade Practice is DHEC advising DHHS of  
22 false information regarding the authority of HPS to continue  
23 to provide services and that services they had already  
24 provided were illegally provided, which incurred substantial  
25 fees, costs, loss of business and other things for HPS, but

1 DHEC and HPS -- excuse me, DHHS and HPS made peace.

2 When we brought this action initially in 2019, both  
3 DHEC and DHHS were parties. We were trying to have a  
4 declaratory judgment action as to the validity of the  
5 contracts, which we're still pursuing. The action kind of  
6 fell by the wayside while all the DHHS administrative  
7 proceedings were going forward. So then this case took life  
8 again once the settlement with DHHS was reached.

9 The exact nature of the damages sustained as a result  
10 of the false statements and false notifications by DHEC to  
11 DHHS is the focus of the first cause of action for Unfair  
12 Trade Practices. The cases, which I've not had a chance to  
13 read, that Mr. Floyd handed up talk about the government  
14 acting within the scope of their authority. And that may be  
15 true, but that's what happened here.

16 What happened here is they lied. They told DHHS an  
17 untruth, which is that HPS did not have authority to provide  
18 the services that it had been providing and that it was  
19 going to continue to provide, which led to this launch of an  
20 investigation into HPS to try to get a million or so dollars  
21 back and not to pay them for the work that they were then  
22 doing and had notified DHEC they were continuing to do and  
23 DHEC had not said a word about it. And all that is set  
24 forth in the pleadings, Your Honor, so you'll have to assume  
25 that to be true.



1 DHEC also notified several of the schools that HPS was  
2 no longer licensed with DHEC and, therefore, they were not  
3 welcome in the public schools unless they had a dentist on  
4 site, which is absolutely false. That's not what the law  
5 provides. The public health program provides for the dental  
6 hygienist program to operate in the public health settings  
7 under the general supervision of a dentist.

8 And that's been defined to mean a dentist supervises  
9 the process, establishes the procedures. They don't have to  
10 have a dentist on site when they see these children. All  
11 they're doing is cleaning teeth, applying sealants. They're  
12 doing preventative dental care. They're not filling teeth.  
13 They're not putting on crowns or anything like that. They  
14 are preventative. They are providing preventative care, the  
15 same thing you and I get when we go get our teeth cleaned  
16 every six months.

17 So as a result of DHEC falsely notifying the schools  
18 that HPS was no longer authorized to provide the services,  
19 that was another hit to its continued business. Because we  
20 have a copy of the e-mails, at least, one of the e-mails  
21 where a DHEC employee falsely stated to one of the schools,  
22 and I forget which one, but it was an e-mail to the school  
23 nurse saying you can't use HPS anymore, they're not  
24 approved. Which was false.

25 And that's part of the -- part of what we're litigating

1 here and the breach of contract is was there still a  
2 contract? So we have to litigate that because DHEC  
3 apparently is still taking the position that they were right  
4 to tell DHHS that we didn't have a contract, when, in fact,  
5 we thought that was old news. We thought that had been  
6 established. So we're going to have to litigate in this  
7 breach of contract action which of the contracts -- the  
8 memorandums of agreement were in effect and what the terms  
9 of those were.

10 Mr. Floyd told you that we did not sign the one in  
11 2019, and that's correct, we did not. And we attempted to  
12 meet with DHHS and DHEC to explain to them what the problem  
13 was about what had changed in the standard of care that they  
14 were requiring the hygienists to participate in and nobody  
15 would meet with us. It was just all of a sudden, we got  
16 communication from DHEC and DHHS just shutting us down in  
17 every way they could.

18 THE COURT: Well, isn't that them not meeting without  
19 so that you can get a contract?

20 MS. BALLARD: No, what we were trying to explain to  
21 them was why the language of the last MOA that they  
22 presented to us deviated from state law and from the  
23 standard of care.

24 THE COURT: Right. And you're explaining that so that  
25 it can be fixed so that you can sign it because it remained

1 unsigned, which meant you don't have a contract.

2 MS. BALLARD: Except for the automatic renewal clauses  
3 in the prior contracts, which are -- they vary from contract  
4 to contract. And we also have the communications between  
5 them by e-mail where they're continuing to provide any  
6 services without DHEC's objections.

7 Particularly, as it relates to the January 2018  
8 decision of the Board of Dental Examiners that allowed HPS  
9 to expand its practice to include in addition to ordinary  
10 sealants on teeth, the more, I believe Mr. Floyd said  
11 primitive, I'm not sure what he said, but the ART --

12 MR. FLOYD: Third world.

13 MS. BALLARD: Third world, excuse me. Third world.  
14 Which is interesting because they've been used in the United  
15 States for 40 years and they're well received and they're  
16 well within the standard of care.

17 But anyway, the Board of Dentistry allowed HPS to  
18 continue providing those, but at the same time miraculously,  
19 at the same time, the Medicaid bulletin that Mr. Floyd  
20 mentioned was issued by DHHS that said oh, those third world  
21 covers, those third world preventative care that is primary  
22 preventative care that is reversible, according to the  
23 statute and according to the dental board -- I lost my train  
24 of thought, Your Honor, I'm sorry.

25 DHEC did send a letter canceling the contract on

1 12/31/19 and it was after that that HPS set up its new and  
2 current structure. But that doesn't take away from the fact  
3 that we had to litigate with DHHS over this million or so  
4 dollars and however that turned out was a direct and  
5 proximate result of the false statements made to DHHS by  
6 DHEC. I'll read this case, of course, but I'm talking about  
7 actions by DHEC that interfered with HPS's ability to  
8 continue to provide services to individual patients in the  
9 public schools. That's little different than two state  
10 agencies arguing with one another.

11 In terms of the civil conspiracy, Your Honor, the civil  
12 conspiracy as I've gone into in great detail in our second  
13 amended complaint -- this goes back a long way. The  
14 dentists have for some reason always felt like HPS  
15 threatened their existence, that if preventative work was  
16 done in the public schools that kids wouldn't get cavities  
17 and stuff and so, therefore, the dentists wouldn't have  
18 patients. So there's always been this fight between the  
19 dentists and the dental hygienists as to whether -- who  
20 ought to be providing the services.

21 What DHEC had determined and based on state studies  
22 that had been done is that most of the children in the lower  
23 income parts of the state that ended up being the patients  
24 at HPS would never have gotten preventative dental treatment  
25 at all, but for this state program. And because these

1 students for the past 20 some odd years have been getting  
2 teeth cleanings and sealants and preventative health care  
3 through the HPS program, there's a lot of people who have  
4 grown into adults without dental problems. And that,  
5 apparently, the dentists don't like.

6 The Medicaid bulletin that was issued about the same  
7 time DHHS would say oh, we just heard y'all aren't licensed,  
8 the Medicaid bulletin that was issued said oh, well, we can  
9 do the ART -- or we're going to pay for the ART and we're  
10 going to pay for the other preventative things that have  
11 just been approved by the dental association, but only if  
12 they're done by a dentist as part of an overall evaluation.  
13 In other words, kick the hygienists out. So you can see the  
14 struggle or conspiracy between DHEC and DHHS to get the  
15 hygienists out of the public health program.

16 So the Unfair Trade Practices and civil conspiracy,  
17 assuming the allegations of our complaint to be true, which  
18 the Court must do for purposes of a 12(b)(6) leads then to  
19 our breach of contract action which relates to the contract  
20 that they breached without reason in December of 2019. They  
21 breached it because we were fighting back and attempting to  
22 not have to pay a million dollars back to DHHS because we  
23 called them on their false statements to DHHS, which caused  
24 us to have to litigate for a couple of years with DHHS.

25 So breach of contract accompanied by a fraudulent act

1 is exactly what occurred when they oh, we're going to breach  
2 this contract, the one that was renewed through December of  
3 2019. They canceled it then, so they said see, you now you  
4 can't provide any services. You could argue that you had a  
5 contract until now, that being 12/31/19, but we're going to  
6 cancel it and kick you out of the program entirely. So that  
7 is the breach of contract with fraudulent intent. And they  
8 were operating under the 2019 to 2020 contract -- or MOA,  
9 excuse me.

10 I don't want to go into the details of what was wrong  
11 with the standard of care that was prescribed in the last  
12 MOA that HPS would not sign, but it was inconsistent with  
13 the standard of care. And we attempted several times to  
14 meet with both DHEC and DHHS to explain to them why the  
15 terms under the new dental standards that were incorporated  
16 into their MOA were not consistent with state law and did  
17 not represent an accurate standard of care for dental  
18 hygienist. And they just refused to meet with us. What we  
19 were hoping to do was solve this problem and oh, we can fix  
20 that part and go forward, but they wouldn't even talk to us.  
21 They wouldn't even meet with us.

22 So the past -- it's 2022 now, for the past three years,  
23 HPS has been fighting for its financial survival in a number  
24 of ways, one of which is not having all of its assets  
25 stripped away by DHHS's attempt to get reimbursed for things

1       that DHEC said they were not supposed to be doing. And the  
2       slow down in services and almost cessation of services  
3       caused by the false statements by DHEC to the schools that  
4       HPS didn't have authority to be in the schools unless there  
5       was a dentist on site. All that is false. You know, we  
6       have the e-mails where they did it.

7               So I'll look at these cases, Your Honor, and see if  
8       there's anything further I need to address with them, but  
9       none of the existing authorities, including the 2013 HPS  
10      case that was decided by the Supreme Court preclude us from  
11      going forward with intentional wrongful actions taken by  
12      DHEC for the purpose of harming HPS and their patients.  
13      Hundreds of thousands of school students have received the  
14      services -- the preventative dental services through HPS in  
15      the 20 years it's been operating, but a lot of them are no  
16      longer being provided with those services as a direct and  
17      proximate result of what DHEC did to cause damage to HPS and  
18      to those students.

19             Under the 12(b)(6) standard, Your Honor, we submit that  
20      we have stated causes of action for Unfair Trade Practices  
21      against DHEC, for civil conspiracy against DHEC with the  
22      other defendants and unnamed persons as well and breach of  
23      contract with fraudulent intent.

24             Again, I'm not sure why Mr. Floyd made reference to  
25      10(c). 10(c) applies to documents that are attached to and

1 incorporated into a pleading. He hasn't filed a pleading.  
2 All he's filed is a motion to dismiss and those weren't on  
3 it.

4 THE COURT: No, your pleading.

5 MS. BALLARD: My pleading is the complaint and it  
6 doesn't have these agreements attached to it.

7 THE COURT: Your amended complaint and petition for  
8 emergency and permanent and injunctive relief. That was  
9 filed November 22nd, 2019 in this action.

10 MS. BALLARD: I stand corrected. Those are -- you're  
11 right, those are parts of the -- of our second amended  
12 complaint, so they can under Rule 10(c) be considered by the  
13 Court. But the Court is going to have to determine in the  
14 breach of contract action whether there was a contract in  
15 existence that got breached. And because of the sloppy,  
16 sloppy way that DHEC was doing it, we're not even sure which  
17 year contract was in effect when we were providing services  
18 in 2017 and 2018, which everybody agrees were proper. But  
19 those were included in the time periods that DHHS was told  
20 that we didn't have a contract and we should be required to  
21 disgorge the Medicaid payments that we had received.

22 Your Honor, I think that covers it. I will review the  
23 cases and see if I have any other comments about why they're  
24 inapplicable, but in the 12(b)(6) standard, I think the  
25 motion to dismiss must be denied as against DHEC.



1 THE COURT: Mr. Floyd.

2 MR. FLOYD: I can be brief.

3 THE COURT: Sure.

4 MR. FLOYD: To answer the question, the burning  
5 question in the room, FOIA. The state agency settlement  
6 agreements are subject to FOIA. As confidential as you want  
7 to make them, they're still subject to FOIA, so we all know  
8 that was a walk-away settlement.

9 All of these incendiary statements, there's no dispute  
10 they refused to sign the contract. I don't understand this  
11 mental gymnastics that Ms. Ballard is trying to make me go  
12 through looking back at these other contracts when she  
13 refuses to sign a contract. In fact, tries to negotiate,  
14 admittedly tries to negotiate with the state.

15 THE COURT: Yes, let's pause there.

16 I meant to ask you, Ms. Ballard.

17 MS. BALLARD: Yes.

18 THE COURT: Because when I inquired earlier, you seemed  
19 to agree that this negotiation was because the contract  
20 hadn't been signed. The argument or the position was that  
21 it didn't comport with the law and so you wanted a meeting  
22 in an effort to get it revised so that you could sign the  
23 contract.

24 MS. BALLARD: Could sign the contract for 2020 going  
25 forward, yes.

1 MR. FLOYD: 2019/2020 school year.

2 MS. BALLARD: The school year from September 2019 to  
3 the spring of 2020, that's the one.

4 THE COURT: Right. So if that's the one that you  
5 couldn't get a meeting on and didn't sign, then how are you  
6 also alleging that during that time period, there was a  
7 contract? You were trying to get a contract. Why are you  
8 trying to negotiate to get one if you already have one?

9 MS. BALLARD: DHEC thinks we had a contract because  
10 they canceled it on 12/31/19. We were arguing no, we are  
11 continuing to provide services under the 2017 contract. And  
12 they must have seen the merit in our position because they  
13 said oh, okay, we know you haven't signed a new contract, so  
14 even if you are providing services under the old contract,  
15 we're going to cancel that one, too.

16 So they did, in fact, cancel our ability to continue to  
17 provide services under the 2017 contract. The language of  
18 which allowed us to continue to provide services until a new  
19 -- I may not be calling the words exactly right -- until a  
20 MOA was signed.

21 So we notified DHEC that we were continuing to provide  
22 services. We notified DHHS that we were continuing to  
23 provide services. No one objected. They continued to  
24 receive our statistics. In fact, Your Honor, as set forth  
25 in our complaint, in the August 2019 meeting where DHEC met

1 with all of the providers under the public health school  
2 program, they asked HPS to submit their statistics for the  
3 last year, which they did.

4 So DHEC, at least, at that point in August of 2019  
5 thought HPS was still a provider. They were not taking the  
6 position until later that there was no contract in effect.  
7 They told DHSS later, which we, again, found out when we had  
8 to respond to the request to disgorge the Medicaid money.  
9 But we were trying to explain to them what was wrong with  
10 the new contract that they wanted us to sign. I can go into  
11 the details of that, but I don't think it's relevant for  
12 this particular issue. But we took the position that we  
13 were continuing to operate under the 2017 contract so they  
14 canceled it.

15 MR. FLOYD: Again, Your Honor, the allegations of the  
16 complaint are in August of 2019, HPS was invited to and  
17 participated in the DHEC provider information conference in  
18 August of 2019. In connection -- this is paragraph 61, in  
19 connection with the August 2019 provider conference, DHEC  
20 presented a new proposed MOA, despite the continued  
21 existence. She alleges that there's this old contract.

22 Your Honor, I can answer the question. Paragraph --  
23 that admitted complaint petition for emergency and permanent  
24 injunctive relief happens to have that letter that Ms.  
25 Ballard attached to her pleadings that says DHEC -- because

1 they were continuing to operate under the program without a  
2 signed contract for the 2019/20 school year. DHEC wrote  
3 them and said, Without waiving any rights to contest the  
4 validity of the March -- at this time, they were actually  
5 saying we're still operating under the March MOA and  
6 reserving all rights to contest the assertion. DHEC had no  
7 choice. She's still in schools. There is no contract. She  
8 refuses to sign the contract. They had no choice but to  
9 contest it and make sure that she's not still in these  
10 schools doing things illegal contrary to the public health  
11 dental prevention program. There's no dispute about that.

12 She hasn't addressed the ability of DHEC to be a  
13 regulatory body under the Columbia Outdoor Advertising  
14 Supreme Court case. They have every right to regulate. The  
15 legislature has given it to them, plain and simple. And I  
16 could go on and on, but that's --

17 Thank you, Your Honor.

18 THE COURT: All right. Next.

19 MR. MOORE: Thank you, Your Honor, may it please the  
20 Court. Ray Moore on behalf of the South Carolina Dental  
21 Association.

22 Judge, as an initial matter, thank you so much, Your  
23 Honor, for agreeing to hear us after the status conference  
24 last week. This has been dragging on for several years.  
25 For my client, this case has been dragging on for four or

1 five months. I can't remember when we filed the motion --

2 MS. BALLARD: What he says, Your Honor, I agree with.

3 MR. MOORE: Thank you.

4 But it has been a lingering issue for my client as  
5 well, and I'll touch on that at the end of my argument.

6 While the South Carolina Dental Association vigorously  
7 disputes most of the allegations in the complaint, for the  
8 purposes of this motion, we are accepting all of the well  
9 pled factual allegations as true, but Your Honor is not  
10 required to honor the legal conclusions and the generic  
11 allegations that are not well pled.

12 So with that in mind, I want to tell you what the --  
13 this is a long second amended complaint, 115 separate  
14 allegations, but I want to direct you to what is alleged  
15 about the South Carolina Dental Association. The only acts  
16 alleged against my client are lobbying, influencing,  
17 convincing, persuading public officials for the economic  
18 gain of its member dentist.

19 For example, Paragraph 10 talks about an ongoing  
20 narrative with employees of public agencies. Paragraph 11  
21 alleges the South Carolina Dental Association lobbied to  
22 impede HPS to increase financial gain. Paragraphs 18 and 19  
23 allege that the Association or its members appropriated the  
24 work and the economic interest of HPS. Paragraph 20 alleges  
25 that the Association lobbied and persuaded DHEC. Paragraph

1       22 alleges that lobbyists convinced DHEC to impede and  
2       eliminate HPS. And they allege that is solely for private  
3       financial interest. Paragraph 26 alleges that because of  
4       lobbying, DHEC terminated HPS, again, for the benefit of  
5       private dentists. Paragraph 28 alleges the sole purpose --  
6       that these parties worked among themselves for the sole  
7       purpose of providing private dentists methods to  
8       misappropriate dental care of public school children. And  
9       Paragraph 47 alleges that the Dental Association convinced  
10      the board to reverse itself after being lobbied. These are  
11      the allegations.

12             Just as a preemptory matter, Ms. Ballard talked about  
13      false statements that are alleged in the complaint as to  
14      DHEC, but there's no false statement alleged against the  
15      Dental Association. And what is alleged is that the purpose  
16      was for financial benefit. In fact, the complaint in  
17      several areas says sole financial -- sole reason for the  
18      financial benefit of dentists.

19             So back to what I said at the beginning, if every word  
20      of what is alleged in the complaint is true, the Plaintiff  
21      can't prevail on the two causes of action -- I know there  
22      were others, but there's only two against my client, the  
23      UTPA and a civil conspiracy claim.

24             And I'm going to address two overarching bases for each  
25      claim. The first is as a matter of state law, they can't

1 prevail on these claims. But secondly -- and I know that  
2 there is a preference on behalf of courts not to reach  
3 constitutional issues and Your Honor may decide that you  
4 don't have to reach a constitutional issue. I think you  
5 don't necessarily have to reach it. But the second reason  
6 is, frankly, the most hallowed law in the United States, the  
7 constitution and the 1st Amendment, which protect this  
8 activity.

9 And I'll talk about, first of all, the state law. So  
10 why are these claims not actionable under state law against  
11 the South Carolina Dental Association? As to the first, the  
12 UTPA claim. The Supreme Court has spoken in Justice  
13 Beatty's decision in HPS in 2013. Three of the same  
14 Justices on the court then are still on the court. Justice  
15 Beatty now the Chief Justice who wrote that decision. And  
16 the conduct involved -- in that case, it was alleged that  
17 the Board of Dentistry promulgated an emergency regulation  
18 and was that in trade or commerce?

19 In that same case, in that same set of facts, it was  
20 alleged that the Association lobbied for that enactment.  
21 The lobbying is not working in trade or commerce. In fact,  
22 the South Carolina Dental Association, whose object is to  
23 promote the dental health in South Carolina and to promote  
24 oral health can't practice dentistry. The Association is an  
25 eleemosynary organization, who has a charitable benefit even

1 if its work can benefit its member dentists. It is not  
2 conducting trade or commerce. And lobbying, convincing,  
3 persuading regulatory authority is not trade or commerce  
4 under Justice Beatty's clear opinion in the HPS case.

5 What is prescribed by the Unfair Trade Practice Act is  
6 unfair methods in the conduct of trade or commerce. That is  
7 what is declared unlawful. And that doesn't exist here.  
8 Lobbying, persuading, convincing, as alleged in the  
9 complaint, those are not unfair trade practices as a matter  
10 of law, even if they provided every word of the complaint.

11 I would note to Your Honor, as there's been discussion  
12 of the 12(b)(6) standard here, in the HPS case before, it  
13 was under the even more liberal standard of the Rule 15  
14 amendment to the pleadings and the pleadings should be  
15 amended -- amendment should be freely given where justice  
16 requires. And the Court said no.

17 So we reach the civil conspiracy claim. Once again,  
18 Justice Beatty, at this time, Chief Justice Beatty leads the  
19 way in the Paradise case last year. I would note that in  
20 their papers, Plaintiffs relied on out of date cases and did  
21 not recite all of the elements of the civil conspiracy  
22 claim. But as of last year, seven months before this second  
23 amended complaint was filed, the Paradise decision was  
24 issued.

25 And there are four elements, the combination of two or



1 more persons to commit an unlawful act -- this is the second  
2 element, to commit an unlawful act or a lawful act by  
3 unlawful means. That has not been alleged here. Once  
4 again, what has been alleged is that we lobbied, that we  
5 persuaded, that we convinced. The third element, together  
6 with the commission of an overt act. There has been no  
7 overt act alleged, unless it is the lobbying. Once again,  
8 that cannot be actionable. And then damages proximately  
9 resulting. We accept that those have been alleged. So what  
10 has been alleged, they'll only act as lobbying officials,  
11 lobbying DHEC, persuading, convincing, influencing. This  
12 can't be the basis for conspiracy.

13 One of the cases that hasn't come up yet that's in our  
14 papers, Your Honor, is the Angus vs. Burrows and Chapin  
15 case. That is cited in our materials. In that case,  
16 Burrows and Chapin, a developer in the Myrtle Beach area,  
17 lobbied, persuaded and convinced city council to fire an  
18 official who was standing in the way of permitting. And the  
19 Supreme Court said that's the basis for a civil conspiracy.  
20 And the quote from that case was that in our democratic  
21 society, a public official is answerable to the public,  
22 members of the public, lobbyists, developers are not third  
23 party interlopers. And in that case, the court affirmed a  
24 summary judgment. It really can't be actionable.

25 And this is where we get to the second issue. If this

1 is actionable, then we fly right into the base of the 1st  
2 Amendment. When I think of the 1st Amendment, I think of  
3 free speech. I think of freedom of religion, I think of  
4 freedom of the press. But the 1st Amendment also has that  
5 bugaboo clause the right to petition the government for  
6 redress of grievances.

7 I'll read it for Your Honor. Congress -- this has been  
8 extended to the states, too, that any government shall make  
9 no law respecting an establishment of religion or  
10 prohibiting the free exercise thereof or abridging the  
11 freedom of speech for the press. The right of the people to  
12 peaceably assemble and to petition the government for  
13 redress of grievances.

14 The case that Mr. Floyd argued a few moments ago that  
15 came out of Columbia, the Omni Outdoor case, that case is in  
16 the middle of a long line of cases under the rubric of the  
17 Noerr-Pennington Doctrine. This is a 1st Amendment Doctrine  
18 that protects -- it was first adopted in anti-trust context  
19 when businesses or industries would try to compete using the  
20 government as leverage and the aggrieved party would sue for  
21 an anti-trust violation.

22 In the Noerr case, the Noerr case was truckers versus  
23 railroaders. I can't remember which was which, I think it  
24 was the railroads trying to squeeze out the truckers and  
25 using the government to do it and lobbying the government to

1 do it. And the U.S. Supreme Court said you can't do that.  
2 That's a 1961 case, Eastern Railroad vs. Noerr Motor  
3 Freight. This is in our papers.

4 Later in 1965, there was an issue of mines. Big mines  
5 were trying to squeeze out the small mines and they were  
6 using the government to do it. And trying to install  
7 minimum wage and safety requirements that were forcing small  
8 mines out of business. And the Supreme Court said no, they  
9 can do that. It is not an anti-trust. It is not an  
10 actionable conspiracy to do that.

11 And that long line of cases continued to the case that  
12 Mr. Floyd discussed, the Omni Outdoor Advertising case. And  
13 in that case, again, arising right here in Columbia, the  
14 Supreme Court said, Giving full consideration to this matter  
15 for the first time -- this was a conspiracy case that was  
16 being argued that there was a conspiracy exception to this  
17 Noerr-Pennington Doctrine. Giving full consideration to  
18 this matter for the first time, we conclude that a  
19 conspiracy exception to Noerr must be rejected. We do not  
20 describe our reasons at length since they are largely the  
21 same as set forth above in the opinion. As we have  
22 described, Parker and Noerr are complimentary expressions of  
23 the principle that the anti-trust laws that regulate  
24 business, not politics.

25 The former decision, that is Parker, Parker vs. Brown,

1 the former decision protects the state's acts of governing  
2 so that DHEC can't be responsible when it is lobbied and  
3 makes a decision and on the other side of the coin, it says  
4 and the latter, the citizens' participation in government.  
5 Insofar as the identification of an immunity destroying  
6 conspiracy is concerned, Parker and Noerr generally present  
7 two faces of the same coin.

8 What that means is that when DHEC gets lobbied and  
9 takes action, Parker immunity protects it. And when an  
10 entity lobbies DHEC or the government or whoever they lobby,  
11 they are protected in that activity. It is not actionable  
12 under the Noerr-Pennington Doctrine as set forth in the Omni  
13 Advertising case.

14 Now, Your Honor, here's my argument. This has to be  
15 applied at this stage of the case. We can't wait. It's a  
16 waste of party and judicial resources to continue past this,  
17 but it's even worse that it has a chilling effect on bodies  
18 that are petitioning the government for redress. This  
19 matter, this particular Plaintiff has had a chilling effect  
20 on my client for almost 20 years.

21 My client is involved, not just in dealing with  
22 hygienists, but in many, many, many aspects of public health  
23 dentistry. The deal and lobby with issues with anesthesia  
24 and who can provide anesthesia, that's going to restrict  
25 somebody. They deal with issues about mobile dentistry.

1       Should we allow dentist in RVs to go around and should we  
2       take a position on that? That's going to restrict somebody.  
3       They deal with issues about what kind of equipment is  
4       appropriate, what kind of x-ray machines are appropriate.  
5       Should we restrict somebody? They can't be chilled in the  
6       action that they take with the government. They should be  
7       free to lobby without compulsion, not making false  
8       statements, but no false statements have been alleged here.

9               So I ask Your Honor to consider the chilling effect as  
10       you decide whether to rule on a 12(b)(6) motion. It would  
11       cripple a government agency to be hauled into court every  
12       time a party says that they conspired with somebody. And  
13       DHEC, my goodness, that building is so big, how many  
14       different programs like this do they have with different  
15       entities, different interest coming before them? I believe  
16       it would cripple them. I believe it cripples the public's  
17       -- it chills the public's ability to take a position. So  
18       for that reason, Your Honor, I would ask that this be  
19       dismissed at this early stage.

20              The one last thing that I would say, and this is back  
21       to the state law cause of action that I forgot to include --  
22       excuse me, the state law basis to dismiss, is that there has  
23       to be an intent to harm. What's been alleged in this  
24       complaint is an incidental harm to HPS, but not an intent to  
25       harm HPS. What's been alleged is that we're doing it solely

1 for the economic benefit.

2 And that language -- I'm not exaggerating that  
3 language, it says it repeatedly through the complaint that  
4 we're doing it solely for our economic benefit. If there is  
5 an incidental harm to HPS, that is not actionable. Under  
6 the civil conspiracy claim, you have to intend harm, not  
7 intend benefit.

8 Justice Few in his concurrence in the recent Paradise  
9 case said, In our free enterprise economy, we encourage  
10 entrepreneurs to use aggressive tactics to seize competitive  
11 advantage, to create jobs for people and build value for  
12 communities. For these efforts, entrepreneurs rightfully  
13 expect to earn handsome profits. Participants in this  
14 healthy competition use every lawful tactic at their  
15 disposal. Those who lose out are understandably envious and  
16 often angry, but actions that conform to the law, even when  
17 motivated by anger or an intent to harm must not be the  
18 basis of civil liability.

19 Your Honor, that's my position on behalf of the  
20 Association. I thank you for your patience in hearing us  
21 today.

22 THE COURT: Yes, sir.

23 MS. BALLARD: Thank you, Your Honor.

24 THE COURT: Yes, ma'am.

25 MS. BALLARD: Our position is that not only did the

1 Dental Association lobby, they succeeded in convincing both  
2 DHHS and DHEC to change their positions and take adverse  
3 action against HPS, which, of course, takes adverse action  
4 against the public school children that HPS serves.

5 The 1st Amendment issue is an interesting one. Not all  
6 1st Amendment rights are protected. You can't yell fire in  
7 a movie theater. We all know that. There are reasonable  
8 restrictions on the exercise of the 1st Amendment. We would  
9 submit that lobbying a government agency to breach contracts  
10 and to establish standards that deviate from the standard of  
11 care that are required of dental hygienists is actionable  
12 because it causes harm not only to HPS, but to the public as  
13 well. So there have to be limitations on the 1st Amendment  
14 right.

15 I take issue with the fact that the Dental Association  
16 has been chilled for years. When I first got involved with  
17 HPS about, I guess, 12 to 15 years ago, I signed onto the  
18 Dental Association's website and I saved -- fortunately, I  
19 archived what was on there. And it was all about how we can  
20 help dentists make more money. They've changed through the  
21 years. Now, you can't even get into the website without a  
22 password and user name. So you can't get into it and it's  
23 become somewhat of a private enterprise. I urge you to look  
24 at the website and try to get into it. You can't.

25 And I don't know why. I don't know if it's because we

1 caught them with what they were doing. You know, this is  
2 not the first time we've sued the Dental Association, it's  
3 the second. As Mr. Floyd told you, there was a settlement  
4 the first time around. We contend that they're doing the  
5 same thing they were doing before. They harmed the  
6 students, they harmed the public, they've harmed HPS. And  
7 you certainly don't have a 1st Amendment right to do that.

8 THE COURT: Do you have any case law to support your  
9 contention that this successful lobbying is covered by the  
10 tort claims act?

11 MS. BALLARD: Not off the top of my head, but I  
12 certainly will be happy to supplement with the law on that  
13 point, Your Honor.

14 MR. MOORE: Your Honor, the lobbying in Columbia,  
15 Outdoor Advertising vs. Omni was successful lobbying. The  
16 lobbying in the Noerr and Pennington cases was successful  
17 lobbying. That was why it harmed the businesses that  
18 brought those suits. So we contend that those are  
19 protected.

20 I would just want to speak to some of the things about  
21 the website. You know, I was on the website this morning  
22 and I didn't have to have a password. I will say that those  
23 are well beyond the pleadings and that has not been alleged  
24 and I don't think that is proper for the Court's  
25 consideration.



1           And the second thing that wasn't alleged, it was not  
2           alleged that we lobbied them to breach a contract or that we  
3           lobbied them to deviate from the standard of care. The  
4           lobbying was about regulatory activity and things like that.  
5           There was no specific allegation in the complaint about  
6           lobbying to lie, lobbying to breach the contract or lobbying  
7           to deviate from the standard of care.

8           Thank you.

9           MS. BALLARD: Your Honor, I agree. The reference to  
10          the website was not appropriate and I withdraw that  
11          argument.

12          THE COURT: Okay. I mean, I think -- and I, of course,  
13          will give you the opportunity, Ms. Ballard, to find whatever  
14          case law you believe supports your contention, but I think  
15          just logically, it seems that you would be hard pressed to  
16          do that because if the lobbying efforts are not successful,  
17          then probably no one is aggrieved by that. And how on earth  
18          can someone control whether their own lobbying efforts are  
19          successful or unsuccessful? I mean, of course, the goal is  
20          to be successful, so -- I don't know, but I will give you  
21          the opportunity.

22          MS. BALLARD: Thank you, Your Honor.

23          THE COURT: Yes, ma'am.

24          MS. LAFFITTE: I'm Becky Laffitte, I'm here on behalf  
25          of Dr. Richard Boyd, as personal representative of the

1 Estate of Dr. Rocky Napier. And for purposes of this  
2 argument, Judge Newman, with regard to whether or not they  
3 are considered separate entities, the Estate vs. Dr. Boyd as  
4 personal representative, I am here on behalf of them because  
5 I think they are one in the same for purposes of legal  
6 arguments.

7 This is an interesting matter, Your Honor. Your Honor  
8 can take judicial notice, and I think it's on Page 2 of my  
9 memo of the death of Dr. Rocky Napier. Dr. Napier was a  
10 well-respected children's dentist, who, unfortunately,  
11 passed away on March the 7th, 2021. He was not part of the  
12 2019 litigation matters and it wasn't until March 26th,  
13 2022, that Dr. Napier was even named as a party in this  
14 litigation.

15 Respectfully, Your Honor, the issue before you  
16 initially is that the statute of limitations has run. There  
17 are no claims that survive his death that HPS or Ms. Tammy  
18 Byrd, assuming she is different, have against the Estate.  
19 He, under the -- under section 62-3-803, the law is clear,  
20 Your Honor, that you have one year to file a claim against  
21 the Estate for anything this person you claim may have done  
22 to you before the death. I have a copy of the statute if  
23 you need it, Your Honor, if you would like it.

24 What we have here, Your Honor, is that a year and some  
25 months passed before the Estate of Dr. Napier was sued. And

1       so, respectfully, there are no claims that HPS or Ms. Byrd  
2       now have against him. We confirmed and it's in the brief  
3       with the probate court that no claims of a creditor had been  
4       filed on behalf of HPS or Ms. Byrd.

5               So, Your Honor, before they even get to the other  
6       arguments, we believe that that's one hurdle they can't  
7       jump. And, in fact, noticeably it was absent from the memo  
8       that they submitted to Your Honor last night. And I suggest  
9       that it was absent because it's a hurdle they know that they  
10      can't jump. And if you can't -- if you can't hit the first  
11      hurdle, you can't go to the others.

12             But, Your Honor, let me, if I might, because I want to  
13      make sure that I present the proper arguments on behalf of  
14      Dr. Napier, who is now deceased, and his Estate and Dr.  
15      Boyd. If you look at the second amended complaint -- and  
16      I'm going to reply upon a lot of the arguments that Mr.  
17      Floyd and Mr. Moore made on behalf of the state entities  
18      because I'm going to show you or refer you to some  
19      paragraphs in the second amended complaint.

20             The only allegation where Dr. Napier is mentioned by  
21      himself is in Paragraph 9 of the second amended complaint.  
22      And it says on information and belief, Rocky Napier, a  
23      licensed South Carolina dentist and member of the Dental  
24      Association, has for decades objected to the work of HPS in  
25      the public schools and has involved himself in the work of

1 public and private organizations, including DHEC and the  
2 Dental Association to further this conspiracy described  
3 herein to damage and destroy HPS for the purpose of  
4 increasing the financial income of private dentists,  
5 including himself.

6 If you go to Paragraph 10, Your Honor, he's lumped in  
7 again with either DHEC or the Dental Association and he's  
8 called a volunteer advocate.

9 If you go to Paragraph 18, he, again, is a beneficiary  
10 -- he follows a reference to the Dental Association and its  
11 agents and servants and employees, including Rocky Napier,  
12 had conspired and actively undertaking to destroy. Again,  
13 Your Honor, no actions of trade or commerce. At best,  
14 they're saying he was lobbying or he's advocating for a  
15 position that they respectfully take exception to.

16 If you go to Paragraph 20, Dr. Napier is referred to  
17 for alleged lobbying efforts.

18 Paragraph 22, he is put in under the Dental Association  
19 again in a lobbying or objecting capacity as alleged.

20 In Paragraph 29, again, he is put in almost as an after  
21 fact on all of these with either the Dental Association or  
22 DHEC as being an alleged conspirator in matters that they  
23 claim that he did in an effort to cause harm.

24 And we'll get to that in a minute, Your Honor, because  
25 the law is clear, these allegations of UTPA and civil

1 conspiracy concern fraud and deceit. And the law is clear,  
2 when someone is not here to advocate for himself or explain  
3 it, the law does not even allow any evidence to come in.

4 I then refer you to 34, again, he is included in almost  
5 a consuming way with either DHEC or the Dental Association.

6 And then you go to 39, the same way.

7 73, the same way.

8 So, Your Honor, unfortunately, there are no single  
9 allegations against Dr. Napier that would fall A, to get  
10 them over the hurdle of the statute of limitations, or then  
11 to go the UTPA and civil conspiracy.

12 So I'd like to go to the UTPA, Your Honor. And I know  
13 a lot of time has passed and you have been very patient with  
14 all of us. And if I miss an argument, it's inadvertent and  
15 I would just simply ask Your Honor, and I know you already  
16 have read the law and the arguments that we've listed in the  
17 motion and supplemental memorandum.

18 But on Page 6 of the memo, and this is where it's very  
19 important that the law has been stated here --

20 MS. BALLARD: In what memo?

21 MS. LAFFITTE: I'm sorry, on my memo. On the memo of  
22 Dr. Napier.

23 MS. BALLARD: Thank you.

24 MS. LAFFITTE: I'm not going to read it all, Your  
25 Honor, but, basically, it says that the law recognizes the

1 great unfairness if one is allowed to assert causes of  
2 action where fraud and deceit are concerned and that  
3 individual is now deceased and is not here.

4 And I cited under the statute from S.C. Code annotated  
5 19-11-20 prohibits any interested person from testifying  
6 concerning conversations or transactions with the decedent  
7 if the testimony could affect his or her interest. Based on  
8 the principle, it is against public policy to allow a  
9 witness thus interested to testify as to such matters when  
10 such testimony, if untrue, cannot be contradicted.

11 The sad thing here, Your Honor, is that we have a  
12 well-respected dentist who has passed away. Is it about  
13 dental services or is it about greed? Is it about dental  
14 services or is it about somebody's money? Dr. Napier has an  
15 elderly mother and a sister. So what we have here is HPS or  
16 Tammy Byrd trying to bring an action against a deceased  
17 dentist when A, she missed the boat, because she didn't file  
18 the creditor's claim, respectfully. She didn't do it.  
19 She's barred.

20 And Your Honor, I'm asking Your Honor -- and I know it  
21 may be difficult, but talk about a chilling effect of any  
22 other people who die and are subject to creditor's claims  
23 long after the statute permits claims to be filed.

24 So Your Honor, we have really great concerns that they  
25 are pursuing this matter against Dr. Napier on these

1       allegations that are baseless in some respects and he's  
2       lumped in with people and he's a volunteer or he's an  
3       objector. Those are not recognized causes of action.

4               So, Your Honor, we go on to A, you can't get to UTPA.  
5       And there's no conduct to trade or business here that's been  
6       referenced. They want to say the Dental Association and  
7       dentists in general, but they don't have the evidence nor  
8       can they present the first piece of evidence at any court  
9       about what may have happened because he's not here. And the  
10      law has said fraud and deceit, you don't get it in, you just  
11      can't get it in.

12             So we don't have trade or commerce. If you want to  
13      claim the unfair deceptive acts affects the public's  
14      interest, he's deceased. So even at that point, he can't  
15      affect the public interest.

16             And the Plaintiff suffered monetary or property loss as  
17      a result of the Defendant's unfair and deceptive acts. She  
18      can't prove them. HPS or Ms. Byrd cannot prove any of these  
19      acts which are alleged because the law prohibits them from  
20      doing so.

21             So, Your Honor, next, we go to the civil conspiracy.  
22      And I follow the same arguments that Mr. Floyd and Mr. Moore  
23      have made. You know, all of these require intent. And,  
24      unfortunately, they can't prove intent because the statute  
25      has run. By law, they can't get any evidence here.

1           Your Honor, we respectfully ask Your Honor to follow  
2   62-3-803, in and of its face and these claims are barred  
3   forever. Your Honor, we would take the position that they  
4   would be HPS or Ms. Byrd because arguably they're one in the  
5   same and we don't want -- I think her ship has sailed on  
6   that.

7           So Your Honor, we respectfully move that all causes of  
8   action be dismissed against the State of Dr. Rocky Napier  
9   and that this matter proceed however. But, Your Honor, the  
10   Estate of Dr. Napier shouldn't be here. Dr. Napier  
11   shouldn't be here, of course, in his condition of being  
12   deceased, but his family should not be placed through  
13   something on these allegations that don't show any viable  
14   causes of action against him. And we just respectfully ask  
15   Your Honor that you make the decision that is rock solid on  
16   the law and that is the dismissal of the Estate of Dr.  
17   Napier and Dr. Richard Boyd as personal representative.

18           Thank you for your time.

19           THE COURT: Yes, ma'am.

20           Ms. Ballard.

21           MS. BALLARD: Thank you, Your Honor. I agree with Ms.  
22   Laffitte that Richard Boyd and the estate are one in the  
23   same. To the extent there's any concern about that, I  
24   absolutely agree with that.

25           The argument about 62-3-803 applies only to claims that



1 have to be asserted in the probate court. It has nothing to  
2 do with regular common law or statutory claims that are  
3 governed by common law and statutes of limitation. I've  
4 actually litigated in probate court before and claims  
5 against the estate in probate court are barred by that  
6 statute, but claims in common pleas have never been  
7 addressed as being within the scope of that statute. So we  
8 think the statute of limitations argument has no bearing.

9 With reference to the fact that Dr. Napier is  
10 unfortunately dead -- and I had the occasion to meet him.  
11 He was a lovely man. I'm sorry he is deceased. In the  
12 earlier iteration of this lawsuit, Dr. Napier produced to us  
13 two boxes of his e-mails. So we don't have to testify about  
14 what Dr. Napier says, we know what he said. We have copies  
15 of all of his e-mails with all of these Defendants and  
16 others. The dead man statute would only apply if we were  
17 attempting to introduce verbal testimony of what Dr. Napier  
18 said. We don't have to do that. We've got two boxes of his  
19 e-mails, which he produced to us. And I should have said  
20 that in the complaint. I apologize that we didn't.

21 In terms of the civil conspiracy, I would rest on the  
22 arguments that we have made. The e-mails, which are  
23 substantial, Dr. Napier was vigorously involved in the  
24 efforts that we've discussed already to try to shut down the  
25 dental hygienists program, and successfully so.

1           So the statute of limitations is a red herring, Your  
2 Honor. That applies only to claims filed in the probate  
3 court and adjudicable in the probate court. None of these  
4 causes of action would be adjudicable in the probate court  
5 and, therefore, the statute is irrelevant.

6           And I would ask you for the opportunity to provide that  
7 additional law on the successful lobbying efforts, which I  
8 think are incorporated into Ms. Laffitte's argument as well.

9           MS. LAFFITTE: Your Honor, if I might comment, 62-3-803  
10 is applicable. The only property that even the estate would  
11 have is now in probate court. Once you die, anything you  
12 have and you're going after, it comes in probate. And I am  
13 not aware that any civil action, such as this should not  
14 have come through probate. I have seen it before. They  
15 didn't even address it, Your Honor, before today should be  
16 loud and clear they respectfully are wrong.

17           Even if I am wrong and Ms. Ballard is right, and she's  
18 a very bright lawyer and I know that, they still can't  
19 survive UTPA or civil conspiracy based on the law that I  
20 cited to you. When someone is deceased on claims of fraud  
21 and deceit, you cannot come after them. Whatever she may  
22 have gotten from him before my involvement, that won't come  
23 in. I mean, it will be a fight on that because I don't  
24 think any court's going to let it in when he's not here to  
25 clarify or to give any understanding as to what may have

1       been meant.

2               Your Honor, respectfully, we think 62-3-803 is the law  
3       and this claims has to go.

4               Thank you.

5               MS. BALLARD: Your Honor, how long would you give me to  
6       submit that additional law?

7               THE COURT: Ten days.

8               MS. LAFFITTE: What law -- just so I'll know what law  
9       you've asked of her?

10              THE COURT: About the successful lobbying efforts.

11              MS. LAFFITTE: Thank you.

12              THE COURT: Anything else from anyone else?

13              MS. BALLARD: Nothing else from the Plaintiff, Your  
14       Honor. Thank you.

15              MR. MOORE: Nothing from the Association. Thank you,  
16       Your Honor.

17              MR. FLOYD: Nothing from DHEC. Thank you.

18              THE COURT: Okay. I will give Ms. Ballard ten days to  
19       submit that additional case law and file it in a memorandum.  
20       If you will also e-mail it to me or my clerk so that we know  
21       it's done.

22              If anything pops up that any Defendant feels they need  
23       to respond to, then I will give you ten days thereafter to  
24       file a response, but I would ask you, also, to e-mail a copy  
25       of your response to my office so that we know that that is

1       done.

2               After that, I'll get you a decision. Assuming that  
3       this case survives all these motions, then we'll talk about  
4       assigning it to a judge.

5               Thank you.

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CERTIFICATE OF TRANSCRIBER

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

August 14, 2022

Penny M. Johnson  
Penny M. Johnson  
Court Reporter III

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Sep 30 2025**

**SC Court of Appeals**

APPEAL FROM RICHLAND COUNTY  
JOCELYN NEWMAN, CIRCUIT COURT JUDGE

Appellate Case No. 2025-000592

Health Promotion Specialists, LLC, ..... Appellants,

v.

South Carolina Department of Health  
And Environmental Control, The South Carolina  
Dental Association, Dr. Richard E. Boyd,  
As Personal Representative of the Estate of Rocky Napier,  
And one or more John Does, Unidentified current or former  
Agents of South Carolina Department of Health  
And Environmental Control, Defendants,

Of which South Carolina Department of Health  
And Environmental Control is the, .....Respondent.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

s/ Desa Ballard

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