THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

RECORD ON APPEAL
VOLUME I

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CENTER

Win Myat,) Docket No. 2012-CP-43-2030

Plaintiff,)

vs.) **AMENDED CONSENT SCHEDULING ORDER**

Tuomey Regional Medical Center,)

Defendant.)

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SOUTH CAROLINA

Pursuant to the South Carolina Rules of Civil Procedure, the following schedule is established for this case:

1. Discovery shall be completed no later than February 1, 2015. All discovery requests shall be served in time for the responses thereto to be served by this date. *De bene esse* depositions must be completed by the discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve this matter.

2. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, and those relating to the admissibility of evidence at trial, shall be filed on or before February 15, 2015.

3. Mediation, if participation is agreed to by the parties, shall be completed in this case on or before March 1, 2015.

4. Motions in limine must be filed no later than seven business days prior to trial.

5. Attorneys shall meet at least five business days prior to the date of trial for the purpose of exchanging and marking all exhibits to be used at trial for the purpose of resolving any objections to the admissibility of such exhibits, to the fullest extent possible.

6. This case is subject to being called for jury selection and trial after April 1, 2015.

IT IS SO ORDERED.

William Jeffrey Young
Chief Administrative Judge
Third Judicial Circuit

Sumter, South Carolina
2 NOV, 2014

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CENTER

Win Myat,)
)
Plaintiff,)
)
vs:)
)
Tuomey Regional Medical Center,)
)
Defendant.)

Docket No. 2012-CP-43-2030

CONSENT ORDER FOR DATE CERTAIN TRIAL

THIS MATTER came before the Court upon Joint Motion of the parties to set this case for a date certain trial. The case is currently on the trial roster for the week of May 4, 2015. The parties and counsel have conferred with their witnesses and jointly move that the case be set for trial the week of August 24, 2015. The parties' respective consent signature pages follow.

IT IS THEREFORE ordered that this case be set for date certain trial the week of August 24, 2015.

IT IS SO ORDERED.

R. Ferrell Cothran, Jr.
Chief Administrative Judge
Third Judicial Circuit

Sumter, South Carolina
April 30, 2015

WE CONSENT:

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
	)	
Win Myat	)	Case No.: 2012-CP-43-2030
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Tuomey Regional Medical Center	)	**ORDER**
	)	
Defendant.	)	
	)	
	)	
	)	

This matter is before the Court on a number of post-trial motions filed by the Plaintiff, Dr. Win Myat, and the Defendant, Tuomey Regional Medical Center. A hearing on these motions was held on March 8, 2016. Present at the hearing were William R. Padget, Esquire, and Francis M. Hinson, IV, Esquire, Attorneys for the Plaintiff, and David C. Holler, Esquire, Attorney for the Defendant. For the reasons set forth below, the Court denies Defendant's Motions for Directed Verdict and Judgment Notwithstanding the Verdict (JNOV). The Court finds that the Defendant is entitled to protection under the South Carolina Solicitation of Charitable Funds Act (SCFA), which caps tort liability of qualifying "charitable organizations" at the same liability limits imposed by S.C. Code Ann. § 15-78-120, the South Carolina Tort Claims Act ($300,000.00 for a single occurrence of liability). Thus, the jury verdict of $2,500,000 is reduced to $300,000. Further, the Court denies Plaintiff's Motions to Reconsider allowing Defendant to amend its answer and reopen its case.

BACKGROUND AND TRIAL

This is a slip and fall case brought by Dr. Win Myat (Plaintiff), a physician employed by

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Tuomey Regional Medical Center (Defendant). The complaint was filed on October 15, 2012. On April 21, 2014, Tuomey moved for Summary Judgment on liability. Plaintiff's current counsel, William Padget, filed a Notice of Appearance on July 7, 2014.

A consent scheduling order was entered on November 7, 2014, and a mediation report was filed on February 19, 2015. By Order of May 5, 2015, the case was set for a date certain trial on August 24, 2015.

On August 21, 2015, Tuomey moved to amend its Answer to assert the protections of South Carolina Code Section 33-56-180, also known as the Solicitation of Charitable Funds Act (the Act). Plaintiff's initial complaint asserted, and Tuomey's answer alleged, that Tuomey was a charitable organization. Tuomey had previously identified itself as a charitable organization under the Act subject to the limitation of liability under Section 33-56-180 in its discovery responses to Plaintiff. The Court granted the motion to amend, and on August 24, 2015, Defendant filed an Amended Answer, alleging that it qualified for and should receive a cap on liability under the SCFA. On September 8, 2015, Plaintiff filed a motion to reconsider that decision. On September 10, 2015, Plaintiff filed a reply to Tuomey's amended answer.

Prior to trial, and in response to Defendant's motion for summary judgment, Plaintiff stipulated that he would not argue that Tuomey had actual or constructive knowledge of the liquid on the floor and failed to correct the problem, but would proceed to trial solely to prove that the liquid on which Plaintiff slipped, was more likely than not, put on the floor by one of Tuomey's employees.[1] This slip and fall case was tried before a jury beginning August 31, 2016. At the close of Tuomey's case on September 1, 2015, Plaintiff moved for a directed verdict, arguing that Tuomey failed to present evidence that it was a charitable organization entitled to

[1] Defendant Tuomey moved for summary judgment on April 21, 2014, arguing that there was no evidence: (1) that Tuomey had actual or constructive knowledge of the dangerous condition (i.e. the liquid on the floor) and failed to remedy it; or (2) that the dangerous condition was created by one of Tuomey's employees.

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protection under Section 33-56-180. Tuomey immediately moved to reopen its case and requested judicial notice of its 501(c)(3) status and the protections of Section 33-56-180. Tuomey presented evidence and also offered to submit testimony on its 501(c)(3) status at that point in time. On September 2, 2015, the Court granted Tuomey's motion to reopen its case and took the issue of Tuomey's 501(c)(3) status under advisement. On September 11, 2015, Plaintiff moved to reconsider the Court's reopening of the evidence on the issue of 501(c)(3) status.

During the pendency of the trial and because the parties agreed the application of Section 33-56-180 was a question of law for the court and not a question of fact for the jury, the parties agreed to continue with the trial to a jury verdict and thereafter address issues regarding Tuomey's 501(c)(3) status, if necessary, at a later date. Following a jury verdict of $2.5 million on September 2, 2015, the Court allowed Plaintiff to conduct discovery on the issue of Tuomey's 501(c)(3) status and the application of Section 33-56-180.

The court held a status conference on September 29, 2015. At that conference, a motion to compel (filed on September 29, 2015) by Plaintiff was resolved by consent. Following discovery, a hearing was held on March 8, 2016, on the issue of Tuomey's 501(c)(3) status. The Court entertained arguments on all issues pending at that time.

DISCUSSION

I. Motion for Directed Verdict and Judgment Notwithstanding the Verdict

The standard for ruling on a motion for directed verdict is the same as for a motion for judgment notwithstanding the verdict. A judge can grant a directed verdict motion when the evidence is only susceptible of one reasonable inference. *See e.g., Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). A motion for judgment

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notwithstanding the verdict is a renewal of the motion for directed verdict. SCRCP 50(a) and (b).

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015) (citing *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002)). Denying motions for directed verdict and JNOV is proper if more than one inference can be drawn from the evidence presented. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (citing *Vacation Time of Hilton Head Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 332 S.E.2d 781 (Ct. App. 1985)). Additionally, if the evidence yields an ambiguous inference, i.e., one that is in doubt, denying the motion is similarly appropriate. *Id.*

In making its determination, the trial court does not have the "authority to decide credibility issues or to resolve conflicts in the testimony and evidence." *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998). The trial court looks only at the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). A motion for JNOV should only be granted where there exists no evidence to support the jury's verdict. *Reiland* at 634 (citing *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)).

The Supreme Court of South Carolina has held that a motion for directed verdict should only be granted in "rare cases." *Linnen v. Commercial Cas. Co.*, 152 S.C. 450, 150 S.E. 127, 128 (1929). "[U]nder the Scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind

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of a reasonable juror the case should be submitted to the jury for its determination." *Woodle v. Brown*, 223 S.C. 204, 210, 74 S.E.2d 914, 917 (1953).

"A directed verdict on liability is properly denied where there is any evidence, direct or circumstantial, justifying submission of the issue to the jury." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998) (citing *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994). Direct evidence is evidence based on "actual knowledge of the situation and requires no inference by the jury." *State v. Salisbury*, 343 S.C. 520, 525, 541 S.E.2d 247, 249 (2001). On the other hand, circumstantial evidence, also known as indirect evidence, is evidence "based on inference and not on personal knowledge or observation." *Black's Law Dictionary*, Evidence (10th ed. 2014).

> *Indirect* evidence (called by the civilians, *oblique*, and more commonly known as *circumstantial* evidence) is that which is applied to the principal fact, indirectly, or through the medium of other facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference . . . .

Alexander M. Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* 4 (1868) (emphasis in original).

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co.*, 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968).

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Here, prior to the start of trial, Tuomey moved for summary judgment, arguing there was no evidence that: (1) Tuomey had actual or constructive knowledge of the dangerous condition (i.e., liquid on the floor) and failed to remedy it; or (2) the dangerous condition was created by one of Tuomey's employees. In response, Plaintiff stipulated that he would not argue that Tuomey had actual or constructive knowledge of the liquid on the floor and failed to correct the problem, but would proceed to trial solely to prove that the liquid on which Plaintiff slipped was, more likely than not, put on the floor by one of Tuomey's employees.[2] Further, Plaintiff argued that there was ample evidence to show that one of Tuomey's nurses spilled the liquid, and, therefore, summary judgment would be improper.

In a brief and at oral argument, Plaintiff pointed to numerous facts revealed in discovery that, when taken together, created strong circumstantial evidence showing that one of Tuomey's nurses or nurse technicians spilled water on the hospital's floor, thereby creating the dangerous condition that caused Plaintiff to fall and suffer injury. The principle facts revealed in discovery are as follows:

1. On July 6, 2011, at around 5:30 A.M., there was a clear liquid on the floor located adjacent to the same nurses' station where Plaintiff fell. (Depo. of Kathy Sapp, pp. 11-19).

2. The liquid was in a puddle about six to seven inches in diameter. (Depo. of Kathy Sapp, p. 22).

3. Visiting hours at the hospital end at 9:00 P.M. and do not resume until 6:00 A.M. (Depo. of William Whitehouse, p. 22).

4. An ice machine and sink are located in a room near the nurses' station. Visitors are not permitted to use the ice machine or sink, which are only to be used by Defendant's employees. (Depo. of William Whitehouse, p. 13).

[2] A defendant is liable if its employee creates a dangerous condition on its premises resulting in injuries. *Pennington v. Zayre Corp.*, 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

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5. Nurses' duties include delivering ice and water to patients in their hospital rooms. It is the custom and practice of Defendant's nurses to fill cups of ice and water on a cart that is kept in the location where Plaintiff slipped and fell. (Depo. of William Whitehouse, p. 31).

6. It is the nurses' custom and practice to fill the cups of ice and water at around 4:00 A.M. (Depo. of William Whitehouse, p. 31).

7. On the morning of July 6, 2011, Plaintiff slipped and fell in a puddle of clear liquid that was located in the place where nurses had filled cups with ice and water an hour and a half earlier. (Depo. of Kathy Sapp, pp. 11-19, Depo. of William Whitehouse, p. 31).

Additional evidence was presented at trial, comprising a combination of direct and indirect evidence. The following evidence and testimony was presented to the jury:

1. Around 5:30 A.M. on the morning of July 6, 2011, Plaintiff slipped and fell directly beside the nursing station on Unit 3 South of the hospital.

2. Kathy Sapp, an officer working for the South Carolina Department of Corrections, testified that she witnessed Plaintiff's fall, and, thereafter, rushed to assist him.

3. Plaintiff testified that the slip and fall was due to a puddle of water directly beside the nursing station on Unit 3 South on the aforementioned date and time.

4. Following Plaintiff's fall, witnesses observed a puddle of clear liquid beside the nursing station in the exact location where he had slipped. While their testimony as to the size of the puddle differed slightly, both Officer Sapp and Marilyn Wilson (a CNA employed by Defendant) testified that they saw this puddle of clear liquid on the floor at this location.

5. The fall occurred after the close of the hospital's visiting hours, which had ended at 9:00 P.M. the previous evening and were not scheduled to resume again until 6:00 A.M. Thus, at the time when Plaintiff fell, visitors had not been permitted on Unit 3 South for more than eight hours.

6. Mary Yates, former safety director for Defendant, testified as to the hospital's visiting hours and, when shown a written copy of Defendant's hospital policies and procedures, confirmed that a section found on page 3 establishes the policy for visiting hours.

7. Although patients are sometimes allowed to have visitors stay overnight in their rooms, no witness recalled observing any visitors or other non-employees walking in the halls or around the nursing station of Unit 3 South during the early morning hours of July 6, 2011.

8. The only non-employee exceptions were Officer Sapp and her fellow corrections officer, Sergeant James Austin.

9. Officer Sapp testified that neither she nor Sergeant Austin spilled any liquids on the floor during the night/morning at issue, and, like all the other witnesses, testified that she did not recall seeing any visitors or patients on Unit 3 South that evening/morning.

10. Ms. Yates stated that her investigation of the incident did not uncover any evidence of visitors in the area in the hours preceding Plaintiff's fall.

11. Certified Nursing Assistant (CNA) Marilyn Wilson testified that during the night/morning at issue, there were seven hospital employees working on Unit 3 South: four RNs, two CNAs (one of which was her) and one student technician.

12. Nurse Whitehouse, CNA Wilson, and Ms. Yates all testified that per Defendant's policies and procedures, neither patients nor visitors are permitted to be at or around the nurse's station. Thus, by Defendant's own policy and the testimony of its employees, patients and visitors are not allowed to stand, walk, or otherwise be in the area where Plaintiff slipped and fell.

13. A photograph showed two large purple and white signs displayed prominently in the area where Plaintiff fell. These signs stated: "NO PATIENTS OR VISITORS ALLOWED AROUND OR THROUGH THE NURSING STATION."

14. Ms. Yates testified that, even though Defendant's policies and procedures do not allow nurses to have drinks at the nursing station, nurses have been known to violate this policy.

15. Nurse Whitehouse and CNA Wilson testified that the room containing the ice machine and sink is locked with a combination code on the door. Visitors are not permitted to use the ice machine or sink, which are only to be used by hospital employees. In fact, physicians are not even permitted to enter the small room and are not provided with the combination code to the door.

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16. A photograph showed a large red and white sign that was prominently displayed on the door to the room with the sink and ice machine. This sign stated: "Stop! Staff Only."

17. Nurse Whitehouse and CNA Wilson testified that the sink and ice machine are the only sources of water that are located close to the location of the clear liquid on the floor.

18. Nurse Whitehouse and CNA Wilson testified that every morning between the hours of 4:00 A.M. and 5:00 A.M., Defendant's nurses and CNAs use the sink and the ice machine to fill pitchers. These pitchers are then placed on a small cart and wheeled around to the patients on Unit 3 South. Consistent with the staff's custom and practice, this activity took place during the hour immediately preceding Plaintiff's fall.

19. At the time Plaintiff slipped, the cart that Defendant's staff members used to deliver ice and water was located very close to the nursing station. CNA Wilson testified that the nurses' water delivery cart was only about an arm's length from where she saw Plaintiff sitting on the floor immediately following his fall.

20. Hospital employees admitted that water on the floor at that location constituted a dangerous condition.

21. Nurse Whitehouse, who has worked for Defendant since 2009, provided the lay opinion that an employee of the Defendant was the most likely source of the clear liquid.

Considering all the above evidence in the light most favorable to the Plaintiff, more than a scintilla of evidence was presented by which a reasonable jury could conclude that one of Tuomey's agents created a dangerous condition, i.e., that an employee of Tuomey was the most likely source of the liquid on the floor. The evidence, both direct and indirect, is enough for a jury to reasonably determine that, by a preponderance of the evidence, the clear liquid on which Plaintiff slipped and fell was spilled on the floor by an employee of Tuomey.

Tuomey is not entitled to a directed verdict or JNOV, as there was ample evidence to support submitting this case to the jury. Viewing the evidence in the light most favorable to the Plaintiff, as well as all inferences that reasonably can be drawn therefrom, the evidence yields at

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least one inference that the source of the liquid was an employee of the Tuomey. Accordingly, Tuomey's Motions for Directed Verdict and JNOV are denied.

II. Motion to Reconsider Amendment

Rule 15 of the South Carolina Rules of Civil Procedure governs the amendments of pleadings, which provides in pertinent part:

> 15(a). Amendments. A party may amend his pleading once as a matter or course at any time before or within 30 days after a responsive pleading is served or, if the pleadings is one to which no 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.

SCRCP 15(a). It is well established that a motion to amend is addressed to the circuit court's sound discretion, and the party opposing the motion has the burden of establishing prejudice. *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014). Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action. *Id.*

Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and "freely given when justice so requires and does not prejudice any other party." SCRCP 15(a). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005). The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 22-23, 431 S.E.2d 587, 590 (1993). "This rule strongly favors amendments and the court is encouraged to freely grant leave

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to amend." *Parker* at 286, 607 S.E.2d at 717 (citing *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct.App.1987)).

A charitable corporation is defined as "a nonprofit corporation that is dedicated to benevolent purposes and thus entitled to special tax status under the Internal Revenue Code." *Black's Law Dictionary*, Corporation (10th ed. 2014).

Here, in his complaint dated October 12, 2012, Plaintiff alleged Tuomey "is an eleemosynary corporation." Complaint, p.1. In the amended complaint dated November 2, 2012, Plaintiff again alleged that Tuomey "is an eleemosynary corporation organized and existing under the laws of the State of South Carolina." Amended Complaint, p.1. Tuomey, answering the amended complaint of the Plaintiff, admitted to paragraph two of the amended complaint, which contained the allegation that it was an eleemosynary corporation. Answer, p.1.

In its motion to amend, Tuomey stated: "Upon information and belief, Plaintiff has at all times recognized that the charitable entity cap applied to his claim, including without limitation, through the time period in which he demanded $300,000 during a February 18, 2015 mediation." Motion to Amend Answer, p.3. Additionally, Tuomey filed an affidavit of David C. Holler, which stated the following information pertaining to the $300,000 cap:

1. The case was filed by attorney Robert B. (Sam) Phillips. Sam and I had numerous conversations about the $300,000 statutory limitation of Plaintiff's claim during our initial conversation as well as during conversations leading up to Plaintiff's discovery deposition.

2. The case initially appeared on the ADR roster with a mediation deadline of August 29, 2013. Sam Phillips and I agreed to place the case on a scheduling order with discovery deadlines. The statutory cap was discussed during these exchanges.

3. On May 9, 2014, I took Plaintiff's discovery deposition. At the conclusion of his discovery deposition, Sam Phillips and I discussed this case for nearly two (2) hours. We discussed the statutory cap of $300,000 and the fact that no physician has taken Plaintiff out of work. We discussed that

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regardless of the outcome of this case, Plaintiff would have only a limited recovery that would not cover his losses.

4. On June 22, 2014, the case was placed on the docket pursuant to the scheduling order. At some point in time, Bill Padget contacted me indicating that Sam Phillips had left his law firm. Bill asked that the case be continued based upon his recent involvement. I agreed. During our initial conversation, and during several subsequent conversations, the statutory cap of $300,000 was discussed.

5. On September 10, 2014, Tuomey's discovery responses identified the liability insurance carrier and policy numbers "with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the South Carolina Solicitation of Charitable Funds Act (Section 33-56-180)."

6. On February 18, 2015, the case was mediated by Richard Hinson. The statutory cap was discussed extensively and Plaintiff's opening demand was the statutory cap of $300,000. The case was not settled.

7. On Friday, August 21, 2015, I reviewed the Answer in preparation for trial and immediately realized that I had failed to assert the statutory cap for charitable entities. I immediately called Plaintiff's counsel and asked for his consent to amend the answer. Bill Padget indicated that he was aware that the defense had not been pled but was not in a position to consent.

8. I immediately thereafter placed a conference call to the trial judge and Bill Padget indicating that I would be moving to amend the answer. The trial judge was advised generally of our respective positions regarding the motion to amend and how it may affect the trial of the case set for August 24, 2015. During this conversation with the trial judge, Bill Padget indicated that he was not aware that the statutory cap had not been pled until sometime after the mediation held on February 18, 2015.

9. At all times during my discussions with Plaintiff's counsel, it has been stated and understood that Tuomey was entitled to the statutory cap for charitable entities. At no time has anyone challenged my statements that the statutory cap would apply. In the absence of such a challenge, I did not have any reason to review the Answer prior to my trial preparations.

Affidavit of David C. Holler.

Thus, this Court cannot find that Plaintiff satisfied his burden of establishing prejudice. On the contrary, Plaintiff's complaint coupled with the affidavit of David C. Holler show that the Plaintiff was on notice of the statutory cap and had ample opportunity to refute it. Therefore,

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this Court finds that justice was furthered by allowing Tuomey to amend its answer and that Plaintiff was not prejudiced as a result of the amendment.

III. Motion to Reconsider Reopening

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." *Brenco v. S.C. Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). "A trial judge enjoys considerable latitude and discretion in these matters." *Brown v. La France Indus.*, 286 S.C. 319, 325, 333 S.E.2d 348, 351 (Ct. App. 1985). It is an abuse of discretion to reopen a case where reopening will prejudice the non-moving party. *See Perry v. Smalls*, 308 S.C. 259, 262, 417 S.E.2d 611, 613 (Ct. App. 1992) (noting that because there was no prejudice to the opposing party, it was not error to reopen the case).

Here, at the close of Tuomey's case on September 1, 2015, Plaintiff moved for a directed verdict based upon a lack of evidence that Defendant was a charitable organization entitled to protections under South Carolina Code Section 33-56-180. Tuomey immediately moved to reopen its case. On September 2, 2015, the Court granted Tuomey's motion to reopen its case and took the issue of Tuomey's 501(c)(3) status under advisement.

Throughout the trial, this Court was under the impression that the question of Tuomey's 501(c)(3) status was one to be decided by the court and not for the jury. Additionally, there was evidence presented in support of Tuomey's motion to amend its answer that lends further credence to the position that Plaintiff was not prejudiced by this Court's decision to allow Tuomey to reopen its case. Therefore, this Court finds that the Plaintiff was not prejudiced by the decision to reopen this case because the matter was a question for the court and Plaintiff had adequate notice of the issue.

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IV. Solicitation of Charitable Funds Act

The South Carolina Solicitation of Charitable Funds Act (SCFA) caps tort liability of qualifying "charitable organizations" at the same liability limits imposed by South Carolina Code Section 15-78-120, also known as the South Carolina Tort Claims Act ($300,000.00 for a single occurrence of liability). S.C. Code Ann. § 33-56-180(A). The SCFA provides both general and specific definitions of a "charitable organization." The SCFA provides a general definition in Section 33-56-20: Subsection 33-56-20(1)(a)(I) provides that "charitable organization" means a person "determined by the Internal Revenue Service to be a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code." The Charitable Funds Act provides a specific definition in Section 33-56-170(1): "Charitable organization" means any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or (501)(d) of Title 26 of the United States Code, as amended."

"The construction of a statute is a judicial function and responsibility." *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) (quoting *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011)). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "When the meaning of words is so plain and obvious, the courts cannot speculate on the intention. To do so would be an

assumption of legislative power." *Indep. Ins. Co. v. Indep. Life & Acc. Ins. Co.*, 218 S.C. 22, 34, 61 S.E.2d 399, 405 (1950).

In the instant case, the Defendant asserts the definitions of "charitable organization" in Section 33-56-20 and Section 33-56-170 are synonymous and consistent with each other. Defendant argues that the Internal Revenue Service is the sole determiner of 501(c)(3) tax status based on the plain and ordinary meaning of the two definitions. Plaintiff, on the other hand, asserts the removal of the term "determined" from Section 33-56-170 signals legislative intent that "charitable organization" not be synonymous with the definition found in Section 33-56-20. Plaintiff further asserts that in construing the provisions of Section 33-56-170, qualifying as a charitable organization eligible for protections of a cap on its liability is not wholly dependent on whether the organization has received an IRS determination of tax-exempt status. Rather, the proper inquiry is whether the organization meets the provisional requirements of an organization that is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.

Defendant urges the Court to defer to the IRS to make the determination as to whether it qualifies and continues to qualify for the protections of Section 33-56-170. In doing so, Defendant relies on tax assessment cases from the federal courts to support its position that only the IRS has the authority to revoke or rescind its tax exempt status. Conversely, Plaintiff maintains that the state statute requires the Court to conduct an analysis to determine whether the entity qualifies for the protections of the SCFA by reference and incorporation of Section 501(c)(3) of Title 26 of the U.S. Code. The plain language of the statue, Plaintiff argues, dictates that the qualification for the protections of the SCFA is a legal determination that must be made by this Court.

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Plaintiff argues that even though this Court does not have the authority to revoke 501(c)(3) status, this Court does have the power to decline application of the statutory limit on liability if it finds that the Defendant has failed to meet the criteria necessary to qualify as a 501(c)(3) corporation. Specifically, Plaintiff asserts that the Defendant should not be allowed to derive the benefits of the statutory cap because Tuomey Regional Medical Center permitted its earnings or assets to inure to the benefit of a private individual.

Protections under the Charitable Funds Act are premised on an organization's eligibility as a 501(c)(3) under federal law. Unless operating exclusively for 501(c)(3) purposes, there is no longer a charitable purpose entitling that organization to the protections of the Charitable Funds Act. This Court agrees with the Plaintiff's contention that if an organization is acting in a manner inconsistent with its stated charitable purposes that would invalidate its 501(c)(3) status, this Court has the authority to not permit the organization to avail itself of the protections of the SCFA.

However, the Court finds nothing that would support a finding that Tuomey Regional Medical Center acted in a manner inconsistent with its stated charitable purpose. The Court is unaware of any evidence of a challenge by any citizen of Sumter County that citizens were declined medical care based on ability to pay. Further, the Court is not aware of any action taken by the IRS to revoke Tuomey's 501(c)(3) status as a result of earnings or assets inuring to the benefit of a private individual or any other activity that may be inconsistent with 501(c)(3) status. Tom Moran, tax counsel for Tuomey Regional Medical Center, testified that at the date of the injury—July 6, 2011—and at the date of the final hearing in this matter—March 8, 2016—Tuomey met both the general and specific definitions of "charitable organization" found in

Section 33-56-20 and Section 33-56-170. The Court finds nothing that would refute Mr. Moran's testimony.

Defendant was allowed to reopen its case to determine whether it was, at the time of the injury, a 501(c)(3) corporation as determined by the Internal Revenue Service. The Court finds that Tuomey was a 501(c)(3) corporation exempt from taxation at the time of the Plaintiff's injury. The Court finds that Tuomey's 501(c)(3) status qualifies it as a "charitable organization" under the SCFA to which the statutory limit on liability applies. Therefore, the Court applies the statutory cap to the jury verdict in this case, thereby reducing the verdict from $2,500,000 to $300,000.

CONCLUSION

Based on the record and the argument presented, the Court denies Tuomey's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict. The Court finds that the Defendant is entitled to protection under the SCFA, which caps tort liability of qualifying charitable organizations at the same liability limits imposed by the South Carolina Tort Claims Act. Thus, the jury verdict of $2,500,000 is reduced to $300,000. Further, the Court denies Plaintiff's Motions to Reconsider allowing Defendant to amend its answer and reopen its case.

AND IT IS SO ORDERED.

Honorable R. Ferrell Cothran, Jr.

April ____, 2016.

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Sumter Common Pleas

Case Caption: Win Myat VS Tuomey Healthcare System

Case Number: 2012CP4302030

Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)

Win Myat,) CIVIL ACTION COVERSHEET
Plaintiff(s))
2012 OCT 15 AM 11:25 2012-CP - 43- 2030
vs.)
JA... CAMPBELL
CLERK OF COURT
Tuomey Healthcare System. SUMTER COUNTY, S.C.
Defendant(s))

Submitted By: Robert B. (Sam) Phillips, Esquire
Address: Post Office Box 1799, Columbia, SC 29202

SC Bar #: 16954
Telephone #: 803-765-2935
Fax #: 803-252-0786
Other:
E-mail: sphillips@finkellaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** October 12, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
) Civil Action No. 2012-CP-43-2030

2012 OCT 15 AM 10:25
JANE CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Win Myat,

Plaintiff,

vs.

Tuomey Healthcare System

Defendant.

SUMMONS
(Jury Trial Demanded)

TO: THE DEFENDANT 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 the said pleading upon the subscribers at their offices, 1201 Main Street, Suite 1800, Post Office Box 1799, Columbia, South Carolina 29202, within thirty (30) days after service hereof, exclusive of the day of such 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.

FINKEL LAW FIRM, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935

Robert B. (Sam) Phillips
Attorney for Plaintiff

Columbia, South Carolina
October 12, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
		2012 OCT 1 THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	Civil Action No.
		JAM... CAMPBELL CLERK OF COURT SUMTER COUNTY, S.C.
Win Myat,	)	2012-CP-43-230
Plaintiff,	)	
vs.	)	**COMPLAINT** (Jury Trial Demanded)
Tuomey Healthcare System	)	
Defendant.	)	

The Plaintiff, Win Myat, would allege as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Dr. Win Myat, M.D. (hereinafter "Dr. Wyat" or "Plaintiff"), is a resident of Sumter County, South Carolina.

2. Defendant Tuomey Regional Medical Center (hereinafter "Tuomey" or "Defendant"), is an eleemosynary corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Sumter County, South Carolina.

3. Upon information and belief, Tuomey operates a 266-bed hospital facility at 129 N. Washington Street in Sumter, South Carolina that provides imaging, laboratory, subacute care, surgery, pediatric, infectious disease, oncology, pulmonary, renal and rehabilitation services to the greater Sumter community. Hereinafter the Washington Street facility will be referred to as the "Hospital."

FACTUAL BACKGROUND

4. Dr. Myat is a board certified internist and infectious disease physician. He specializes in the treatment of infectious diseases.

5. In April of 2008, Dr. Myat began treating infectious disease patients at the Hospital pursuant to an agreement between the parties.

6. On July 6, 2011, Dr. Myat slipped and fell in a puddle of water that was adjacent to the nurses' station in the nephrology section of the Hospital.

7. Upon information and belief, the puddle of water was the result of spilled water and/or ice by Tuomey' employees who were working at the Hospital on July 6, 2011.

8. As the result of the July 6th fall, Dr. Myat was treated by physicians at the Hospital for injuries to his hip. Despite this medical treatment, Dr. Myat is permanently disabled and unable to perform the services required of an infectious medicine physician.

FOR A FIRST CAUSE OF ACTION
(Premises Liability)

The allegations of the foregoing paragraphs are incorporated herein as set forth verbatim.

9. Dr. Myat entered the Hospital during the early morning hours of July 6, 2011 with the express or implied permission of Tuomey for the purpose of providing medical services to Tuomey's patients located in several different areas (floors) of the Hospital.

10. Tuomey owed Dr. Myat a duty of care to create and maintain a work environment that was free of dangers and risks to Dr. Myat.

11. Tuomey owed Dr. Myat a duty of care to train and supervise its employees and agents as to safety precautions that would warn of or eliminate unreasonable risks at

the Hospital.

12. Tuomey owed Dr. Myat a duty of care to discover dangers, risks and take safety precautions to warn of or eliminate unreasonable risks at the Hospital.

13. Tuomey owed Dr. Myat a duty to exercise care for his safety including to warn Mr. Myat of any latent dangers of which Tuomey had knowledge or should have had knowledge.

14. Tuomey owed Dr. Myat a duty to exercise care for his safety and well-being including to warn Dr. Myat of any obvious dangers which he may encounter despite their obvious nature which may not be discovered due to distraction.

15. Tuomey owed Dr. Myat a duty to exercise care for his safety and well-being including to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey may have previously warned any other invitee.

16. Tuomey owed Dr. Myat a duty to exercise care for his safety including warning him of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Dr. Myat should have anticipated.

17. Tuomey owed Dr. Myat a duty to exercise care to ensure precautions were taken to protect against harm, including but not limited to, such precautions as requiring adequate lighting, providing materials to easily clean up spills, requiring supervisory personnel to oversee the distribution of water and ice to patients or have employees to work in pairs and have one employee follow-up behind the work of another.

18. All of the above outlined duties are non-delegable duties stemming from the Tuomey's exclusive ownership and control of the Hospital and the nature of the conditions and work to be performed.

19. Tuomey breached these duties as outlined above and were guilty of negligence, gross negligence, recklessness, and willful and wanton disregard for the safety of Dr. Myatt in one or more of the following particulars:

a. In failing to discover risks and hazards, and take safety precautions to warn of or eliminate unreasonable risks which existed at the Hospital, such as slipping on spilled water and/or ice.

b. In failing to warn Dr. Myat of any latent dangers of which Tuomey had knowledge or should have had knowledge, such as the danger of slipping and falling on spilled water and/or ice.

c. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter while working at the Hospital despite their obvious nature which Dr. Myat may not discover due to distraction and/or the conditions under which he was required to work, such as the danger of slipping and falling on spilled water and/or ice while working at the Hospital.

d. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey may have previously warned any other invitee.

e. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey should have anticipated, such as the spilling of water and/or ice in poorly lit areas that are the subject of extensive foot traffic.

f. In failing to ensure reasonable precautions were taken to ensure against harm, including but not limited to, such precautions as to keep the floors around work stations clean, dry and free of substances that cause slips and falls and having one employee oversee the actions of another.

g. In failing to properly supervise the activities ongoing at the Hospital and ensure that reasonable safety precautions were taken to ensure Dr. Myat's safety.

20. As a direct and proximate result of Tuomey's negligent, grossly negligent, reckless, willful and wanton conduct, as set forth above, Dr. Myat has suffered actual and consequential damages, and is entitled to such damages, in addition to punitive damages,

as may be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence/Negligent Supervision)

The allegations of the foregoing paragraphs are incorporated herein as set forth verbatim.

21. Tuomey had a duty to ensure the safety of Dr. Myat and to properly supervise the operation of its Hospital and the conduct of its employees and agents.

22. This duty to Dr. Myat was non-delegable as it stems from Tuomey's exclusive ownership and control of the Hospital, and the dangerous and hazardous nature of the work performed therein.

23. Tuomey breached this duty to Dr. Myat by failing to properly supervise the activities ongoing at the Hospital and ensure that reasonable safety precautions were taken to protect Dr. Myat's safety.

24. As a direct and proximate result of Tuomey's negligent, grossly negligent, reckless, willful and wanton conduct, as set forth above, Dr. Myat:

a. Suffered, and continues to suffer, severe physical pain;

b. Suffered, and continues to suffer, substantial physical and mental pain and suffering to his head, neck, legs, arms and hip as a result of slipping and falling;

c. Suffered injuries to his hip requiring extensive medical treatment;

d. Suffered severe physical trauma resulting in an impaired ability to walk and/or stand without suffering intense pain;

e. Incurred, and continues to incur, and will in the future incur extensive medical bills for his reasonable and necessary treatment;

f. Was subjected, and continues to be subjected to, potent and powerful drugs and medications;

g. Suffered, and continues to suffer, loss of enjoyment of life.

h. Suffered, and continues to suffer, permanent injury and impairment.

i. Suffered, continues to suffer, and will in the future suffer lost wages and income.

25. As a result of the injuries sustained due to Tuomey's negligent, grossly negligent, reckless, willful, and wanton conduct, Plaintiff is entitled to receive actual, consequential, and punitive damages in the amount as a jury may determine.

RELIEF REQUESTED

WHEREFORE, the Plaintiff prays that the Court hold the Defendant liable for the conduct complained of herein; to enter judgment against the Defendant and in favor of Plaintiff; and to award the following relief:

a. Actual damages, consequential damages, and punitive damages in an amount provable at trial.

b. For other such relief as this Court deems just and equitable.

FINKEL LAW FIRM, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935

Robert B. (Sam) Phillips
S.C. Bar #16954
Attorney for Plaintiff

Columbia, South Carolina
October 12, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	Civil Action No. 2012-CP-43-2030
	)	
Win Myat,	)	
	)	
Plaintiff,	)	
	)	**AMENDED SUMMONS**
vs.	)	(Jury Trial Demanded)
	)	
Tuomey Regional Medical Center,	)	
	)	
Defendant.	)	

FILED
2012 NOV -5 PM 12:56
JANET S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said pleading upon the subscribers at their offices, 1201 Main Street, Suite 1800, Post Office Box 1799, Columbia, South Carolina 29202, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

FINKEL LAW FIRM, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935

Robert B. (Sam) Phillips
Attorney for Plaintiff

Columbia, South Carolina
November 2, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	Civil Action No. 2012-CP-43-2030
Win Myat,	)	
Plaintiff,	)	**AMENDED COMPLAINT**
vs.	)	(Jury Trial Demanded)
Tuomey Regional Medical Center,	)	
Defendant.	)	

RECORDED
2012 NOV -5 PM 12:05
JANET CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

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4. Dr. Myat is a board certified internist and infectious disease physician. He specializes in the treatment of infectious diseases.

5. In April of 2008, Dr. Myat began treating infectious disease patients at the Hospital pursuant to an agreement between the parties.

6. On July 6, 2011, Dr. Myat slipped and fell in a puddle of water that was adjacent to the nurses' station in a section of the Hospital known as "3 South."

7. Upon information and belief, the puddle of water was the result of spilled water and/or ice by Tuomey' employees who were working at the Hospital on July 6, 2011.

8. As the result of the July 6th fall, Dr. Myat was treated by physicians at the Hospital for injuries to his left knee and lower back. Despite this medical treatment, Dr. Myat is permanently disabled and unable to perform the services required of an infectious medicine physician.

FOR A FIRST CAUSE OF ACTION
(Premises Liability)

The allegations of the foregoing paragraphs are incorporated herein as set forth verbatim.

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10. Tuomey owed Dr. Myat a duty of care to create and maintain a work environment that was free of dangers and risks to Dr. Myat.

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and agents as to safety precautions that would warn of or eliminate unreasonable risks at the Hospital.

12. Tuomey owed Dr. Myat a duty of care to discover dangers, risks and take safety precautions to warn of or eliminate unreasonable risks at the Hospital.

13. Tuomey owed Dr. Myat a duty to exercise care for his safety including to warn Mr. Myat of any latent dangers which Tuomey had knowledge or should have had knowledge of.

14. Tuomey owed Dr. Myat a duty to exercise care for his safety and well-being including to warn Dr. Myat of any obvious dangers which he may encounter despite their obvious nature which may not be discovered due to distraction.

15. Tuomey owed Dr. Myat a duty to exercise care for his safety and well-being including to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey may have previously warned any other invitee.

16. Tuomey owed Dr. Myat a duty to exercise care for his safety including warning him of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Dr. Myat should have anticipated.

17. Tuomey owed Dr. Myat a duty to exercise care to ensure precautions were taken to protect against harm, including but not limited to, such precautions as requiring adequate lighting, providing materials to easily clean up spills, requiring supervisory personnel to oversee the distribution of water and ice to patients or have employees to work in pairs and have one employee follow-up behind the work of another.

18. All of the above outlined duties are non-delegable duties stemming from the Tuomey's exclusive ownership and control of the Hospital and the nature of the conditions

and work to be performed.

19. Tuomey breached these duties at outlined above and were guilty of negligence, gross negligence, recklessness, and willful and wanton disregard for the safety of Dr. Myatt in one or more of the following particulars:

a. In failing to discover risks and hazards, and take safety precautions to warn of or eliminate unreasonable risks which existed at the Hospital, such as slipping on spilled water and/or ice.

b. In failing to warn Dr. Myat of any latent dangers of which Tuomey had knowledge or should have had knowledge, such as the danger of slipping and falling on spilled water and/or ice.

c. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter while working at the Hospital despite their obvious nature which Dr. Myat may not discover due to distraction and/or the conditions under which he was required to work, such as the danger of slipping and falling on spilled water and/or ice while working at the Hospital.

d. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey may have previously warned any other invitee.

e. In failing to warn Dr. Myat of any obvious dangers which Dr. Myat may encounter despite their obvious nature which Tuomey should have anticipated, such as the spilling of water and/or ice in poorly lit areas that are the subject of extensive foot traffic.

f. In failing to ensure reasonable precautions were taken to ensure against harm, including but not limited to, such precautions as to keep the floors around work stations clean, dry and free of substances that cause slips and falls and having one employee oversee the actions of another.

g. In failing to properly supervise the activities ongoing at the Hospital and ensure that reasonable safety precautions were taken to ensure Dr. Myat's safety.

20. As a direct and proximate result of Tuomey's negligent, grossly negligent, reckless, willful and wanton conduct, as set forth above, Dr. Myat has suffered actual and

consequential damages, and is entitled to such damages, in addition to punitive damages, as may be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence/Negligent Supervision)

The allegations of the foregoing paragraphs are incorporated herein as set forth verbatim.

21. Tuomey had a duty to ensure the safety of Dr. Myat and to properly supervise the operation of its Hospital and the conduct of its employees and agents.

22. This duty to Dr. Myat was non-delegable as it stems from Tuomey's exclusive ownership and control of the Hospital, and the dangerous and hazardous nature of the work performed therein.

23. Tuomey breached this duty to Dr. Myat by failing to properly supervise the activities ongoing at the Hospital and ensure that reasonable safety precautions were taken to protect Dr. Myat's safety.

24. As a direct and proximate result of Tuomey's negligent, grossly negligent, reckless, willful and wanton conduct, as set forth above, Dr. Myat:

a. Suffered, and continues to suffer, severe physical pain;

b. Suffered, and continues to suffer, substantial physical and mental pain and suffering due to the injury in both legs, both hips and his lower back as a result of slipping and falling;

c. Suffered injuries to his knee requiring extensive medical treatment;

d. Suffered severe physical trauma resulting in an impairment of his gait, range of motion and ability to walk and stand without suffering intense pain;

e. Incurred, and continues to incur, and will in the future incur extensive medical bills for his reasonable and necessary treatment;

f. Was subjected, and continues to be subjected to, potent and powerful drugs and medications;

g. Suffered, and continues to suffer, loss of enjoyment of life.

h. Suffered, and continues to suffer, permanent injury and impairment.

i. Must purchase his own medical insurance now and in the future.

j. Suffered, and will continue to suffer, lost wages and income.

25. As a result of the injuries sustained due to Tuomey's negligent, grossly negligent, reckless, willful, and wanton conduct, Plaintiff is entitled to receive actual, consequential, and punitive damages in the amount as a jury may determine.

RELIEF REQUESTED

WHEREFORE, the Plaintiff prays that the Court hold the Defendant liable for the conduct complained of herein; to enter judgment against the Defendant and in favor of Plaintiff; and to award the following relief:

a. Actual damages, consequential damages, and punitive damages in an amount provable at trial.

b. For other such relief as this Court deems just and equitable.

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Robert B. (Sam) Phillips
S.C. Bar #16954
Attorney for Plaintiff

Columbia, South Carolina
November 7,2012

STATE OF SOUTH CAROLINA,) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER.) DOCKET NO. 2012-CP-43-2030

RECORDED
2013 JAN 18 PM 2:13
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Win Myat,

Plaintiff,

-vs-

Tuomey,

Defendant.

ANSWER
(Jury Trial Demanded)

Defendant Tuomey, answering the Amended Complaint of the Plaintiff, would respectfully show:

1. Defendant denies each and every allegation of the Amended Complaint not hereinafter specifically admitted, qualified, or explained.

For the First Defense

2. Paragraphs one, two, three, four, and five are admitted.

3. Upon information and belief, Plaintiff fell at the approximate time, date and location set forth in paragraph six. All other allegations of paragraph six are specifically denied.

4. Paragraph seven is denied.

5. Paragraph eight is denied except to the extent that Plaintiff has, upon information and belief, received some medical treatment. All other allegations of paragraph eight are specifically denied.

6. Paragraphs nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen are denied. Plaintiff's presence on Defendant's property was for the primary benefit of Plaintiff, a physician practicing medicine on patients in the hospital, and is therefore an invitee.

DCH
#1

7. Paragraphs nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, and twenty-five are denied.

For a Second Defense

8. Defendant moves to dismiss the amended complaint. Rule 12(b)(1), *SCRCP*. Plaintiff is an employee as defined by the laws of the workers' compensation act, and thus his claim is barred by *South Carolina Code* § 42-1-540.

For a Third Defense

9. Plaintiff's damages, if any, were caused by his own negligence in failing to keep a proper lookout, in failing to take notice of open and obvious conditions, in failing to keep himself under proper control, in failing to wear appropriate protective attire, and in otherwise acting as a reasonable person under the attending circumstances.

10. Plaintiff is barred from recovery pursuant to the doctrine of comparative negligence.

11. Plaintiff's recovery, if any, shall be proportionally reduced pursuant to the doctrine of comparative negligence.

For the Fourth Defense

12. Plaintiff's damages, if any, were caused by an unavoidable accident or occurrence.

13. Defendant demands trial by jury.

WHEREFORE, Defendant, having fully answered, prays the amended complaint be dismissed, including without limitation, for lack of subject matter jurisdiction, for the costs in defending this matter, and for such other and further relief as this Court deem necessary and proper.

Signature on Following Page

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, L.L.C.

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ATTORNEY FOR DEFENDANT

January 16, 2013

#3

STATE OF SOUTH CAROLINA,)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER.) DOCKET NO. 2012-CP-43-2030

Win Myat,)
Plaintiff,)
)
-vs-)
)
Tuomey,)
Defendant.)
)

RECORDED
2015 AUG 21 PM 4:14
CLERK OF COURT
SUMTER COUNTY, S.C.

MOTION TO AMEND ANSWER UNDER RULE 15, *SCRCP*

Defendant respectfully moves to amend its Answer to assert the defenses of *South Carolina Code* § 33-56-180. Tuomey is a non-profit corporation.

This is a slip and fall case. Plaintiff is a physician specializing in infectious disease and was rounding patients at Tuomey when he was injured. Complaint, p. 2. On July 6, 2011, Plaintiff slipped on water and fractured his left knee cap. Id. Plaintiff underwent surgical repair and physical therapy. Plaintiff claims he is totally disabled. Id.

Plaintiff, through counsel Robert B. (Sam) Phillips, filed a complaint on October 15, 2012. An amended complaint was filed on November 2, 2012. Tuomey answered on January 16, 2013. Counsel for Tuomey did not plead *South Carolina Code* § 33-56-180 in its initial answer.

Amendments of pleadings are controlled by Rule 15, *SCRCP*, which provides in pertinent part:

> 15(a). Amendments. 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 served or, if the pleading is one to which no 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**. (Emphasis added).

A motion to amend is addressed to the sound discretion of the trial judge. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004); *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462 (Ct.App.2004). Leave to amend pleadings pursuant to Rule 15, *SCRCP*, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999); *Lewis-Davis*, 360 S.C. at 232, 599 S.E.2d at 465. The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993); *Pruitt*, 330 S.C. at 489, 499 S.E.2d at 253. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987). See also Parker v Spartanburg Sanitary Sewer Dist, 362 S.C. 276, 607 S.E2d 711 (Ct. App. 2005)(holding the statutory caps under the Tort Claims Act are not an affirmative defense).

In *James v Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1999), the Court of Appeals denied a charitable entity's motion to amend its answer made after a jury verdict. In *James*, the Court recognized that "amendments under South Carolina Rule 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the evidence presented at trial." *James*, 331 S.C. at 285-86. *James* does not apply here because Tuomey's motion is made before trial.

On the issue of prejudice, the *James* court determined the "failure to raise its charitable status ... affected both parties to the action and the manner in which the case was tried to the jury.

James, 331 S.C. at 283. Because "allowing the amendment would have prejudiced the Jameses," the charitable entity's motion to amend was denied. *James*, 331 S.C. at 286. In this case, the parties prepared and mediated the case with the understanding the statutory cap applies. See Holler affidavit. No trial has yet occurred. No party will suffer prejudice as a result of the requested amendment.

Upon information and belief, Plaintiff has at all times recognized that the charitable entity cap applied to his claim, including without limitation, through the time period in which he demanded $300,000 during a February 18, 2015 mediation. See Holler affidavit. At no time has Plaintiff challenged Tuomey's initial and persistent assertion that the claim was limited to the $300,000 statutory cap. Id. Defendant submits that amendment "shall be freely given when justice so requires and does not prejudice any other party." Rule 15. This motion is based upon the attached affidavit, such other matters as may be brought to the attention of the court, and the laws of the State of South Carolina. Counsel for Defendant asserts that he has consulted with opposing counsel prior to no avail. Rule 11, SCRCP. You are invited to appear and participate as you deem necessary and proper.

For the foregoing reasons, Tuomey respectfully requests leave to amend its Answer to assert *South Carolina Code* § 33-56-180 as a defense.

Respectfully submitted,

LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.

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August 21, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) Docket No.: 2012-CP-43-2030

2015 SEP 18 PM 2:41

JAMES S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Win Myat,

Plaintiff,

vs.

Tuomey Regional Medical Center,

Defendant.

PLAINTIFF'S MOTION AND MEMORANDUM TO RECONSIDER DEFENDANT'S MOTION TO AMEND ITS ANSWER

Plaintiff, Win Myat, by and through his undersigned counsel, submits this motion and memorandum requesting that the Court reconsider it order granting Defendant Tuomey Regional Medical Center's motion to amend its answer. Plaintiff requests that the Court deny Defendant's motion to amend its pleading.

ISSUES ARGUMENT

For all the reasons set forth previously, Plaintiff has been prejudiced by the Defendant's tardy amendment to include a new defense in its Answer. This prejudice was further evidenced by the Defendant, after having rested its case, moved to reopen its case and proffer an entirely new witness (never previously identified) and proffer new documents (never provided in discovery) in an attempt to meet its burden of proving that it entitled to receive the protections set forth in S.C. Code § 33-56-180.

Paragraph one of the Court's Amended Consent Scheduling Order required:

> Discovery **shall** be completed no later than February 1, 2015. **All discovery** requests shall be served in time for the responses thereto to be served by this date. *De bene esse* depositions must be completed by the discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve this matter. (*emphasis added*)

Despite this order requiring all discovery to be completed seven months prior, and despite the trial having commenced, and despite the Defense having rested its case, Defense has now asked to proffer entirely new evidence to prove the statutory defense that it could have raised back in January of 2013. This chain of events underscores the prejudice to Plaintiff.

As previously raised, there are four principle ways in which the Plaintiff would be prejudiced, any one of which should preclude an untimely amendment to Defendant's answer. The importance and prejudice of the first reason has only been highlighted and emphasized by the presentation of new evidence coming after Defendant rested its case.

(1) As protection under the Charitable Immunity Act was never pled as an affirmative defense, Dr. Myat did not conduct any discovery to determine if Defendant Regional Medical Center presently qualifies as a charitable organization. There are very specific requirements one must meet in order to qualify as a charitable organization and receive the corresponding benefits and protections. By way of example, missteps in the amount of compensation provided to officers and board members can prevent an organization from qualifying as a 501(c)(3) nonprofit organization and disqualify the business from the protections offered by S.C. Code Ann. § 33-56-180. Relying on Defendant's Answer, as any plaintiff surely has a right to do, Dr. Myat has conducted no such discovery on this topic and would therefore be prejudiced if leave to amend the Answer is granted.

(2) Similar to facts set forth James v. Lister, 331. S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998), Dr. Myat did not look to name an individual employee or prepare to prove gross negligence at trial. Had the cap been pled, Dr. Myat could have used the discovery process to vigorously seek to identify the employee who spilled water/ice and failed to clean it up. Identifying such an employee would have allowed Dr. Myat to name the employee individually and prove his/her gross

negligence, thereby allowing Dr. Myat an opportunity to recover beyond the limits of the cap. As it is now, it is simply too late to conduct additional discovery on this topic. Further, as witnesses' memories fade over time, the chances of Dr. Myat identifying the responsible employee are slim to none, given that more than four years has passed since the event at issue.

(3) In part because he believed his tort claim would not be capped, Dr. Myat did not pursue any potential worker's compensation claim he may have had. Defendant Tuomey asserted a possible statutory employee defense proclaiming as a second defense in both its initial Answer and its Amended Answer:

> Defendant moves to dismiss the amended complaint. Rule 12(b)(1), SCRCP. Plaintiff is an employee as defined by the laws of the workers' compensation act, and thus his claim is barred by South Carolina Code § 42-1-540.

This assertion could have entitled Dr. Myat to pursue worker's compensation benefits. However, Plaintiff continued to pursue only his tort claims, in large part because the award in tort would not be limited since that the cap was never pled. At this point, the statute of limitations has run on Dr. Myat's potential workers compensation claim and he would suffer prejudice from the requested amendment.

(4) Dr. Myat's wife was never a named party to bring a loss of consortium claim relating to the injuries sustained by her husband. The statute of limitations has now run on these alternative claims, which could have been asserted in the face of the charitable cap defense.

CONCLUSION

At the time this case was filed, Defendant Tuomey had every opportunity to have claimed the protections of the Charitable Immunity Act in its Answer. However, because they were not pled, Dr. Myat chose not to pursue certain remedies or seek particular types of discovery. As

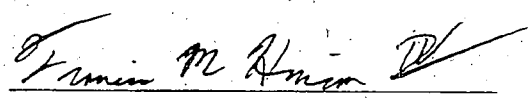
discussed above, not only would the Plaintiff be prejudiced by Defendant amending its Answer in the eleventh hour, but the Defendant would actually be granted a windfall from its failure to plead an affirmative defense. Permitting affirmative defenses to be added at the last minute would actually encourage late amendments to pleadings and promote strategic reasons why one might to wait until the eve of trial to add affirmative defenses. As regrettable as it may be that Defendant Tuomey did not pled a particular defense, this oversight was solely its own doing, and should not be allowed to result in prejudice to Dr. Myat.

For the aforementioned reasons, because it would result in prejudice the Plaintiff's rights, Plaintiff requests that the Court reconsider it's prior ruling and deny Defendant's Motion to Amend its Answer.

Respectfully submitted,

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September 3, 2015
Columbia, South Carolina

By: 

William R. Padget (SC Bar #: 72579)
Francis M. Hinson, IV (SC Bar # 74917)
Attorneys for Plaintiff

STATE OF SOUTH CAROLINA COUNTY OF SUMTER Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030 2015 SEP -8 P 2:41 JAMES C. CAMPBELL CLERK OF COURT SUMTER COUNTY, S.C. **CERTIFICATE OF SERVICE**

I, the undersigned, of the law offices of Finkel Law Firm LLC, attorneys for Plaintiff, do hereby certify that I have served all counsel of record on this date, September 4, 2015, in this action with a copy of the pleading(s) herein below specified, by depositing same in the United States mail, first-class postage pre-paid to the following address(es):

PLEADINGS: Plaintiff's Motion and Memorandum to Reconsider Defendant's Motion to Amend Its Answer

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Margaret M. Rock
Litigation Paralegal

Columbia, South Carolina
September 4, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) Docket No.: 2012-CP-43-2030

RECORD
2015 SEP 10 P 2:
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Win Myat,

Plaintiff,

vs.

Tuomey Regional Medical Center,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED ANSWER AND REQUEST FOR DECLARARORY RELIEF

Plaintiff Win Myat, replying to Defendant's Amended Answer, filed August 24, 2015, would respectfully show:[1]

DENIAL OF AFFIRMATIVE DEFENSE

1. Plaintiff specifically denies Defendant Tuomey Regional Medical Center's ("Tuomey's") assertion and affirmative defense (contained in Paragraph 13 of its Amended Answer) that Defendant is entitled to receive the protections of limited recovery set forth in Solicitation of Charitable Funds Act, S.C. Code § 33-56-10, *et. seq.*

2. As provided in S.C. Code § 33-56-180, in order to qualify for the protections of the Solicitation of Charitable Funds Act, the entity must be a "charitable organization."

3. S.C. Code § 33-56-170 defines "charitable organization" as "any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended."

4. Defendant Tuomey asserts the protects of the Charitable Funds Act by claiming to be exempt from taxation pursuant to 26 USCA § 501(c)(3).

1 Plaintiff maintains that Defendant should not have been granted leave to filed its Amended Answer nor permitted to reopen its case after Defendant rested its case at trial without submitting any testimony or evidence regarding its tax status; Plaintiff submits this Reply to apprise all parties and the Court of his legal positions, but does not intend waiver of any of its procedural objections previously made.

5. Upon information and belief, by its operations, structure and other behavior/activities, Defendant Tuomey does not meet and/or no longer meets the rules/qualifications set forth in 26 USCA § 501(c)(3) to remain tax exempt.

6. Section 501(c)(3) of Title 26 of the United States Code provides that, in order to qualify for tax exempt status, an organization must not permit any part of its net earnings to "inure[] to the benefit of any private shareholder or individual [....]"

7. IRS Publications provide: "No part of an organization's net earnings may inure to the benefit of an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, or a key employee. This means that an organization is prohibited from allowing its income or assets to accrue to insiders. An example of prohibited inurement would include payment of unreasonable compensation to an insider. Any amount of inurement may be grounds for loss of tax-exempt status. IRS Pub. 4421, *Compliance Guide for 501(c)(3) Public Charities*, p. 4 (Rev. July 2014); see also, IRS Pub. 557, *Tax-Exempt Status for Your Organization* (Rev. Feb. 2015).

8. As established by United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 976 F. Supp. 2d 776, 784 (D.S.C. 2013) *aff'd*, 792 F.3d 364 (4th Cir. 2015), Defendant Tuomey has paid its physicians "in excess of the fair market value for their services" in violation of the provisions of the Stark laws and other federal law as may be revealed after proper discovery is conducted.

9. By its wrongdoing, as established in United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., Tuomey is not entitled to receive the protections set forth in the Solicitation of Charitable Funds Act.

10. Tuomey is barred or otherwise prevented from claiming the protections of the

Solicitation of Charitable Funds Act by the doctrines of unclean hands, waiver, and any other equitable doctrines as may be revealed after proper discovery is conducted.

REQUEST FOR DECLARATORY RELIEF

11. Pursuant to S.C. Code § 15-53-10, *et. seq.*, Plaintiff requests a declaratory judgment that Defendant Tuomey Regional Medical Center is not entitled to the protections of limited recovery set forth in Solicitation of Charitable Funds Act.

Respectfully submitted,

FINKEL LAW FIRM LLC

September 9, 2015
Columbia, South Carolina

By: _____

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Attorneys for Plaintiff Win Myat, M.D.

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030
Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	**PLAINTIFF'S MOTION AND MEMORANDUM TO RECONSIDER DEFENDANT'S MOTION TO REOPEN ITS CASE**

RECORDED
2015 SEP 11 AM 11:37
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Plaintiff, Win Myat, by and through his undersigned counsel, in accordance with Rule 59(e) of the South Carolina Rules of Civil Procedure, submits this motion and memorandum requesting that the Court reconsider its oral order granting Defendant Tuomey Regional Medical Center's motion to reopen its case. Plaintiff requests that the Court deny Defendant's motion to reopen its case.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff filed its original Summons and Complaint on October 15, 2012. An Amended Summons and Complaint was filed on November 5, 2012. Defendant Tuomey answered on January 16, 2013. This Answer did not include a pleading for the protections of the Solicitation of Charitable Funds Act ("SCFA"), which is affirmative defense that must be specifically pled. James v. Lister, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). More than two and one-half years of discovery has taken place since.

An initial Consent Scheduling Order was issued on November 12, 2013. That order provided:

> **Discovery shall be completed no later than March 31, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. *De bene esse* depositions must be completed by the discovery deadline. No motions relating to discovery shall be filed until

counsel have consulted and attempted to resolve this matter. (*emphasis added*)

An Amended Consent Scheduling Order was signed on November 2, 2014. That Order was essentially identical to the first, expect that it extended various deadlines and provided that all discovery was to be completed by February 1, 2015. Defendant had not pled the protections of the SCFA, nor identified any witnesses or documentation regarding Defendant's tax exempt status. Thus, Plaintiff conducted no discovery on this issue.

On the eve of the date certain trial, Defendant moved to amend its Answer to include the affirmative defense of limitation of liability under the SCFA. Over Plaintiff's objections, the Court granted the Defendant's motion to amend its answer.[1] Following the filing of the Amended Answer, Defendant disclosed no new evidence and disclosed no new witnesses in support of the recently pled affirmative defense.

At trial, Defendant presented no evidence that it qualified for the protections offered by the SCFA, *i.e.* that it was in fact a tax exempt entity under federal tax law.[2] After the Defense rested its case, Plaintiff moved for a directed verdict, arguing that Defendant Tuomey had not met its burden of proving the affirmative defense and had, in fact, offered zero evidence to prove that it qualified as a tax-exempt charitable organization. Having no valid rebuttal for this failure, Defendant moved to reopen its case, and a little over an hour later, brought new documents and a new witness into the courtroom. On the eve of receiving the jury's verdict, the Court granted

1 Plaintiff maintains that Defendant should not be granted leave to amend its Answer. If, after more than two years of discovery, Defendant is permitted to amend its Answer to claim an affirmative defense, and then, after not presenting any evidence of the newly claimed defense at trial, is allowed to reopen its case, and is then granted leave to reopen discovery regarding a defense for which it failed to offer any evidence, such a series of events will result in an undue delay in the case that the Court should not allow. *See* Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (stating that undue delay is a basis to deny a motion to amend a pleading).

2 *See* S.C. Code § 33-56-170 (2015) (defining a charitable organization entitled to the statutory protections as "any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended.")

Defendant's motion to reopen its case, but held the presentation of the issue/evidence in abeyance, pending other matters.

ARGUMENT

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. South Carolina Dep't. of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008), *citing* Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct.App.1991). It as an abuse of discretion to reopen a case where reopening will prejudice the non-moving party. *See* Perry v. Smalls, 308 S.C. 259, 262, 417 S.E.2d 611, 613 (Ct. App. 1992) (because there was no prejudice to the opposing party, it was not error to reopen the case).

When the party could have offered the same evidence in discovery and at trial, it is an abuse of discretion to allow the case to be reopened for new evidence to be admitted. *See* Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993) (because the moving party could have provided same evidence during trial, the trial judge could decline to reopen the record), *overruled on other grounds*, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

At any point in discovery, Defendant could have disclosed documents and witnesses relating to its alleged charitable institution status. To this very issue, following its motion to reopen the case, one of the documents that Defendant brought into the courtroom was a letter dating back to 1991. Following the trial, two days after the jury returned a verdict, Tuomey offered Thomas Moran, Esq. (Defendant's tax lawyer) as a fact witness (and seeming as an expert witness as well) and Debra Mixon (a Tuomey employee) to testify as to Tuomey's alleged tax exempt status. These witnesses were available to be disclosed by Tuomey weeks, months and

even years earlier. Nothing that Defendant now offers is newly acquired or previously unavailable. At the very least, Defendant could have disclosed such documents and witnesses at the time it moved to amend its answer; however, Defendant did not do so. Defendant Tuomey now moves to reopen the case to present evidence that it failed to disclose and failed to present at trial. Defendant Tuomey's motion to reopen the case seeks to prejudice the Plaintiff simply to correct Tuomey's oversights and failures.

CONCLUSION

At the time this case was filed, Defendant Tuomey had every opportunity to have claimed the protections of the SCFA in its pleadings and to disclose the evidence/documents/witnesses related to that defense. However, because the SCFA was not pled until just before trial and because no evidence of the SCFA was ever disclosed or presented at trial, it would be unjust and prejudicial to the Plaintiff to allow the case to be reopened to correct Defendant Tuomey's mistakes.

For the aforementioned reasons, because it would result in manifest prejudice, Plaintiff requests that the Court reconsider its prior ruling and deny Defendant's Motion to reopen its case.

Respectfully submitted,

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September 10, 2015
Columbia, South Carolina

By: _____
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Attorneys for Plaintiff Win Myat, M.D.

STATE OF SOUTH CAROLINA,)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER.) DOCKET NO. 2012-CP-43-2030

2015 SEP 14 PM 3:56
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Win Myat,

-vs-) TUOMEY'S POST VERDICT MOTIONS

Tuomey,

Tuomey submits the following:

a. in support of its Rule 50 directed verdict and J.N.O.V. motions;

b. in support of the court's ruling to reopen the evidence;

c. as necessary, as a motion for a Rule 59 new trial for the reasons set forth below;

d. as necessary, as a motion for judicial notice of Tuomey as a 501c3 organization as recognized by the Secretary of the Treasury (I.R.S.);

f. as necessary, in support of an evidentiary hearing on the issue of 501c3 status;

g. and as necessary, as a motion for reformation of the verdict in accordance with *South Carolina Code* § 33-56-180;

I. DIRECTED VERDICT AND J.N.O.V., RULE 50, *SCRCP*;

a. "When ruling on directed verdict or JNOV motions, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. [citation omitted] ... However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. [citation

omitted] In reviewing a grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party." *Brannon v. Palmetto Bank*, 371 S.C. 357, 361-362, 638 S.E.2d 105, 107-108 (Ct. App. 2006);

b. "However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. [citation omitted] A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) *superceded by statute on other grounds*;

c. "However, this does not give the Court license to ignore facts unfavorable to that party." *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981); *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007)("This does not mean the trial court should ignore facts unfavorable to the opposing party."); *Guider v. Churpeyes, Inc*, 370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006); *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct. App. 1998)("In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party.

Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor."); *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 314 (Ct. App. 1996)(the "court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party against whom the directed verdict was granted; however, we cannot ignore facts unfavorable to that party..."); *Love v Gamble*, 316 S.C. 203, 207-208, 448 S.E.2d 876, 878-879 (Ct. App. 1994)("In reviewing the grant of a directed verdict motion, we view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. [citation omitted] However, this does not mean that the court should ignore facts unfavorable to the opposing party.");

d. "Under Rule 50(b), the court may [1] allow the verdict to stand, [2] reopen the judgment and grant a new trial, or [3] direct entry of judgment as if the directed verdict motion had been granted." Alex Sanders, *Trial Handbook for South Carolina Lawyers*, § 37:5 (2014)(numbers added);

e. "A fact cannot be established by circumstances which is perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist." *William v Ford*, 233 S.C. 304, 312, 104 S.E.2d 378, 382 (1958);

f. Jury Charge in this case: "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred."

g. No testimony of how water came to be on the floor;

h. Only "guess" of nurse that employee more likely spilled rather than visitor:

1. Question in discovery deposition was subject to objection as to form;

2. "God doesn't play dice" - Albert Einstein;

3. Evidence must be more than mere mathematical probability;

j. innuendo, coupled with conjecture, and built on speculation does not equal evidence Tuomey's employee placed water on the floor;

k. CONSTRUCTIVE NOTICE not an issue for jury based upon directed verdict and consent of Plaintiff to strike;

l. "guess" testimony exceeded scope of *SCRE* 701;

m. "guess" testimony did not offer a relevant "fact" in offering an opinion; "Relevant Evidence" means evidence to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, *SCRE*;

n. "guess" testimony was not relevant, and thus was not admissible. Rule 402, *SCRE*;

o. relevancy of guess was conditioned on fact that was not subsequently introduced into evidence under Rule 104(b), *SCRE*;

p. erroneous introduction of "guess" testimony resulted in an impermissible shifting of the burden of proof to Tuomey to prove an employee did NOT spill water, a point argued stringently by Plaintiff during closing. See Rule 301, *SCRE*;

q. prejudicial effect outweighed probative value of "guess" testimony. Rule 403, *SCRE*;

r. Nurse lacked personal knowledge to "guess" how water was on the floor. Rule 602, *SCRE*;

s. during closing argument, Plaintiff's counsel falsified evidence (floor diagram) during power point presentation that pitchers were filled in immediate area where fall occurred, despite pre-closing assurances that only 'evidence' would be shown;

t. Viewing the evidence in the light most favorable to the non-moving party, Tuomey is entitled to direction of verdict, and J.N.O.V. Rule 50, *SCRCP*;

u. reiterate memorandum, case law, and argument submitted at summary judgment and directed verdict at end of Plaintiff's case;

v. ALTERNATIVELY, Tuomey moves for a new trial under Rule 50(b), *SCRCP*, Tuomey alternatively moves for a new trial based upon admission of nurse "guess" testimony that an employee more likely than not spilled water on the floor, and for all other matters raised before, during and after this trial;

II. MOTION TO OPEN EVIDENCE PROPERLY GRANTED

a. The decision to reopen the evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Lites v. Taylor*, 284 S.C. 316, 326 S.E.2d 173 (Ct. App. 1985); *Brown v. La France Industries, a Div. of Riegel Textile Corp.*, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985);

b. The trial judge enjoys considerable latitude and discretion in these matters, and the opposing party must demonstrate prejudice before the judge's decision will be reversed. *Brown v. La France Industries, a Div. of Riegel Textile Corp.*, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985); See also *Spinx Oil Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 427 S.E.2d 649 (1993) (generally, the trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case); *Brenco v. South Carolina Dept. of Transp.*, 377 S.C. 124, 659 S.E.2d 167 (2008) (same);

c. "It is a well nigh universally recognized principle, and a common practice, for the trial court to allow a case to be reopened and additional evidence introduced in order to prevent a nonsuit or directed verdict, where counsel for plaintiff has omitted evidence by accident, inadvertance, or even because of mistake or misapprehension as to the necessity for offering a particular witness or particular evidence. A matter of this kind is left to the sound discretion of the trial judge; and a refusal to re-open a case may be an abuse of discretion where the party has acted in good faith, and where no prejudice would result to the other party." *Chapman v. Associated Transport*, 218 S.C. 554, 63 S.E.2d 465 (1951);

d. Courts have allowed parties to reopen the case after closing argument had begun, *Wingo v. Caldwell*, 35 S.C. 609, 14 S.E. 827 (1892); *State v. Thomas*, 42 S.C.L. 295, 8 Rich. 295, 1855 WL 3111 (Ct. App. Law 1855), and after arguments have been made. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944); Alex Sanders, *Trial Handbook for South Carolina Lawyers*, § 8:5 (2014);

e. "A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge. His ruling will not be reversed absent an abuse of discretion. A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." *State v. Wren*, 470 S.E.2d 111 (S.C. Ct. App. 1996);

f. "In South Carolina, it is well established that the decision of the trial judge to allow a party to reopen his case will not be reversed unless the opposing party was prejudiced thereby. See McKay, Robinson, and Tate, *Practice and Procedure*, 11 S.C.L.Q. 93 (1958). A trial judge enjoys considerable latitude and discretion in these matters." *Brown v. La France Industries, a Div. of Riegel Textile Corp.*, 286 S.C. 319, 324-325, 333 S.E.2d 348, 351 (Ct. App. 1985)("In the case before us, La France suffered no prejudice by the reopening of the claimants' case. La France was expressly authorized to present rebuttal testimony and failed to do so. We therefore find La France's contention to be without merit. [citations omitted]");

g. "The circumstance that the plaintiffs' counsel omitted to tender the book formally in evidence before the argument of the cause was gone into, ought not, I think, to deprive him of any benefit he might derive from it. The rule which prohibits the introduction of new evidence after the evidence is closed, was intended to guard against the frauds and inconvenience which might ensue from a different practice. But when important evidence has been omitted by the inadvertence of counsel or from any other cause to which no suspicion attaches, it is not unusual to admit it at any stage of the case before the jury have retired, and I have myself, when on circuit, sometimes admitted evidence when on summing up to the jury the counsel for the first time discovered the

omission." *Allen v Watson*, 2 Hill (SC) 319, 20 S.C.L. 319 (1834);

III. TUOMEY REQUESTS RECOGNITION OF 501C3 TAX STATUS BY JUDICIAL NOTICE

a. JUDICIAL NOTICE BY RULE:

Rule 201, *SCRE*, provides inter alia:

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts;

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;

(c) When Discretionary. A court may take judicial notice, whether requested or not;

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information;

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken;

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding;

...

b. JUDICIAL NOTICE BY LAW:

1. "Every court of this State shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States when such common law or statutes shall have been put in issue by the pleadings." *South Carolina Code* § 19-3-120. "This article may be cited as the 'Uniform Judicial Notice of Foreign Law Act.'" *South Carolina Code* § 19-3-110;

2. "The court may inform itself of such laws in such manner as it may deem proper and may call upon counsel to aid it in obtaining such information." *South Carolina Code* § 19-3-130;

3. "The determination of such laws shall be made by the court and not by the jury and shall be reviewable." *South Carolina Code* § 19-3-140;

c. JUDICIAL NOTICE GENERALLY DURING 20TH CENTURY ERA : "Judicial notice is taken of the public acts of Congress, and federal statutes need not be pleaded in the state courts." *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922)(tax dispute case);

1. "Judicial notice' takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge. [citations

omitted] 'The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.' [citation omitted]" *Moss v. Aetna Life Ins. Co*, 267 S.C. 370, 228 S.E.2d 108 (1976);

PERSUASIVE AUTHORITY

2. "The Court takes judicial notice of the fact that NCMC is a state actor." *Hamad v. Nassau County Medical Center*, 191 F.Supp.2d 286, FN 1 (D.C. NY 2000); *Magee v. Nassau County Medical Center*, 27 F.Supp.2d 154 1998)("The Court takes judicial notice that NCMC is a public entity.");

3. "We also consider matters of which the court may or must take judicial notice [citation omitted] which in this case include statutes of the United States and regulations of the Internal Revenue Service..." citing the statutory equivalent of Evidence Rule 201, *Freis v. Soboroff*, 81 Cal.App.4th 1102, 97 Cal.Rptr.2d 429 (2000); *Kessel v. Albetis*, 56 Barb. 362 (Sup. Ct. NY 1870)("The court is bound to take judicial notice of the statutes relating to internal revenue...");

4. "University Hospital has requested that the court take judicial notice of its bylaws. .... As the bylaws describe the powers and duties granted to University Hospital's board of trustees and medical staff, their consideration is necessary to determine

whether the hospital is an independent entity with respect to its degree of legal autonomy from the Ohio State University of which it is a unit and any other state governing bodies. Plaintiffs do not oppose this request. The court therefore takes judicial notice of the bylaws.", *Daniel v. American Bd. of Emergency Medicine*, 988 F.Supp. 127, 155 (W.D. NY 1997);

5. For an illustrative discussion of judicial notice: In *Enroth v. Memorial Hosp. at Gulfport*, 566 So.2d 202, 203-204 (Sup. Ct. Miss 1990), the Enroths on appeal from a judgment:

> arguing first that the record was devoid of a factual predicate for the Court's finding that Memorial Hospital was a political subdivision of the state and, further, that this is the sort of fact of which the Court could not take judicial notice and, thereafter, that, even if the Chancery Court's factual premises were adequately grounded, Memorial Hospital as a matter of law enjoys no protection from the running of limitations.

The Supreme Court remanded to the trial court:

> with instructions that the Court advise us specifically of the basis of the foregoing finding. If the finding is predicated upon judicial notice, the Court should, of course, afford the Enroths a reasonable opportunity to be heard in opposition. See Rule 201(e), *Miss.R.Ev.*

Following a second appeal, the Mississippi Supreme Court addressed the question presented in this case:

> Our first question is whether the ownership, operation and status of a facility such as a hospital are matters, the factual components of which may be judicially noticed. Our point of beginning is Rule 201(b), *Miss.R.Ev.*, which provides

> Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The question then becomes, how the Court should go about the business of judicially noting these facts?

> It is a cliche of judicial notice that a fact is not judicially noticeable by virtue of being known to the judge; conversely, the mere fact that the judge happens to be unacquainted with the fact of common knowledge should not bar him from taking judicial notice of it. This situation is likely to arise when a judge sits in another district and the fact to be noticed is a matter known only within the territorial jurisdiction of that court or where some local fact is to be noticed on appeal. But even where the judge thinks that he knows the fact to be a matter of common knowledge, it would be a salutary practice to check his understanding against other sources of information when this can be conveniently done....

21 C. Wright & K. Graham, Federal Practice & Procedure: Evidence § 5108 at 513-14 (1977).

A court may look to any source it deems helpful and appropriate, including official public documents, records and publications. The Court is not limited by rules of evidence otherwise enforceable in judicial proceedings. *Witherspoon v. State ex rel. West, 138 Miss.* 310, 320, 103 So. 134, 136-37 (1925) said:

> He may resort to ... government publications, dictionaries, encyclopedias, geographies, or other books, periodicals and public addresses.

(citing, inter alia, *Puckett v. State*, 71 Miss. 192, 195, 14 So. 452, 453 (1893)). Nothing in Rule 201 casts doubt on *Witherspoon*.

In reviewing sources utilized by the trial court in taking judicial notice, the *Enroth* court notes:

> In the case at bar, the Court recited and listed the sources it had considered and included among those (1) numerous newspaper articles discussing the nature, operation and funding of Memorial Hospital, (2) conversations with physicians, (3) conversations with the Chancery Judge's own niece who was an employee at the hospital, (4) conversations with a lawyer not involved with this particular case but who was familiar with the matter, and (5) the fact that, before becoming Chancery Judge and in his prior capacity as a lawyer, he had been involved in a lawsuit regarding the hospital in which its legal status had been an issue. We hold these bases adequate that the Court may judicially know the factual components of the Hospital's status.

d. PUBLIC RECORDS AS HEARSAY EXCEPTION, AVAILABILITY OF DECLARANT IMMATERIAL

Rule 803(8), *SCRE*, provides, *inter alia*:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report....";

e. SELF-AUTHENTICATING EVIDENCE

Rule 902(5), *SCRE*, provides, *inter alia*:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ...

(5) Books, pamphlets, or other publications purporting to be issued by public authority....";

f. GOVERNMENT RECORDS AS EVIDENCE

1. *Hughes v. U.S*, 953 F.2d 531 (9th Cir. 1992)(taxpayer may not collaterally attack admissibility of IRS records; records fall within the hearsay exception of Rule 803(8) and are self-authenticating under Rule 902(1));

2. *In re Garm*, 114 B.R. 414 (M.D. Penn. 1990)("the document in question is a Certificate of Official Record from the Internal Revenue Service under seal of the Director of the Internal Revenue Service Center, Mid–Atlantic Region, Philadelphia, Pennsylvania. Under Rule 902(1) of the *Federal Rules of Evidence* this document under seal is self-authenticating and no requirement of extrinsic evidence proving authentication was necessary at time of trial."; "We find that the document in question fits squarely within this hearsay exception [of Rule 803(8)(Public Records and Reports]".);

3. *U.S. v. Ryan*, 969 F.2d 238, 240 (1992)("United States Treasury Department's certified computer records, which demonstrated that the defendant failed to file income tax returns, were admissible as self-authenticating documents.");

4. *U.S. v Thurner*, 21 Fed.Appx. 477, 478 (Ct. App. 7th Cir. 2001)(IRS "records are self-authenticating." citing *U.S. v Ryan, supra*);

5. *Brewer v U.S.*, 764 F.Supp. 309, 318 (D.C. NY 1991)("Consistently, courts have held that [IRS] Form 1340 is self-authenticating.");

6. "Plaintiffs rather are attacking the entire system of the IRS in transcribing and storing information instead of pointing to any specific item or possible error. This court is not the proper forum for such an attack." ... "The "public records" exception to the hearsay rule admits the [IRS records.]" citing Rule 803(8), the public records exception to hearsay); *U.S. Burdine*, 205 F.Supp.2d 1175, 1178 (2002)('Forms 4340 are admissible into evidence as self-authenticating official records of the United States, and these documents carry a presumption of correctness.'", *Rossi v U.S.*, 755 F.Supp. 314, 317 (D.C. Or. 1990);

IV. 21ST CENTURY JUDICIAL NOTICE OF GOVERNMENT WEBSITES

a. Judge J. Michele Childs in *Coleman v Kolb*, 2015 WL 4878846 (D.S.C. Aug. 14, 2015) writes:

"Under Federal Rule of Evidence 201(b), "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Postings on government websites are inherently authentic or self-authenticating. See *Williams v. Long*, 585 F.Supp.2d 679, 686–89, 688 n. 4 (D. Md. 2008).";

b. Judge Henry M Herlong, Jr., in *Mance v Cartledge*, 2015 WL 4168056, FN 1 (D.S.C. July 9, 2015) writes:

"The Court may take judicial notice of factual information located in postings on government web sites. See *Tisdale' v. South Carolina Highway Patrol*, C/ANo. 0:09–1009–IIFF–PJG, 2009 WL 1491409, *1 n. 1 (D.S.C. May 27, 2009), aff'd 347 F. App'x 965 (4th Cir. Aug.27, 2009); *In re Katrina Canal Breaches Consolidated Litigation*, No. 05–1182, 2008 WL 4185869 at * 2 (E.D.La. September 8,2008) [noting that courts may take judicial notice of governmental websites including other courts' records]; *Williams v. Long*, 585 F.Supp.2d 679, 687–88 (D.Md. 2008) [noting that some courts have found postings on government web sites as inherently authentic or self-authenticating].";

c. Judge Richard Gergel in *Cole v Montgomery*, 2015 WL 2341721 (D.S.C. 2015) cites: *In Re Katrina Canal Breaches Consol. Litig.*, 533 F.Supp.2d 615, 631–33 & nn. 14–15 (E.D.La.2008) (collecting cases indicating that federal courts may take judicial notice of governmental websites, including court records);

d. The case of *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.C. MD 2007) offers a cogent discussion of self-authentication of evidence in the 21st century:

> In *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours and Co.*, the court admitted into evidence printouts of postings on the website of the United States Census Bureau as self-authenticating under Rule 902(5). 2004 WL 2347556 (E.D.La. Oct.18, 2004). Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily."; the court extensively discussed the authentication and admissibility of electronically stored information;

citing *Paralyzed Veterans of America v. McPherson*, *supra*, as follows:

> Federal courts consider records from government websites to be self-authenticating under Rule 902(5). See, e.g., *Estate of Gonzales v. Hickman*, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, *2 n. 3 (C.D.Cal. May 30, 2007) (unreported) (finding report issued by the Inspector General of the State of California on the Office of the Inspector General's website to be self-authentic); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method for

authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily"); *United States ex rel. Parikh v. Premera Blue Cross*, No. C01-0476P, slip op., 2006 WL 2841998, *4 (W.D.Wash. Sep.29, 2006) (determining documents found on government websites to be self-authenticating); *Hispanic Broad. Corp. v. Educ. Media Found.*, No. CV027134CAS (AJWX), 2003 WL 22867633, *5 n. 5 (C.D.Cal. Oct.30, 2003) (unreported) (holding, "exhibits which consist of records from government websites, such as the FCC website are self-authenticating").

...

Moreover, "[a] trial court may presume that public records are authentic and trustworthy. The burden of establishing otherwise falls on the opponent of the evidence, who must come 'forward with enough negative factors to persuade a court that a report should not be admitted.' " *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (quoting *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir.1992)). Bowen points to nothing in particular in challenging the authenticity or trustworthiness of what are printouts of her official state website. Defendant Bowen's objection to the printouts is accordingly OVERRULED.";

e. As cited by Judge Childs and Judge Herlong, *Williams v. Long*, 585 F.Supp.2d 279, 686–89, 688 n. 4 (D. Md. 2008), better describes the self authentication features of a government website:

"The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under Rule 902(5) for the reasons discussed above. First and foremost, the Maryland Judiciary is a branch of the Maryland State Government; therefore, any online "official publication" issued by the Maryland Judiciary would be self-authenticating. See *Fed.R.Evid.* 902(1), (5). Second, the URL on the top of the printed webpage identifies that the results are in fact from the website. Third, the first page features a caption, stating, "Maryland Judiciary Case Search Results," and the next page states, "District Court of Maryland." Accordingly, there is no doubt that these results were published on the website of a public authority. Thus, they are self-authenticating."

f. INTERNAL REVENUE SERVICE WEBSITE: "The Court takes judicial notice of the publicly available information on the IRS website." *Linchpins of Liberty v. United States*, 71 F.Supp.3d 236, FN 7 (D.C. DC 2014); "the Court has taken judicial notice of this description on the IRS website." *Irish v Ferguson*, 970 F.Supp.2d 317, FN 47 (M.D. Penn. 2013);

V. RECENT JUDICIAL NOTICE CASES OF GOVERNMENT WEBSITES - PERSUASIVE

a. *Arizona Libertarian Party v Reagan*, – F.3d –, 2015 WL 4664606 (9th Cir. April 24, 2015)("We may take judicial notice of 'official information posted on a governmental website, the accuracy of which [is] undisputed.' *Dudum v. Arntz*, 640 F.3d 1098, 1101 n. 6 (9th Cir. 2011) (citing *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 998–99 (9th Cir. 2010)).");

b. *Swindol v Aurora Flight Sciences Corp*, – F.2d –, 2015 WL 5090578 (5th Cir. August 28, 2015)(5th Cir. Court of Appeals *sua sponte* moved to amend complaint to establish diversity jurisdiction holding: "We follow *Kaufman* to the extent it supports the taking of judicial notice of public documents establishing Aurora's citizenship." citing Rule 201(b), *Federal Rules of Evidence*, which mirrors Rule 201, *South Carolina Rules of Evidence*.);

c. *Johnson v United States Steel Corporation*, – Cal. Rptr.3d –, 2015 WL 5120242 (CA Ct. App. 1st District, September 1, 2015)("Court of Appeals would take judicial notice of government report on

toxicological profile for benzene.");

d. *Securities and Exchange Commission v Alexander*, – F.Supp.3d, 2015, 2015 WL 4397421, FN. 3 (Dist. Ct., NDCA July 17, 2015)("The Court may also take judicial notice of the SEC's attestations that a search of SEC records and files do not reveal any registration documents related to this action. (citation omitted) The Court therefore GRANTS Plaintiff's request for judicial notice.");

e. *Clements v Sanofi-Aventis, U.S., Inc.*, – F.Supp.3d –, FN 2, 2015 WL 3648911 (D.C. NJ June 11, 2015)(judicial notice of FDA approvals of drug Sculptra "are also matters of public record, appropriate for judicial notice under FRE 201");

f. *U.S., ex rel. Modglin v DJO Global, Inc.*, – F.Supp.3d –, 2015 WL 4111709 (C.D. CA May 8, 2015)("Under Rule 201, the court can take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet," such as websites run by governmental agencies." ... citing *Paralyzed Veterans of Am. v. McPherson*, No. C 06–4670, 2008 WL 4183981, *5 (N.D.Cal. Sept. 8, 2008) ('Information on government agency websites has often been treated as properly subject to judicial notice'). "The court therefore grants defendants' request for judicial notice.");

VI. TUOMEY'S 501C3 TAX EXEMPT STATUS DETERMINED BY SECRETARY OF TREASURY

1. Plaintiff's contract with Tuomey, signed and dated by Plaintiff on August 1, 2008 (and entered into evidence during trial), indicates "Hospital's indemnification of Contractor [Plaintiff] is subject to the limitations set forth in ... the South Carolina Charitable Contributions Act, S.C. Code Section 15-78-120." See ¶ 6.13, page 10.

   A. At all times Plaintiff worked for or at Tuomey, Plaintiff was factually on notice in writing of Tuomey's 501c3 status;

2. The Treasury Secretary alone has the standing to revoke or rescind Tuomey's 501c3 tax exempt status. *In re Heritage Village Church and Missionary Fellowship, Inc. v. United States*, 87 B.R. 401 (1988); *Bob Jones University v United States*, 461 U.S. 574 (1983);

3. An "assessment" of taxes is a formal, discrete act with specific legal consequences. The IRS makes an assessment of unpaid taxes only after a notice of deficiency is sent to the taxpayer. *In re Carlson*, 580 F.2d 1365, 1368 (10th Cir. 1978). See 28 *U.S.C.A.* § 1346(a)(1)(district court has original jurisdiction of "any civil action against the United States ... for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected...."); 26 U.S.C.A. § 6303 ("Notice and demand for tax"); *Conway v Commissioner of Internal Revenue*, 137 T.C. 209 (2011);

4. 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.");

5. STATE COURTS LACK JURISDICTION: "Claims against the United States were not raised and could not have been raised in the New York lawsuits because New York State Courts do not have jurisdiction to hear issues of federal tax law.", *Imprimis Investors LLC v. U.S.*, 83 Fed.Cl. 46, 66 (U.S.F.C. 2008);

6. Tuomey's 501c3 tax exempt status is a matter of public record and available from the Internal Revenue Services government website; http://apps.irs.gov/app/eos/

7. Tuomey's 501c3 tax exempt status has been available on the IRS website since before July 6, 2011, the date of Plaintiff's injury; See generally, Donald L. Korb, Chief Counsel, Internal Revenue Service 1965 - present, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A view from within*, 46 Duq. L. Rev. 323 (Spring 2008);

A. As a 501c3 tax exempt organization, Tuomey files an IRS Form 990 (Return of Organization Exempt From Income Taxation) annually, and the IRS has widely distributed this information to the public though the internet since year 2002, a time before Plaintiff's date of injury on July 6, 2011; See https://bulk.resource.org/irs.gov/eo/readme.html;

B. Under federal law, Tuomey is required to provide an IRS Form 990 to any person upon request; See https://bulk.resource.org/irs.gov/eo/doc/about.html;

C. In addition to receiving this information from the IRS, multiple non-profit and for-profit organizations provide IRS Form 990's to the public through the internet: See, Eg. http://nccs.urban.org/; https://www.citizenaudit.org/; http://www.guidestar.org/Home.aspx; and http://www.metmuseum.org/about-the-museum/annual-reports

8. Tuomey's status as an eleemosynary corporation (as initially pled by Plaintiff) is the substantial equivalent of a 501c3 designation; Nina J. Crimm, *An explanation of the Federal Income Tax Exemptiion for Charitable Organizations: A theory of risk compensation*, 50 Fla. L. Rev. 419 (July 1998);

9. Tuomey's charitable status, available through the South Carolina Secretary of State, as a non-profit is substantially the equivalent of 501c3 status and has been available on line since prior to July 6, 2011: See http://www.sos.sc.gov/Search%20Charities;

A. State charitable tax law mirrors federal tax law;

10. Tuomey's ability to solicit charitable contributions is satisfied by its 501c3 status, thus allowing it to solicit funds through the Tuomey Foundation; See https://www.tuomeyfoundation.org/;

VII. TUOMEY MOVES FOR NEW TRIAL

1. For the reasons set forth in its motion for summary judgment, during the pre-trial, trial and post-trial of the case, and in the memorandum and motions herein, Tuomey moves for new trial absolute under the thirteenth juror doctrine;

a. "Under the 'thirteenth juror' doctrine, a trial [court] may grant a new trial absolute when [it] finds the evidence does not justify the verdict." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct.App.1996). The trial court has the authority to grant a new trial upon its finding that justice has not prevailed or if the verdict is inconsistent and reflects the jury's confusion. *Id.* at 404, 477 S.E.2d at 722.

2. For the reasons set forth in its motion for summary judgment, during the pre-trial, trial and post-trial of the case, and in the memorandum and motions herein, Tuomey moves for new trial because the jury verdict is not supported by the greater weight (or fair preponderance) of the evidence;

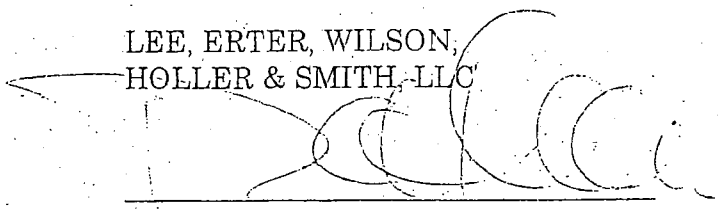
a. "[i]t may well be that a party's evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor.", *McEntire v. Mooregard Exterminating Services, Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. 2003);

b. Not only does a trial judge have the discretion but also the duty to grant a new trial if the jury verdict is contrary to the fair preponderance of the evidence. *Mack v. Frito-Lay, Inc.*, 243 S.C. 376, 133 S.E.2d 833 (1963). *Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978); *Jessup v. Hansen*, 289 S.C. 54, 344 S.E.2d 618 (Ct. App. 1986);

Signature on the following page

Respectfully submitted,

LEE, ERTER, WILSON,
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Attorney for Tuomey

September 14, 2015

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER.	)	DOCKET NO. 2012-CP-43-2030
Win Myat;	)	
	)	
-vs-	)	TUOMEY'S POST VERDICT MOTIONS
	)	APPENDIX
Tuomey,	)	
	)	

DIRECTED VERDICT AND J.N.O.V. RULE 50, SCRCP

William v Ford, 233 S.C. 304, 104 S.E.2d 378 (1958).

JUDICIAL NOTICE - 20TH CENTURY ERA - PERSUASIVE

Enroth v. Memorial Hosp. at Gulfport, 566 So.2d 202 (Sup. Ct. Miss 1990).

21ST CENTURY JUDICIAL NOTICE OF GOVERNMENTAL WEBSITES

Coleman v Kolb, 2015 WL 4878846 (D.S.C. Aug. 14, 2015).

Mance v Cartledge, 2015 WL 4168056, FN 1 (D.S.C. July 9, 2015).

Cole v Montgomery, 2015 WL 2341721 (D.S.C. 2015).

Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D.C. MD 2007).

Williams v. Long, 585 F.Supp.2d 697 (D. Md. 2008).

RECENT JUDICIAL NOTICE CASES ON GOVERNMENTAL WEBSITES

Arizona Libertarian Party v Reagan, – F.3d –, 2015 WL 4664606 (9th Cir. April 24, 2015).

Swindol v Aurora Flight Sciences Corp, – F.2d –, 2015 WL 5090578 (5th Cir. August 28, 2015).

Johnson v United States Steel Corporation, – Cal. Rptr.3d –, 2015 WL 5120242 (CA Ct. App. 1st District, September 1, 2015).

Securities and Exchange Commission v Alexander, – F.Supp.3d –, 2015, 2015 WL 4397421, FN. 3 (Dist. Ct., NDCA July 17, 2015).

Clements v Sanofi-Aventis, U.S., Inc., – F.Supp.3d –, FN 2, 2015 WL 3648911 (D.C. NJ June 11, 2015).

U.S., ex rel. Modglin v DJO Global, Inc., – F.Supp.3d –, 2015 WL 4111709 (C.D. CA May 8, 2015).

233 S.C. 304
Supreme Court of South Carolina.

Svilla WILLIAMS and W. R. Burgess,
Administrators of the Estate
of Miller Williams, Appellants,
v.
Carl J. FORD et al., Respondents.

No. 17455. | July 29, 1958.

Wrongful death action. The jury's verdict was for the plaintiffs. On defendants' motion for judgment n. o. v., the Common Pleas Court of Clarendon County, Bruce Littlejohn, J., set the verdict aside and ordered judgment for the defendants. The plaintiffs appealed. The Supreme Court, Legge, J., held that where truck's speed was below posted limits, the highway was straight and level, the hour was past midnight, the left lane was clear, there was no intersection or pedestrian crosswalk near, the truck driver saw brake lights appear on preceding automobile some 200 yards ahead and saw the automobile pull off to right of highway, the truck driver drove far enough to left to pass automobile with safety, pedestrian, who was dressed in dark clothes and who had narrowly escaped being struck by automobile, suddenly appeared in front of truck and staggered into middle of road, and the driver immediately applied his brakes and pulled as hard as he could to the left in a vain effort to avoid hitting pedestrian, driver was not negligent.

Affirmed.

West Headnotes (3)

[1] **Evidence**
⇐ Circumstantial Evidence

To warrant a conclusion sought to be established in a civil case by circumstantial evidence, the facts and circumstances disclosed by such evidence must be such as, considered in the light of ordinary experience, would lead with reasonable certainty to such conclusion, and not leave it to mere speculation or conjecture.

Cases that cite this headnote

[2] **Automobiles**
⇐ Persons on Foot in General

Where truck's speed was below posted limits, the highway was straight and level, the hour was past midnight, the left lane was clear, there was no intersection or pedestrian crosswalk near, the truck driver saw brake lights appear on preceding automobile some 200 yards ahead and saw the automobile pull off to right of highway, the truck driver drove far enough to left to pass automobile with safety, the pedestrian, who was dressed in dark clothes and who had narrowly escaped being struck by automobile, suddenly appeared in front of truck and staggered into middle of road, and the driver immediately applied his brakes and pulled as hard as he could to the left in a vain effort to avoid hitting pedestrian, driver was not negligent.

Cases that cite this headnote

[3] **Evidence**
⇐ Circumstantial Evidence

A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted, unimpeached testimony that the fact does not exist.

5 Cases that cite this headnote

Attorneys and Law Firms

**379 *305 James Hugh McFaddin, Manning, for appellant.

John G. Dinkins, Manning, Edens & Woodward, Columbia, for respondent.

Opinion

*306 LEGGE, Justice.

Action for alleged wrongful death of plaintiff's intestate who, walking on a highway about 1:30 a. m. on February 11, 1955, was struck and killed by a truck. The defendants Carl J. Ford, Connie Mack Ford and A. J. Ford, copartners trading as Ford Produce Company, with their principal office at Raleigh,

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North Carolina, were the owners of the truck. The defendant G. F. Dowd, their employee, was driving it, en route from Sanford, Florida, to Raleigh.

Defendants' motion, at the close of all of the evidence, for direction of verdict, was denied, and the case was submitted to the jury, which found for the plaintiff five thousand ($5,000) dollars actual damages. Thereafter, on defendants' motion for judgment n. o. v., the trial judge set the verdict aside and ordered judgment for the defendants upon the following grounds:

1. That negligence on the part of the driver of the truck could not reasonably be inferred from the evidence; and

2. That if the evidence could be viewed as supporting the allegations of negligence on the driver's part, then the only reasonable inference that could be drawn from all of the evidence was that the death of plaintiff's intestate resulted from his own contributory negligence.

Appeal from that order necessitates review of the evidence bearing on the accident. That on the part of the plaintiff was wholly circumstantial, the substance of it being as follows:

*307 Miller Williams, the decedent, a colored man about fifty-four years of age, was employed **380 as a handyman, and lived, on the farm of Mr. Hodge on U. S. Highway 15, two miles north of Paxville. Thomas Harvin, who also worked on Mr. Hodge's farm, and whose residence was some 75 or 80 yards north of Mr. Hodge's testified that he and Williams finished work about dusk on the afternoon of February 10; and that was the last time he saw Williams until after the accident, which occurred on the highway at a point about 50 or 75 yards from Harvin's house. When they separated at the end of their day's work, Williams had told Harvin that he was going to the home of Cassie Perry, near Paxville. Harvin testified that he went to the scene of the accident shortly after it happened, which was, as before stated, about 1:30 a. m. on February 11. He did not say, nor does the evidence otherwise disclose, how his attention had been called to the accident. He testified that when he arrived at the scene Williams' body was lying in the west lane (i. e., left of the center line, from the standpoint of northbound traffic) of the pavement, about two or three feet from the dirt shoulder; that a car was parked on the dirt shoulder on the right (east) side of the highway; that there were tire marks on the left side of the pavement; and that between the parked car and the body of Williams there was room enough for a truck to pass through. He testified also that the defendants' truck and another truck were at the scene, but he did not specify their exact location.

State Highway Patrolman McElhaney, who investigated the accident, testified:

The accident occurred on U. S. Highway 15 about a mile and a half north of Paxville. When he arrived at the scene the body of Williams was on the pavement, approximately four feet from its left edge going north. This highway is in most places twenty-four feet wide, but he did not know its width at the point in question; it is straight and level in both directions from this point. It had rained earlier in the night, and the road was still wet, but it was not raining when the witness was there. He found tire marks, forty feet in length, *308 on the left (west) side of the road; but he could not say whether they were brake marks or skid marks, nor could he recall whether they were straight or curved. Upon his memory being refreshed from the transcript of his testimony at the coroner's inquest, he recalled that the marks on the road from their starting point were of 'one wheel on each side of the center line.' In the left lane he found some 'blood and marks, also the pedestrian's hat and some change', but nothing to indicate that the man had been struck in the right lane. He saw the defendants' truck, which was then parked on the right side of the pavement, headed north; he found a 'mashed-in place' on one of its fenders, but was not sure which fender. The driver of the truck admitted that he had run into Williams. The accident did not occur at an intersection or at a marked cross-walk. At some distance, there was a house on each side of the road, their driveways entering the highway several hundred yards from the place of the accident.

Louis Richburg, driver for Samuels Funeral Home, testified that he went to the scene of the accident to bring Williams' body in. He arrived ahead of the highway patrolman, and covered the body, which was about two feet from the left (west) edge of the pavement.

N. R. Blackwell, the embalmer, testified that examination of Williams' body disclosed that the neck, both legs, and right arm had been broken.

The foregoing is all of the evidence offered by the plaintiff on the issue of the defendants' negligence. Following is the substance of the evidence on the part of the defendants:

One Eddie Davis testified: that Williams had been with him on the night of February 10 from 'first night' until around 10:00 or 10:30 p. m.; that they had together gone to a place near the Sumter County line; that they had found some liquor in the **381 woods; that both of them had been drinking a little, but neither of them was drunk. From the place near the

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county line he took Williams to Cassie Perry's house, where he left him; and when Williams got out of the car he, Davis, went on home.

*309 Cassie Perry testified: that her house is about half a mile from Paxville; that she saw Williams on the night in question 'directly after first dark'; and again at between 10:00 and 11:00 p. m., when he came back in company with Eddie Davis, who put him out in her yard; that she was having a prayer meeting in her house that night, and Williams didn't come in 'because he and Ned had been off'; that he didn't stay in the yard long; and that when he left he was walking 'just as good as anyone.' She did not state what direction Williams took when he left; and his whereabouts from the time of his departure, about 11:00 p. m., until the time of the accident, is not revealed by any of the testimony.

The defendants produced the testimony of three eyewitnesses to the accident, to-wit: G. F. Dowd, the driver of the truck; John F. Findley, a stranger; and Norman B. Pyle, an acquaintance of Dowd, who was driving another truck behind Dowd, but who had no business connection with the defendants.

The substance of Dowd's testimony was as follows:

He was making a trip from Sanford, Florida, to Raleigh, North Carolina; his truck, a 1950 Mack, weighed 25,000 lbs., and its load 30,000 lbs.; he was alone, had left Sanford about 2:00 o'clock on the afternoon of February 10, and his last stop before the accident was at Skipper's Truck Stop in Summerton, South Carolina (nine miles south of Paxville), where he had remained about an hour. He testified that from Summerton he had been following an automobile; that a mile and a half beyond Paxville, when he was about 200 or 250 yards behind the automobile, its brake lights went on and it pulled partly off the road to the right shoulder, part of its rear end being still on the pavement; that his speed was about fifty miles an hour; that he pulled over to the left to pass, without reducing his speed, the left lane being clear; that as the truck was about to pass the car a man staggered across the road sideways, with his back toward the oncoming truck; that in an effort to avoid hitting the man he put on brakes and pulled as hard as he *310 could to the left; that the right front fender of the truck struck the man, about two feet left of the center line; that by the time he stopped the truck it was on the left shoulder, that he then pulled the truck over to the right of the road; that his skid marks began at the center line and continued across to the left shoulder; that he must have let up on his brakes when he hit the shoulder, as he was then about to turn over; that the speed limit at the place of the accident was fifty-five miles per hour; that when he first saw Williams he (Williams) was about in the center of the road; and that as soon as he saw Williams he applied his brakes, and the brakes were on when Williams was struck.

John F. Findley, whose past employment included that of peace officer, prison guard, and investigator for an alcohol tax unit, and who knew none of the parties to the action, testified that he was driving from Savannah, Georgia, to Fayetteville, North Carolina; that a truck which later proved to be that of the defendants, had been following him from about Summerton; that as he (Findley) was about a mile and a half north of Paxville, he saw, about 75 feet ahead of him, a man staggering in the center of the road, and that he (Findley) went off to the right and off the road to avoid hitting him. When asked if he meant that the man was staggering in the middle of the northbound lane or in the middle of the road, he said: 'In the middle of my lane and then he staggered on into the center of the road and this truck came around me and hit him. He walked into the truck.' He also testified **382 that Williams was wearing dark blue coveralls and a blue denim coat; that he (Findley) had been driving about fifty miles an hour and that the truck had not been gaining on him; that he actually saw the truck hit Williams, the point of impact being on the right-hand fender; that at the time he was struck Williams was about in the middle of the road; that the driver of the truck cut sharply to the left to avoid hitting Williams; and that at that time he (Findley) was already stopped, with part of his automobile on the shoulder and about two feet of its rear portion on the pavement.

*311 Norman B. Pyle, of Raleigh, N. C., testified as follows:

He was employed as truck driver by Beasley Produce Company; he had never worked for Ford Produce Company; he had known Dowd for many years. On the night of the accident his truck and Dowd's, which had been running together from the Florida-Georgia line, stopped at Skipper's Truck Stop, about half a mile south of Summerton. After they left Skipper's, Pyle's truck was following Dowd's; and when the accident happened Pyle's truck was about a city block behind Dowd's. Pyle saw an automobile go to the right, and Dowd's truck go to the left and 'cut right short'. Pyle threw his bright lights on and saw something 'stagger out and cross the road'; he didn't know at the moment whether or not it was a man; he could not state just where in the road the decedent was when the truck hit him; when he got to the scene decedent's body was in the roadway about two feet from the center line.

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[1] To warrant a conclusion sought to be established in a civil case by circumstantial evidence, the facts and circumstances disclosed by such evidence must be such as, considered in the light of ordinary experience, would lead with reasonable certainty to such conclusion, and not leave it to mere speculation or conjecture. Leek v. New South Express Lines, 192 S.C. 527, 7 S.E.2d 459; Attaway v. One Chevrolet 5-P Truck, 228 S.C. 559, 91 S.E.2d 270.

[2] The conclusion thus sought to be established here was, under the allegations of the complaint, that the decedent, while walking in a northerly direction on the left side or left shoulder of the highway, facing southbound traffic as required by law for pedestrians, had been negligently and recklessly run down from the rear by the defendants' truck, which was on its wrong side of the road. In support of that conclusion the plaintiff, of necessity, relied solely upon the physical evidence found on the highway immediately or every shortly after the accident. That evidence was perfectly consistent with the direct, uncontradicted and *312 unimpeached testimony of the defendants' eyewitnesses. We agree with the trial judge that it failed to meet the probative requirements before mentioned.

[3] 'A fact cannot be established by circumstances which is perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist.' 32 C.J.S. Evidence § 1039, p. 1101; 20 Am.Jur., Evidence, Section 1189, p. 1043; Esso Standard Oil Co. v. Stewart, 190 Va. 949, 59 S.E.2d 67, 18 A.L.R.2d 1319; City of Summerville v. Sellers, 94 Ga.App. 152, 94 S.E.2d 69.

The plaintiff's case is not strengthened by anything in the evidence for the defendants. That evidence showed that Dowd's speed was below the posted limit; that the hour was past midnight; that the road was straight and level, its left lane was clear, and there was no intersection or pedestrian cross-walk near; and that when he saw, some 200 yards ahead, the brake lights appear on Findley's automobile and that automobile pull off to the right of the road, he drove far enough to the left to pass it with safety. Negligence cannot reasonably be inferred from the fact that he did not reduce his speed at that time; under the conditions described **383 he was under no duty to do so. When he was about to pass the stopped automobile, Williams, who was dressed in dark clothes, and who had narrowly escaped being struck by Findley's car, suddenly appeared in front of Dowd's truck, staggering into the middle of the road; and Dowd immediately applied his brakes and pulled as hard as he could to the left in an effort to avoid hitting him. The trial judge correctly held that this evidence was not reasonably susceptible of the inference of negligence on the part of Dowd. Cf. Wright v. South Carolina Power Co., 205 S.C. 327, 31 S.E.2d 904; Critzer v. Kerlin, 231 S.C. 315, 98 S.E.2d 761.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ., concur.

All Citations

233 S.C. 304, 104 S.E.2d 378

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566 So.2d 202
Supreme Court of Mississippi.

John ENROTH and Betty Jo Enroth
v.
MEMORIAL HOSPITAL AT GULFPORT.

No. 07-CA-58911. | July 25, 1990.

Amount of hospital's lien, which had not been renewed for over seven years, was transferred to escrow agent and interpleader was brought. The Harrison County Chancery Court, First Judicial District, William L. Stewart, J., held that hospital was entitled to the funds, and former owner of the property subject to lien appealed. Following remand, 556 So.2d 1377, the Supreme Court, Robertson, J., held that: (1) trial court properly took judicial notice of factual components of the question of ownership, operation and status of the hospital, and (2) community hospital jointly owned by city and hospital district was a political subdivision so that seven-year period of limitations governing judgment liens was inoperative against it.

Affirmed.

West Headnotes (5)

[1] **Evidence**
⇦ Public Institutions

Ownership, operation and status of hospital were matters, the factual components of which could be judicially noticed. Rules of Evid., Rule 201(b).

2 Cases that cite this headnote

[2] **Evidence**
⇦ Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance

In taking judicial notice, court may look to any source it deems helpful and appropriate, including official public documents, records and publications, and the court is not limited by rules of evidence otherwise enforceable in judicial proceedings. Rules of Evid., Rule 201(b)(1, 2).

2 Cases that cite this headnote

[3] **Evidence**
⇦ Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance

There were adequate bases for court to judicially know the factual components of hospital's status, in determining whether it was a political subdivision immune from bar of statutory periods of limitations, where court considered newspaper articles, conversations with physicians and hospital employee, conversations with lawyer familiar with the matter, and fact that judge had previously been involved with a lawsuit regarding the hospital in which its legal status had been an issue. Rules of Evid., Rule 201(b)(1, 2).

3 Cases that cite this headnote

[4] **Evidence**
⇦ Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance

Party was provided with opportunity to be heard, as required by rule, before court's taking judicial notice of fact, where counsel for party was present and afforded opportunity to present evidence or otherwise be heard, and announced that he did not have any proof to offer. Rules of Evid., Rules 201, 201(e).

Cases that cite this headnote

[5] **Limitation of Actions**
⇦ Municipality or Officers Thereof

Community hospital owned by city and hospital district and governed by board of trustees jointly appointed by city council and board of supervisors of county was a subdivision of the state or municipal corporation thereof, and thus seven-year period of limitations governing judgment liens was inoperative against it. Code 1972, §§ 15-1-47, 15-1-51, 41-13-10 et seq., 41-13-15, 41-13-15(1); Const. § 104.

8 Cases that cite this headnote

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Attorneys and Law Firms

*203 Herman F. Cox, Jimmy D. McGuire, McGuire & Cox, Gulfport, for appellant.

Ann Bowden-Hollis, Galloway & Galloway, Gulfport, for appellee.

Before DAN M. LEE, P.J., and PRATHER and ROBERTSON, JJ.

ROBERTSON, Justice, for the Court:

I.

This appeal presents questions regarding the manner of proving the legal status of a community hospital in Gulfport, Mississippi, and thereafter the question whether Section 104 of our constitution affords the hospital immunity from the running of statutes of limitations.

II.

John Enroth and Betty Jo Enroth are husband and wife and are adult residents of Harrison County and are Appellants here. Memorial Hospital of Gulfport, today's Appellee, is a judgment lien creditor of John Enroth.

Back on October 19, 1978, in proceedings in the County Court of Harrison County the Hospital obtained a judgment against Enroth in the principal sum of $1,406.88 plus interest and costs. The Hospital had this judgment enrolled in the Judgment Roll of Harrison County, First Judicial District, on November 29, 1978, and from that moment and by that means perfected a lien upon all property Enroth then owned or may thereafter have acquired within the county and judicial district. The judgment has not been paid, nor at the time of this action had its lien been discharged.

It seems John Enroth and Betty Jo Enroth owned some real property within the First Judicial District of Harrison County, and, in the Spring of 1986, the Enroths contracted to sell that property to David McKenna and Annette McKenna. In the course of a title examination preliminary to the sale, all parties discovered the Hospital's unsatisfied judgment which by that time, with interest, had risen to over $2,500.00. More importantly, by this time more than seven years had elapsed since the judgment had been enrolled, without renewal, *see* Miss.Code Ann. § 15-1-47 (1972). As perfect as it may be when enrolled, a judgment lien does not persist in perpetuity and is ordinarily extinguished after seven years, if not renewed. The question here is whether Memorial Hospital may be a political subdivision of the state and thus immune from the bar of limitations contained in Miss. Const. Art. 4, § 104, and Miss.Code Ann. § 15-1-51 (1972).

Behaving sensibly, the parties withheld the amount of the accrued judgment debt-some $2,543.20-and proceeded to close the sale to the McKennas and have the judgment marked satisfied, its lien cancelled, with John Enroth and Memorial Hospital transferring their claims to the funds, which an escrow agent promptly interpled in the Chancery Court of Harrison County, First Judicial District.

Upon stipulated facts, the Chancery Court held that Memorial Hospital was a political subdivision of the State of Mississippi and thus immune from the bar of statutory periods of limitations.

In its opinion, the Chancery Court

> expressly finds that Memorial Hospital at Gulfport is a subdivision of the State of Mississippi and that it is entitled to the protection of Section 104 of the Constitution of the State of Mississippi and also Section 15-1-51 of the Mississippi Code of 1972, annotated.

The Court then entered judgment for the Hospital and against Enroth for the sums interpled.

III.

The Enroths appealed to this Court, arguing first that the record was devoid of a factual predicate for the Court's finding *204 that Memorial Hospital was a political subdivision of the state and, further, that this is the sort of fact of which the Court could not take judicial notice and, thereafter, that, even if the Chancery Court's factual premises were adequately grounded, Memorial Hospital as a matter of law enjoys no protection from the running of limitations.

A careful examination of the record left us in substantial doubt regarding the factual basis for the Court's critical finding, and we remanded to the Chancery Court

> with instructions that the Court advise us specifically of the basis of the foregoing finding. If the finding is predicated upon judicial notice, the Court should, of course, afford the Enroths a reasonable opportunity to be heard in opposition. *See* Rule 201(e), Miss.R.Ev.

Enroth v. Memorial Hospital at Gulfport, 556 So.2d 1377 (Miss.1990) (unpublished opinion); *see Tricon Metals & Services, Inc. v. Topp,* 516 So.2d 236, 239 (Miss.1987).

The Chancery Court convened the parties for hearing on March 30, 1990, and announced its finding that Memorial Hospital at Gulfport was a community hospital jointly owned by the City of Gulfport and the Gulfport-West Harrison County Hospital District. The Court expressly predicated this finding upon its judicial knowledge.

IV.

A.

[1] Our first question is whether the ownership, operation and status of a facility such as a hospital are matters, the factual components of which may be judicially noticed. Our point of beginning is Rule 201(b), Miss.R.Ev., which provides

> **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

See Thornton v. Shows by Shows, 537 So.2d 1363, 1365 (Miss.1989); *Administrators of the Tulane Educational Fund v. Cooley,* 462 So.2d 696, 699 (Miss.1984); *see also Eidt v. City of Natchez,* 421 So.2d 1225, 1229-30 (Miss.1982) (pre-rules discussion of types of facts that may be judicially noticed).

Where the strictures of the rules have otherwise been met, we have over the years-pre-Rules and post-Rules-recognized that a court may take judicial notice that "a certain town or city is within a certain county," *Jackson v. State,* 556 So.2d 335, 336-37 (Miss.1990); of the official acts of public officials, *Frazier v. State by and Through Pittman,* 504 So.2d 675, 681-82, fns. 3, 5, 8, 10 (Miss.1987); of the fact that 11:00 p.m. does not occur "in the daytime" within the limitations of a search warrant, *Strange v. State,* 530 So.2d 1336, 1339 (Miss.1988); of statistical information concerning unemployment levels and average weekly wages, *Eidt v. City of Natchez,* 421 So.2d 1225, 1229-30 (Miss.1982); of the geologically establishable behavioral properties of natural gas under pressure, *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board,* 457 So.2d 1298, 1307 (Miss.1984), *reversed on other grounds,* 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986).

Closer to the case at bar, we have implicitly noticed the status of corporate enterprises in *Morco Industries, Inc. v. City of Long Beach,* 530 So.2d 141, 142-44 (Miss.1988) and *Administrators of the Tulane Educational Fund v. Cooley,* 462 So.2d 696, 699-700 (Miss.1984), and the incorporated status of municipalities and villages, *City of Aberdeen v. Bank of Amory,* 191 Miss. 318, 322, 2 So.2d 153, 155 (1941); *King v. Caraway,* 132 Miss. 679, 688, 97 So. 422, 424 (1923); *Owen v. Anderson,* 119 Miss. 66, 71, 80 So. 386, 387 (1919). *See also Caruthers v. Panola County,* 205 Miss. 403, 418, 38 So.2d 902, 906 (1949) (judicial notice that Panola County is divided into two judicial districts and that Batesville is the county seat of the second district).

*205 One does not have to be a lawyer to sense that the organization, funding and operation of Memorial Hospital at Gulfport are matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.". Certainly in this latter sense the factual status of the hospital is one "not subject to reasonable dispute." The Chancery Court, however, relied on Rule 201(b)(1) in holding that the Hospital's status was generally known within the community. We agree here as well. These factual matters regarding the Hospital are the kind of adjudicative facts subject to the Court's judicial knowledge within Rule 201(b)(1) or (2).

B.

[2] [3] The question then becomes, how the Court should go about the business of judicially noting these facts?

> It is a cliche of judicial notice that a fact is not judicially noticeable by virtue of being known to the judge; conversely, the mere fact that the judge happens to be unacquainted with the fact of common knowledge should not bar him from taking judicial notice of it. This situation is likely to arise when a judge sits in another district and the fact to be noticed is a matter known only within the territorial jurisdiction of that court or where some local fact is to be noticed on appeal. But even where the judge thinks that he knows the fact to be a matter of common knowledge, it would be a salutary practice to check his understanding against other sources of information when this can be conveniently done....

21 C. Wright & K. Graham, *Federal Practice & Procedure: Evidence* § 5108 at 513-14 (1977).

A court may look to any source it deems helpful and appropriate, including official public documents, records and publications. The Court is not limited by rules of evidence otherwise enforceable in judicial proceedings. *Witherspoon v. State ex rel. West,* 138 Miss. 310, 320, 103 So. 134, 136-37 (1925) said:

> He may resort to ... government publications, dictionaries, encyclopedias, geographies, or other books, periodicals and public addresses.

(*citing, inter alia, Puckett v. State,* 71 Miss. 192, 195, 14 So. 452, 453 (1893)). Nothing in Rule 201 casts doubt on *Witherspoon.*

In the case at bar, the Court recited and listed the sources it had considered and included among those (1) numerous newspaper articles discussing the nature, operation and funding of Memorial Hospital, (2) conversations with physicians, (3) conversations with the Chancery Judge's own niece who was an employee at the hospital, (4) conversations with a lawyer not involved with this particular case but who was familiar with the matter, and (5) the fact that, before becoming Chancery Judge and in his prior capacity as a lawyer, he had been involved in a lawsuit regarding the hospital in which its legal status had been an issue. We hold these bases adequate that the Court may judicially know the factual components of the Hospital's status.

C.

[4] One further point requires note. Rule 201(e) provides that a party affected by the Court's taking judicial notice of a fact is entitled to an opportunity to be heard. This accords with our pre-rules law. *Eidt v. City of Natchez,* 421 So.2d at 1230-31. In our February 21, 1990, order for remand, we directed that the Chancery Court "afford the Enroths a reasonable opportunity to be heard in opposition."

The record of the proceedings on remand held March 30, 1990, reflects that counsel for the Enroths was present and was afforded the opportunity to present evidence or otherwise be heard. Counsel announced "I don't have any proof to offer either way.... I have nothing to offer, one way or the other." There can be no doubt that the Enroths were afforded the procedural opportunities required by common fairness and, more specifically, by Rule 201(e).

***206 V.**

[5] We take it as established that Memorial Hospital at Gulfport is jointly owned by the City of Gulfport, a municipal corporation, and the Gulfport-West Harrison County Hospital District, a corporate creation of political subdivisions of this state, that the Hospital is governed by a board of trustees jointly appointed by the City Council of the City of Gulfport and the Board of Supervisors of Harrison County, that it is substantially supported by public funding. The legal question, then, is the effect of these facts, and we ask the question within the particular context of constitutional and statutory provisions.

Miss. Const. Art. 4, Section 104 (1890) provides

> Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporations thereof.

Implementing Section 104, though its terms appear self-executing, the legislature enacted Section 2736 of the

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Annotated Code of 1892, by way of 1892 Miss.Laws 60, ch. 65:

> Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporations thereof....

This statute is now codified as Miss.Code Ann. § 15-1-51 (1972).

Town of Crenshaw v. Panola County, 115 Miss. 891, 903-04, 76 So. 741, 743 (1917), recognized that a municipality enjoys Section 104 immunity, but this is no surprise as a "municipal corporation" is expressly named therein, and in Section 15-1-51 as well. *Gully v. Bew,* 170 Miss. 427, 436, 154 So. 284, 288 (1934) held a county a "subdivision" entitled to the protection of Section 104. To like effect is *Board of Education v. League,* 405 So.2d 122, 124-26 (Miss.1981). Closer to the mark *Adams v. Illinois Central Railroad Company,* 71 Miss. 752, 754-55, 15 So. 640, 640 (1894) held the Yazoo-Mississippi Delta Levee District a "subdivision," within Section 104.

Community hospitals are creatures of statute. The original legislation appears in 1944 Miss.Laws 490-92, ch. 277 and provided for various combinations between county, city, town or supervisors district for the creation, operation and funding of community hospitals. The current statutes on community hospitals are codified as Miss.Code Ann. §§ 41-13-10 et seq. (1972 and supplements). Miss.Code Ann. § 41-13-15 (Supp.1989) is the operative statute at issue and in sub-section 1 thereof provides

> Any county and/or any political or judicial subdivision of a county and/or any municipality of the State of Mississippi, acting individually or jointly, may acquire and hold real estate for a community hospital ... and construct a community hospital thereon....

This is precisely what the City of Gulfport and the Gulfport-West Harrison County Hospital District have done and the product of their labors is Memorial Hospital at Gulfport. We have held the office of trustee for a community hospital a public office. *State Ex Rel. Pair v. Burroughs,* 487 So.2d 220, 223 (Miss.1986). Add to the above our holding that public operation of a hospital is a governmental rather than a proprietary function, *City of Leland v. Leach,* 227 Miss. 558, 560-61, 86 So.2d 363, 364-65 (1956).

Without further ado we hold that Memorial Hospital at Gulfport is a "subdivision [of the state] or municipal corporation thereof" within the meaning and contemplation of Section 104 of the Constitution and statutory Section 15-1-51. It follows that Section 15-1-47's seven-year period of limitations governing judgment liens was and is inoperative against the judgment the Hospital held against John Enroth. The Chancery Court correctly entered judgment that the Hospital was entitled to the funds interpled and denying Enroth's claim thereto.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, SULLIVAN, ANDERSON, PITTMAN and BLASS, JJ., concur.

All Citations

566 So.2d 202

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United States District Court,
D. South Carolina,
Columbia Division.

Rodney COLEMAN, Plaintiff,
v.
Wade S. KOLB, Deborah T. Nielson, Eugene Williams, Judge Thomas W. Cooper, Mr. Mims, Defendants.

Civil Action No. 3:14–cv–02955–JMC. | Signed Aug. 14, 2015.

Attorneys and Law Firms

Rodney Coleman, Ridgeville, SC, pro se.

ORDER AND OPINION

J. MICHELLE CHILDS, District Judge.

*1 Plaintiff Rodney Coleman ("Plaintiff") filed this *pro se* action pursuant to 42 U.S.C. § 1983. Plaintiff alleges Defendants Wade S. Kolb, Sumter County Solicitor; Deborah T. Nielson, Sumter County Assistant Solicitor; Eugene Williams, Sumter County Police Investigator; Judge Thomas W. Cooper; and Tommy Mims, former Sumter County Sherriff (collectively "Defendants"), violated his constitutional rights because he was never arrested and charged with possession of a firearm during the commission of a violent crime, an offense for which he was convicted. (ECF No. 1.)

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, the matter was referred to United States Magistrate Judge Bristow Marchant for pre-trial handling. On October 8, 2014, the Magistrate Judge issued a Report and Recommendation ("Report") recommending the court summarily dismiss the action without issuance and service of process. (ECF No. 31.) This review considers Plaintiff's Motion and Demand to Object to Report and Recommendation ("Objections"), filed October 23, 2014. (ECF No. 34.) The court also considers Plaintiff's Motion and Demand to File Notice of Appeal (ECF No. 36), Motion and Demand for Abeyance and to Amend Original Complaint (ECF No. 38), and Motion to Amend (ECF No. 40).

For the reasons set forth herein, the court **ACCEPTS** the Magistrate Judge's Report. The court thereby **DISMISSES** Plaintiff's Complaint (ECF No. 1) and **DENIES** Plaintiffs' Motions (ECF Nos. 34, 36, 40).

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The court concludes upon its own careful review of the record that the factual and procedural summation in the Magistrate Judge's Report is accurate, and the court adopts this summary as its own. (*See* ECF No. 31.) The court will only recite herein facts pertinent to the analysis of Plaintiff's Objections and Motions.

Plaintiff is currently incarcerated at MacDougall Correctional Institution within the South Carolina Department of Corrections ("SCDC"), serving a 35–year sentence on a conviction of murder and a 5–year sentence on a conviction for possession of a weapon during a violent crime, to be served concurrently. *See* SCDC Incarcerated Inmate Search, http://public.doc.state.sc.us/ scdc-public/ (last visited Aug. 13, 2015); *see also*, Sumter County Third Judicial Circuit Public Index, http://publicindex.sccourts.org/Sumter/PublicIndex/PISearch.aspx, Case No.1996GS4300573A (last visited Aug. 14, 2015). [1]

Plaintiff filed his Complaint on June 30, 2014, alleging the Sumter County "General Session Court did not have jurisdiction to convict and sentence the plaintiff to 5 years for" possession of a weapon during a violent crime because he was not arrested and charged with that offense. (ECF No. 1 at 3–4.) Plaintiff also alleges prosecutorial misconduct, including the withholding of *Brady* material [2] and other evidence. (*Id.* at 4–7.) Plaintiff seeks a jury trial, $100 million "for 18 years of imprisonment, pain and suffering, lost wages from employment, emotional stress and lost [*sic*] of home, property, and family,"'[a] declaration that the acts and omissions described herein violated Plaintiff's rights under the Constitution and laws of the United States," compensatory and punitive damages "in the amount of $250.00 per day spent in prison due to lost wages," and any additional relief the court deems proper. (*Id.* at 9–11.)

*2 On October 8, 2014, the Magistrate Judge issued the Report, recommending the court summarily dismiss the action. (ECF No. 31.) First, the Magistrate Judge found,

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"to the extent that Plaintiff may be requesting release from incarceration, such relief may only be obtained in a habeas [corpus] action."(*Id.* at 3.) Further, the Magistrate Judge found, Plaintiff's claims are precluded under *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which states that a prisoner's claims for damages are not cognizable under § 1983 if they would necessarily question the validity of his conviction. (*Id.* at 3–5.)

In addition, the Magistrate Judge found that even if Plaintiff's claims were not barred by *Heck,* summary dismissal was appropriate for each Defendant. For Defendants Mims and Williams, "Plaintiff's pleadings fail to provide any specific factual information to support a claim that either of these Defendants violated his constitutional rights."(*Id.* at 5.) Defendants Kolb and Nielson are entitled to absolute prosecutorial immunity for activities performed as officers of the court. (*Id.* at 6.) Defendant Cooper "is entitled to absolute judicial immunity from suit for all actions taken in his judicial capacity."(*Id.* at 7.)

Regarding Plaintiff's request for a declaratory judgment, the Magistrate Judge found Plaintiff is not entitled to such relief "because he does not ask the Court to define the parties' rights in the future."(*Id.* at 8.)

Finally, regarding any claims Plaintiff may be asserting under state law, "[s]ince Plaintiff has asserted no valid federal claim, this Court cannot exercise 'supplemental' jurisdiction over Plaintiff's state law claims, if any."(*Id.* at 9.) Further, the Magistrate Judge stated, there is not diversity of citizenship among the parties and thus the court cannot exercise diversity jurisdiction over these matters. (*Id.*)

Plaintiff timely filed his Objections on October 23, 2014. (ECF No. 34.) In addition, on February 19, 2015, Plaintiff filed a Motion and Demand to File Notice of Appeal (ECF No. 36), followed by a Motion and Demand for Abeyance and to Amend Original Complaint (ECF No. 38) on May 19, 2015, and a Motion to Amend (ECF No. 40) on June 12, 2015.

II. LEGAL STANDARD AND ANALYSIS

A. Summary Dismissal

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Matthews v. Weber,* 423 U.S. 261, 270–71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). This court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made, and the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation, or recommit the matter with instructions. *See*28 U.S.C. § 636(b)(1).

*3 Objections to a Report and Recommendation must specifically identify portions of the Report and the basis for those objections. Fed.R.Civ.P. 72(b)."[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'"*Diamond v. Colonial Life & Acc. Ins. Co.,* 416 F.3d 310, 316 (4th Cir.2005) (quoting Fed.R.Civ.P. 72 advisory committee's note). Failure to timely file specific written objections to a Report will result in a waiver of the right to appeal from an Order from the court based upon the Report. 28 U.S.C. § 636(b)(1); *Thomas v. Arn,* 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wright v. Collins,* 766 F.2d 841 (4th Cir.1985); *United States v. Schronce,* 727 F.2d 91, 94 (4th Cir.1984). If the plaintiff fails to properly object because the objections lack the requisite specificity, then *de novo* review by the court is not required.

As Plaintiff is a *pro se* litigant, the court is required to liberally construe his arguments. *Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir.1978). The court addresses those arguments that, under the mandated liberal construction, it has reasonably found to state a claim. *Barnett v. Hargett,* 174 F.3d 1128, 1133 (10th Cir.1999).

In his Objections, Plaintiff reasserts the arguments in his Complaint, but fails to specifically address and refute the Magistrate Judge's findings. He offers no argument to counter the Magistrate Judge's findings that his claims are barred by *Heck.*Plaintiff objects only to the finding that his claims against Defendants Kolb, Nielson, and Cooper are barred by immunity via a general objection to the idea of "judicial error," stating, "why can't you folks be held responsible for your mess ups[?]" (ECF No. 34 at 3.) Finally, Plaintiff makes a general assertion that Defendants Mims and Williams "did violate [Plaintiff's] Constitutional Rights ... and sat in the courtroom without upholding the law themselves, therefore let a wrongful conviction be granted."(*Id.* at 1.) He fails, however, to assert specific facts to allege any rights

violations by these Defendants. Plaintiff offers no objections to the Magistrate Judge's findings regarding his request for declaratory relief, or regarding this court's lack of jurisdiction over any state law claims he may be asserting.

As such, Plaintiff's Objections lack the requisite specificity required by Federal Rule of Civil Procedure 72(b). Because Plaintiff failed to properly object to the Report with specificity, the court does not need to conduct a *de novo* review and instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond*, 416 F.3d at 315. The court does not find clear error and accepts the Report by the Magistrate Judge.

B. Motion and Demand to File Notice of Appeal

*4 On February 19, 2015, Plaintiff filed a Motion and Demand to File Notice of Appeal, with the understanding that the Magistrate Judge's Report acted as a summary dismissal of Plaintiff's claim. (ECF No. 36.) In the Motion, Plaintiff stated that he was not informed of his right to file notice of appeal within 30 days of the decision, and requested an extension to file notice of appeal. (*Id.* at 1.)

As the Magistrate Judge's Report is only a recommendation to the court, and not a final action, Plaintiff's Motion was premature. With no final decision to appeal, and with the time period in which to appeal not at issue, Plaintiff's requested relief is unnecessary, and is therefore denied.

C. Motion and Demand for Abeyance and Motions to Amend

On May 19, 2015, Plaintiff filed a Motion and Demand for Abeyance and to Amend Original Complaint (ECF No. 38), followed by a second Motion to Amend filed on June 12, 2015 (ECF No. 40).

In the May Motion, having received no response to his Objections, Plaintiff requests the court place the case in abeyance to allow him to amend his Complaint to add further details. (ECF No. 38 at 1.) Plaintiff further requests a writ of mandamus "to expedite the litigation process." (*Id.*) Plaintiff lists a number of additional details with which he wishes to supplement his Complaint, as well as additional Defendants he wishes to add. (*Id.* at 2–4.) Plaintiff reiterates further details in his June Motion, attaching several documents pertaining to his arrest and conviction. (ECF No. 40.)

A party may amend its pleading, even after the time to amend as a matter of course has expired, when justice would require granting the request to amend. Fed.R.Civ.P. 15(a)(2). A motion to amend should be denied only where it would be prejudicial, there has been bad faith, or the amendment would be futile. *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir.2008) (citing *HCMF Corp. v. Allen*, 238 F.3d 273, 276–77 (4th Cir.2001)). The decision to grant a party leave to amend rests within the sound discretion of the district court. *Sandcrest Outpatient Servs., P.A. v. Cumberland Cnty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1148 (4th Cir.1988). However, "it is well-settled that '[i]n the absence of any apparent or declared reason ... the leave sought should, as the rules require, be freely given.'" *National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir.1988) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

Even with the additional facts Plaintiff alleges, the essence of his claim would necessarily call into question the validity of his conviction. As such, even with the proposed amendments, Plaintiff's claim would be precluded by *Heck*. Therefore, the amendment would be futile and is denied.

In addition, as the court has now taken action, Plaintiff's request for a writ of mandamus is unnecessary and is therefore denied as moot.

III. CONCLUSION

*5 Based on the aforementioned reasons and a thorough review of the Report of the Magistrate Judge and the record in this case, the court **ACCEPTS** the Report of the Magistrate Judge (ECF No. 31). It is therefore ordered that this action (ECF No. 1) is **DISMISSED** with prejudice. It is further ordered that Plaintiff's Motion and Demand to File Notice of Appeal (ECF No. 36), Motion and Demand for Abeyance and to Amend Original Complaint (ECF No. 38), and Motion to Amend (ECF No. 40) are **DENIED.**

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

BRISTOW MARCHANT, United States Magistrate Judge.

The Plaintiff, Rodney Coleman, proceeding *pro* se and in *forma nauneris*, brings this action pursuant to 42 U.S.C.

§ 1983. Plaintiff is an inmate at the Evans Correctional Institution, part of the South Carolina Department of Corrections ("SCDC"). Plaintiff appears to allege that his constitutional rights were violated because he was convicted of possession of a firearm during the commission of a violent crime, but was never arrested and charged with this offense.

Specifically, Plaintiff alleges that he was arrested and charged with murder on April 7, 1996, and that the corresponding arrest warrant was filed by the Clerk of Court of Sumter County on April 12, 1996. However, he claims he was never arrested or charged with the offense of possession of a firearm during the commission of a violent crime on April 7, 1996, and that his constitutional rights were violated when he was convicted and sentenced to five years for the offense of possession of a firearm during the commission of a violent crime, because the sentencing court did not have jurisdiction since Plaintiff had never been arrested and charged with this offense. Plaintiff appears to allege claims for malicious prosecution as to Defendants Kolb and Nielson, as well as that Judge Cooper did not have jurisdiction to impose the sentence with respect to the possession of a firearm charge. He also claims that "Sumter County et al" withheld evidence from the crime scene. Complaint, ECF No. 1–9. Plaintiff requests declaratory relief, a new trial, and one million dollars. *Id.* at 9, 11.

Discussion

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Complaint pursuant to the procedural provisions of 28 U.S.C. § 1915 and § 1915A, the Prison Litigation Reform Act, Pub.L. No. 104–134, 110 Stat. 1321 (1996), and in light of the following precedents: *Denton v. Hernandez,* 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992), *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989), *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Nasim v. Warden, Maryland House of Corr.,* 64 F.3d 951 (4th Cir.1995), and *Todd v. Baskerville,* 712 F.2d 70 (4th Cir.1983). Pro se complaints are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir.1978), and a federal district court is charged with liberally construing a pal se complaint to allow the development of a potentially meritorious case. *Hughes v. Rowe,* 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980); *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081(2007) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555–56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

***6** However, even when considered pursuant to this liberal standard, for the reasons set forth herein below this case is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.,* 901 F.2d 387 (4th Cir.1990); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) [outlining pleading requirements under the Federal Rules of Civil Procedure].

Improper Remedy

First, to the extent that Plaintiff may be requesting release from incarceration, such relief may only be obtained in a habeas action. *See Preiser v. Rodriguez,* 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) [complaint or petition challenging the fact or duration of confinement should be construed and processed as a habeas corpus petition, while a complaint or petition challenging the conditions of confinement should be construed and processed as a complaint pursuant to 42 U.S.C, § 1983]. In *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Fourth Court reiterated that release from prison is not a remedy available under 42 U.S.C. § 1983. Therefore, to the extent Plaintiff is seeking release from prison, that claim is subject to dismissal.

Heck v. Humphrey

Plaintiffs claims for damages based on malicious prosecution and false imprisonment are subject to summary dismissal based on the United States Supreme Court's decision in Heck, where the Court held that a state prisoner's claim for damages is not cognizable under § 1983 where success of the action would implicitly question the validity of the conviction or duration of the sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. *Heck,* 512 U.S. at 486–487.

As Plaintiff has not shown a favorable termination as to his conviction, [1] his claims for malicious prosecution and/or false imprisonment are barred by *Heck,* and should be

dismissed. *See Lambert v. Williams,* 223 F.3d 257, 260–261 (4th Cir.2000) [claim for malicious prosecution requires a showing that the initiation or maintenance of a proceeding against the plaintiff was without probable cause to support it and a termination thereof occurred in favor of the plaintiff], cert. *denied,*531 U.S. 1130, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001); *Brooks v. City of Winston–Salem,* 85 F.3d 178, 183 (4th Cir.1996) [Claim for malicious prosecution does "not accrue until a favorable termination is obtained."]; *Roesch v. Otarola,* 980 F.2d 850, 853–854 (2d Cir.1992) [holding that requirement that a plaintiff receive favorable termination applies to claims of false arrest, false imprisonment, and malicious prosecution].

It may be that Plaintiff, even though he is currently incarcerated, has completed his sentence as to the challenged conviction, as the records from the Sumter County Third Circuit Public Index [2] indicate that Plaintiff was sentenced on the possession of a weapon during a violent crime conviction to five years concurrent; see http:/ / publicindex.sccourts.org/Sumter/PublicIndex/PIError.aspx?County= 43 & CourtAgency–43001 & Casenum=1996GS4300573A & CaseType–C (last visited Oct. 6, 2014); and in *Wilson v. Johnson,* 535 F.3d 262 (4th Cir.2008), the Fourth Circuit indicated that Heck does not bar a § 1983 action where "a prisoner could not, as a practical matter, seek habeas relief."*Wilson,* 535 F.3d at 268. However, even if Plaintiff is currently no longer in custody as to the challenged conviction, he had ample time to bring his habeas claims while in custody and has not alleged that circumstances beyond his control existed to prevent him from pursuing habeas relief. Therefore, even if Plaintiff has now completed his sentence, these claims are still subject to dismissal. *See Bishop v. County of Macon,* 484 F. App'x 753, 754 (4th Cir.2012) [Finding that *Wilson's* exception only applies where the plaintiff can show that circumstances beyond his control left him unable pursue habeas remedies, and warning that *"Wilson* does not permit a plaintiff to end-run *Heck* by simply sitting on his rights until all avenues for challenging a conviction have closed."].

Defendants Mims and Williams

*7 It is noted that Plaintiff names Sumter County Sheriff Mims and Sumter County Police Investigator Williams as Defendants in the caption of his Complaint. However, even if Plaintiff's claims against Defendants Mims and Williams are not barred by Heck, these Defendants are entitled to summary dismissal because Plaintiff's pleadings fail to provide any specific factual information to support a claim that either of these Defendants violated his constitutional rights. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. at 555 [requiring, in order to avoid dismissal, " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the claim is and the grounds upon which it rests' " (quoting Fed.R.Civ.P. 8(a)(2)].

In order to proceed under § 1983, a plaintiff must affirmatively show that a defendant acted personally in the deprivation of his constitutional rights; *Vinnedge v. Gibbs,* 550 F.2d 926, 928 (4th Cir.1977); and when a complaint contains no personal allegations against a defendant, that defendant is properly dismissed.See *Karafiat v. O'Mally,* 54 F. App'x 192, 195 (6th Cir.2002); *Whaley v. Hatcher,* No. 1:08CV 125–01–MU, 2008 WL 1806124, at *1 (W.D.N.C.Apr.18, 2008). Here, Plaintiff does not mention either of the Defendants in the body of his Complaint, and has not alleged any specific claim against either of these Defendants. Therefore, they are entitled to dismissal as party Defendants, even if this case was otherwise allowed to proceed.

Defendants Kolb and Nielson

Plaintiff claims that Sumter County Assistant Solicitor Deborah T. Nielson committed prosecutorial misconduct by bringing the possession of a firearm during the commission of a violent crime charge "knowing that on April 07, 1996 Plaintiff was never arrested and charged with [this] offense ... according to the arrest report."ECF No. 1. He further claims that Nielson had a witness falsely testimony to help convict him. Plaintiff appears to claim that he was unable to pay the required money to the South Carolina Law Enforcement Division ("SLED") to obtain crime scene evidence and that Nielson failed to provide the court and Plaintiff's attorney with copies of all relevant evidence. Plaintiff also claims that the grand jury true bill indictment as to the firearm charge is defective because the relevant evidence has been held at SLED for eighteen years and Plaintiff is unsure what evidence Sumter Solicitor Wade S. Kolb, Jr. presented to the grand jury.

These two individuals are entitled to dismissal as party Plaintiff's because Prosecutors have absolute immunity for activities performed as "an officer of the court" where the conduct at issue was closely associated with the judicial

phase of the criminal process. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 341–343, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). For example, when a prosecutor "prepares to initiate a judicial proceeding,""appears in court to present evidence in support of a search warrant application," or conducts a criminal trial, bond hearings, grand jury proceedings, and pre-trial "motions" hearings, absolute immunity applies. *Id.* at 343; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993); *Dababnah v. Keller–Burnside*, 208 F.3d 467 (4th Cir.2000). In the instant action, Plaintiff's claims against Defendants Nielson and Kolb involve the prosecution of Plaintiff's criminal case. Therefore, these Defendants are protected from Plaintiff's claims for damages by prosecutorial immunity. See *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) [absolute immunity "is an immunity from suit rather than a mere defense to liability"]; *see also Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir.2004) [immunity extends to "persons working under [a prosecutor's] direction, when they function as advocates for the state" and are clearly associated with the judicial process].

Defendant Judge Cooper

*8 Plaintiff claims that Judge Thomas W. Cooper, Jr. erred in sentencing him for the offense of possession of a firearm during the commission of a violent charge when Plaintiff "was never arrested and charged with this offense on April 07, 1996."Complaint, ECF No. 1 at 3. He also claims that his attorney filed a motion on May 30, 1996 to obtain certain evidence, but the motion was never granted. However, Judge Cooper is entitled to absolute judicial immunity from suit for all actions taken in his judicial capacity. See *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 351–64, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Pressly v. Gregory*, 831 F.2d 514, 517 (4th Cir.1987) [a suit by South Carolina inmate against two Virginia magistrates]; *Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir.1985) ["It has long been settled that a judge is absolutely immune from a claim for damages arising out of his judicial actions."]; see also *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) [immunity presents a threshold question which should be resolved before discovery is even allowed]; *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) [absolute immunity "is an immunity from suit rather than a mere defense to liability"]; *accord Bolin v. Story*, 225 F.3d 1234 (11th Cir.2000) [discussing judicial immunity of United States District Judges and United States Circuit Judges]. Therefore, Judge Cooper is entitled to dismissal as a party Defendant.

Declaratory Relief

Plaintiff requests "[a] declaration that the acts and omissions described herein violated Plaintiff's rights under the Constitution and laws of the United States.""Declaratory judgments, however, are meant to define the legal rights and obligations of the parties in the anticipation of some future conduct."*Johnson v. McCuskey*, 72 F. App'x 475, 477 (7th Cir.2003) (citing *Bontkowski v. Smith*, 305 F.3d 757, 761 (7th Cir.2002); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2751 (3d ed.1998))."Declaratory judgments are not meant simply to proclaim that one party is liable to another."*Johnson v. McCuskey*, 72 F. App'x at 478 (citing *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1553–54 (Fed.Cir.1994)). Plaintiff is not entitled to the declaratory relief that he seeks in the instant Complaint because he does not ask the Court to define the parties' rights in the future. Rather, he seeks merely a declaration from the Court that the Defendants violated his rights in the past. See *Abebe v. Richland County*, C/A No. 2:09–02469–MBS–RSC, 2009 WL 6582396 (D.S.C. Oct.8, 2009) [plaintiffs request for declaratory judgment "misses the mark" when he asks the court for declarations that the acts and omissions described in the complaint violated his rights under the constitution], *adopted*, 2010 WL 2431062 (D.S.C. Jun.14, 2010). Consequently, Plaintiff's Complaint, insofar as it seeks "[a] declaration that acts and omissions described herein violated Plaintiff's rights under the Constitution and Laws of the United States" (ECF No. 1 at 11), should be dismissed.

Claims under South Carolina Law

*9 To the extent Plaintiff has alleged claims under state law (he asserts that Defendants' actions violated "South Carolina pretrial matters"), federal courts are allowed to hear and decide state-law claims only in conjunction with federal-law claims, through the exercise of "supplemental jurisdiction." *See*28 U.S.C. § 1367; *Wisconsin ikp't of Corrs. v. Schacht*, 524 U.S. 381, 387, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998). Since Plaintiff has asserted no valid federal claim, this Court cannot exercise "supplemental" jurisdiction over Plaintiff's state law claims, if any. *See Lovern v. Edwards*, 190 F.3d 648,

655 (4th Cir.1999)["[T]he Constitution does not contemplate the federal judiciary deciding issues of state law among non-diverse litigants"].

While a civil action for a state law claim would be cognizable in this Court on its own under the federal diversity statute, that statute requires complete diversity of parties and an amount in controversy in excess of seventy-five thousand dollars ($75,000.00).*See*28 U.S.C. § 1332(a). Complete diversity of parties in a case means that no party on one side may be a citizen of the same State as any party on the other side. *See Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 372–374, 98 S.Ct. 2396, 57 L.Ed.2d 274(1978). Here, Plaintiff's Complaint and proposed service documents indicate that all parties to this action are residents of South Carolina, so diversity of citizenship does not exist. *See* ECF No. 1 at 1; ECF No. 26. Accordingly, this Court has no diversity jurisdiction over any state law claims being asserted.

Recommendation

Based on the foregoing, it is recommended that the Court **dismiss** Plaintiff's Complaint without prejudice and without issuance and service of process.

Plaintiff's attention is directed to the important notice on the next page.

Filed Oct. 7, 2014.

All Citations

Slip Copy, 2015 WL 4878846

Footnotes

1 Under Federal Rule of Evidence 201(b), "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."Postings on government websites are inherently authentic or self-authenticating. *See Williams v. Long,* 585 F.Supp.2d 279, 686–89, 688 n. 4 (D.Md.2008).

2 *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

1 In fact, he even asks for a "new trial".

2 The Court may take judicial notice of factual information located in postings on government web sites. *See Williams v. Long,* 585 F.Supp.2d 679, 687–88 (D.Md.2008) [noting that some courts have found postings on government web sites as inherently authentic or self-authenticating].

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2015 WL 4168056
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Beaufort Division.

Eric MANCE, Petitioner,
v.
Larry CARTLEDGE, Respondent.

C.A. No. 9:15–701–HMH–BM. | Signed July 9, 2015.

Attorneys and Law Firms

Eric Mance, Bishopville, SC, pro se.

OPINION & ORDER

HENRY M. HERLONG, JR., Senior District Judge.

*1 This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Bristow Marchant, made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina.

The magistrate judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber,* 423 U.S. 261, 270–71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. *See*28 U.S.C. § 636(b)(1) (2006).

The Petitioner filed no objections to the Report and Recommendation. In the absence of objections to the magistrate judge's Report and Recommendation, this court is not required to give any explanation for adopting the recommendation. *See Camby v. Davis,* 718 F.2d 198, 199 (4th Cir.1983). The court must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."*Diamond v. Colonial Life & Acc. Ins. Co.,* 416 F.3d 310, 315 (4th Cir.2005).

After a thorough review of the Report and Recommendation and the record in this case, the court adopts Magistrate Judge Marchant's Report and Recommendation and incorporates it herein. It is therefore

ORDERED that the Petition for a Writ of Habeas Corpus, docket number 1, is summarily dismissed without prejudice and without requiring Respondent to file a return. It is further

ORDERED that a certificate of appealability is denied because Petitioner has failed to make "a substantial showing of the denial of a constitutional right."28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

BRISTOW MARCHANT, United States Magistrate Judge.

Eric Mance (Petitioner), a state prisoner in the Lee Correctional Institution of the South Carolina Department of Corrections (SCDC), filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2008 convictions for armed robbery, assault and battery with intent to kill (ABWIK), and possession of apistol by a person convicted of a violent crime. *See* Petition, ECF No. 1 at 1.

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition filed in the above-captioned case pursuant to the procedural provisions of the Anti–Terrorism and Effective Death Penalty Act of 1996, Pub.L. 104–132, 110 Stat. 1214 (AEDPA), and in light of the following precedents: *Denton v. Hernandez,* 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Neitzke v. Williams,* 490 U.S. 319, 324–25, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Haines v. Kemer,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Nasim v. Warden. Md. House of Corr.,* 64 F.3d 951 (4th Cir.1995); and *Todd v. Baskerville,* 712 F.2d 70 (4th Cir.1983).*Pro se* petitions are also held to a less stringent standard than those drafted by attorneys, and a federal district court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case. *See Hushes v. Rowe,* 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163(1980) (quoting *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)); *Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir.19781 (citing *Rice v. Olson,* 324 U.S. 786, 791–92, 65 S.Ct. 989, 89 L.Ed. 1367

(19451: *Holiday v. Johnston,* 313 U.S. 342, 350, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941)).

*2 Nonetheless, this Court is charged with screening Petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court."Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.,* 901 F.2d 387, 391 (4th Cir.1990). Such is the case here.

Discussion

With respect to his conviction and sentence, petitioner's sole federal remedy is a writ of habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2254, which can be sought only after he has exhausted his state court remedies. *See*28 U.S.C. § 2254(b); *Picard v. Connor,* 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 490–491, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (exhaustion required under 28 U.S.C. § 2241). Further, subsection (d) of § 2244 provides:

> (d) (1) A 1–year period of limitation shall apply to an application for ass writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Here, Petitioner was convicted in a jury trial on the charges of armed robbery, ABWIK, and possession of a pistol by a person convicted of a violent crime on August 30, 2008, and was sentenced to life in prison without the possibility of parole. ECF No. 1 at 1. Petitioner's direct appeal was dismissed on February 11, 2010. *State v. Mance,* No.2010–UP–120, 2010 WL 10079370 (S.C.Ct.App. Feb.11, 2010); ECF No. 1 at 2. Thereafter, an application for post-conviction relief (PCR) was not filed by Petitioner until almost a year later, on February 4, 2011, which Petitioner states was denied on March 23, 2013, and which Richland County records indicate was dismissed on April 29, 2013. *See* ECF No. 1 at 3; Richland County Fifth Judicial Circuit Public Index, http://www5.rcgov.us/SCJDWEB /PublicIndex/CaseDetails.aspx?County=40 & Court Agency=40002 & Casenum=2011CP4000741 & CaseType=V (last visited June 8, 2015). [1] Petitioner appears to have appealed the denial of his PCR action to the South Carolina Supreme Court, [2] which Petitioner states was denied on July 24, 2014, ECF No. 1 at 4. The remittitur date from the Supreme Court of South Carolina is August 11, 2014. *See* attached copy of letter from the Supreme Court of South Carolina. [3]

*3 In sum, the record reflects that Petitioner's direct appeal became final on February 11, 2010. After a lapse of ninety days, because Petitioner did not file a petition for writ of certiorari with the United States Supreme Court (*see* ECF No. 1 at 2), *see, e.g. Harris v. Hutchinson,* 209 F.3d 325 (4th Cir.2000)[d]rect review concludes at expiration of time for seeking certiorari from United States Supreme Court]; U.S. Sup.Ct. R. 13(1) [time for filing petition for certiorari with United States Supreme Court is 90 days], the § 2254 one-year statute of limitations under 28 U.S.C. § 2244 began to run the next day, on May 13, 2010, and unless tolled, ran until it expired on May 13, 2011. *See Hernandez v. Caldwell,* 225

F.3d 435, 438–39 (4th Cir.2000) [applying the anniversary date method in calculating the one-year limitations period in § 2244 and concluding that "the actual count on the limitations period began on April 25, 1996, and ended on April 24, 1997, excluding any time tolled"]. Since Petitioner did not file his PCR until February 4, 2011, 267 days had passed since the statute of limitations began to run, and only 98 days remained. Thus, Petitioner needed to file this Petition, at the latest, by November 17, 2014 [4] (98 days after the remittitur was filed on August 11, 2014). However, Petitioner did not do so until February 4, 2015. [5]

The United States Supreme Court has acknowledged that district courts are "permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition."*Day v. McDonough,* 547 U.S. 198, 209, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006); *see also Eriline Co. S.A. v. Johnson,* 440 F.3d 648, 655 (4th Cir.2006) [carving out habeas corpus petitions and *in forma pauperis* complaints as narrow circumstances to permit *sua sponte* consideration of statute of limitations when defense is clear on face of petition or complaint]. However, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."*Id.* Similarly, the United States Court of Appeals for the Fourth Circuit has mandated caution in *sua sponte* dismissals of untimely petitions under the AEDPA:

> [W]hen a federal habeas court, acting *sua sponte,* dismisses a § 2254 action as untimely without notice to or input from the petitioner, the court cannot be certain that there are no circumstances that would cause the petition to be timely. The district court ought at least to inquire whether there are any facts not apparent to the court that militate against the application of the limitations bar.

McMillan v. Jarvis, 332 F.3d 244, 249 (4th Cir.2003); *Hill v. Braxton,* 277 F.3d 701, 707 (4th Cir.2002).

Here, the standard habeas petition form (AO–241) requests information in question number 18 pertaining to the timeliness of the petition, as follows: "If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition."The footnote to the question provides the text of § 2244(d). Petitioner answered Question 18 of his Petition, by merely stating:

> *4 My direct appeal and P.C.R. had to first be adjudicated as well as my appeal from P.C.R. to the highest state court. The judgement from the highest state court only became final on 7/24/14.

ECF No. 1 at 13.

In order to provide the "fair notice" required by *Day, McMillan,* and *Hill,* Petitioner was given the opportunity, by a proper form and order to show cause dated March 17, 2015 (which was remailed to Petitioner on April 22, 2015), [6] to show cause why his case should not be dismissed on timeliness grounds. Petitioner was specifically informed that the Court was considering dismissal of his case based on the one-year statute of limitations and given an opportunity to provide facts concerning the issue of timeliness of his Petition that would cast doubt on whether this action should be dismissed based on the limitations bar. Proper Form Order and Order to Show Cause, ECF No. 5 at 3–4; ECF No. 9. [7] However, Petitioner failed to file any response to the order to show cause, norhas he provided this Court with any information sufficient to support an equitable tolling of the limitations period. Therefore, this petition should be dismissed as untimely.

Recommendation

Based on the foregoing, it is recommended that the instant Petition for a Writ of Habeas Corpus be summarily dismissed without prejudice and without requiring Respondent to file a return. *See Eriline Co. S.A. v. Johnson,* 440 F.3d at 656 [district courts are charged with the duty to independently screen initial filings and dismiss those actions that plainly lack merit without requesting an answer from the respondent].

Signed June *10,* 2015.

All Citations

Slip Copy, 2015 WL 4168056

Footnotes

1 The Court may take judicial notice of factual information located in postings on government web sites. *See Tisdale' v. South Carolina Highway Patrol,* CIANo. 0:09–1009–IIFF–PJG, 2009 WL 1491409, *1 n. 1 (D.S.C. May 27, 2009), aff'd347 F. App'x 965 (4th Cir. Aug.27, 2009); *In re Katrina Canal Breaches Consolidated Litigation,* No. 05–1182, 2008 WL 4185869 at * 2 (E.D.La. September 8,2008) [noting that courts may take judicial notice of governmental websites including other courts' records]; *Williams v. Long,* 585 F.Supp.2d 679, 687–88 (D.Md.2008) [noting that some courts have found postings on government web sites as inherently authentic or self-authenticating].

2 In response to the question ofwhether Petitioner filed "any second petition, application, or motion," he wrote that he filed a writ of certiorari to the South Carolina Supreme Court. ECF No. 1 at 3.

3 Out of an abundance of caution, the remittur date (which is later than the date the Petitioner states that his PCR appeal was denied) has been used in the calculation of the limitations period. *See Gonzalez,* 132 S.Ct. at 654 n. 10 [distinguishing between § 2244(d)(2) and (d)(1) provisions]; *see also*SCACR 221(b); *Christy v. Christy,* 317 S.C. 145, 452 S.E.2d 1, 4 (S.C.Ct.App.1994) [sending of the remittitur ends appellate jurisdiction].

4 November 16, 2014 was a Sunday.

5 Filing date under *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) [prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court]. The envelope in which Petitioner mailed his Petition is stamped as received by the PCI mailroom on February 4, 2015, and was postmarked February 14, 2015. The Petition was received by this Court on February 18, 2015. *See* ECF No. 1–1.

6 After Petitioner failed to respond to the first proper form and order to show cause, a review of SCDC's website revealed that Petitioner had been moved from the Perry Correctional Institution of SCDC to the Lee Correctional Institution of SCDC on March 18, 2015. *See* http:// public.doc.state.sc.us/scdc-public/ [Search Inmate "Eric Mance"] (last visited June 8, 2014). In response to the second mailing of the proper form and order to show cause, Petitioner filed a motion to proceed *in forma pauperis. See* ECF No. 11. However, he failed to file anything in response to the order to show cause portion of the order.

7 As noted in the show cause order, Petitioner could be entitled to equitable tolling of the statute of limitations if he were to present facts of "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time."*Rouse v. Lee,* 339 F.3d 238, 246 (4th Cir.2003).

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2015 WL 2341721
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Florence Division.

Carolyn COLE, Plaintiff,
v.
Gerald V. MONTGOMERY; Carolina Health Care Services; East Coast Protective Services; Southeast Protection Services; Southeast Airport Services; Thomas Behan; The Montgomery–Davis Group; The Montgomery–Davis Group Properties; Rhonda Montgomery Davis; Stanley Montgomery; Oasis Mortgage; James Penniegraft; JoAnn Penniegraft Cheek; Mark Randolph, Esq.; Jennifer Dalton Watson; Option One Mortgage; Southeastern Title Agency, LLC; Stewart Title Guaranty Company; RBC Centura Bank; Investors Title Insurance Company; Duane Bryant, Esq.; J. Rufus Farrior, Esq.; Litton Loan Servicing; Washington Mutual Bank; Chase Bank; Armina Switzenberg, a/k/a Switzenberg and Associates; Argent Mortgage; Commonwealth Land Title Insurance Company; Attorney's Title Company, Div. of United General Tire; East Coast Hospitality Staffing; Vernessa Pertell; Town of Atlantic Beach; Jake Evans; Jospehine Isom; Charlene Taylor; Joe Montgomery; William Booker; Christopher Clagg; Charles Williams; Tracy Edge; Municipal Association of South Carolina; State Ethics Commission of South Carolina; Herbert Hayden; Jim Bagnall, Defendants.

No. 4:14–cv–4462–RMG.
| Signed May 12, 2015.

Attorneys and Law Firms

Carolyn Cole, North Myrtle Beach, SC, pro se.

ORDER

RICHARD MARK GERGEL, District Judge.

*1 This matter is before the Court upon the Report and Recommendation ("R & R") of the Magistrate Judge recommending partial summary dismissal of Plaintiff's complaint. (Dkt. No. 25.) For the reasons set forth below, the Court agrees with and ADOPTS the R & R as the order of the Court.

I. BACKGROUND

Plaintiff filed this civil action *pro se,* alleging a number of federal law and state law claims against 44 Defendants in her 107–page Complaint. (Dkt. No. 1.) This case was automatically referred to the United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(d), D.S.C. Upon initial review, the Magistrate Judge issued a Report and Recommendation recommending partial summary dismissal of this action. (Dkt. No. 25.) Neither party filed timely objections to the R & R.

II. LEGAL STANDARD

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber,* 423 U.S. 261, 270–71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). This Court is charged with making a de novo determination of those portions of the R & R to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate judge with instructions."*Id.*

III. DISCUSSION

After a thorough review of the record and the R & R, the Court finds the Magistrate Judge applied sound legal principles to the facts of this case and therefore agrees with and adopts the R & R as the order of the Court.

The Court first finds that the Magistrate Judge properly dismissed Defendants State Ethics Commission (Ethics Commission) and Tracy Edge (Edge) from this action. Because the Ethics Commission is a state agency of South Carolina, all claims against it are barred by the Eleventh Amendment. *Bellamy v. Borders,* 727 F.Supp. 247, 250

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(D.S.C.1989) (noting that the Eleventh Amendment renders state agencies "immune from suit in federal court unless the state has consented to be sued" (citing *Alabama v. Pugh,* 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978))). In addition, given that Edge is not mentioned in the substantive allegations of the Complaint, Plaintiff has failed to state any plausible claims against him. *See Newkirk v. Cir. Ct. of City of Hampton,* 2014 WL 4072212, at *2 (E.D.Va. Aug.14, 2014) (complaint subject to summary dismissal when no factual allegations against named defendants within the body of the pleading).

The Court next finds that the Magistrate Judge properly dismissed all claims against Plaintiff's ex-husband, Defendant Gerald Montgomery (Montgomery), that are based on business transactions between him and other Defendants affecting the property that was jointly owned during the marriage.[1] Plaintiff and Montgomery have divorced and are currently embroiled in Florida state court litigation regarding the proper equitable division of the parties' jointly held property. (Dkt.Nos.21–1, 21–2.) Because divorces involve "important state interests," this Court defers to the ongoing state court action, and dismiss those claims alleging matters that are intertwined with the division of the parties' marital-property. *See Martin Marietta Corp. v. Md. Comm'n on Human Relations,* 38 F.3d 1392, 1396 (4th Cir.1994) (the United States Supreme Court finds abstention appropriate when "(1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise federal claims in the state proceedings" (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982))); *Harper v. Pub. Serv. Comm'n of West Va. .,* 396 F.3d 348, 353–54 (4th Cir.2005) (certain areas of civil law including, inter alia, "family law," constitute "important state interests" warranting abstention); *Kelm v. Hyatt,* 44 F.3d 415, 419–420 (6th Cir.1995) (marital property and domestic violence issues are "important state interests"). The Court can discern no reason why Plaintiff cannot raise in the Florida action those claims relating to Montgomery's allegedly fraudulent actions involving the parties' marital property. Accordingly, the Court dismisses Counts One through Seven of the Complaint against Montgomery.

*2 The Court next finds that the Magistrate Judge properly dismissed Plaintiff's federal claim of identity theft and the related state law claims against all Defendants. Plaintiff labeled her first count "violation of false identification crime control act of 1982" and cited 18 U.S.C. §§ 1028 and 1738 in support. (Dkt. No. 1 at 90.) These statutes, however, do not provide a private right to a civil action in this court. *See*Pub.L. 106–578, § 4, 114 Stat. 3076 (repealed 18 U.S.C. § 1738 on December 28, 2000); *Rahmani v. Resorts Int'l Hotel Inc.,* 20 F.Supp.2d 932, 937 (E.D.Va.1998), *aff'd,*182 F.3d 909 (4th Cir.1999) (§ 1028 does not "provide for any private cause of action"). Accordingly, because Plaintiff cannot allege a plausible claim pursuant to these statutes against any Defendant, the Court dismisses Count One of her Complaint. As a result, there is no basis on which the Court can exercise its supplemental jurisdiction to consider Plaintiff's closely related state-law-based claims of fraud, breach of contract, defamation of credit, slander of title, trespass to try title, or unfair trade practices.[2] Counts Two through Seven are therefore dismissed as well.

Similarly, the Court agrees with the Magistrate Judge that no private right of civil action exists under 15 U.S.C. 45 § 5, and therefore Count Eight of the Complaint, alleging "violation of Federal Trade Commission Act" under 45 § 5, should be dismissed. *See Summey v. Ford Motor Credit Co.,* 449 F.Supp. 132, 135 (D.S.C.1976), *aff'd,*573 F.2d 1306 (4th Cir.1978) ("It is well-settled that there is no private, federal claim for which this court can grant relief for violations of the Federal Trade Commission Act.").

The Court next finds that the Magistrate Judge properly dismissed Plaintiff's claim for "equitable relief" against all Defendants based on allegedly fraudulent deals among Montgomery and the other Defendants that adversely affected Plaintiff's property interests. As an initial matter, Plaintiff's allegations relating to this claim do not satisfy Federal Rule of Civil Procedure 8—she references "the contract, note and mortgage," but her lengthy Complaint discusses many contracts, notes, and mortgages, and the Court cannot discern to which Plaintiff's claim refers. *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); (Dkt. No. 1 at 104). Further, for reasons previously explained, this Court defers to the ongoing Florida state court action on certain subject matters. Therefore, because this claim alleges matters that are intertwined with the division of the parties' marital-property, the Court dismisses Count Twenty.

The Court next finds that the Magistrate Judge properly dismissed Plaintiff's 28 U.S.C. § 1983 claims against certain Defendants under the First Amendment, Fourth Amendment,

Fifth Amendment, and Fourteenth Amendment. Defendants Stanley Montgomery; JoAnn Cheek; James Penniegraft; Oasis Mortgage; Mark Randolph; Armina Swittenberg; Jennifer Dalton Watson; Carolina Health Care Services; East Coast Protective Services; Southeast Protection Services; Southeast Airport Services; Thomas Behan; the Montgomery Davis Group; the Montgomery Davis Group Properties; Rhonda Montgomery Davis; Oasis Mortgage; Southeastern Title Agency, LLC; Stewart Title Guaranty Company; RBC Centura Bank; Investors Title Insurance Company; Duane Bryant, Esq.; J. Rufus Farrior, Esq.; Litton Loan Servicing; Washington Mutual Bank; Chase Bank; Commonwealth Land Title Insurance Company; Attorney's Title Company; and/or East Coast Hospitality (hereinafter collectively referred to as "the Business Associate Defendants"); Option One Mortgage; Argent Mortgage; and the Municipal Association of South Carolina, a non-profit corporation, are private citizens, not state actors. Further, Plaintiff's allegations fail to establish a reasonable inference of "state action" in connection with any of these Defendants as to the allegedly illegal acts asserted under these claims. *See Blum v. Yaretsky*, 457 U.S. 991, 1004–06, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes "state action"); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) ("state action" exists when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"). Accordingly, the Court dismisses Counts Ten, Eleven, Twelve, and Nineteen against the Business Associate Defendants, Option One Mortgage, Argent Mortgage, and the Municipal Association of South Carolina. [3] As a result, there is no basis on which the Court can exercise its supplemental jurisdiction to consider Plaintiff's closely related state-law-based conspiracy claim against these Defendants. The conspiracy claim, Count Fourteen, is therefore dismissed as to these Defendants. (Dkt. No. 1 at 100–101.)

*3 Finally, the Court finds that the Magistrate Judge properly dismissed Plaintiff's claims pursuant to 42 U.S.C. §§ 1985 and 1986 against all Defendants. The Complaint fails to support a reasonable inference that any of the actions of which Plaintiff complains were taken as a result of racial animus or to discriminate against Plaintiff because of her membership in a class based on race, color, religion, or national origin. Accordingly, Plaintiff fails to state a claim under § 1985, and therefore, her claim under § 1986 also fails as a matter of law. *See Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) (finding that "there must be some racial, or perhaps otherwise classbased, invidiously discriminatory animus behind the conspirators' action" to state a cause of action under 42 U.S.C. § 1985); *Boyer v. Finley*, No. 2:07–cv–1868, 2007 WL 2477310, at *5 (D.S.C. Aug.28, 2007) ("Section 1986 is derivative of § 1985."). The Court therefore dismisses Counts Fifteen, Sixteen, Seventeen, and Eighteen as to all Defendants. [4]

IV. CONCLUSION

For the reasons set forth above, the Court agrees with and **ADOPTS** the R & R of the Magistrate Judge as the order of the Court. (Dkt. No. 25.) Accordingly, the Court summarily dismisses without prejudice the Complaint in its entirety as to Defendants State Ethics Commission, Tracy Edge, the Municipal Association of South Carolina, and the Business Associate Defendants (Defendants Stanley Montgomery; JoAnn Cheek; James Penniegraft; Oasis Mortgage; Mark Randolph; Armina Swittenberg; Jennifer Dalton Watson; Carolina Health Care Services; East Coast Protective Services; Southeast Protection Services; Southeast Airport Services; Thomas Behan; the Montgomery Davis Group; the Montgomery Davis Group Properties; Rhonda Montgomery Davis; Oasis Mortgage; Southeastern Title Agency, LLC; Stewart Title Guaranty Company; RBC Centura Bank; Investors Title Insurance Company; Duane Bryant, Esq.; J. Rufus Farrior, Esq.; Litton Loan Servicing; Washington Mutual Bank; Chase Bank; Commonwealth Land Title Insurance Company; Attorney's Title Company; and/or East Coast Hospitality).

Counts One through Eight, Fifteen through Eighteen, and Twenty are summarily dismissed without prejudice as to Defendants Gerald Montgomery, Option One Mortgage, Argent Mortgage, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Herbert Hayden, Jim Bagnall, and Christopher Clagg.

Therefore, Plaintiff's only remaining claims are for unfair debt collection, Count Nine, as to Defendants Option One Mortgage and Argent Mortgage only, and the violation of civil rights, Counts Ten, Eleven, Twelve, Fourteen, and Nineteen, as to Defendants Gerald Montgomery, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles

Williams, Herbert Hayden, Jim Bagnall, and Christopher Clagg only. The Court directs Plaintiff to submit an amended Complaint including only factual allegations supporting the facially plausible claims against the remaining Defendants. Plaintiff has fourteen (14) days from the issuance of this order to file her amended Complaint, If she fails to do so, the Court will dismiss this action.

*4 **AND IT IS SO ORDERED.**

REPORT AND RECOMMENDATION

KAYMANI D. WEST, United States Magistrate Judge.

This is a civil action filed by a pro se litigant requesting to proceed *in forma pauperis*. Pursuant to 28 U.S.C. § 636(b)(1), and Local Civil Rule 73.02(B)(2)(e) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in such pro se cases and to submit findings and recommendations to the district court.

I. Factual and Procedural Background

In a 107–page Complaint with 20 separate counts including several captioned as alleged civil claims under federal statutes addressing identity-theft issues, 18 U.S.C. §§ 1028, 1738; fair-trade issues involving banks and lenders, 15 U.S.C. § 45; unfair debt collection activities, "15 U.S.C. § 45"; [1] and civil-rights issues, 42 U .S.C. §§ 1983, 1985, 1986; as well as various claims that arguably are state-law-based causes of action for fraud, breach of contract, defamation of credit, slander of title, trespass to try title, South Carolina unfair trade practices, and conspiracy. ECF No. 1–1. Plaintiff names 44 Defendants. Some Defendants are non-South Carolina residents who allegedly engaged in fraudulent dealings with Plaintiff's former spouse, Defendant Gerald Montgomery, that involve allegedly jointly owned marital property. Other Defendants include South Carolina residents who were public officials allegedly involved in collusion and conspiracy to violate Plaintiff's federal constitutional rights in connection with Plaintiff's political activities in the Town of Atlantic Beach, South Carolina. Plaintiff and Defendant Montgomery's jointly held property and related financial issues are currently the subject matter of a long-pending divorce action in Orange County, Florida (Circuit Court Case No.2006–DR009815–0). ECF No. 1–5. According to Plaintiff's responses to certain questions on the official form she completed to request *in forma pauperis* status in this case, the parties were granted a divorce on April 23, 2009; however, through a bifurcated process, the parties' marital-related financial issues are still pending before that Florida court. *See* ECF Nos. 1–1 at 20; 21–1, 21–2. According to the Florida court's on-line docket, the most recent activity in the Florida divorce action was a May 20, 2014 order granting Plaintiff's then-attorney's motion to withdraw from representation and a January 9, 2015 Order of Reassignment/Recusal that apparently resulted in a new judge assignment in the case. *See* http:// myclerk.myor angeclerk.com/CaseDetail.aspx?CaseID=1125632 (last consulted April 8, 2015). Many of Plaintiff's factual allegations, particularly insofar as Defendant Montgomery and his business associates in North Carolina and Georgia are concerned, involve procedural issues such as problematic discovery matters and involvement in questionable transactions involving property currently being considered in the Florida divorce action. *E.g.*, ECF No. 1–1 at 24–27. Plaintiff labels her former husband's and his associates' activities connected to the divorce action as a "harassment campaign," *id.* at 27, and states that "the only justice the [divorce] Court offers is equitable distribution." *Id.* at 30.

*5 Plaintiff also alleges a complex scheme by Defendant Montgomery and numerous state actors connected to Atlantic Beach (Defendants Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Jospehine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Municipal Association of South Carolina, State Ethics Commission of South Carolina, Herbert Hayden, Jim Bagnall, and Christopher Clagg) to discredit and bankrupt Plaintiff so that she would be unable to exercise her constitutional rights to participate in Atlantic Beach politics or speak out against problems she allegedly experienced in Horry County, South Carolina beginning in 2009. [2] According to Plaintiff, there is also a pending civil action in state court in Horry County that involves certain claims arising from the Town of Atlantic Beach's alleged "failure to comply with [a] court-ordered settlement ..." of a matter involving "a loan that was made to the Town [of Atlantic Beach]." *Cole v. Town of Atl. Beach*, Case No.2014CP2601654. Publicly available on-line records show that Defendants Booker, Evans, Isom, Montgomery, and Taylor are all listed as defendants in that case. Although the available on-line records of that case disclose numerous filings by the parties and court orders, http://publicindex . sccourts.org/Horry/PublicIndex/CaseDetails.aspx?County= 26 & CourtAgency=26003 & Casenum=2014CP2601654 & CaseType=V (last consulted

April 8, 2015), the contents of such filings are not available for viewing.[3]

Plaintiff asks this court to award her damages and declaratory relief against the various Defendants. ECF No. 1–1 at 106–07.

II. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the pro se Complaint pursuant to the procedural provisions of 28 U.S.C. § 1915. The review has been conducted in light of the following precedents: *Neitzke v. Williams,* 490 U.S. 319, 324–25, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Gordon v. Leeke,* 574 F.2d 1147 (4th Cir.1978).

The Complaint in this case was filed under 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action "fails to state a claim on which relief may be granted" or is "frivolous or malicious." 28 U.S.C. § 1915(e) (2)(B)(i), (ii). Hence, under 28 U.S.C. § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed sua sponte. *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

This court is required to liberally construe pro se pleadings, *Estelle v. Gamble,* 429 U.S. at 97, holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980). The mandated liberal construction afforded pro se pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a pleading to "conjure up questions never squarely presented" to the court. *Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir.1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts that set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.,* 901 F.2d 387, 390–91 (4th Cir.1990). Even under this less stringent standard, however, the pro se Complaint under review in this case is subject to partial summary dismissal.

III. Discussion

A. Immune and Frivolously Named Parties (Defendants State Ethics Commission and Tracy Edge)

*6 Initially, the Complaint should be partially summarily dismissed insofar as it seeks to recover relief from this federal court under any count from Defendant State Ethics Commission because any such claims are barred by the Eleventh Amendment to the United States Constitution. Defendant State Ethics Commission is an agency of the State of South Carolina, and, as such, it is not necessary for this Defendant to file an answer to Plaintiff's Complaint. *See* http://ethics.sc.gov/Pages/default.aspx (last consulted April 8, 2015). The State Ethics Commission is immune from suit under 42 U.S .C. § 1983 or any other federal claim made by Plaintiff because the Eleventh Amendment to the United States Constitution divests this court of jurisdiction to entertain a suit brought against the State of South Carolina or its integral parts. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."*See Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); *Coll. Savs. Bank v. Fla. Prepaid Educ. Expense Bd., 521* U.S. 666 (1999); *Coll Savs. Bank v. Fla. Prepaid Educ. Expense Bd.,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (although express language of Eleventh Amendment only forbids suits by citizens of other States against a State, Eleventh Amendment bars suits against a State filed by its own citizens); *see Bellamy v. Borders,* 727 F.Supp. 247, 248–50 & nn. 2–3 (D S C.1989); *Coffin v. S.C. Dep't of Soc. Servs.,* 562 F.Supp. 579, 583–585 (D.S.C.1983). Accordingly, Plaintiff's Complaint should be partially summarily dismissed to the extent that it seeks to hold Defendant State Ethics Commission liable for any relief in this court.

Additionally, the Complaint should be partially summarily dismissed insofar as Tracy Edge is named as a Defendant because Plaintiff does not allege any wrongdoing on his part. Close review of the entire Complaint discloses that Defendant Edge's name is not mentioned in the substantive factual allegations contained in the body of the Complaint and, as a result, there are no allegations from which any inference may be raised that he is liable for anything that Plaintiff asserts against other Defendants. As a result, the Complaint is frivolous and fails to state any plausible

claims whatsoever against Defendant Edge. *See Newkirk v. Cir. Ct. of City of Hampton,* No. 3:14CV372–HEH, 2014 WL 4072212 (E.D.Va. Aug.14, 2014) (complaint subject to summary dismissal when no factual allegations against named defendants within the body of the pleading) (citing *Potter v. Clark,* 497 F.2d 1206, 1207 (7th Cir.1974) ("Where a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed.").

B. Claims Relating to Plaintiff's Marital Property (Counts One through Seven as to Defendant Gerald Montgomery)

*7 Plaintiff's Complaint should also be partially summarily dismissed to the extent that Plaintiff seeks to hold Defendant Gerald Montgomery, Plaintiff's former spouse, liable for damages or other relief based on business transactions between him and any other Defendant that affected or may affect Plaintiff's interests in real estate, corporate enterprises, or any other property that was jointly owned during the marriage. In deference to the Florida state court that is currently considering all property issues between the former couple in their divorce action, this court should decline to consider and should summarily dismiss all claims against Defendant Montgomery relating to the validity or invalidity of any transaction involving Plaintiff's and her former husband's jointly held real estate under the doctrine established under *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny.[4] In *Younger,* the United States Supreme Court held that a federal court should not interfere with ongoing state criminal proceedings "except in the most narrow and extraordinary of circumstances."*Gilliam v. Foster,* 75 F.3d 881, 903 (4th Cir.1996).*Younger* abstention applies "as well 'to noncriminal judicial proceedings when important state interests are involved.' " *Harper v. Pub. Serv. Comm'n of W. Va.,* 396 F.3d 348, 351 (4th Cir.2005). The Fourth Circuit Court of Appeals has derived the following test to determine when *Younger* abstention is appropriate: "(1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise federal claims in the state proceedings." *Martin Marietta Corp. v. Md. Comm'n on Human Relations,* 38 F.3d 1392, 1396 (4th Cir.1994) (citing *Middlesex Cnty. Ethics Comm'n v. Garden St. Bar Ass'n,* 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)); *see Broadnax v. Cannon,* No. 3:07–3092–MJP, 2008 WL 1805645, *1+ (D.S.C. Apr 17, 2008) (applying *Younger* in a civil matter and discussing the requirements for abstention). It has often been held that "where constitutional issues arise [in state court litigation], state court judges are fully competent to handle them subject to Supreme Court review." *Bonner v. Cir. Ct. of St. Louis,* 526 F.2d 1331, 1336 (8th Cir.1975); *see Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14–16, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Cellermaster Wines, Inc. v. Chastain,* 530 F.Supp. 714, 717 (S.D.Fla.1982). Also, state courts have concurrent jurisdiction with federal court over civil rights claims pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and claims under the Fair Debt Collection Act, 15 U.S.C. § 1692k(d).*See Felder v. Casey,* 487 U.S. 131, 139, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (state courts possess concurrent jurisdiction over § 1983 litigation); *Virgil v. Reoganized M.W. Co., Inc.,* 156 F.Supp.2d 624, 631 (S.D.Miss.2001) (Fair Debt Collection Act grants concurrent jurisdiction to state and federal courts).[5]

Publicly available records show that there are ongoing state judicial proceedings between Plaintiff and her now-former spouse, Defendant Gerald Montgomery, in the Circuit Court of Orange County, Florida. *See In Re Katrina Canal Breaches Consol. Litig.,* 533 F.Supp.2d 615, 631–33 & nn. 14–15 (E.D.La.2008) (collecting cases indicating that federal courts may take judicial notice of governmental websites, including court records); *Williams v. Long,* 585 F.Supp.2d 679, 686–88 & n. 4 (D.Md.2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating). Those proceedings involve questions concerning the proper equitable division of the parties' jointly held property, and those types of domestic-relations-related questions have been found to involve "important state interests." *See Harper v. Puh. Serv. Comm'n of West Va.,* 396 F.3d at 351 (*Younger* applies in certain "important state interest" areas of civil law including, inter alia, "family law"); *Kelm v. Hyatt,* 44 F.3d 415, 419–420 (6th Cir.1995) (marital property and domestic violence issues are "important state interests"); *Parent v. New York,* 485 F. App'x 500, at *2 (2d Cir.2012) (same); *Al–Mansour v. Shraim,* No. CCB–11–2939, 2012 WL 983785 (D.Md. Mar.21, 2012) ("Divorce and child support proceedings 'implicate important state interests' for purposes of considering *Younger* abstention."). Because divorces involve "important state interests" that should be determined in pending state court proceedings, federal courts should defer to state courts in matters obviously intertwined with property issues involved in pending divorce actions.

*8 In this case, it is known from publicly available court information that Plaintiff's Florida divorce case has

not yet proceeded to final judgment, and there is nothing in the Complaint indicating that Plaintiff is unable to pursue her claims based on her former spouse's alleged fraudulent actions involving martial property before the divorce court.[6] Review of the available on-line records from Plaintiff's divorce case discloses numerous motions by the parties and orders from the court relating to issues involving the parties' real estate holdings. That court is the court that has been dealing with the financial aspects of Plaintiff's and Defendant Montgomery's marriage since at least April 2009, when it granted the divorce but reserved the issue of equitable distribution of assets for subsequent consideration, ECF No. 21–1, and that is where Plaintiff should present her property-related claims against Defendant Gerald Montgomery. Accordingly, this court should summarily dismiss Counts One through Eight of the Complaint against Defendant Gerald Montgomery in deference to the Florida divorce court proceedings and for failure to state plausible federal claims.

C. Property–Related Federal and State–Law–Based Claims (Counts One through Eight and Twenty)

Counts One through Eight should also be dismissed as to all Defendants. The Complaint fails to state plausible claims against any Defendant for "identity theft" under Count One for any related state-law-based claim under Counts Two through Seven, for violation of the Federal Trade Commission Act under Count Eight, or for Equitable Relief under Count Twenty. In connection with these counts, Plaintiff broadly alleges the following of Defendant Gerald Montgomery's business associates and related corporate enterprises: Defendants Stanley Montgomery; JoAnn Cheek; James Penniegraft; Oasis Mortgage; Mark Randolph; Armina Swittenberg; Jennifer Dalton Watson; Carolina Health Care Services; East Coast Protective Services; Southeast Protection Services; Southeast Airport Services; Thomas Behan; the Montgomery–Davis Group; the Montgomery Davis Group Properties; Rhonda Montgomery Davis; Oasis Mortgage; Southeastern Title Agency, LLC; Stewart Title Guaranty Company; RBC Centura Bank; Investors Title Insurance Company; Duane Bryant, Esq.; J. Rufus Farrior, Esq.; Litton Loan Servicing; Washington Mutual Bank; Chase Bank; Commonwealth Land Title Insurance Company; Attorney's Title Company; and/or East Coast Hospitality (hereinafter collectively referred to as "the Business Associate Defendants") and Option One Mortgage and Argent Mortgage "conspired" with her former spouse to forge her signature on certain documents affecting property that was jointly held between Plaintiff and Gerald Montgomery during their marriage. Plaintiff also alleges that these Business Associate Defendants and Option One Mortgage and Argent Mortgage conspired with her former spouse to use without her consent other documents that identified Plaintiff such as a drivers' license, joint tax returns, and joint bank account information to issue, act on, and obtain undue benefit from the use of the improperly drafted and obtained real-estate-related documents. ECF No. 1 at 90. The first ten counts of the Complaint are primarily based on these factual allegations, but Plaintiff does not refer to any other Defendants except Gerald Montgomery, the Business Associate Defendants, Option One Mortgage, and Argent Mortgage in her allegations relative to those Counts. *Id.* at 90–98.

1. Identity Theft and Related State–Law–Based Claims (Counts One through Seven)

***9** As the statutory basis for Count One, Plaintiff cites to 18 U.S.C. §§ 1028 and 1738. ECF No. 1 at 90. She discusses "restitution orders for identity theft cases ...," *id.* at 91, but she does not allege and cannot show that either of these federal criminal statutes provides a private right to a civil action in this court. First, 18 U.S.C. § 1738 does not provide Plaintiff with a private right of civil action for "identity theft" as it was repealed on December 28, 2000. *See* Internet False Identification Prevention Act of 2000, Pub.L. 106–578, § 4, 114 Stat. 3076 (2000). Second, the applicable federal law makes clear that § 1028 does not provide for a private, civil right of action arising from asserted violations of the statute. *See, e.g., Garay v. U.S. Bancorp,* 303 F.Supp.2d 299, 302–03 (E.D.N.Y.2004) (§ 1028, no private right of action under federal criminal statutes); *Rahmani v. Resorts Int'l Hotel, Inc.,* 20 F.Supp.2d 932, 937 (E.D.Va.1998) (holding 18 U.S.C. § 1028 provides no private cause of action); *Burroughs v. Burroughs,* No. 3:11–2133–JFA–PJG, 2011 WL 5024180, at *2 (Sept. 30, 2011), *adopted,* 2011 WL 5024169 (D.S.C. Oct.20, 2011) (same), Therefore, Plaintiff's first count labeled "violation of false identification crime control act of 1982" is not plausible as to any Defendant, including the Business Associate Defendants.

Furthermore, because Plaintiff's "identity theft" allegations do not state a plausible federal claim, there is no basis on which this court can exercise its supplemental jurisdiction to consider the closely related state-law-based claims raised in Counts Two through Seven of fraud, breach of contract, defamation of credit, slander of title, trespass to try title, or unfair trade practices that Plaintiff attempts to assert against

the Business Associate Defendants or as to any Defendant based on the same underlying factual allegations. *See*28 U.S.C. § 1367(c); *Shanaghan v. Cahill,* 58 F.3d 106, 109 (4th Cir.1996) ("federal courts generally have discretion to retain or dismiss state law claims when the federal basis for an action drops away").

Although this court can hear state4aw-based claims under its diversity jurisdiction, *see*28 U.S.C. § 1332; *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 372–74 & nn. 13–16, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), the Complaint under review will not support the exercise of such jurisdiction in this case because Plaintiff, a South Carolina resident, has named several other South Carolina residents as Defendants in this case. The fact that there are South Carolina residents on both sides of this case destroys "complete diversity," which is required before this court may consider state-law-based claims such as those asserted under Counts Two through Seven. *See Newman–Greene, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 829, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) (complete diversity required); *C.L. Ritter Lumber Co. v. Consol. Coal Co.,* 283 F.3d 226, 229 (4th Cir.2002) (same).

2. Federal Trade Commission Act Violations Claims (Count Eight)

***10** Additionally, this court should summarily dismiss Count Eight as to all Defendants because Plaintiff fails to state a plausible claim for "violation of Federal Trade Commission Act 15 U.S.C. 45 § 5" because that statute, which governs certain proceedings before the Federal Trade Commission ("FTC"), does not provide a private right of civil action to any individual citizen such as Plaintiff. *Summey v. Ford Motor Credit Co.,* 449 F.Supp. 132, 135–36 (D.S.C.1976); *see, e.g., Holloway v. Bristol–Myers Corp.,* 485 F.2d 986, 988–1002 (D.C.Cir.1973); *Rahmani v. Resorts Int'l Hotel, Inc.,* 20 F.Supp.2d 932, 937 (E.D.Va.1998); *Bracken v. Simmons First Nat'l Bank,* No. 6:13–cv–1377–TMC, 2014 WL 2613175, at *4 (D.S.C. June 9, 2014).

3. Equitable Relief Claims (Count Twenty)

Finally, this court should summarily dismiss Count Twenty as to all Defendants because it asks this court to provide "equitable relief" for Plaintiff's claims based on allegedly fraudulent deals among her former spouse and some or all Defendants that adversely affected Plaintiff's property interests. ECF No. 1 at 104. Although Plaintiff references "the contract, note and mortgage" in this count, *id.,* she does not specify to which of the many contracts, notes, and mortgages discussed in her lengthy pleading she refers. For this reason alone, Count Twenty should be dismissed for non-compliance with Federal Rule of Civil Procedure 8 because Plaintiff does not provide sufficient identifying information about the documents to which she refers. *See Iqbal,* 556 U.S. at 678; *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Tobey v. James,* 706 F.3d 379, 386 (4th Cir.2013). However, under the liberal-construction-of-pleadings rule, assuming that Plaintiff intended to refer to "the contract, note and mortgage" on some or all property that is or was jointly owned by her and Defendant Gerald Montgomery, dismissal of this count is required under the *Younger* doctrine. As previously stated, the Orange County, Florida Circuit Court that is currently considering Plaintiff's property-related claims against her former spouse is the proper court to award any equitable relief necessary to resolve those claims. *See Younger v. Harris; Harper v. Pub. Serv. Comm'n of W. Va.* Accordingly, this court should summarily dismiss Count Twenty of the Complaint as to all Defendants.

D. Civil Rights Claims and Related State–Law–Based Claims

1. Implausible 42 U.S.C. § 1983 Claims (Counts Ten, Eleven, Twelve, and Nineteen as to the Business Associate Defendants, Option One Mortgage, Argent Mortgage, or the Municipal Association of South Carolina)

Counts Ten, Eleven, Twelve, and Nineteen should be partially summarily dismissed insofar as they are applicable to the Business Associate Defendants, Option One Mortgage, Argent Mortgage, or the Municipal Association of South Carolina, a non-profit corporation, *see* http://www.guidestar . org/organizations/57–6000743/municipal–association–south -carolina.aspx (last consulted April 8, 2015). Plaintiff fails to state plausible First Amendment, Fourth Amendment, Fifth Amendment, or Fourteenth Amendment claims under 42 U.S.C. § 1983 against any of these private persons or entities. Referencing 42 U.S.C. § 1983 as the basis for her claims, Plaintiff alleges that "Defendants" used confidential information obtained through identity theft or otherwise to spread damaging information about Plaintiff and her associates and thereby "silence" Plaintiff's attempts to participate in political/governmental matters in the Town of Atlantic Beach in Counts Ten through Twelve of the Complaint.[7] ECF No. 1–1 at 96–99. Under Count Nineteen, again specifically referencing § 1983, Plaintiff also alleges that the Business Associate Defendants, Option One Mortgage, and Argent Mortgage, in conspiracy

with her former spouse, abused legal processes in foreclosure actions in North Carolina state courts to inflict damage on her. ECF No. 1–1 at 103–04.

*11 To state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that: (1) the defendants deprived him or her of a federal right, and (2) did so under color of state law. *See Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *see also Hall v. Quillen,* 631 F.2d 1154, 1155–56 (4th Cir.1980). Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes "state action." *See Blum v. Yaretsky,* 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). To qualify as state action, the conduct in question "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor."*Lugar v. Edmondson Oil Co.,* 457 U.S. 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *see United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen Helpers of Am., AFL–CIO,* 941 F.2d 1292 (2d Cir.1991). Purely private conduct such as that alleged against Plaintiff's former husband's business and banking associates, no matter how wrongful, injurious, fraudulent, or discriminatory, is not actionable under 42 U.S.C. § 1983. *See Lugar,* 457 U.S. at 936 (1982); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 721, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Whether a private individual's action or corporation's action rises to the level of state action necessarily depends on the relationship between the activity and the state. The inquiry involves "whether there is a sufficiently close nexus between the State and the challenged action ... so that the action of the latter may be fairly treated as that of the State itself."*Jackson v. Metro. Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). In *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), the United States Supreme Court held that a state is responsible for private action only when it has exercised "coercive power" or has provided "significant encouragement" in the implementation of the action. It is also well settled that "a private person does not act under color of state law simply because he invokes state authority,"*Brummett v. Gamble,* 946 F.2d 1178, 1184 (5th Cir.1991), such as by reporting a crime or making statements about suspected criminal activity to police. *See, e.g., Bailey v. Harleysville Nat'l Bank & Trust,* 188 F. App'x 66, 68 (3d Cir.2006) ("However, in the absence of a conspiracy with the police to violate constitutional rights, a business's summons of a police officer to deal with a possible disturbance, does not make it a state actor."); *Palmerini v. Burgos,* No. 10–cv–210 (FLW), 2011 WL 3625104, at *6 (D.N.J. Aug. 15, 2011); *Warner v. Sweeney,* No. 05–cv–2871 (JBS), 2005 WL 2257925, at *3 (D.N.J. Sept. 12, 2005). Also, the fact that private citizens act as opposing parties and counsel and assert their respective legal positions in litigation in state courts does not make their actions taken in connection with the state litigation "state action." *See Dist. 28, U.M.W.A. v. Wellmore Coal Corp.,* 609 F.2d 1083, 1086–87 (4th Cir.1979).

*12 Although Plaintiff broadly and conclusively alleges that the Business Associate Defendants, Option One Mortgage, Argent Mortgage, and the Municipal Association of South Carolina conspired with her former spouse, a private person, to steal her identity, falsely accuse her of not paying her debts, and require her to respond to various property-related lawsuits and that unnamed "public officials in local and state government used their official positions to silence" her, ECF No. 1 at 97, she does not allege any facts showing any particular "nexus" or unusually close relationship between any of the Business Associate Defendants, Option One Mortgage, Argent Mortgage, or the Municipal Association of South Carolina and any state actor. There are no facts stated in the Complaint that would support a reasonable inference of "state action" in connection with any of these Defendants' allegedly improper dealing in marital property or with the Town of Atlantic Beach political issues of which Plaintiff complains. While this court must liberally construe a pro se complaint, the United States Supreme Court has made clear that a plaintiff must do more than make conclusory statements to state a claim; *see Iqbal,* 556 U.S. at 667–68; *Twombly,* 550 U.S. at 555, and the reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. *Iqbal,* 556 U.S. at 678–79. Thus, as far as Counts Ten, Eleven, Twelve, and Nineteen and the Business Associate Defendants, Defendants Option One Mortgage, Argent Mortgage, and the Municipal Association of South Carolina are concerned, no plausible § 1983 claims are stated because they are private citizens and not state actors and their alleged activities are not such as would make their actions " 'fairly attributable' to the state." *Montano v. Hedgepeth,* 120 F.3d 844, 848–849 (8th Cir.1997) (quoting *Lugar,* 457 U.S. at 937).

2. Implausible State–Law–Based Conspiracy Claims (Count Fourteen as to the Business Associate

Defendants, Option One Mortgage, Argent Mortgage, or the Municipal Association of South Carolina)

Count Fourteen should be partially summarily dismissed insofar as it may be liberally construed as attempted state-law-based "conspiracy" claims against any of the Business Associate Defendants, Option One Mortgage, Argent Mortgage, or the Municipal Association of South Carolina. As previously discussed, Plaintiff fails to state any plausible § 1983 claims against any of these private persons and entities that could be considered under this court's federal-question jurisdiction and there is no basis on which this court can exercise its diversity jurisdiction to consider state-law-based claims in this case because of the presence of a South Carolina-resident Plaintiff as well as South Carolina-resident Defendants. *See Newman–Greene, Inc. v. Alfonzo–Larrain,* 490 U.S. at 829 (complete diversity required); *C.L. Ritter Lumber Co. v. Consol. Coal Co.,* 283 F.3d at 229 (same). In absence of any federal subject-matter jurisdiction to consider a § 1983 claim against the these Defendants, there is also no basis for the court to exercise supplemental jurisdiction to consider any such state-law-based claim arising out of the same facts or transactions. Accordingly, the court should partially dismiss Count Fourteen insofar as the Business Associate Defendants, and Defendants Option One Mortgage, Argent Mortgage, and the Municipal Association of South Carolina are sued thereunder.

3. Implausible 42 U.S.C. §§ 1985, 1986 Claims (Counts Fifteen, Sixteen, Seventeen, and Eighteen as to all Defendants)

*13 Finally, the court should summarily dismiss Counts Fifteen, Sixteen, Seventeen, and Eighteen of the Complaint because Plaintiff fails to state plausible claims pursuant to 42 U.S.C. §§ 1985, 1986 against any Defendant. There are no factual allegations that would support a reasonable inference that any of the actions of which Plaintiff complains were taken as a result of racial animus or to discriminate against Plaintiff because of her membership in a class based on race, color, religion, or national origin. *See Simmons v. Poe,* 47 F.3d 1370, 1376–77 (4th Cir.1995); *see also U.S. by Katzenbach v. Gulf–State Theaters, Inc.,* 256 F.Supp. 549, 552 (D.Miss.1966) ("The Civil Rights Act is not concerned with the subjective racial prejudices of the people affected. Instead it is directed toward discrimination against certain classes of persons when those classes are determined on the basis of race, color, religion, or national origin"). Moreover, despite her broad and conclusory assertions of a "conspiracy" among some or all of the Defendants, Plaintiff's failure to allege racial or other class-based discrimination by any Defendant precludes any plausible claim under § 1985(3).*See Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) (finding that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to state a cause of action under 42 U.S.C. § 1985). Because § 1986 is considered to be "derivative" of § 1985 and because, as discussed above, no plausible § 1985 claim is stated against any Defendant, no plausible § 1986 claim is stated against any Defendant either. *See Farese v. Scherer,* 342 F.3d 1223, 1232 n. 12 (11th Cir.2003) (" § 1986 claims are derivative of § 1985 claims"; citing *Park v. City of Atlanta,* 120 F.3d 1157, 1159–60 (11th Cir.1997)); *Boyer v. Finley,* No. 2:07–1868 DCN–RSC, 2007 WL 2477310 (D.S.C. Aug.28, 2007). This court should, therefore, summarily dismiss Counts Fifteen, Sixteen, Seventeen, and Eighteen as to all Defendants.

E. Facially Plausible Claims: Unfair Debt Collection (Count Nine), Civil Rights Claims (Counts Ten, Eleven, Twelve, Fourteen), and Related State–LawBased Conspiracy (Count Nineteen)

Having thoroughly reviewed Plaintiff's pro se pleading, the undersigned finds that the only facially plausible claims in the Complaint under review are those designated as Count Nine, alleging Unfair Debt Collection claims against Defendants Option One Mortgage and Argent Mortgage only, and Counts Ten, Eleven, Twelve, Thirteen, Fourteen, and Nineteen, alleging § 1983 civil rights and related state-law-based conspiracy claims against Defendants Gerald Montgomery, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Herbert Hayden, Jim Bagnall, and Christopher Clagg only. As set out below, in the interest of judicial economy, the undersigned recommends service be deferred pending the district court's consideration of this Report and Recommendation and pending Plaintiff's submission of an amended complaint.

IV. Recommendation

*14 *Accordingly, it is recommended* that the district court partially summarily dismiss without prejudice the Complaint in its entirety as to Defendants State Ethics Commission, Tracy Edge, the Municipal Association of South Carolina, and the Business Associate Defendants (Stanley Montgomery, JoAnn Cheek, James Penniegraft, Oasis Mortgage, Mark Randolph, Armina Swittenberg, Jennifer Dalton Watson, Carolina Health Care Services, East Coast Protective Services, Southeast Protection

Services, Southeast Airport Services, Thomas Behan, The Montgomery–Davis Group, The Montgomery Davis Group Properties, Rhonda Montgomery Davis, Oasis Mortgage, Southeastern Title Agency, LLC, Stewart Title Guaranty Company, RBC Centura Bank, Investors Title Insurance Company, Duane Bryant, Esq., J. Rufus Farrior, Esq., Litton Loan Servicing, Washington Mutual Bank, Chase Bank, Commonwealth Land Title Insurance Company, Attorney's Title Company, and/or East Coast Hospitality Staffing).

Counts One through Eight, Fifteen through Eighteen, and Twenty should be summarily dismissed as to Defendants Gerald Montgomery, Option One Mortgage, Argent Mortgage, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Herbert Hayden, Jim Bagnall, and Christopher Clagg.

The only counts that should remain pending are Count Nine as to Defendants Option One Mortgage and Argent Mortgage only and Counts Ten, Eleven, Twelve, Fourteen, and Nineteen as to Defendants Gerald Montgomery, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Herbert Hayden, Jim Bagnall, and Christopher Clagg only.

It is further recommended that no service of process be authorized against any Defendant in this case at this time,[8] pending completion of the district court's review of this Report. If the district court adopts this Report and Recommendation and summarily dismisses a majority of the named Defendants from the case and fully or partially summarily dismisses the majority of the asserted claims in the Complaint, in the interest of judicial economy and to protect limited judicial resources, Plaintiff should be required to submit an amended complaint including only factual allegations supporting the facially plausible claims against the remaining Defendants.[9]

It is further recommended that after Plaintiff submits the amended complaint as recommended above, Defendants Gerald Montgomery, Vernessa Pertell, Town of Atlantic Beach, Jake Evans, Josephine Isom, Charlene Taylor, Joe Montgomery, William Booker, Charles Williams, Herbert Hayden, Jim Bagnall, Christopher Clagg, Option One Mortgage, and Argent Mortgage be served with the amended complaint.

IT IS SO RECOMMENDED.

April 16, 2015.

All Citations

Slip Copy, 2015 WL 2341721

Footnotes

1 These claims are found in Counts One through Seven of the Complaint. These counts allege claims for violation of false identification of crime control act of 1982, fraud, breach of contract, defamation of credit, slander of title, trespass to try title, and unfair trade practices. (Dkt. No. 1 at 90–94.)

2 Plaintiff, a South Carolina resident, asserts claims against several other South Carolina residents in the Complaint, thereby depriving this Court of diversity jurisdiction. (Dkt. No. 1.)

3 Count Ten alleges violation of the First Amendment, Count Eleven alleges violation of the Fourth Amendment, Count Twelve alleges deprivation of property, and Count Nineteen alleges abuse of process and malicious prosecution.

4 Counts Fifteen, Sixteen, and Seventeen allege violations of § 1985, and Count Eighteen alleges a violation of § 1986.

1 Plaintiff captions her Ninth Count "(Unfair Debt Collection Practices) 15 USC § 45," ECF No. 1–1 at 95; however, the proper United States Code sections for the "Fair Debt Collection Practices Act" are 15 U.S.C. §§ 1692 through 1692p. Under the liberal construction rule applicable to pro se pleadings, the court should disregard the incorrect statutory citation and construe Count Nine as based on the federal Fair Debt Practices Act found in the United States Code beginning at 15 U.S.C. § 1692.

2 Plaintiff alleges that she was "hired as town manager of Atlantic Beach" in March 2002. ECF No. 1–1 at 9. It appears from other allegations that her employment tenure in Atlantic Beach ended on March 18, 2005, which was several months after she and Defendant Montgomery moved to Florida as a married couple in August 2004. *Id.* at 11. Their divorce action was filed on June 23, 2006. http:// myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=1125632 (last consulted April 8, 2015).

3 As a result, at this stage of the litigation, this court is unable to discern the exact subject matter of the pending Horry County action, *i.e.*, whether it involves issues of important state interest or whether it involves a "garden variety" private dispute among the parties. The distinction is an important one as far as any potential future application of an abstention doctrine in favor of the Horry County litigation is concerned. *See William Penn Apts. v. D.C. Ct.App.*, 39 F.Supp.3d 11, 19 (D.D.C.2014); *Lawrence v. Schwiep*, No. 4:05 CV 14–RH/WCS, 2005 WL 2491564, at *4 (N.D.Fla. Oct.7, 2005); *see also infra* Section III B (applying *Younger* abstention in favor of state divorce action involving important state interests).

4 Although the parties have not addressed abstention, because the pro se Complaint is still under initial review, the court may raise the issue sua sponte. *See, e.g, Briggman v. Va. Dep't Soc. Servs.*, 526 F.Supp.2d 590, 604 n. 4 (W.D.Va.2007) (citing *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976)).

5 The only Fair Debt Collection claim asserted in the Complaint under review is Count Nine, and it is stated against Defendants Option One Mortgage and Argent Mortgage only. ECF No. 1–1 at 95–96.

6 Plaintiff's assertions that the Florida divorce court cannot provide her with complete "justice" but only with "equitable distribution," ECF No. 1–1 at 30, are unsupported legal conclusions, which this court is not required to accept as true when conducting an initial review of a pro se pleading. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Cook v. Howard*, 484 F. App'x 805, 810 (4th Cir.2012) (*Iqbal* applies to pro se complaints).

7 Plaintiff uses the collective term "Defendants" to refer to whom she intends to sue in Counts Ten, Eleven, and Twelve. ECF No. 1–1 at 96–99. The required liberal construction of her pro se pleading indicates that Plaintiff intended to include the Business Associate Defendants, Option One Mortgage, and Argent Mortgage in her collective term "Defendants." This is so because she includes factual allegations in these counts similar to those she made in connection with the first eight counts that specifically included those Defendants. For example, Plaintiff includes in Count Ten allegations about the "Defendants' " supposed submission of unauthorized "personal identifying information to banks, lending institutions, the IRS, and others...." *Id.* at 97. Although it is not clear that Municipal Association of South Carolina is also intended to be included under Plaintiff's collective terminology, for purposes of this Report, it is presumed that it is based on her reference in Count Ten to "[t]he public officials in local and state government." *Id.*

8 Plaintiff will not be prejudiced by the recommended withholding of service authorization because the 120–day time limit for service of process under Federal Rule of Civil Procedure 4(m) does not begin to run until the such time as the court issues a formal order directing service of an initial pleading following completion of the required initial review process for any pro se-filed pleading. *Robinson v. Clipse*, 602 F.3d 605, 608–09 (4th Cir.2010) (tolling Rule 4(m) time limitation in pro se cases during initial review).

9 Because Plaintiff is appearing *in forma pauperis*, she will rely on the United States taxpayers, through the United States Marshal Service and this court, to cover the costs of serving her pleading. *See Danik v. Hous., Auth. of Baltimore City*, 396 F. App'x 15, 16 (4th Cir.2010). The taxpayers should not be forced to pay additional costs to serve an excessive number of pages of allegations that relate only to dismissed claims and/or parties.

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241 F.R.D. 534
United States District Court,
D. Maryland.

Jack R. LORRAINE and, Beverly Mack, Plaintiffs,
v.
MARKEL AMERICAN INSURANCE COMPANY, Defendants.

Civil Action No. PWG-06-1893. | May 4, 2007.

Synopsis

Background: Suit was brought to enforce arbitrator's award. Parties moved and cross moved for summary judgment.

[Holding:] The District Court, Grimm, Chief United States Magistrate Judge, held that failure of both parties to observe evidence rules, as they applied to electronically stored information (ESI), precluded any entry of summary judgment.

Motions denied.

West Headnotes (3)

[1] **Alternative Dispute Resolution**
⇐ Arbitrability of Dispute

When the parties to an arbitration agreement do not agree to submit questions of arbitrability to the arbitrator for resolution, determining the scope of the agreement is an issue for the court to decide.

Cases that cite this headnote

[2] **Evidence**
⇐ Unofficial or Business Records in General

In order for electronically stored information (ESI) to be admissible, it must be (1) relevant, (2) authentic, (3) not hearsay or admissible under an exception to rule barring hearsay evidence, (4) original or duplicate, or admissible as secondary evidence to prove its contents, and (5) probative value must outweigh its prejudicial effect. Fed.Rules Evid.Rules 401, 403, 803, 804, 807, 901(a), 1001-1008, 28 U.S.C.A.

67 Cases that cite this headnote

[3] **Federal Civil Procedure**
⇐ Admissibility

Failure of counsel for both sides, in suit to compel arbitration, to observe evidence rules concerning electronically stored information (ESI), particularly rules governing authenticity, hearsay issues, original writing rule, and absence of unfair prejudice, rendered their summary judgment exhibits inadmissible. Fed.Rules Evid.Rules 401, 403, 803, 804, 807, 901(a), 1001-1008, 28 U.S.C.A.

33 Cases that cite this headnote

Attorneys and Law Firms

*534 Geoffrey S. Tobias, Ober Kaler Grimes and Shriver, Baltimore, MD, for Plaintiffs.

Peter Joseph Basile, Ferguson Schetelich and Ballew PA, Baltimore, MD, for Defendant.

MEMORANDUM OPINION

GRIMM, Chief United States Magistrate Judge.

Plaintiffs/Counter-Defendants Jack Lorraine and Beverly Mack bring this action to enforce a private arbitrator's award finding that certain damage to their yacht, *Chessie,* was caused by a lightning strike that occurred on May 17, 2004, while *Chessie* was anchored in the Chesapeake Bay. [1] Defendant/ Counter-Plaintiff Markel American Insurance Company ("Markel") likewise has counterclaimed to enforce the arbitrator's award, which, in addition to concluding that certain damage to *Chessie's* hull was caused by lightning, also concluded that the damage incurred was limited to an amount of $14,100, plus incidental costs. Following discovery, Plaintiffs moved for summary judgment (Paper No. 16), and Defendants filed a response in opposition and cross motion for summary judgment (Paper No. 19), to which Plaintiffs filed an opposition and reply (Paper No. 21),

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followed by Defendant's reply (Paper No. 23). In a letter order dated February 7, 2007 (Paper No. 26), I denied without prejudice both motions for the reasons discussed more fully below, and informed the parties that I intended to file a more comprehensive opinion explaining my ruling, which is found herein.

BACKGROUND

It is difficult for the Court to provide the appropriate background to the underlying *535 arbitration in this case because, as will be discussed in greater detail below, neither party has proffered any admissible evidence to support the facts set forth in their respective motions. *See* FED.R.CIV.P. 56(c). Based on the pleadings, however, it appears undisputed that *Chessie* was struck by lightning on May 17, 2004, and that Plaintiffs filed a claim with Markel, their insurance carrier, for certain damage incurred as a result of the strike. Compl. ¶¶ 5, 6; Answer ¶¶ 2, 6. Markel issued payment under the policy for some of the damage claimed, and the matter would have been concluded had Plaintiffs not discovered damage to the hull when they pulled the boat out of the water several months later. Compl. ¶ 7. Markel denied that the hull damage was caused by the lightning strike and/or covered by Plaintiffs' insurance policy, and initiated a declaratory judgment action in the United States District Court for the Middle District of Pennsylvania to that effect. Compl. ¶ 13, Answer ¶ 15. The parties subsequently negotiated a private arbitration agreement and voluntarily dismissed the Pennsylvania claim. Compl. ¶ 15, Answer ¶ 17.

The scope of the arbitration agreement is the basis of this litigation. The final agreement states, in relevant part,

> "The parties to this dispute ... have agreed that an arbitrator shall determine whether certain bottom damage in the amount of $36,000, to the Yacht CHESSIE was caused by the lightning strike occurring on May 17, 2004, or osmosis, as claimed by [Markel]."

Pl.'s Mot. Ex. A, Def.'s Mot. Ex. C. The agreement also contemplated that the arbitrator would issue an "award" within 30 days of the final submission of evidence. *Id.* The arbitrator issued his award on June 12, 2006. In it, he held that some, but not all, of *Chessie's* hull damage was caused by lightning. Specifically, the arbitrator stated,

> "I find that there *is* a basis for an argument regarding loss related damage. Evidence shows that the lightning strike on Mary 17, 2004 was discharged through the hull below the water line.... The **corruption** of the **surface laminate of the bottom** *is* basis for a loss related award.... The award amount must be kept in proportion to the ***loss related damage*** only. I find that the repairs relating to that damage should be based on a cost of $300.00 per foot ($14,000.00). Other expenses relating to charges for hauling, mast un-stepping/re-stepping, blocking, storage, moving, launching or environmental fees should be added to that amount."

Def.'s Mot. Ex. D. This award forms the basis for the present litigation, in which both parties ostensibly seek to confirm and enforce the arbitrator's decision.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there exists no genuine issue as to any material fact and a decision may be rendered as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material facts to resolve. *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir.1987). In determining whether summary judgment should be granted, the court "must assess the documentary materials submitted by the parties in the light most favorable to the nonmoving party." *Id.* (citing *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 598 (4th Cir.1985)).

If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify specific facts showing that there is a genuine issue for trial. The existence of only a "scintilla of evidence" is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials submitted must show facts from which the finder of fact reasonably could find for the party opposing summary judgment. *Anderson*, 477 U.S. at 251, 106 S.Ct. 2505.

Moreover, to be entitled to consideration on summary judgment, the evidence supporting the facts set forth by the parties must be such as would be admissible in evidence. *See* FED.R.CIV.P. 56(c); *see also Sakaria v. Trans World Airlines,* 8 F.3d 164, 171 (4th Cir.1993) (finding that the district court *536 properly did not consider inadmissible hearsay in an affidavit filed with motion for summary judgment); *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1315-16 (4th Cir.1993) ("The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof in the form of admissible evidence that could carry the burden of proof in his claim at trial."). With regard to documentary evidence, this Court previously has held that,

> "[u]nsworn, unauthenticated documents cannot be considered on a motion for summary judgment. To be admissible at the summary judgment stage, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)-that the documents be admissible in evidence."

Miskin v. Baxter Healthcare Corp. et al., 107 F.Supp.2d 669 (D.Md.1999) (Grimm, J.) (citing *Orsi v. Kirkwood,* 999 F.2d 86, 92 (4th Cir.1993)).

THE FEDERAL ARBITRATION ACT

As a preliminary matter, Plaintiffs have styled their complaint as one to enforce the arbitrator's award under § 9 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (2006), when, in reality, it is a complaint to *modify* the award under section 10 of that statute. This is so because, although the arbitrator found that only $14,100 of *Chessie's* hull damage was caused by lightning, Plaintiffs nonetheless ask the Court to award a judgment in the amount of $36,000. Plaintiffs' argument regarding the substance of the agreement between the parties further underscores this conclusion. Specifically, Plaintiffs allege that the parties entered into an "all or nothing" agreement, whereby the arbitrator was to determine that the hull damage was caused by lightning, and if so, award Plaintiffs the $36,000.00 in damages claimed. Pl.'s MSJ at 5. According to Plaintiffs,

> "the Arbitrator's sole function was to determine whether the hull damage, in the agreed-upon amount of $36,000, was caused by the lightning strike occurring on May 17, 2004. *The Arbitration Agreement did not grant the Arbitrator the authority to assess a damage amount.*"

Id. (emphasis added). This argument is consistent with a motion to modify under § 10(b)(4), which permits a federal court to modify or vacate an arbitration award upon a showing that "the arbitrator[ ] exceeded their powers." Accordingly, the Court will evaluate Plaintiffs' motion under § 10 of the FAA.

In contrast, Markel's complaint truly is one to enforce the arbitrator's award. Markel denies that it entered into an "all or nothing" arbitration agreement with regard to damages, and seeks to enforce the arbitrator's award of $14,100. Def.'s Mot. at 5.

The question before the Court, therefore, is whether the arbitrator exceeded his authority under the arbitration agreement by assigning a value to the damages attributable to the lightning strike that was less than the $36,000 claimed by Plaintiffs. If the answer is yes, then the court can vacate, remand, or modify the award. 9 U.S.C. § 10, 11. If the answer is no, then the court must grant Defendant's motion to confirm the award under § 9 of the FAA.

[1] To resolve whether the arbitrator exceeded his authority, the Court first must determine the scope of the arbitration agreement; specifically, whether the parties agreed to arbitrate the amount of damages caused by the lightning strike. Because the parties did not agree to submit questions of arbitrability to the arbitrator for resolution, determining the scope of the agreement is an issue for the Court to decide. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In this regard, the Supreme Court has advised that, "[w]hen deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary state-law principles of contract interpretation." *Kaplan,* 514 U.S. at 944, 115 S.Ct. 1920, *accord E.I. Dupont De Nemours & Co. v. Martinsville Nylon Employees' Council Corp.,* 78 F.3d 578 (4th Cir.1996). In doing so, the Court must "give due regard to the federal policy favoring arbitration and resolve 'any doubts concerning the scope of arbitrable issues in favor of

arbitration.' " *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir.2005) *(quoting* *537 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Maryland law[2] regarding contract interpretation requires the court first to "determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *GMAC v. Daniels*, 303 Md. 254, 262, 492 A.2d 1306, 1310 (Md.1985). If the language of the contract is clear and unambiguous, then the Court "must presume that the parties meant what they expressed." *Id.* If the language of the contract is ambiguous, however, the court may consider parol evidence to determine the intent of the parties. *E.g. Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 433, 418 A.2d 1187, 1190 (Md.1980). Contract language is ambiguous if it could be read to have more than one meaning by a reasonably prudent layperson. *Clendenin Bros., Inc. v. United States Fire Ins. Co.*, 390 Md. 449, 459, 889 A.2d 387, 393-394 (Md.2006), citing *Truck Ins. Exch.*, 288 Md. at 433, 418 A.2d at 1190.

Here, I find that the language of the arbitration agreement is ambiguous; it could be read either to permit the arbitrator to determine the amount of damage to *Chessie,* or to limit his authority to determining only whether the claimed damages were caused by the lightning strike. Under normal circumstances, the Court would look to the documentary evidence provided by the parties, which in this case includes the arbitration agreement, award, and copies of e-mail correspondence between counsel, ostensibly supplied as extrinsic evidence of the parties' intent with regard to the scope of the arbitration agreement. In this case, however, the admissibility problems with the evidence presented are manifest. First, none of the documentary evidence presented is authenticated by affidavit or otherwise. Next, most of the facts relevant to the contract negotiations at issue have been provided by counsel *ipse dixit,* without supporting affidavits or deposition testimony. The evidentiary problems associated with the copies of e-mail offered as parol evidence likewise are substantial because they were not authenticated, but instead were simply attached to the parties' motions as exhibits.

Because neither party to this dispute complied with the requirements of Rule 56 that they support their motions with admissible evidence, I dismissed both motions without prejudice to allow resubmission with proper evidentiary support. (Paper No. 26). I further observed that the unauthenticated e-mails are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium. Given the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence. Although cases abound regarding the discoverability of electronic records, research has failed to locate a comprehensive analysis of the many interrelated evidentiary issues associated with electronic evidence. Because there is a need for guidance to the bar regarding this subject, this opinion undertakes a broader and more detailed analysis of these issues than would be required simply to resolve the specific issues presented in this case. It is my hope that it will provide a helpful starting place for understanding the challenges associated with the admissibility of electronic evidence.

ADMISSIBILITY OF ELECTRONICALLY STORED INFORMATION

Be careful what you ask for, the saying goes, because you might actually get it. For the last several years there has been seemingly endless discussion of the rules regarding the discovery of electronically stored information ("ESI"). The adoption of a series of amendments to the Federal Rules of Civil Procedure relating to the discovery of ESI in December of 2006 has only heightened, not lessened, this discussion. Very little has been written, however, about what is required to insure that ESI obtained during discovery is admissible into evidence at trial, or whether it constitutes "such facts as would *538 be admissible in evidence" for use in summary judgment practice. FED.R.CIV.P. 56(e).[3] This is unfortunate, because considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted. The process is complicated by the fact that ESI comes in multiple evidentiary "flavors," including e-mail, website ESI, internet postings, digital photographs, and computer-generated documents and data files.[4]

[2] Whether ESI is admissible into evidence is determined by a collection of evidence rules[5] that present themselves like a series of hurdles to be cleared by the proponent of the

evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible. Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI **relevant** as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it **authentic** as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it **hearsay** as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an **original** or **duplicate** under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of **unfair prejudice** or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first.

*539 *Preliminary Rulings on Admissibility(Rule 104)*

The relationship between Rule 104(a) and (b) can complicate the process by which ESI is admitted into evidence at trial, or may be considered at summary judgment. The rule states, in relevant part:

> "(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).... In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

FED.R.EVID. 104(a) and (b).

When the judge makes a preliminary determination regarding the admissibility of evidence under Rule 104(a), the Federal Rules of Evidence, except for privilege, do not apply. Rule 104(a), 1101(d)(1). Therefore, the court may consider hearsay or other evidence that would not be admissible if offered to the jury, [6] and "hearings on preliminary matters need not be conducted with all the formalities and requirements of a trial." [7] Accordingly, the trial judge may make preliminary determinations in chambers or at a sidebar conference in court. [8]

The following types of preliminary matters typically are determined by the judge under Rule 104(a): whether an expert is qualified, and if so, whether his or her opinions are admissible; existence of a privilege; and whether evidence is hearsay, and if so, if any recognized exception applies. [9]

The interplay between Rule 104(a) and 104(b) can be a bit tricky, which is illustrated by the manner in which evidence, whether ESI or "hard copy," must be authenticated under Rule 901(a). Authentication under Rule 901 is viewed as a subset of relevancy, because "evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." [10] Accordingly, "[r]esolution of whether evidence is authentic calls for a factual determination by the jury and admissibility, therefore, is governed by the procedure set forth in Federal Rule of Evidence 104(b) 'relating to matters of conditional relevance generally.' " [11] In essence, determining whether ESI is authentic, and therefore relevant, is a two step process. First, "[b]efore admitting evidence for consideration by the jury, the district court must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." [12] Then, "because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which *540 the proponent claims." [13] As the Fourth Circuit summarized this process:

> "Although the district court is charged with making this preliminary determination, because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims. Because the ultimate resolution of authenticity is a question for the jury, in rendering its preliminary decision on whether

the proponent of evidence has laid a sufficient foundation for admission the district court must necessarily assess the adequacy of the showing made before the jury. [14]"

With respect to this two step process, the Fourth Circuit went on to state:

> "[a]n in camera hearing addressing authenticity does not replace the presentation of authenticating evidence before the jury; the district court must revisit this issue at trial. Thus, even though the district court may have ruled during an in camera proceeding that the proponent had presented sufficient evidence to support a finding that [the evidence] was authentic, evidence that would support the same ruling must be presented again, to the jury, before the [evidence] may be admitted. [15]"

In short, there is a significant difference between the way that Rule 104(a) and 104(b) operate. Because, under Rule 104(b), the jury, not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible under the rules of evidence. [16] It is important to understand this relationship when seeking to admit ESI. For example, if an e-mail is offered into evidence, the determination of whether it is authentic would be for the jury to decide under Rule 104(b), and the facts that they consider in making this determination must be admissible into evidence. In contrast, if the ruling on whether the e-mail is an admission by a party opponent or a business record turns on contested facts, the admissibility of those facts will be determined by the judge under 104(a), and the Federal Rules of Evidence, except for privilege, are inapplicable.

Relevance (Rules 401, 402, and 105)

The first evidentiary hurdle to overcome in establishing the admissibility of ESI is to demonstrate that it is relevant, as defined by Federal Rule of Evidence 401, which states:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Clearly, facts that tend to prove essential elements of the causes of action and affirmative defenses asserted in the pleadings are "of consequence to the litigation," as are facts that tend to undermine or rehabilitate the credibility of the witnesses who will testify. SALTZBURG at § 401.02[8]. So too, however, are background facts that, although they may not prove elements of the claims and defenses, and may not even be disputed, nonetheless routinely are admitted to help the fact finder understand the issues in the case and the evidence introduced to prove or disprove them. FED.R.EVID. 401 advisory committee's note. It is important to recognize that relevance is not a static concept; evidence is not relevant or irrelevant, occupying some rigid state of all or nothing. SALTZBURG at § 401.02[11]. Instead, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter *541 properly provable in the case." FED.R.EVID. 401 advisory committee's note. As recognized by Federal Rule of Evidence 105, evidence may be admissible for one purpose, but not another, or against one party, but not another. [17] Therefore, it is important for the proponent of the evidence to have considered all of the potential purposes for which it is offered, and to be prepared to articulate them to the court if the evidence is challenged. This point is particularly significant, as discussed below, when considering hearsay objections, where disputed evidence may be inadmissible hearsay if offered for its substantive truth, but admissible if offered for a reason other than its literal truth.

In assessing whether evidence is relevant under Rule 401, it also is important to remember that there is a distinction between the admissibility of evidence, and the weight to which it is entitled in the eyes of the fact finder, as Rule 104(e) [18] instructs. To be relevant, evidence does not have to carry any particular weight-it is sufficient if it has "any tendency" to prove or disprove a consequential fact in the litigation. Whether evidence tends to make a consequential fact more probable than it would be without the evidence is not a difficult showing to make. FED.R.EVID. 401 advisory committee's note; SALTZBURG at § 401.02[1] ("To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence. The question of relevance is thus different from whether evidence is *sufficient* to prove a point.") *See also* WEINSTEIN at § 401.05-06.

The Federal Rules of Evidence are clear: evidence that is not relevant is never admissible. FED.R.EVID. 402. Once evidence has been shown to meet the low threshold of relevance, however, it presumptively is admissible unless the constitution, a statute, rule of evidence or procedure, or case law requires that it be excluded. [19] Thus, the function of all the rules of evidence other than Rule 401 is to help determine whether evidence which in fact is relevant should nonetheless be excluded. FED.R.EVID. 402 advisory committee's note ("Succeeding rules [in Article IV of the rules of evidence] ... in response to the demands of particular policies, require the exclusion of evidence despite its relevancy."). *See also* SALTZBURG § 402.02 [1]-[2].

Establishing that ESI has some relevance generally is not hard for counsel. Articulating all of what may be multiple grounds of relevance is something that is important, though not as frequently done as it should be. Accordingly, evidence that might otherwise be admitted may be excluded because the proponent put all his or her eggs in a single evidentiary basket, which the trial judge views as inapplicable, instead of carefully identifying each potential basis for admissibility. That was not the problem in this case, however, because the e-mail and other documentary evidence attached as exhibits to the summary judgment motions are relevant to determining the scope of the arbitration agreement between the parties, and therefore this evidence meets the requirements of Rule 401. Assuming, as is the case here, the proponent of ESI establishes its relevance and concomitant presumptive admissibility, the next step is to demonstrate that it is authentic. It is this latter step that the parties in this case omitted completely.

Authenticity (Rules 901-902)

In order for ESI to be admissible, it also must be shown to be authentic. Rule 901(a) defines what this entails: "[t]he requirement ***542** of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As already noted, "[a]uthentication and identification represent a special aspect of relevancy.... This requirement of showing authenticity or identity falls into the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b)." FED.R.EVID. 901 advisory committee's note. The requirement of authentication and identification also insures that evidence is trustworthy, which is especially important in analyzing hearsay issues. Indeed, these two evidentiary concepts often are considered together when determining the admissibility of exhibits or documents. [20] WEINSTEIN at § 901.02[2].

A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. *Id.* at § 901.02[3]. This is not a particularly high barrier to overcome. For example, in *United States v. Safavian*, the court analyzed the admissibility of e-mail, noting,

> "[t]he question for the court under Rule 901 is whether the proponent of the evidence has 'offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is....' The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so."

435 F.Supp.2d at 38 (citations omitted). *See also United States v. Meienberg*, 263 F.3d 1177, 1180 (10th Cir.2001) (analyzing admissibility of printouts of computerized records); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir.2000) (analyzing admissibility of exhibits reflecting chat room conversations); *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir.1994)(discussing admissibility of radiotelegrams); *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir.1982)(addressing chain of authenticity); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 WL 2367740, at * 16 (N.D.Ill. Oct.15, 2004) (analyzing admissibility of the content of a website).

Ironically, however, counsel often fail to meet even this minimal showing when attempting to introduce ESI, which underscores the need to pay careful attention to this requirement. Indeed, the inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation. *See, e.g., In re Vee Vinhnee*, 336 B.R. 437 (proponent failed properly to authenticate exhibits of electronically stored business records); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir.2000) (proponent failed to authenticate exhibits taken from an organization's website); *St. Luke's Cataract and Laser Institute PA v. Sanderson*, 2006 WL 1320242, at *3-4 (M.D.Fla. May 12, 2006) (excluding exhibits because affidavits used to authenticate exhibits showing content of web pages were factually inaccurate and affiants lacked personal knowledge of facts); *Rambus v. Infineon Tech. AG*, 348 F.Supp.2d 698

(E.D.Va.2004) (proponent failed to authenticate computer generated business records); *Wady v. Provident Life and Accident Ins. Co. of Am.*, 216 F.Supp.2d 1060 (C.D.Cal.2002) (sustaining an objection to affidavit of witness offered to authenticate exhibit that contained documents taken from defendant's website because affiant lacked personal knowledge); *Indianapolis Minority Contractors Assoc., Inc. v. Wiley*, 1998 WL 1988826, at *7 (S.D.Ind. May 13, 1998) (proponent of computer records failed to show that they were from a system capable of producing reliable and accurate results, and therefore, failed to authenticate them).

Although courts have recognized that authentication of ESI may require greater scrutiny than that required for the authentication *543 of "hard copy" documents,[21] they have been quick to reject calls to abandon the existing rules of evidence when doing so. For example, in *In re F.P.* the court addressed the authentication required to introduce transcripts of instant message conversations. In rejecting the defendant's challenge to this evidence, it stated:

> "Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of PaR.E. 901 and Pennsylvania case law ... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." 878 A.2d at 95-96. Indeed, courts increasingly are demanding that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources. As one respected commentator on the Federal Rules of Evidence has noted:

> "In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. If a computer processes data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many states in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective software programs are used or stored-data media become corrupted or damaged.
>
> *544 The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Factors that should be considered in evaluating the reliability of computer-based evidence include the error rate in data inputting, and the security of the systems. The degree of foundation required to authenticate computer-based evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routineness of the computer operation, and the ability to test and verify results of the computer processing.
>
> Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge."

WEINSTEIN at § 900.06[3]. Obviously, there is no "one size fits all" approach that can be taken when authenticating electronic evidence, in part because technology changes so rapidly that it is often new to many judges.

Although Rule 901(a) addresses the requirement to authenticate electronically generated or electronically stored evidence, it is silent regarding how to do so. Rule 901(b), however, provides examples of how authentication may be accomplished. It states:

"(b) Illustrations.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority."

The ten methods identified by Rule 901(b) are non-exclusive. FED.R.EVID. 901(b) advisory committee's note ("The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law."); WEIN *545 STEIN at § 901.03[1] ("Parties may use any of the methods listed in Rule 901(b), any combination of them, or any other proof that may be available to carry their burden of showing that the proffered exhibit is what they claim it to be."); *Telewizja Polska USA,* 2004 WL 2367740 (authentication methods listed in Rule 901(b) are "non-exhaustive"). *See also United States v. Simpson,* 152 F.3d 1241, 1249 (10th Cir.1998) (evaluating methods of authenticating a printout of the text of a chat room discussion between the defendant and an undercover detective in a child pornography case).

Although the methods of authentication listed in Rule 901(b) "relate for the most part to documents ... some attention [has been] given to ... computer print-outs," particularly Rule 901(b)(9), which was drafted with "recent developments" in computer technology in mind. FED.R.EVID. 901(b) advisory committee's note. When faced with resolving authentication issues for electronic evidence, courts have used a number of the methods discussed in Rule 901(b), as well as approved some methods not included in that rule:

Rule 901(b)(1).

This rule permits authentication by: "[t]estimony that a matter is what it is claimed to be." This rule "contemplates a broad spectrum" including "testimony of a witness who was present at the signing of a document...." FED.R.EVID. 901(a) advisory committee's note. "[I]n recognition of the proponent's light burden of proof in authenticating an exhibit ... the 'knowledge' requirement of Rule 901(b)(1) is liberally construed. A witness may be appropriately knowledgeable through having participated in or observed the event reflected by the exhibit." WEINSTEIN at § 901.03[2] (cross-reference omitted). Courts considering

the admissibility of electronic evidence frequently have acknowledged that it may be authenticated by a witness with personal knowledge. *United States v. Kassimu,* 2006 WL 1880335 (5th Cir. May 12, 2006) (ruling that copies of a post office's computer records could be authenticated by a custodian or other qualified witness with personal knowledge of the procedure that generated the records); *St. Luke's,* 2006 WL 1320242 at *3-4 ("To authenticate printouts from a website, the party proffering the evidence must produce 'some statement or affidavit from someone with knowledge [of the website] ... for example [a] web master or someone else with personal knowledge would be sufficient.' " (citation omitted)); *Safavian,* 435 F.Supp.2d at 40 n. 2 (D.D.C.2006) (noting that e-mail may be authenticated by a witness with knowledge that the exhibit is what it is claimed to be); *Wady,* 216 F.Supp.2d 1060 (sustaining objection to affidavit of plaintiff's witness attempting to authenticate documents taken from the defendant's website because the affiant lacked personal knowledge of who maintained the website or authored the documents). Although Rule 901(b)(1) certainly is met by the testimony of a witness that actually drafted the exhibit, it is not required that the authenticating witness have personal knowledge of the making of a particular exhibit if he or she has personal knowledge of how that type of exhibit is routinely made. WEINSTEIN at § 901.03[2]. [22] It is necessary, however, that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record *546 exception to the hearsay rule, Rule 803(6), or public record exception, Rule 803(8).

Rule 901(b)(3).

This rule allows authentication or identification by "[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated." Interestingly, the rule allows either expert opinion testimony to authenticate a questioned document by comparing it to one known to be authentic, or by permitting the factfinder to do so. Obviously, the specimen used for the comparison with the document to be authenticated must be shown itself to be authentic. WEINSTEIN at § 901.03[7][b]. This may be accomplished by any means allowable by Rule 901 or 902, as well as by using other exhibits already admitted into evidence at trial, or admitted into evidence by judicial notice under Rule 201. *Id.* Although the common law origin of Rule 901(b)(3) involved its use for authenticating handwriting or signatures, FED. R. EVID. 901(b)(3) advisory committee's note, it now is commonly used to authenticate documents, WEINSTEIN at § 901.03[7][b], and at least one court has noted its appropriate use for authenticating e-mail. *Safavian,* 435 F.Supp.2d at 40 (E-mail messages "that are not clearly identifiable on their own can be authenticated ... by comparison by the trier of fact (the jury) with 'specimens which have been [otherwise] authenticated'-in this case, those e-mails that already have been independently authenticated under Rule 901(b)(4).").

Rule 901(b)(4.)

This rule is one of the most frequently used to authenticate e-mail and other electronic records. It permits exhibits to be authenticated or identified by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The commentary to Rule 901(b)(4) observes "[t]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety," including authenticating an exhibit by showing that it came from a "particular person by virtue of its disclosing knowledge of facts known peculiarly to him," or authenticating "by content and circumstances indicating it was in reply to a duly authenticated" document. FED.R.EVID. 901(b)(4) advisory committee's note. Use of this rule often is characterized as authentication solely by "circumstantial evidence." WEINSTEIN at § 901.03[8]. Courts have recognized this rule as a means to authenticate ESI, including e-mail, text messages and the content of websites. *See United States v. Siddiqui,* 235 F.3d 1318, 1322-23 (11th Cir.2000) (allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname, and testimony by witnesses that the defendant spoke to them about the subjects contained in the e-mail); *Safavian,* 435 F.Supp.2d at 40 (same result regarding e-mail); *In re F.P.,* 878 A.2d at 94 (noting that authentication could be accomplished by direct evidence, circumstantial evidence, or both, but ultimately holding that transcripts of instant messaging conversation circumstantially were authenticated based on presence of defendant's screen name, use of defendant's first name, and content of threatening message, which other witnesses had corroborated); *Perfect 10, Inc. v. Cybernet Ventures, Inc.,* 213 F.Supp.2d 1146, 1153-54 (C.D.Cal.2002) (admitting website postings as evidence due

to circumstantial indicia of authenticity, including dates and presence of identifying web addresses).

One method of authenticating electronic evidence under Rule 901(b)(4) is the use of "hash values" or "hash marks" when making documents. A hash value is:

> "A unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity of an original data set and can be used as a digital *547 equivalent of the Bates stamp used in paper document production. [23] "

Hash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4). Also, they can be used during discovery of electronic records to create a form of electronic "Bates stamp" that will help establish the document as electronic. [24] This underscores a point that counsel often overlook. A party that seeks to introduce its own electronic records may have just as much difficulty authenticating them as one that attempts to introduce the electronic records of an adversary. Because it is so common for multiple versions of electronic documents to exist, it sometimes is difficult to establish that the version that is offered into evidence is the "final" or legally operative version. This can plague a party seeking to introduce a favorable version of its own electronic records, when the adverse party objects that it is not the legally operative version, given the production in discovery of multiple versions. Use of hash values when creating the "final" or "legally operative" version of an electronic record can insert distinctive characteristics into it that allow its authentication under Rule 901(b)(4).

Another way in which electronic evidence may be authenticated under Rule 901(b)(4) is by examining the metadata for the evidence. Metadata,

> "commonly described as 'data about data,' is defined as 'information describing the history, tracking, or management of an electronic document.' Appendix F to *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* defines metadata as 'information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).' Technical Appendix E to the *Sedona Guidelines* provides an extended description of metadata. It further defines metadata to include 'all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records.' Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept."

Williams v. Sprint/United Mgmt. Co., 230 F.R.D. at 646 (footnote omitted); Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center, 2007 at 24-25 (defining metadata as "[i]nformation about a particular data set or document which describes how, when, and by whom the data set or document was collected, created, accessed, or modified ..."). Recently revised Federal Rule of Civil Procedure 34 permits a party to discover electronically stored information and to identify the form or forms in which it is to be produced. A party therefore can request production of electronically stored information in its "native format", which includes the metadata for the electronic document. [25] Because metadata shows the date, *548 time and identity of the creator of an electronic record, as well as all changes made to it, metadata is a distinctive characteristic of all electronic evidence that can be used to authenticate it under Rule 901(b)(4). Although specific source code markers that constitute metadata can provide a useful method of authenticating

electronically stored evidence, this method is not foolproof because,

> "[a]n unauthorized person may be able to obtain access to an unattended computer. Moreover, a document or database located on a networked-computer system can be viewed by persons on the network who may modify it. In addition, many network computer systems usually provide for a selected network administrators to override an individual password identification number to gain access when necessary."
>
> WEINSTEIN at § 900.01[4][a]; *see also Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 530 (1 st Cir.1996) (discussing how metadata markers can reflect that a document was modified when in fact it simply was saved to a different location). Despite its lack of conclusiveness, however, metadata certainly is a useful tool for authenticating electronic records by use of distinctive characteristics.

Rule 901(b)(7):
This Rule permits authentication by:

> "Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

The commentary to Rule 901(b)(7) recognizes that it applies to computerized public records, noting that "[p]ublic records are regularly authenticated by proof of custody, without more. [Rule 901(b)(7)] extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected." FED.R.EVID. 901(b)(7) advisory committee's note (citation omitted). To use this rule the "proponent of the evidence need only show that the office from which the records were taken is the legal custodian of the records." WEINSTEIN at § 901.10[2]. This may be done by "[a] certificate of authenticity from the public office; [t]he testimony of an officer who is authorized to attest to custodianship, [or] the testimony of a witness with knowledge that the evidence is in fact from a public office authorized to keep such a record." *Id.* (footnote omitted). Examples of the types of public records that may be authenticated by Rule 901(b)(7) include tax returns, weather bureau records, military records, social security records, INS records, VA records, official records from federal, state and local agencies, judicial records, correctional records, law enforcement records, and data compilations, which may include computer stored records. *Id.*

Courts have recognized the appropriateness of authenticating computer stored public records under Rule 901(b)(7) as well, and observed that under this rule, unlike Rule 901(b)(9), there is no need to show that the computer system producing the public records was reliable or the records accurate. For example, in *United States v. Meienberg,* the court rejected defendant's challenge to the admissibility of a law enforcement agency's computerized records. Defendant argued that the only way they could be authenticated was under Rule 901(b)(9), through proof that they were produced by a system or process capable of producing a reliable result. Defendant further argued that the records had not been shown to be accurate. The appellate court disagreed, holding that the records properly had been authenticated under Rule 901(b)(7), which did not require a showing of accuracy. The court noted that any question regarding the accuracy of the records went to weight rather than admissibility. 263 F.3d at 1181. Thus, a decision to authenticate under Rule 901(b)(7), as opposed to 901(b)(9) may mean that the required foundation is much easier to prove. ***549** This underscores the importance of the point previously made, that there may be multiple ways to authenticate a particular computerized record, and careful attention to all the possibilities may reveal a method that significantly eases the burden of authentication.

Rule 901(b)(9):
This Rule recognizes one method of authentication that is particularly useful in authenticating electronic evidence stored in or generated by computers. It authorizes authentication by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." FED.R.EVID. 901(b)(9). This rule was "designed for situations in which the accuracy of a result is dependent upon a process or system which produces it." FED.R.EVID. 901(b)(9) advisory committee's note. *See also* WEINSTEIN at § 901.12[3];[26] *In re Vee Vinhnee,* 336 B.R. at 446 ("Rule 901(b)(9), which is designated as an example of a satisfactory authentication, describes the appropriate authentication for results of a process or system and contemplates evidence describing the process or system used to achieve a result and demonstration that the result is accurate. The advisory committee note

makes plain that Rule 901(b)(9) was designed to encompass computer-generated evidence ..."). [27]

Rule 902:

In addition to the non-exclusive methods of authentication identified in Rule 901(b), Rule 902 identifies twelve methods by which documents, including electronic ones, may be authenticated without extrinsic evidence. This is commonly referred to as "self-authentication." The rule states:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> (2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
>
> (3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the ***550** genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
>
> (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
>
> (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.
>
> (6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.
>
> (7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
>
> (8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
>
> (9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
>
> (10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.
>
> (11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

*551 (B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

The obvious advantage of Rule 902 is that it does not require the sponsoring testimony of any witness to authenticate the exhibit-its admissibility is determined simply by examining the evidence itself, along with any accompanying written declaration or certificate required by Rule 902. The mere fact that the rule permits self-authentication, however, does not foreclose the opposing party from challenging the authenticity. Because Rule 104(b) applies in such cases, the exhibit and the evidence challenging its authenticity goes to the jury, which ultimately determines whether it is authentic. FED.R.EVID. 902 advisory committee's note.

Some of the examples contained in Rule 902, such as Rule 902(3) (foreign public documents), 902(4) (certified copies of public records), 902(8) (acknowledged documents), 902(11) (certified copies of domestic records of a regularly conducted activity), and 902(12) (certified foreign records of regularly conducted activity), do require a certificate signed by a custodian or other qualified person to accomplish the self-authentication.

Although all of the examples contained in Rule 902 could be applicable to computerized records, three in particular have been recognized by the courts to authenticate electronic evidence: 902(5) (official publications); 902(7) (trade inscriptions); and, 902(11) (certified domestic records of regularly conducted activity). The first, Rule 902(5), provides:

> "(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority."

The rule "[dispenses] with preliminary proof of the genuineness of purportedly official publications .... [but] does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility." FED.R.EVID. 902(5) advisory committee's note. This means that, to be admissible, the proponent may also need to establish that the official record qualifies as a public record hearsay exception under Rule 803(8). WEINSTEIN at § 902.02[2]. Although the rule is silent regarding the level of government that must authorize the publication, commentators suggest that the list includes the United States, any State, district, commonwealth, territory or insular possession of the United States, the Panama Canal Zone, the Trust Territory of the Pacific islands, or a political subdivision, department, officer, or agency of any of the foregoing. *Id.*

In *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours and Co.*, the court admitted into evidence printouts of postings on the website of the United States Census Bureau as self-authenticating under Rule 902(5). 2004 WL 2347556 (E.D.La. Oct.18, 2004). Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the

public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily.

Rule 902(7) provides that exhibits may be self-authenticated by "[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." As one commentator has noted, "[u]nder Rule 902(7), labels or tags affixed in the course of business require no authentication. Business e-mails often contain information showing the origin of the transmission and identifying the ***552** employer-company. The identification marker alone may be sufficient to authenticate an e-mail under Rule 902(7)." WEINSTEIN at § 900.07[3][c].

Rule 902(11) also is extremely useful because it affords a means of authenticating business records under Rule 803(6), one of the most used hearsay exceptions, without the need for a witness to testify in person at trial. It provides:

> "(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.
>
> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

This rule was added in the 2000 amendments to the Federal Rules of Evidence, and it was intended to "[set] forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness." FED.R.EVID. 902(11) advisory committee's note. Unlike most of the other authentication rules, Rule 902(11) also contains a notice provision, requiring the proponent to provide written notice of the intention to use the rule to all adverse parties and to make available to them the records sufficiently in advance of litigation to permit a fair opportunity to challenge them. WEINSTEIN at § 902.13[2]. Because compliance with Rule 902(11) requires the proponent to establish all the elements of the business record exception to the hearsay rule, Rule 803(6), courts usually analyze the authenticity issue under Rule 902(11) concomitantly with the business record hearsay exception. [28] *Rambus,* 348 F.Supp.2d at 701 ("Thus, the most appropriate way to view Rule 902(11) is as the functional equivalent of testimony offered to authenticate a business record tendered under Rule 803(6) because the declaration permitted by Rule 902(11) serves the same purpose as authenticating testimony ... [B]ecause Rule 902[11] contains the same requirements, and almost the same wording, as Rule 803(6), decisions explaining the parallel provisions of Rule 803(6) are helpful in resolving the issues here presented."); *In re Vee Vinhnee,* 336 B.R. at 444 (stating that in deciding whether to admit business records, the authenticity analysis is merged into the business record analysis).

Finally, as noted at the beginning of this discussion regarding the authenticating electronic records, Rule 901(b) makes clear that the ten examples listed are illustrative only, not exhaustive. In ruling on whether electronic evidence has been properly authenticated, courts have been willing to think "outside of the box" to recognize new ways of authentication. For example, they have held that documents provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic. *Indianapolis Minority Contractors Ass'n,* 1998 WL 1988826, at *6 ("The act of production is an implicit authentication of documents produced.... Federal Rule of Evidence 901 provides that '[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Defendants admit that they did produce [the exhibits at issue].... Thus ... the ***553** Defendants cannot have it both ways. They cannot voluntarily produce documents and implicitly represent their authenticity and then contend they cannot be used by the Plaintiffs because the authenticity is lacking." (citation omitted)); *Perfect 10,* 213 F.Supp.2d at 1153-54 (finding that exhibits of website postings had been

properly authenticated for three reasons, including that certain of them had been provided to the plaintiff by the defendant during discovery).

In *Telewizja Polska USA,* the court embraced a non-traditional method of authentication when faced with determining whether exhibits depicting the content of the defendant's website at various dates several years in the past were admissible. 2004 WL 2367740. The plaintiff offered an affidavit from a representative of the Internet Archive Company, which retrieved copies of the defendant's website as it appeared at relevant dates to the litigation though use of its "wayback machine."[29] The defendant objected, contending that the Internet Archive was not a reliable source, and thus the exhibits had not been authenticated. The court disagreed, stating:

> "Federal Rule of Evidence 901 'requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence.' Admittedly, the Internet Archive does not fit neatly into any of the non-exhaustive examples listed in Rule 901; the Internet Archive is a relatively new source for archiving websites. Nevertheless, Plaintiff has presented no evidence that the Internet Archive is unreliable or biased. And Plaintiff has neither denied that the exhibit represents the contents of its website on the dates in question, nor come forward with its own evidence challenging the veracity of the exhibit. Under these circumstances, the Court is of the opinion that [the affidavit from the representative of the Internet Archive Company] is sufficient to satisfy Rule 901's threshold requirement for admissibility."
>
> *Id.* at *6.

Additionally, authentication may be accomplished by the court taking judicial notice under Rule 201 of certain foundational facts needed to authenticate an electronic record. Under this rule, the parties may request the court to take judicial notice of adjudicative facts that are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FED.R.EVID. 201(b); WEINSTEIN at § 201.12[1]. Judicial notice could be a helpful way to establish certain well known characteristics of computers, how the internet works, scientific principles underlying calculations performed within computer programs, and many similar facts that could facilitate authenticating electronic evidence.

Authentication also can be accomplished in civil cases by taking advantage of FED.R.CIV.P. 36, which permits a party to request that his or her opponent admit the "genuineness of documents." Also, at a pretrial conference, pursuant to FED.R.CIV.P. 16(c)(3), a party may request that an opposing party agree to stipulate "regarding the authenticity of documents," and the court may take "appropriate action" regarding that request. Similarly, if a party properly makes his or her FED. R. CIV. P. 26(a)(3) pretrial disclosures of documents and exhibits, then the other side has fourteen days in which to file objections. Failure to do so waives all objections other than under Rules 402 or 403, unless the court excuses the waiver for good cause. This means that if the opposing party does not raise authenticity objections within the fourteen days, they are waived.

The above discussion underscores the need for counsel to be creative in identifying methods of authenticating electronic evidence when the facts support a conclusion that the evidence is reliable, accurate, and authentic, regardless of whether there is a particular example in Rules 901 and 902 that neatly fits.

Finally, any serious consideration of the requirement to authenticate electronic evidence needs to acknowledge that, given the *554 wide diversity of such evidence, there is no single approach to authentication that will work in all instances. It is possible, however, to identify certain authentication issues that have been noted by courts and commentators with particular types of electronic evidence and to be forearmed with this knowledge to develop authenticating facts that address these concerns.

E-mail

There is no form of ESI more ubiquitous than e-mail, and it is the category of ESI at issue in this case. Although courts today have more or less resigned themselves to the fact that "[w]e live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world," *Safavian,* 435 F.Supp.2d at 41, it was not very long ago that they took a contrary view-"[e]-mail is far less of a systematic business activity than a monthly inventory printout." *Monotype Corp. PLC v. Int'l Typeface,* 43 F.3d 443, 450 (9th Cir.1994) (affirming trial court's exclusion of e-mail as inadmissible as a business record). Perhaps because of the spontaneity and informality of e-mail, people tend to reveal more of themselves, for better or worse, than in other more

deliberative forms of written communication. For that reason, e-mail evidence often figures prominently in cases where state of mind, motive and intent must be proved. Indeed, it is not unusual to see a case consisting almost entirely of e-mail evidence. *See, e.g., Safavian,* 435 F.Supp.2d 36.

Not surprisingly, there are many ways in which e-mail evidence may be authenticated. One well respected commentator has observed:

> "[E]-mail messages may be authenticated by direct or circumstantial evidence. An e-mail message's distinctive characteristics, including its 'contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances' may be sufficient for authentication.
>
> Printouts of e-mail messages ordinarily bear the sender's e-mail address, providing circumstantial evidence that the message was transmitted by the person identified in the e-mail address. In responding to an e-mail message, the person receiving the message may transmit the reply using the computer's reply function, which automatically routes the message to the address from which the original message came. Use of the reply function indicates that the reply message was sent to the sender's listed e-mail address.
>
> The contents of the e-mail may help show authentication by revealing details known only to the sender and the person receiving the message.
>
> E-mails may even be self-authenticating. Under Rule 902(7), labels or tags affixed in the course of business require no authentication. Business e-mails often contain information showing the origin of the transmission and identifying the employer-company. The identification marker alone may be sufficient to authenticate an e-mail under Rule 902(7). However, the sending address in an e-mail message is not conclusive, since e-mail messages can be sent by persons other than the named sender. For example, a person with unauthorized access to a computer can transmit e-mail messages under the computer owner's name. Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness."

WEINSTEIN at § 900.07[3][c]; *see also* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 4.03[4][b] (LexisNexis 6th ed.2005)(hereinafter "IMWINKELRIED, EVIDENTIARY FOUNDATIONS.")

Courts also have approved the authentication of e-mail by the above described methods. *See, e.g., Siddiqui,* 235 F.3d at 1322-23 (E-mail may be authenticated entirely by circumstantial evidence, including its distinctive characteristics); *Safavian,* 435 F.Supp.2d at 40 (recognizing that e-mail may be authenticated by distinctive characteristics 901(b)(4), or by comparison of exemplars with other e-mails that already have been authenticated 901(b)(3)); *Rambus,* 348 F.Supp.2d 698 (E-mail that qualifies as business record may be *555 self-authenticating under 902(11)); *In re F.P.,* 878 A.2d at 94 (E-mail may be authenticated by direct or circumstantial evidence).

The most frequent ways to authenticate e-mail evidence are 901(b)(1) (person with personal knowledge), 901(b)(3) (expert testimony or comparison with authenticated exemplar), 901(b)(4) (distinctive characteristics, including circumstantial evidence), 902(7) (trade inscriptions), and 902(11) (certified copies of business record).

Internet Website Postings

Courts often have been faced with determining the admissibility of exhibits containing representations of the contents of website postings of a party at some point relevant to the litigation. Their reaction has ranged from the famous skepticism expressed in *St. Clair v. Johnny's Oyster and Shrimp, Inc.* 76 F.Supp.2d 773 (S.D.Tex.1999),[30] to more permissive approach taken in *Perfect 10,* 213 F.Supp.2d at 1153-54.[31]

The issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting. *See United States v. Jackson,* 208 F.3d 633, 638 (7th Cir.2000) (excluding evidence of website postings because proponent failed to show that sponsoring organization actually posted the statements, as opposed to a third party); *St. Luke's,* 2006 WL 1320242 (plaintiff failed to authenticate exhibits of defendant's website postings because affidavits used to authenticate the exhibits were factually inaccurate and the author lacked personal knowledge of the website); *Wady,* 216 F.Supp.2d 1060. One commentator has observed "[i]n applying [the authentication standard] to website evidence, there are three questions that must be answered explicitly or implicitly. (1) What was actually on the website? (2) Does the exhibit or testimony accurately

reflect it? (3) If so, is it attributable to the owner of the site?"[32] The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

> "The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; whether the data *556 has been republished by others who identify the source of the data as the website in question?[33]"

Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation. The authentication rules most likely to apply, singly or in combination, are 901(b)(1) (witness with personal knowledge) 901(b)(3) (expert testimony) 901(b)(4) (distinctive characteristics), 901(b)(7) (public records), 901(b)(9) (system or process capable of producing a reliable result), and 902(5) (official publications).

Text Messages and Chat Room Content

Many of the same foundational issues found encountered when authenticating website evidence apply with equal force to text messages and internet chat room content; however, the fact that chat room messages are posted by third parties, often using "screen names" means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host. SALTZBURG at § 901.02[12]. One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

> "(1) [e]vidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);
>
> (2) [e]vidence that, when a meeting with the person using the screen name was arranged, the individual ... showed up; (3) [e]vidence that the person using the screen name identified [himself] as the [person in the chat room conversation]; evidence that the individual had in [his] possession information given to the person using the screen name; (5) [and][e]vidence from the hard drive of the individual's computer [showing use of the same screen name]."

Id. at § 901.02[12]. Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially. For example, in *In re F.P.*, the defendant argued that the testimony of the internet service provider was required, or that of a forensic expert. 878 A.2d at 93-94. The court held that circumstantial evidence, such as the use of the defendant's screen name in the text message, the use of the defendant's first name, and the subject matter of the messages all could authenticate the transcripts. *Id.* Similarly, in *United States v. Simpson,* the court held that there was ample circumstantial evidence to authenticate printouts of the content of chat room discussions between the defendant and an undercover detective, including use of the e-mail name of the defendant, the presence of the defendant's correct address in the messages, and notes seized at the defendant's home containing the address, e-mail address and telephone number given by the undercover officer. 152 F.3d at 1249. Likewise, in *United States v. Tank,* the court found sufficient circumstantial facts to authenticate chat room conversations, despite the fact that certain portions of the text of the messages in which the defendant had participated had been deleted. 200 F.3d at 629-31. There, the court found the testimony regarding the limited nature of the deletions by the member of the chat room club who had made the deletions, circumstantial evidence connecting the defendant to the chat room, including the use of the defendant's screen name in the messages, were sufficient to authenticate the messages. *Id.* at 631. Based on the foregoing cases, the rules most likely to be used to authenticate chat room and text messages, alone or in combination, appear to be 901(b)(1) (witness with personal knowledge) and 901(b)(4) (circumstantial evidence of distinctive characteristics).

Computer Stored Records and Data

Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers. As one commentator has observed "[m]any kinds of computer records and computer-generated information are introduced as real evidence or used as litigation aids at trials. They range from computer printouts *557 of stored digital data to complex computer-generated models performing complicated computations. Each may raise different admissibility issues concerning authentication and other foundational requirements." WEINSTEIN at § 900.06[3]. The least complex admissibility issues are associated with electronically stored records. "In general,

electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues." WEINSTEIN at § 900.06[3]. That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. MANUAL FOR COMPLEX LITIGATION at § 11.447;[34] *see also* IMWINKELRIED, EVIDENTIARY FOUNDATIONS at 4.03[2].[35]

Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one. In *United States v. Meienberg,* the defendant challenged on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. 263 F.3d at 1180-81. The Tenth Circuit disagreed, stating:

> "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility."

Id. at 1181 (citation omitted). *See also Kassimu,* 2006 WL 1880335 (To authenticate computer records as business records did not require the maker, or even a custodian of the record, only a witness qualified to explain the record keeping system of the organization to confirm that the requirements of Rule 803(6) had been met, and the inability of a witness to attest to the accuracy of the information entered into the computer did not preclude admissibility); *Sea-Land Serv., Inc. v. Lozen Int'l,* 285 F.3d 808 (9th Cir.2002) (ruling that trial court properly considered electronically generated bill of lading as an exhibit to a summary judgment motion. The only foundation that was required was that the record was produced from the same electronic information that was generated contemporaneously when the parties entered into their contact. The court did not require evidence that the records were reliable or accurate).

In contrast, in the case of *In re Vee Vinhnee,* the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor, for failing to authenticate them. 336 B.R. 437. The court noted that "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground." *Id.* at 445-46. The court further observed that:

> "The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the ***558** files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created.... Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created."

Id. at 444. The court reasoned that, for paperless electronic records:

> "The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation."

Id. at 445. In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step foundation proposed by Professor Edward Imwinkelried:[36]

Professor Imwinkelried perceives electronic records as a form of scientific evidence and discerns an eleven-step foundation for computer records:

"1. The business uses a computer.

2. The computer is reliable.

3. The business has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors.

5. The business keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact."

Id. at 446-47 (citation omitted). Although the position taken by the court in *In re Vee Vinhnee* appears to be the most demanding requirement for authenticating computer stored records, other courts also have recognized a need to demonstrate the accuracy of these records. *See, e.g., State v. Dunn,* 7 S.W.3d 427, 432 (Mo.Ct.App.2000) (Admissibility of computer-generated records "should be determined on the basis of the reliability and accuracy of the process involved."); *State v. Hall,* 976 S.W.2d 121, 147 (Tenn.1998) ("[T]he admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy."). [37]

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the *Manual for Complex Litigation,* [38] that courts "should ... consider the accuracy and reliability of computerized evidence" in ruling on ***559** its admissibility. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although "it may be better to be lucky than good," as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

The methods of authentication most likely to be appropriate for computerized records are 901(b)(1) (witness with personal knowledge), 901(b)(3) (expert testimony), 901(b)(4) (distinctive characteristics), and 901(b)(9) (system or process capable of producing a reliable result).

Computer Animation and Computer Simulations.
Two similar, although distinct, forms of computer generated evidence also raise unique authentication issues. The first is computer animation, "the display of a sequence of computer-generated images." IMWINKELRIED, EVIDENTIARY FOUNDATIONS at § 4.09[4][a]. The attraction of this form of evidence is irresistible, because:

> "when there is no movie or video of the event being litigated, a computer animation is a superior method of communicating the relevant information to the trier of fact. Absent a movie or video, the proponent might have to rely on static charts or oral testimony to convey a large amount of complex information to the trier of fact. When the proponent relies solely on oral expert testimony, the details may be presented one at a time; but an animation can piece all the details together for the jury. A computer animation in effect condenses the information into a single evidentiary

> package. In part due to television, the typical American is a primarily visual learner; and for that reason, in the short term, many jurors find the animation more understandable than charts or oral testimony. Use of an animation can also significantly increase long-term juror retention of the information."

Id. at § 4.09[4][a]. The second form of computer generated evidence is a computer simulation. The distinction between them has been explained usefully as follows:

> "Computer generated evidence is an increasingly common form of demonstrative evidence. If the purpose of the computer evidence is to illustrate and explain a witness's testimony, courts usually refer to the evidence as an animation. In contrast, a simulation is based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw a conclusion from it, and courts generally require proof to show the validity of the science before the simulation evidence is admitted."
>
> Thus, the classification of a computer-generated exhibit as a simulation or an animation also affects the evidentiary foundation required for its admission.

State v. Sayles, 662 N.W.2d 1, 9 (Iowa 2003) (citation omitted).

Courts generally have allowed the admission of computer animations if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case. This usually is the sponsoring witness. *Id.* at 10 (state's expert witness had knowledge of content of shaken infant syndrome animation and could testify that it correctly and adequately portrayed the facts that would illustrate her testimony); *Hinkle v. City of Clarksburg,* 81 F.3d 416 (4th Cir.1996) (holding that a computer-animated videotaped recreation of events at issue in trial is not unduly prejudicial if it is sufficiently close to the actual events and is not confused by the jury for the real life events themselves); *Friend v. Time Mfg. Co.,* 2006 WL 2135807, at *7 (D.Ariz. July 28, 2006) ("The use of computer animations is allowed when it satisfies the usual foundational requirements for demonstrative evidence. 'At a minimum, the animation's proponent must show the computer simulation fairly and accurately depicts ***560** what it represents, whether through the computer expert who prepared it or some other witness who is qualified to so testify, and the opposing party must be afforded an opportunity for cross-examination.' " (citation omitted)); *People v. Cauley,* 32 P.3d 602 (Colo.App.2001) (holding that, "[a] computer animation is admissible as demonstrative evidence if the proponent of the video proves that it: 1) is authentic ...; 2) is relevant ...; 3) is a fair and accurate representation of the evidence to which it relates; and 4) has a probative value that is not substantially outweighed by the danger of unfair prejudice ..."); *Clark v. Cantrell,* 339 S.C. 369, 529 S.E.2d 528 (2000) ("[A] party may authenticate a video animation by offering testimony from a witness familiar with the preparation of the animation and the data on which it is based ... [including] the testimony of the expert who prepared the underlying data and the computer technician who used that data to create it." (citation omitted)). Thus, the most frequent methods of authenticating computer animations are 901(b)(1) (witness with personal knowledge), and 901(b)(3) (testimony of an expert witness).

Computer simulations are treated as a form of scientific evidence, offered for a substantive, rather than demonstrative purpose. WEINSTEIN at § 900,03[1] (p. 900-21); IMWINKELRIED, EVIDENTIARY FOUNDATIONS at § 4.09[4][a], [c]. The case most often cited with regard to the foundational requirements needed to authenticate a computer simulation is *Commercial Union v. Boston Edison,* where the court stated:

> "The function of computer programs like TRACE 'is to perform rapidly and accurately an extensive series of computations not readily accomplished without use of a computer.' We permit experts to base their testimony on calculations performed by hand. There is no reason to prevent them from performing the same calculations, with far greater rapidity and accuracy, on a computer. Therefore ... we treat computer-generated models or simulations like other scientific tests, and condition admissibility on a sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists."

412 Mass. 545, 591 N.E.2d 165, 168 (1992) (citation omitted). The *Commercial Union* test has been followed by numerous courts in determining the foundation needed to

authenticate computer simulations. For example, in *State v. Swinton,* the court cited with approval *Commercial Union,* but added that the key to authenticating computer simulations is to determine their reliability. 268 Conn. 781, 847 A.2d 921, 942 (2004). In that regard, the court noted that the following problems could arise with this type of computer evidence: (1) the underlying information itself could be unreliable; (2) the entry of the information into the computer could be erroneous; (3) the computer hardware could be unreliable; (4) the computer software programs could be unreliable; (5) "the execution of the instructions, which transforms the information in some way-for example, by calculating numbers, sorting names, or storing information and retrieving it later" could be unreliable; (6) the output of the computer-the printout, transcript, or graphics, could be flawed; (7) the security system used to control access to the computer could be compromised; and (8) the user of the system could make errors. The court noted that Rule 901(b)(9) was a helpful starting point to address authentication of computer simulations. *Id.; see also Bray v. Bi-State Dev. Corp.,* 949 S.W.2d 93 (Mo.Ct.App.1997) (citing *Commercial Union* and ruling that authentication properly was accomplished by a witness with knowledge of how the computer program worked, its software, the data used in the calculations, and who verified the accuracy of the calculations made by the computer with manual calculations); *Kudlacek v. Fiat,* 244 Neb. 822, 509 N.W.2d 603, (1994) (citing *Commercial Union* and holding that computer simulation was authenticated by the plaintiff's expert witness). Thus, the most frequent methods of authenticating computer simulations are 901(b)(1) (witness with personal knowledge); and 901(b)(3) (expert witness). Use of an expert witness to authenticate a computer simulation likely will also ***561** involve Federal Rules of Evidence 702 and 703.

Digital Photographs

Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering exert testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be "enhanced." Digital image "enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change." Edward J. Imwinkelried, *Can this Photo be Trusted?,* Trial, October 2005, at 48. Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs:

> "[S]uppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant's name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an 'improved', digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise would never would have seen."

Id. at 49. There are three distinct types of digital photographs that should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images. *Id.*

An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. *Id.* If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201. *Id.* For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)-the later rule implicating expert testimony under Rule 702. *Id.* Alternatively, if there is a witness familiar with

the scene depicted who can testify that the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion. *Id.*

For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which gets into the realm of scientific or technical evidence under Rule 702. *Id.* Recently, one state court has given particular scrutiny to how this should be done. In *State v. Swinton*, the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. 268 Conn. 781, 847 A.2d 921, 950-52 (2004). The images showed a superimposition of the defendants teeth over digital photographs of bite marks taken from the victim's body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the overlay photographs, which involved *562 a multi-step process in which a wax mold of the defendant's teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him. *Id.* at 950-51.

Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9): (1) The witness is an expert in digital photography; (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them; (3) the witness testifies that the processes used are valid; (4) the witness testifies that there has been "adequate research into the specific application of image enhancement technology involved in the case"; (5) the witness testifies that the software used was developed from the research; (6) the witness received a film photograph; (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer; (8) the witness can identify the trial exhibit as the product of the enchantment process he or she performed. Edward J. Imwinkelried, *Can this Photo be Trusted?*, Trial, October 2005 at 54. The author recognized that this is an "extensive foundation," and whether it will be adopted by courts in the future remains to be seen. *Id.* However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results. FED.R.EVID. 901(b)(9).

To prepare properly to address authentication issues associated with electronically generated or stored evidence, a lawyer must identify each category of electronic evidence to be introduced. Then, he or she should determine what courts have required to authenticate this type of evidence, and carefully evaluate the methods of authentication identified in Rules 901 and 902, as well as consider requesting a stipulation from opposing counsel, or filing a request for admission of the genuineness of the evidence under Rule 36 of the Federal Rules of Civil Procedure. With this analysis in mind, the lawyer then can plan which method or methods of authentication will be most effective, and prepare the necessary formulation, whether through testimony, affidavit, admission or stipulation. The proffering attorney needs to be specific in presenting the authenticating facts and, if authenticity is challenged, should cite authority to support the method selected.

In this case, neither plaintiffs nor defendants provided any authenticating facts for the e-mail and other evidence that they proffered in support of their summary judgment memoranda-they simply attached the exhibits. This complete absence of authentication stripped the exhibits of any evidentiary value because the Court could not consider them as evidentiary facts. This, in turn, required the dismissal, without prejudice, of the cross motions for summary judgment, with leave to resubmit them once the evidentiary deficiencies had been cured.

Hearsay (Rules 801-807)

The fourth "hurdle" that must be overcome when introducing electronic evidence is the potential application of the hearsay rule. Hearsay issues are pervasive when electronically stored and generated evidence is introduced. To properly analyze hearsay issues there are five separate questions that must be answered: (1) does the evidence constitute a **statement,** as defined by Rule 801(a); (2) was the statement made by a **"declarant,"** as defined by Rule 801(b); (3) is the statement being offered to prove the **truth of its contents,** as provided by Rule 801(c); ***563** (4) is the statement **excluded from the definition of hearsay by rule 801(d);** and (5) if the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804 or 807. It is critical to proper hearsay analysis to consider each of these questions.

The requirements of a "Statement," Rule 801(a), made by a "Person", Rule 801(b)

Rule 801(a) states:

> "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

The key to understanding the hearsay rule is to appreciate that it only applies to intentionally assertive verbal or non-verbal conduct, and its goal is to guard against the risks associated with testimonial evidence: perception, memory, sincerity and narration. FED.R.EVID. 801 advisory committee's note ("The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Sometimes a fourth is added, sincerity.") (citations omitted); WEINSTEIN at § 801. 11[1] ("To be considered hearsay, a statement out of court must be offered in evidence to prove the truth of the matter it asserts. This part of the definition arises out of the factfinder's need to assess the credibility of the person who made a statement offered for its truth. When a witness testifies in court, the trier can assess the witness's perception, narration and memory to determine whether the testimony accurately represents the facts observed."); PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE, 262 (ABA Publishing 2005)(hereinafter "RICE") ("Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted by the out-of-court declarant. It is offered into evidence through the testimony of a witness to that statement or through a written account by the declarant. The hearsay rule excludes such evidence because it possesses the testimonial dangers of perception, memory, sincerity, and ambiguity that cannot be tested through oath and cross-examination.").

The use of the word "statement" in Rule 801(a) is a critical component of the hearsay rule. WEINSTEIN at § 801.10[1] ("Because Rule 801 describes hearsay as an out-of-court *statement* offered as proof as [sic] the matter asserted, the definition of 'statement' is of critical importance."); SALTZBURG at § 801.02[1][c] ("If proffered evidence is not a 'statement' within the meaning of Rule 801(a), then it cannot be hearsay, and so cannot be excluded under the [hearsay] Rule."). The word is used in a very precise, and non-colloquial sense-it only applies to verbal conduct (spoken or written) or non-verbal conduct that is intended by a human declarant to be *assertive.* The advisory committee note to Rule 801(a) states this concept squarely:

> "The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one."

Ironically, the word "assertion" is not defined in the hearsay rule, despite its importance to the concept. An assertion usefully may be defined as "to state as true; declare; maintain." Black's Law Dictionary 106 (5th ed.1979).

Although there is not universal agreement on this point, it appears that for verbal or nonverbal conduct to fall within the definition of the hearsay rule as defined under the federal rules of evidence, it must be either an expressly assertive written or spoken utterance, or nonverbal conduct expressly intended to be an assertion-the federal rules appear to have excluded from the definition of hearsay "implied assertions"-or unstated assertions that are inferred from verbal or nonverbal conduct. The advisory committee's note to Rule 801(a) supports the notion non-verbal conduct that is not assertive, and verbal conduct (spoken or written) [39] that is non-assertive should be viewed the same ***564** way-falling outside the definition of a "statement:"

"[N]onverbal conduct ... may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. Admittedly, evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.... *Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).*"

FED.R.EVID. 801(a) advisory committee's note (emphasis added) (citation omitted); *Wilson v. Clancy,* 747 F.Supp. 1154, 1158 (D.Md.1990) ("It appears to be the intent of the limitation of the hearsay definition under FED.R.EVID. 801(a)(2) to non-verbal conduct 'intended by the [declarant] as an assertion' to do away with the notion that 'implied assertions' are within the hearsay prohibition." (alterations in original) (citation omitted)); WEINSTEIN at § 801.10[2][c];[40] SALTZBURG at § 801.02[1][c].[41]

The second question that must be answered in the hearsay analysis is closely tied to the first. A writing or spoken utterance cannot be a "statement" under the hearsay rule unless it is made by a "declarant," as required by Rule 801(b), which provides "[a] 'declarant' is a *person* who makes a statement." (emphasis added). When an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the "report" generated when a fax is sent showing the number to which the fax was sent and the time it was received, there is no "person" involved in the creation of the record, and no "assertion" being made. For that reason, the record is not a statement and cannot be hearsay.

Cases involving electronic evidence often raise the issue of whether electronic writings constitute "statements" under Rule 801(a). Where the writings are non-assertive, or not made by a "person," courts have held that they do not constitute hearsay, as they are not "statements." *United States v. Khorozian,* 333 F.3d 498, 506 (3d Cir.2003) ("[N]either the header nor the text of the fax was hearsay. As to the header, '[u]nder FRE 801(a), a statement is something uttered by "a person," so nothing "said" by a machine ... is hearsay' " (second alteration in original)); *565 *Safavian,* 435 F.Supp.2d at 44 (holding that portions of e-mail communications that make imperative statements instructing defendant what to do, or asking questions are nonassertive verbal conduct that does not fit within the definition of hearsay); *Telewizja Polska USA,* 2004 WL 2367740 (finding that images and text posted on website offered to show what the website looked like on a particular day were not "statements" and therefore fell outside the reach of the hearsay rule); *Perfect 10,* 213 F.Supp.2d at 1155 (finding that images and text taken from website of defendant not hearsay, "to the extent these images and text are being introduced to show the images and text found on the websites, they are not statements at all-and thus fall outside the ambit of the hearsay rule."); *United States v. Rollins, rev'd on other grounds* 2004 WL 26780, at *9 (A.F.Ct.Crim.App. Dec.24, 2003) ("Computer generated records are not hearsay: the role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system itself, relative to its proper functioning and accuracy."); *State v. Dunn,* 7 S.W.3d 427, 432 (Mo.Ct.App.2000) ("Because records of this type [computer generated telephone records] are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay, but rather their admissibility should be determined on the reliability and accuracy of the process involved."); *State v. Hall,* 976 S.W.2d 121, 147 (Tenn.1998) (reviewing the admissibility of computer generated records and holding "[t]he role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.").

The requirement that the statement be offered to prove its substantive truth.

The third question that must be answered in determining if evidence is hearsay is whether the statement is offered to prove its substantive truth, or for some other purpose. Rule 801(c) states: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted.*" (emphasis added). Thus, even if the evidence is an assertion, made by a declarant, it still is not hearsay unless offered to prove the truth of what is asserted. The advisory committee's note to Rule 801(c) underscores this: "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights." FED.R.EVID. 801(c) advisory committee's note (citation omitted). *See also* WEINSTEIN at § 801.11[1] (" 'If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted.' Thus, if a declarant's statement is not offered for its truth, the declarant's credibility is not material, and the statement is not hearsay." (citation omitted)). Commentators have identified many instances in which assertive statements are not hearsay because they are not offered to prove the truth of the assertions: (1) statements offered to prove a claim that the statement was false or misleading, as in a fraud or misrepresentation case;[42] (2) statements offered to "prove that because they were made, listeners had notice or knowledge of the information related in the statements," or to show the effect on the listener of the statement;[43] (3) statements "offered to prove an association *566 between two or more persons;"[44] (4) statements offered as circumstantial evidence of the declarant's state of mind,[45] or motive;[46] (5) statements that have relevance simply because they were made, regardless of their literal truth or falsity-the so called "verbal acts or parts of acts,"[47] also referred to as "legally operative facts";[48] and (6) statements that are questions or imperative commands,[49] such as "what time is it" or "close the door."

When analyzing the admissibility of electronically generated evidence, courts also have held that statements contained within such evidence fall outside the hearsay definition if offered for a purpose other than their substantive truth. *Siddiqui,* 235 F.3d at 1323 (e-mail between defendant and co-worker not hearsay because not offered to prove truth of substantive content, but instead to show that a relationship existed between defendant and co-worker, and that it was customary for them to communicate by e-mail); *Safavian,* 435 F.Supp.2d at 44 (e-mail from lobbyist to defendant not hearsay because they were not offered to prove their truth, but to illustrate the nature of the lobbyist's work on behalf of clients to provide context for other admissible e-mail; and as evidence of the defendant's intent, motive and state of mind); *Telewizja Polska USA,* 2004 WL 2367740; *Perfect 10,* 213 F.Supp.2d at 1155 (exhibits of defendant's website on a particular date were not "statements" for purposes of hearsay rule because they were offered to show trademark and copyright infringement, therefore they were relevant for a purpose other than their literal truth); *State v. Braidic,* 119 Wash.App. 1075, 2004 WL 52412 at *1 (Jan. 13, 2004) (e-mail sent by defendant to victim not hearsay because they were not offered to prove the truth of the statements.).

Finally, of particular relevance to this suit are the cases that have held that communications between the parties to a contract that define the terms of a contract, or prove its content, are not hearsay, as they are verbal acts or legally operative facts. *See, e.g., Preferred Properties Inc. v. Indian River Estates Inc.,* 276 F.3d 790, 799 n. 5 (6th Cir.2002) (verbal acts creating a contract are not hearsay); *Kepner-Tregoe, Inc. v. Leadership Software,* 12 F.3d 527, 540 (5th Cir.1994) (finding contract to be a signed writing of independent legal significance and therefore non-hearsay); *Mueller v. Abdnor,* 972 F.2d 931, 937 (8th Cir.1992) (holding contracts and letters from attorney relating to the formation thereof are non-hearsay); *United States v. Tann,* 425 F.Supp.2d 26, 29 (D.D.C.2006) (finding negotiable instruments to be legally operative documents that do not constitute hearsay); *Planmatics,* 137 F.Supp.2d at 621 (D.Md.2001) (holding testimony regarding instructions made to individuals is not hearsay because instructions were not statements of fact). *See also* WEINSTEIN at § 801.11[3].[50] Because the e-mails that the parties to this suit attached as unauthenticated exhibits to their summary judgment papers were introduced for the purpose of proving the making of the agreement to arbitrate the dispute regarding the damage caused by the lightning strike, and the terms of this agreement, *567 they are not hearsay if offered for this purpose because they are verbal acts, or legally operative facts. What the parties did not do, however, was articulate the non-hearsay purpose for which the e-mails were offered; they merely attached them as exhibits, without further explanation of the

purpose for which they were offered, or clarification that they were not offered for their substantive truth. Because evidence may be offered for more than one purpose, it may be relevant for its substantive truth, and potentially hearsay, or relevant for some other purpose, and non-hearsay. For this reason it is important for a party offering an exhibit into evidence to clearly explain each purpose for which it is offered, and address any hearsay issues associated with each purpose for which it is offered.

Is the evidence excluded from the definition of hearsay by Rule 801(d)(1) or 801(d)(2).

Once it has been determined whether evidence falls into the definition of hearsay because it is a statement, uttered by a declarant, and offered for its substantive truth, the final step in assessing whether it is hearsay is to see if it is excluded from the definition of hearsay by two rules: 801(d)(1), which identifies three types of prior statements by witnesses who actually testify and are subject to cross examination, which are excluded from the definition of hearsay, and 801(d)(2), which identifies five types of admissions by a party opponent that are excluded from the definition of hearsay. FED.R.EVID. 801(d) advisory committee's note ("[s]everal types of statements which would otherwise literally fall within the definition [of hearsay] are expressly excluded from it ..."); WEINSTEIN at § 801[20][1] & 801[30][1]; SALTZBURG at § 801.02[2] & 801.02[6].

Rule 801(d)(1) identifies three types of prior witness statements that are excluded from the definition of hearsay: first, 801(d)(1)(A) excludes prior inconsistent "testimonial statements" made under oath at a trial, hearing, court proceeding or deposition; next, 801(d)(1)(B) excludes prior consistent statements offered to rebut an express or implied allegation of recent fabrication, or improper influence or motive; and finally, 801(d)(1)(C) excludes statements of identification of a person made after perceiving that person. For each of these exceptions, it is required that the declarant testify at trial and be subject to cross examination about the prior statements. FED. R. EVID 801(d)(1); FED.R.EVID. 801(d)(1) advisory committee's note ("[Rule 801(d)(1)] requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay."); WEINSTEIN at § 801.20[2] ("For a prior witness statement to escape the hearsay rule, the declarant must testify at trial and be subject to cross-examination concerning the statement." (citation omitted)).

Rule 801(d)(2) identifies five types of statements as "admissions by a party opponent," and excludes them from the definition of hearsay. Specifically: 801(d)(2)(A) excludes the party's own statement, made in either an individual or representative capacity; 801(d)(2)(B) addresses a statement by another that a party has adopted or manifested a belief in its truth; 801(d)(2)(C) deals with a statement by a person authorized by a party to make a statement concerning a subject; 801(d)(2)(D) excludes a statement made by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the agency or employment relationship; and 801(d)(2)(E) excludes the statement of a co-conspirator of a party made during the existence of the conspiracy and in furtherance of the conspiracy. To qualify as an admission, the party's out-of-court statement must be offered against that party, it cannot offer its own out of court statements as admissions. WEINSTEIN at § 801.30[1] ("To be admissible under [Rule 801(d)(2)], the party's statements must be offered *against* that party. A party cannot use this provision to offer his or her own statements into evidence.").

As can be seen from reading Rule 801(d)(1) and (2), there are specific foundational facts that must be established before the statement or admission can be accepted into evidence. These determinations are made by the trial judge under Rule 104(a), and therefore the rules of evidence, except ***568** for privilege, are inapplicable. FED.R.EVID. 104(a), 1101(d)(1); FED.R.EVID. 104(a) advisory committee's note ("[W]hen a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions too, are made by the judge.")

Given the near universal use of electronic means of communication, it is not surprising that statements contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent if offered against that party. *Siddiqui,* 235 F.3d at 1323 (ruling that e-mail authored by defendant was not hearsay because it was an admission under Rule 801(d)(2)(A)); *Safavian,* 435 F.Supp.2d at 43-44 (holding that e-mail sent by defendant himself was admissible as non-hearsay because it constituted an admission by the defendant, 801(d)(2)(A), and as an "adoptive admission" under Rule 801(d)(2)(B)); *Telewizja Polska USA,* 2004 WL 2367740 (N.D.Ill. Oct.15, 2004) (holding exhibits showing defendant's website as it appeared on a certain day were admissible as admissions against

defendant); *Perfect 10,* 213 F.Supp.2d at 1155 (admitting e-mail sent by employees of defendant against the defendant as admissions under 801(d)(2)(D)).

If, after applying the foregoing four-step analysis, it is determined that the electronic evidence constitutes a statement by a person that is offered for its substantive truth and is not excluded from the definition of hearsay by Rule 801(d)(1) or (2), then the evidence is hearsay, and is inadmissible unless it qualifies as one of many hearsay exceptions identified by Rule 803, 804 and 807. The process of determining whether hearsay falls into one of the many exceptions can appear daunting, because there are twenty-three identified in Rule 803, five in Rule 804, and Rule 807, the so-called "catch-all" exception, allows exceptions to be tailor made. Upon closer examination, however, the task is less onerous because the number of hearsay exceptions can be categorized in helpful ways that make them more manageable, and in most instances a handful of hearsay exceptions repeatedly are used in connection with electronically generated or stored evidence. Familiarity with these rules will suffice in most instances to overcome hearsay objections routinely made to ESI.

Rule 803 contains twenty-three separate hearsay exceptions. At first glance they may seem like they have nothing in common, but they do. All twenty-three are admissible regardless of whether the declarant is available to testify, distinguishing them from the five exceptions in Rule 804, each of which is inapplicable unless the declarant is "unavailable," as defined by any of the five methods identified in Rule 804(a). In addition, the twenty-three exceptions in Rule 803 may be grouped in three broad categories: **Category 1** includes exceptions dealing with **perceptions, observations, state of mind, intent and sensation** 803(1) (present sense impressions); 803(2) (excited utterances); 803(3) (then existing state of mind, condition or sensation); 803(4) (statements in furtherance of medical diagnosis and treatment). **Category 2** includes **documents, records, and other writings** 803(5) (past recollection recorded); 803(6) & (7) (business records); 803(8) & (10) (public records); 803(9) (records of vital statistics); 803(11) (records of religious organizations); 803(12) (certificates of baptism, marriage and related events); 803(13) (family records); 803(14) (records of documents affecting an interest in property); 803(15) (statements in documents affecting an interest in property); 803(16) (ancient documents); 803(18) (learned treatises); 803(22) (judgments of conviction in a criminal case); and 803(23) (judgments in certain kinds of civil cases). **Category 3** includes statements dealing with **reputation** 803(19) (reputation regarding personal or family history); 803(20) (reputation regarding custom, use and practice associated with land, and historically significant facts); and 803(21) (reputation regarding character within the community and among associates).

Given the widely accepted fact that most writings today are created and stored in electronic format, it is easy to see that the many types of documents and writings covered in Rule 803 will implicate electronic writings. Similarly, given the ubiquity of communications in electronic media (e-mail, *569 text messages, chat rooms, internet postings on servers like "myspace" or "youtube" or on blogs, voice mail, etc.), it is not surprising that many statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical) will be communicated in electronic medium. It would unnecessarily prolong an already lengthy opinion to analyze all of the implications of the hearsay exceptions in Rule 803 as they relate to ESI. It is possible, however, to focus on the handful that have been discussed by the courts and that are most likely to be used in a hearsay analysis of ESI. Because the court's research has shown that the Rule 803 hearsay exceptions, rather than those found in Rules 804 or 807, have been cited by courts evaluating the hearsay implications of electronic evidence, the following analysis will be confined to that rule.

Rule 803(1) Present Sense Impression

Rule 803(1) creates an exception from exclusion under the hearsay rule for:

> "(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

There are three elements that must be met for this hearsay exception to apply: (1) the declarant must have personally perceived the event that is described in the statement; (2) the statement must be a simple explanation or description of the event perceived; and (3) the declaration and the event described must be contemporaneous. WEINSTEIN at § 803.03[1]. Present sense impressions are considered trustworthy because the near simultaneous expression of the explanation or description of the event with its perception militates against any memory deficiency, or opportunity to

intentionally misstate what occurred. FED.R.EVID. 803(1) advisory committee's note ("The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."); WEINSTEIN at § 803.03[1].

Rule 803(2) Excited Utterance

Closely related to Rule 803(1) is Rule 803(2),[51] the excited utterance exception to the hearsay rule, which provides:

> "(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The theory behind the excited utterance exception is that perception of a startling or exciting event produces in the declarant an emotional state that reduces the likelihood that the description of the event while under this emotional state will be inaccurate or purposely misstated. FED.R.EVID. 803(2) advisory committee's note ("The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); WEINSTEIN at § 803.04[1] ("The premise underlying the exception for excited utterances is that a person under the influence of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication.").

The prevalence of electronic communication devices, and the fact that many are portable and small, means that people always seem to have their laptops, PDA's, and cell phones with them, and available for use to send e-mails or text messages describing events as they are happening. Further, it is a common experience these days to talk to someone on the phone and hear them typing notes of the conversation on a computer as you are talking to them. For these reasons, Rules 803(1) and (2) may provide hearsay exceptions for electronically stored communications containing either present sense impressions or excited utterances. *See, e.g., United States v. Ferber,* 966 F.Supp. 90 (D.Mass.1997) (holding that e-mail from employee to boss about substance of telephone call with defendant in mail/wire fraud case ***570** did qualify as a present sense expression under Rule 803(1), but did not qualify as an excited utterance under Rule 803(2), despite the language at the end of the e-mail "my mind is mush."); *State of New York v. Microsoft,* 2002 WL 649951 (D.D.C. Apr.12, 2002) (analyzing the admissibility of series of exhibits including e-mail and e-mail "chains" under various hearsay exceptions, and ruling that an e-mail prepared several days after a telephone call that described the call did not qualify as a present sense impression under Rule 803(1) because the requirement of "contemporaneity" was not met).

Rule 803(3) Then Existing State of Mind or Condition

Rule 803(3) provides a hearsay exception for:

> "(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Rule 803(3) also is closely related to Rule 803(1). *See* FED.R.EVID. 803(3) advisory committee's note ("Exception (3) [to Rule 803] is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility."). The rule permits the statement of the declarant's state of mind, sensation, mental, emotional, or physical condition, as well as statements of motive, intent, plan or design, but excludes statements of memory or belief if offered to prove the truth of the fact remembered. FED.R.EVID. 803(3) advisory committee's note ("The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."). The foundation for proving an exception under Rule 803(3) is: (1) The statement must be contemporaneous with the mental state being proven; (2) There must be [an absence of] suspicious circumstances that would evidence a motive for fabrication or misrepresentation of the declarant's state of mind; and (3) The state of mind of the declarant must be relevant in the case. WEINSTEIN at § 803.05[2][a]. Rule 803(3) has been used to prove a wide variety of matters, including the reason why the declarant would not deal with a supplier or dealer, motive, competency, ill-will, motive, lack of intent to defraud, willingness to engage in criminal conduct, the victim's state of mind in an extortion case, and confusion or secondary meaning in a trademark infringement case. *Id.*

Rule 803(3) is particularly useful when trying to admit e-mail, a medium of communication that seems particularly prone to candid, perhaps too-candid, statements of the declarant's state of mind, feelings, emotions, and motives. Indeed, courts have analyzed this rule in connection with ruling on the admissibility of electronic evidence. In *New York v. Microsoft*, the court analyzed admissibility of e-mail and e-mail chains under a variety of hearsay rules, including 803(3). 2002 WL 649951. It concluded that an e-mail made several days following a telephone conversation did not qualify under Rule 803(3) because it contained more than just the declarant's state of mind, but also included the maker's memory of belief about the events that affected his state of mind, which is specifically excluded by Rule 803(3). *Id.* at *5. *See also Safavian*, 435 F.Supp.2d at 44 (admitting e-mail that contained statements of defendant's state of mind under Rule 803(3)).

Rule 803(6) Business Records

Rule 803(6) recognizes an exception to the hearsay rule for:

> "(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business ***571** activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

The foundational elements for a business record are: (1) The document must have been prepared in the normal course of business; (2) it must have been made at or near the time of the events it records; (3) it must be based on the personal knowledge of the entrant or of an informant who had a business duty to transmit the information to the entrant; [52] and (4) to have been made in the normal course of business means that the document was made in the regular course of a regularly conducted business activity, for which it was the regular practice of the business to maintain a memorandum. WEINSTEIN at § 803.08[1]. It is essential for the exception to apply that it was made in furtherance of the business' needs, and not for the personal purposes of the person who made it. Given the fact that many employees use the computers where they work for personal as well as business reasons, some care must be taken to analyze whether the business record exception is applicable, especially to e-mail.

Rule 902(11) also is helpful in establishing the foundation elements for a business record without the need to call a sponsoring witness to authenticate the document and establish the elements of the hearsay exception. Rule 902(11) permits the self-authentication of a business record by showing the following:

> "(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record-
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.
>
> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

*572 Because the elements for both rules are essentially identical, they frequently are analyzed together when Rule 902(11) is the proffered means by which a party seek to admit a business record. *See In re Vee Vinhnee,* 336 B.R. at 446; *Rambus,* 348 F.Supp.2d at 701 (holding that analysis of Rule 803(6) and 902(11) go "hand in hand," and identifying the following requirements for authentication under Rule 902(11):(1) a qualified custodian or other person having personal knowledge makes the authenticating declaration, who must have "sufficient knowledge of the record-keeping system and the creation of the contested record to establish their trustworthiness;" (2) the declaration must establish that the record was made at or near the time of the occurrence or matters set forth in the document by someone with personal knowledge of these matters or from information provided by someone with personal knowledge thereof; (3) the declaration must show that the record is kept in the course of the regularly conducted activity of the business, and the "mere presence of a document ... in the retained file of a business entity do[es] not by itself qualify as a record of a regularly conducted activity"; and (4) the declaration must establish that it is the regular practice of the business to keep records of a regularly conducted activity of the business, and "it is not enough if it is the regular practice of an employee to maintain the record of the regularly conducted activity .... it must be the regular practice of the business entity to do so"-i.e. it is at the direction of the company that the employee maintain the record).

The business record exception is one of the hearsay exceptions most discussed by courts when ruling on the admissibility of electronic evidence. The decisions demonstrate a continuum running from cases where the court was very lenient in admitting electronic business records, without demanding analysis, to those in which the court took a very demanding approach and scrupulously analyzed every element of the exception, and excluded evidence when all were not met. For example, in *State of New York v. Microsoft,* the court analyzed the admissibility of "e-mail chains." 2002 WL 649951 (D.D.C. Apr.12, 2002). The court held that an e-mail prepared by an employee did not qualify as a business record because, while it may have been the regular practice of the employee to send an e-mail following the receipt of a phone call that summarized the call, there had been no showing that it was the regular practice of the employer to require that the employee make and maintain such e-mails. *Id.* at *9. The court was particularly careful in analyzing the hearsay issues associated with e-mail chains involving multiple employees of the same employer. It held that to establish a proper foundation, the proponent would have to show that when the source of the information related in the e-mail is someone other than the maker of the e-mail, that the source, the maker "as well as every other participant in the chain producing the record are, acting in the regular course of [the] business." *Id.* at *14. If this showing is made, the court ruled, then the multiple levels of hearsay in the e-mail chain are covered by Rule 803(6). However, "[i]f the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have." *Id.* at *14. The court also excluded another e-mail chain for failure of the proponent to establish a proper foundation, saying "[p]laintiffs have not established the requisite foundation that the multiple authors of these e-mails each composed their portion of the document in the course of regularly conducted business activity and that it was the regular practice of RealNetworks to compose such e-mail correspondence. Moreover, the multiple authors and forwarded nature of the e-mails undercuts the reliability of the information contained therein." *Id.* at *19.

Similarly, in *Rambus Inc. v. Infineon Tech. AG,* the Court critically analyzed the admissibility of e-mail under the business record exception to the hearsay rule. 348 F.Supp.2d 698, 706 (E.D.Va.2004). Certain exhibits objected to by the defendant were e-mail chains prepared at least in part by persons outside of the business entity that maintained the e-mail as part of its records, and which was seeking their admissibility as *573 business records. The court noted that there was "not a requirement that the records have been prepared by the entity that has custody of them, as long as they were created in the regular course of some [other] entity's business." *Id.* (quoting WEINSTEIN, at § 803.08[8][a]). The court added "[h]owever, it also is true that: To satisfy Rule 803(6) each participant in the chain which created the record-from the initial observer-reporter to the final entrant-must generally be acting in the course of the regularly conduct[ed] business. *Id.* at 707. If some participant is not so engaged, some other hearsay exception must apply to that link of the chain." *Id.* at 706.

In contrast to the demanding approach taken in *Rambus* and *New York v. Microsoft,* the court in *United States v. Safavian* took a more flexible approach to the admissibility of e-mail chains. 435 F.Supp.2d 36, 40-41 (D.D.C.2006). The defendant objected to the admissibility of e-mail chains, arguing that they were not trustworthy because they contained

e-mails embedded within e-mails. The court overruled this objection, stating:

> "[t]he defendant's argument is more appropriately directed to the weight the jury should give the evidence, not its authenticity. While the defendant is correct that earlier e-mails that are included in a chain-either as ones that have been forwarded or to which another has replied-may be altered, this trait is not specific to e-mail evidence. It can be true of any piece of documentary evidence, such as a letter, a contract or an invoice.... The *possibility* of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course.... We live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of the nation's population and is of particular importance in the professional world.... Absent specific evidence showing alteration, however, the Court will not exclude any embedded e-mails because of the mere possibility that it can be done."

Id. at 41. Notably, the court did not engage in the demanding business records exception analysis that was done by the courts in *Rambus and New York v. Microsoft*.

Perhaps the most demanding analysis regarding the admissibility of electronic evidence under the business record exception to the hearsay rule appears in *In re Vee Vinhnee*, 336 B.R. at 445. In this case the appellate bankruptcy panel upheld the trial bankruptcy judge's exclusion of electronic business records, observing that "early versions of computer foundations [accepted by courts] were too cursory, even though the basic elements [of the business records exception] covered the ground." The court held that the proponent of an electronic business record was required to show that the paperless electronic record retrieved from its computer files was the same one as originally had been entered into its computer, noting that the "focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* at 444. It added "[t]he logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the questions of whether records have been changed since their creation." *Id.* at 445. The court reasoned that the "complexity of ever-developing computer technology necessitates more precise focus," because "digital technology makes it easier to alter text of documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to assure the continuing integrity of the records." *Id.*

In contrast to the demanding approach taken in *In re Vee Vinhnee*, many other courts have admitted electronic business records *574 under a much more relaxed standard. *See, e.g., United States v. Kassimu*, 2006 WL 1880335 (5th Cir.2006) (Establishing the foundation for a computer generated business record did not require the maker of the record, or even a custodian, but only a witness qualified to explain the record keeping system of organization.); *United States v. Fujii*, 301 F.3d 535 (7th Cir.2002) (holding that computerized check-in and reservation records were admissible as business records on a showing that the data reflected in the printouts was kept in the ordinary course of the business); *Sea-Land*, 285 F.3d 808 (holding that copy of electronic bill of lading had been properly admitted as a business record because it had been produced from the same electronic information that had been contemporaneously generated when the parties entered into their contract. The court noted that "it is immaterial that the business record is maintained in a computer rather than in company books." (citation omitted)); *Wapnick v. Commissioner of Internal Revenue*, T.C. Memo.2002-45, 2002 WL 215993 (T.C.2002)(computerized accounting records were admissible as business records because foundation was established by IRS agents who compared the data in the computer records with information in the company's tax returns, bank statements, and by contacting clients of the company to verify information in the computerized records).

The lesson to be taken from these cases is that some courts will require the proponent of electronic business records or e-mail evidence to make an enhanced showing in addition to meeting each element of the business records exception. These courts are concerned that the information generated for use in litigation may have been altered, changed or manipulated after its initial input, or that the programs and procedures used to create and maintain the records are not reliable or accurate. Others will be content to view electronic business records in the same light as traditional "hard copy" records, and require only a rudimentary foundation. Unless counsel knows what level of scrutiny will be required, it would be prudent to analyze electronic business records that are essential to his or her case by the most demanding standard. The cases further suggest that during pretrial discovery counsel should determine whether opposing counsel will object to admissibility of critical documents. This can be done by requesting a stipulation, or by propounding requests for admission of fact and genuineness of records under FED.R.CIV.P. 36. If it is known that opposing counsel will object, or refuses to stipulate, or denies a Rule 36 request to admit genuineness, then the lawyer intending to introduce the electronic business record should be prepared to establish the business record exception under the most demanding standard required, to avoid exclusion of the evidence.

Rule 803(8) Public Records.

In addition to the above described hearsay exceptions, courts have found that electronic records also met the requirements of the public records exception under Rule 803(8):

> "(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Furthermore, "[j]ustification for the exception is the assumption that a public official will perform his duty properly, and the unlikelihood that he will remember details independently of the record." FED.R.EVID. 803(8) advisory committee's note. Moreover, "[s]ince the assurances of accuracy are generally greater for public records than for regular business records, the proponent is usually not required to establish their admissibility through foundation testimony.... The burden of proof concerning the admissibility of public records is on the party opposing their introduction." WEINSTEIN at § 803.10[2]. Courts have applied this deferential standard of admissibility for electronic *575 public records. *See, e.g., EEOC v. E.I. DuPont de Nemours and Co.*, 2004 WL 2347556 (holding that table of information compiled by U.S. Census Bureau was admissible as an exception to the hearsay rule as a public record under Rule 803(8), and rejecting claims that the posting of data on the Census Bureau's website rendered it untrustworthy); *Lester v. Natsios*, 290 F.Supp.2d 11 (D.D.C.2003) (admitting e-mail of public agency, and noting that "[r]ecords of public agencies such as those challenged by plaintiff are generally admissible ... under FED.R.EVID. 803(8)."); *United States v. Oceguerra-Aguirre*, 70 Fed.Appx. 473 (9th Cir.2003) (Court held that trial court properly admitted computerized records of Treasury Enforcement Communications System as public records under Rule 803(8) because documents falling under the public records exception are presumed to be trustworthy, and the burden is on the party challenging the records to establish untrustworthiness.)

Rule 803(17) Market Reports, Commercial Publications.

Rule 803(17) recognizes as an exception to the hearsay rule:

> "(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."

This exception covers "lists, etc., prepared for the use of a trade or profession ... newspaper market reports, telephone directories, and city directories. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate." FED.R.EVID. 803(17) advisory committee's

note; WEINSTEIN at § 803. 19[1]. [53] At least one court has admitted electronically stored compilations and directories under Rule 803(17). *Elliott Assoc. L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y.2000) (finding that plaintiff's expert report properly relied on prime rates of interest obtained from Federal Reserve Board website because they were reliable under Rule 803(17)).

A final observation needs to be made regarding hearsay exceptions and electronic evidence. Rule 802 generally prohibits the admission of hearsay unless one of the exceptions in Rules 803, 804 or 807 apply. What, then, is the effect of hearsay evidence that is admitted without objection by the party against whom it is offered? The general rule is that despite Rule 802, if hearsay is admitted without objection it may be afforded its "natural probative effect, as if it were in law admissible." *New York v. Microsoft,* 2002 WL 649951 ("[I]n this country the general rule supported by overwhelming weight of authority is that where ordinarily inadmissible hearsay evidence is admitted into evidence without objection it may properly be considered and accorded its natural probative effect, as if it were in law admissible."); 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 802.1 (5th ed. 2001) ("In the absence of an objection to hearsay 'the jury may consider [the hearsay] for whatever natural value it may have; such evidence is to be given its natural probative effect as if it were in law admissible.' " (citation omitted)). This underscores the need to pay attention to exhibits offered by an opponent, as much as to those records that you need to introduce. A failure to raise a hearsay objection means that the evidence may be considered for whatever probative value the finder of fact chooses to give it.

In summary, when analyzing the admissibility of ESI for hearsay issues, counsel should address each step of the inquiry in order: does the evidence contain a statement, made by a person, which is offered for its substantive truth, but which does not fall into the two categories of statements identified in 801(d)(1) and 801(d)(2). If, as a result of this analysis, a determination is made that *576 the evidence is hearsay, then it is inadmissible unless it covered by one of the exceptions found in Rules 803, 804 and 807.

If ESI has cleared the first three hurdles by being shown to be relevant, authentic, and admissible under the hearsay rule or an exception thereto, it must also be admissible under the original writing rule before it can be admitted into evidence or considered at summary judgment.

The Original Writing Rule, Rules 1001-1008

The next step in evaluating the admissibility of electronic evidence is to analyze issues associated with the original writing rule, which requires an original or duplicate original to prove the contents of a writing, recording or photograph unless secondary evidence is deemed acceptable. [54] *See* FED.R.EVID. 1001-08. The best way to understand the rule is to appreciate its structure. Rule 1001 contains the key definitions that animate the rule: "original," "duplicate," "writing," "recording," and "photograph." The substantive requirements of the original writing rule are succinctly provided by Rule 1002, which mandates that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." It is Rule 1002 that gives the rule its modern name, the "original writing rule," as it requires the original to prove the contents of a writing, recording or photograph, except as excused by the remaining rules in Article X of the rules of evidence. As will be seen, the key to the rule is to determine when "the contents" of a writing, recording or photograph actually are being proved, as opposed to proving events that just happen to have been recorded or photographed, or those which can be proved by eyewitnesses, as opposed to a writing or recording explaining or depicting them. Rule 1003 essentially provides that duplicates are co-extensively admissible as originals, unless there is a genuine issue as to the authenticity of the original, or the circumstances indicate that it would be unfair to admit a duplicate in lieu of an original. *People v. Huehn,* 53 P.3d 733, 738 (Colo.Ct.App.2002) (duplicates of computer generated bank records admissible to the same extent as an original absent unfairness or lack of authenticity). Because of Rule 1003, duplicates are more often admitted into evidence than originals. RICE at 192 ("As a practical matter, Fed.R.Evid. 1003 has eliminated best evidence objections. Copies from the pages of books, treatises, and the other papers are now introduced in place of the entire volume because photocopies of originals are now admissible as if they were the original."). Rule 1004 is the primary rule that identifies when secondary evidence is admissible. As a practical matter, "secondary evidence" is any proof of the contents of a writing, recording or photograph other than an original or duplicate. Examples include testimony from the author of the writing, or someone who read it, earlier drafts, copies, or an outline used to prepare the final. Rule 1005 describes how to prove the contents of public

records, since it is obvious that something other than the original must be used. Rule 1006 permits introduction into evidence of written or testimonial summaries of voluminous writings, recordings or photographs, provided the original or duplicates from which the summaries were prepared were made available to the adverse party at a reasonable time in advance of trial for examination or copying. Thus, Rule 1006 is an example of secondary evidence. Rule 1007 allows the proof of the contents of a writing, recording or photograph by the deposition or testimony of a party opponent, without having to account for the nonproduction of the original. This is another form of secondary *577 evidence. The final rule in Article X of the Federal Rules of Evidence is Rule 1008. It is a specialized application of Rule 104(b)-the conditional relevance rule-and sets forth what must happen when there is a dispute regarding whether there ever was a writing, recording, or photograph, or when there are conflicting versions of duplicates, originals, or secondary evidence offered into evidence. In such instances, as in Rule 104(b), the jury decides the factual dispute. FED.R.EVID. 1008 advisory committee's note.

It has been acknowledged that the original writing rule has particular applicability to electronically prepared or stored writings, recordings or photographs. One respected commentator has observed:

> "Computer-based business records commonly consist of material originally produced in a computer (e.g. business memoranda), data drawn from outside sources and input into the computer (e.g. invoices), or summaries of documents (e.g. statistical runs). The admissibility of computer-based records 'to prove the content of a writing' is subject to the best evidence rule set out in Rule 1002. The rule generally requires the original of a writing when the contents are at issue, except that a 'duplicate' is also admissible unless a genuine issue is raised about its authenticity. A duplicate includes a counterpart produced by 'electronic re-recording, which accurately reproduces the original.' Courts often admit computer-based records without making the distinction between originals and duplicates."

WEINSTEIN at § 900.07[1][d][iv] (citation omitted).

When analyzing the original writing rule as it applies to electronic evidence, the most important rules are Rule 1001, containing the definitions; Rule 1002, the substantive original writing rule; Rule 1004, the "primary" secondary evidence rule; Rule 1006, the rule permitting summaries to prove the contents of voluminous writings, recordings and photographs; and Rule 1007, allowing proof of a writing, recording or photograph by the admission of a party opponent.

Rule 1001 states:

> "For purposes of this article the following definitions are applicable:
>
> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
>
> (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
>
> (4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

It is apparent that the definition of "writings, recordings and photographs" includes evidence that is electronically generated and stored. *See* FED. RULE EVID. 1001 advisory committee's note ("Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form that the information ultimately assumes for useable purposes is words and figures. Hence, the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments."). It further is clear that under Rule 1001(3) the "original" of information stored in a computer is the readable display of the information on the computer screen,

the hard drive or *578 other source where it is stored, as well as any printout or output that may be read, so long as it accurately reflects the data. WEINSTEIN at § 900.07 [1][d][iv]; RICE at 194; *Laughner v. State,* 769 N.E.2d 1147, 1159 (Ind.Ct.App.2002) (ruling that content of internet chat room communications between defendant and undercover police officer that officer "cut-and-pasted" into a word processing program were originals under state version of original writing rule). Moreover, if a computer record accurately reflects the contents of another writing, and was prepared near the time that the original writing was prepared, it may qualify as an original under Rule 1001. *In re Gulph Woods Corp.,* 82 B.R. 373, 377 (Bankr.E.D.Pa.1988) [55]. *See also* WEINSTEIN at § 900.07[1][d][iv]. Finally, as already noted, as a result of Rule 1003, the distinction between duplicates and originals largely has become unimportant, as duplicates are co-extensively admissible as originals in most instances.

Once the definitions of the original writing rule are understood, the next important determination is whether the rule applies at all. Rule 1002 answers this question. It provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." As the advisory committee's note to Rule 1002 makes clear:

> "Application of the rule requires resolution of the question whether contents are sought to be proved. Thus an event may be proved by non-documentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.
>
> The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs.... On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls into this category. Similarly, as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber, photograph of defendant engaged in indecent act."

FED.R.EVID. 1002, advisory committee's note (citations omitted); *see also* WEINSTEIN at § 1002.05[1] ("The best evidence rule only applies when the writing, recording or photograph is being introduced 'to prove the content of a writing, recording or photograph'. The rule is inapplicable when content is not at issue.")(citing FED.R.EVID. 1002). Whether the content is at issue is determined on a case-by-case basis. *Id.* For example, proof that someone is married may be made by the testimony of a witness to the ceremony. The marriage license is not required. However, the rule applies if the only proof of the marriage is by the record itself. Similarly, someone who heard a politician give a speech may testify to what was said without the video recording of the speech, because the content of the recording is not at issue. In contrast, if the only way to prove the content of the speech is by the video, because there *579 are no witnesses available to testify, the rule would apply to the video recording.

Rule 1002 also does not apply when an expert testifies based in part on having reviewed writings, recordings or photographs, because Rule 703 allows an expert to express opinions based on matters not put into evidence. FED.R.EVID. 1002 advisory committee's note; WEINSTEIN at § 1002.05[1] ("The best evidence rule does not apply when an expert resorts to material as a basis for an opinion."). Finally, when the contents of writings, recordings or photographs merely are collateral to the case, meaning they are not "closely related to a controlling issue" in a case, Rule 1002 does not apply, and secondary evidence may be used to prove their contents. FED.R.EVID. 1004(4). In contrast, proving legal transactions, such as wills, contracts, and deeds commonly do involve the best evidence rule because the documents themselves have the central legal significance in the case. WEINSTEIN at § 1002.05[2].

An example of when the original writing rule did apply to electronic evidence is *Laughner v. State,* 769 N.E.2d 1147 (Ind.Ct.App.2002), *abrogated on other grounds by Fajardo v. State,* 859 N.E.2d 1201 (Ind.2007). Laughner was charged with attempted child solicitation. To prove the crime, the state offered printouts of instant message chats between the defendant and an undercover police officer posing as a thirteen year old boy. The police officer "cut-and-pasted" the text of the text messages from the internet chat room into a word processing program, and the printouts that were introduced into evidence were prepared from that program. The defendant objected (citing the state version of the original writing rule, which was identical to the federal version), arguing that the printouts were not the "original" of the text

of the chat room communications. The appellate court agreed that the state was proving the content of a writing, and that the original writing rule required an original, but found that the printout was an original, reasoning:

> "Evidence Rule 1002, the 'best evidence' rule, requires an 'original' in order to prove 'the content' of a writing or recording. However, Evidence Rule 1001(3) provides that when 'data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.' According to [the police officer] he saved the conversations with Laughner after they were concluded, and the printout document accurately reflected the content of those conversations. Therefore, the printouts could be found to be the 'best evidence' of the conversations [between the defendant and the officer]."

Laughner, 769 N.E.2d at 1159.

It is important to keep in mind that failure to properly object to the introduction of evidence in violation of the original writing rule likely will result in a waiver of the error on appeal. WEINSTEIN at § 1002.04[5][a] ("Procedural safeguards adopted by federal courts also militate against an overtechnical application of the best evidence rule. For example, an appellant's failure to properly raise an objection to the best evidence rule at trial will result in waiver of the error on appeal."); *see also State v. Braidic,* 119 Wash.App. 1075, 2004 WL 52412 (2004) (Defendant was convicted of rape and other sex offenses with minor. At trial, victim's mother testified, without objection, to content of chat room text messages between defendant and victim. Appellate court noted applicability of original writing rule to require original to prove the contents of the chat room records, but found that defense counsel's failure to object did not constitute ineffective assistance of counsel). Counsel need to insure that a timely objection is made to attempts to prove the contents of electronic writings, recordings or photographs in violation of the original writing rule, otherwise waiver of the error is the probable consequence.

Rule 1004 identifies four circumstances in which secondary evidence may be introduced instead of an original. The rule provides:

> "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> ***580** (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
>
> (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue."

The first example may be particularly suited for electronic evidence. Given the myriad ways that electronic records may be deleted, lost as a result of system malfunctions, purged as a result of routine electronic records management software (such as the automatic deletion of e-mail after a set time period) or otherwise unavailable means that the contents of electronic writings may have to be proved by secondary evidence.[56] Indeed, at least one court has recognized that the "tenuous and ethereal nature of writings posted in internet chat rooms and message boards means that in all likelihood the exceptions [to the original writing rule that permit secondary evidence] would ... [apply]." *Bidbay.com, Inc. v. Spry,* 2003 WL 723297 (Cal.App.2003)(unpublished opinion); *People v. Huehn,* 53 P.3d 733, 738 (Colo.Ct.App.2002) (holding that trial court did not abuse discretion in admitting computer generated bank records that contained listing of ATM transactions prepared by another company that bank retained to process ATM transactions. The court noted that the Colorado version of Rule 1004(1) permitted secondary evidence of the records provided they were not lost or destroyed in bad faith).

Additionally, Rule 1004 permits proof of the contents of a writing, recording or photograph by secondary evidence when the proponent of the evidence is unable to obtain an original through use of legal process, or when the original is in the possession or control of an adverse party that has actual or inquiry notice of the contents that the proponent intends to introduce the evidence. In the later circumstance, as the advisory committee's note to Rule 104(3) points out, "[a] party who has an original in his control has no need for the protection of the [original writing] rule if put on notice that

proof of contents will be made. He can ward off secondary evidence by offering the original."

Finally, Rule 1004(4) permits proof of the contents of writings, recordings of photographs by secondary evidence if they relate to "collateral matters," defined as "not closely related to a controlling issue" in the case. The advisory committee's note to Rule 1004(4) candidly acknowledges that this is a nebulous standard, stating "[w]hile difficult to define with precision, situations arise in which no good purpose is served by production of the original." *See also* WEINSTEIN at § 1004.40 ("[t]he distinction between controlling and collateral issues can be an exasperating one. The term 'collateral' is elusive and vague. It cannot be defined conceptually, only pragmatically: balancing the importance of the document against the inconvenience of compelling its production, is the rule worth enforcing?") (citation omitted). An example illustrates. A doctor testifying as an expert in a personal injury case can testify that she is licensed to practice medicine in a state without having to produce the license itself. However, if a defendant is charged with practicing medicine without a license, his testimony alone that he has a license from the state will not be accepted, as the license is closely related to a controlling issue in the case.

Rule 1006 recognizes another source of secondary evidence to prove the contents of writings, recordings, or photographs, stating:

> *581 "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

The advisory committee's note recognizes that Rule 1006 is one of necessity, as the "admission of summary of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury." A number of observations may be made about the use of summaries under Rule 1006. First, as the rule expressly states, the writings, recordings or photographs to be summarized must be voluminous. WEINSTEIN at § 1006.03 ("Charts, summaries or calculations are, however, inadmissible when the content being proved is neither voluminous or complicated.") (citations omitted). Second, although the rule is silent on the nature of the summary, the prevailing view is that it may be either written, or testimonial. *Id.* at § 1006.05[2] ("[s]ummary evidence need not be an exhibit, but may take the form of a witness's oral testimony."). Third, the majority view is that the summaries themselves constitute the evidence of the contents of the materials summarized, rather than the underlying writings, recordings or photographs. *Id.* at § 1006.04[1] ("[t]he majority rule is that the summary itself is the evidence to be considered by the factfinder when the underlying documents are voluminous and the other requirements of Rule 1006 are met. Other decisions, however, have held that Rule 1006 summaries were not evidence, and that the jury should be so instructed."). Fourth, if the summaries are accepted as the evidence of the materials summarized, they function as the equivalent of a special exception to the hearsay rule. *Id.* at § 1006.05[4] ("Rule 1006 should be regarded as a special exception to the hearsay rule."); RICE at 197-98 (Recognizing that summaries of voluminous materials that are introduced to prove the content of the summarized material creates a hearsay problem. The author suggests that the residual hearsay rule, Rule 807, is an exception that may apply to overcome this problem). Fifth, the writings, recordings and photographs that are summarized must be made available to the adverse party for examination or copying reasonably in advance of the use of the summary, a requirement that originates from Rule 1006 itself, regardless of whether the adverse party has served a request for production of documents under FED.R.CIV.P. 34. WEINSTEIN at § 1006.06[1] ("the originals or duplicates of voluminous writings, recordings, or photographs must be made available for examination or copying at a reasonable time or place in order for summary evidence to be admissible. The right to examine the underlying records is absolute. Thus, the records must be made available whether or not the opposing party makes a discovery request for inspection."). Sixth, the underlying materials from which the summaries are made must themselves be admissible into evidence. *Id.* at § 1006.06[3] ("Charts, summaries and calculations are only admissible when based on original or duplicate materials that are themselves admissible evidence.").

Because the production of electronically stored information in civil cases frequently is voluminous, the use of summaries under Rule 1006 is a particularly useful evidentiary tool, and courts can be expected to allow the use of summaries provided the procedural requirements of the rule are met. *See, e.g., Wapnick v. Comm'r of Internal Revenue, T.C. Memo.*

2002-45, (T.C.2002) (holding that summaries of voluminous computer records were admissible under Rule 1006 even though they were prepared in anticipation of litigation, because the underlying documents had been admitted into evidence and reasonably had been made available to the opposing party to inspect).

Rule 1007 identifies another, though little used, way in which secondary evidence may be used to prove the contents of electronically prepared or stored information. It provides that the:

> "[c]ontents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, ***582** without accounting for the nonproduction of the original."

On its face this rule is limited to admissions by a party opponent regarding the content of a writing, recording or photograph. Use of the word "admission" refers to any of the types of admissions covered by Rule 801(d)(2), which includes admissions by a representative, agent, employee or co-conspirator that meets the requirements of Rule 801(d)(2) for each of these types of admissions. WEINSTEIN at § § 1007.03[1], 1007.06. It does not require that any showing be made that the writing, recording or photograph is lost or otherwise unavailable. *Id.* at § 1007.04[1]. Further, the rule expressly limits the types of admissions that may be used to prove the contents of writings, recordings or photographs to those obtained during in court testimony, during a deposition, or by the adverse party's written admission.[57] *Id.* at § 1007.04. An adverse party's answers to federal rule of civil procedure Rule 33 interrogatories or a Rule 36 request to admit the genuineness of documents would meet the provisions of Federal Rule of Evidence 1007 regarding a "written admission." *Id.* at § 1007.07 ("[A]n adverse party's responses to written interrogatories made pursuant to Federal Rule of Civil Procedure 33 are admissible to prove content. Similarly, an adverse party's responses to requests for admissions made pursuant to Federal Rule of Civil Procedure 36, are admissible to prove contents.").

Because Rule 1007 so seldom is used or discussed in cases, most lawyers are unaware of it. However, given the frequency with which deponents are asked questions about the content of writings, recordings and photographs, it is prudent to remember that if the deponent is a person whose testimony would qualify as an admission under any of the five varieties recognized by Rule 801(d)(2), then the deposition testimony may be admitted to prove the contents of the writings, recordings and photographs described. The same is true for written responses to FED.R.CIV.P. 33 and 36 discovery that asks for a description of the contents of a writing, recording or photograph. The need is obvious, therefore, to insure that any characterization of the contents of a writing, recording or photograph that could fall within Rule 1007 be accurate.

Rule 1008 is the last of the rules in Article X of the rules of evidence. It states:

> "When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact."

This rule is a specialized application of Rule 104(b), and it allocates responsibility between the trial judge and the jury with respect to certain preliminary matters affecting the original writing rule. As the advisory committee's note to Rule 1008 states:

> "Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104[a]. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, ***583** supra, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and

> into the merits of the controversy ... The latter portion of [Rule 1008] is designed to insure treatment of theses situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. *See* Rule 104(b)."

See also WEINSTEIN at § 1008.02[1]-1008.04[5]. Under the rule, the trial judge determines: whether originals have been lost or destroyed under Rule 1004(1), as well as all issues relating to the appropriateness of the proponent's efforts to search for the lost original; [58] whether or not the original is obtainable by judicial process, under Rule 1004(2); [59] whether the original is in the possession, custody or control of the opposing party under Rule 1004(3); [60] and whether the writing, recording or photograph relates to a collateral matter, which removes it from the reach of the original writing rule. [61]

Rule 1008 identifies three issues that are questions for the jury, however: (1) whether the writing, recording or photograph ever existed in the first place; (2) whether some other writing, recording, or photograph that is offered into evidence is in fact the original; and (3) whether "other" (i.e. secondary) evidence of contents correctly reflects the content of the writing, recording or photograph. FED.R.EVID. 1008 advisory committee's note; WEINSTEIN at § 1008.05[1]. Counsel need to be aware of the different functions the judge and jury serve as they anticipate how to offer electronic writings, recordings and photographs into evidence. Given the challenges that often are associated with the authentication of electronically created or stored evidence, it is not unlikely that there will be disputes of fact regarding whether an electronic writing ever existed in the first place, if the original cannot be produced and secondary evidence is offered, or when different versions of the same electronic document are offered into evidence by the opposing parties.

In summary, when counsel intend to offer electronic evidence at trial or in support of a motion for summary judgment they must determine whether the original writing rule is applicable, and if so, they must be prepared to introduce an original, a duplicate original, or be able to demonstrate that one of the permitted forms of secondary evidence is admissible. In this case, counsel did not address the original writing rule, despite its obvious applicability given that the e-mail exhibits were closely related to a controlling issue and there were proving the contents of the e-mails themselves.

The final evidentiary issue that must be considered in determining whether electronic evidence will be admitted is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, as proscribed under Rule 403 of the federal rules of evidence.

Balancing Probative Value Against the Danger of Unfair Prejudice Under Rule 403

After evaluating the issues associated with relevance, authenticity, hearsay, and the original writing rule, the final step to consider with regard to electronically prepared or stored evidence is the need to balance its probative value against the potential for unfair prejudice, or other harm, under Rule 403 of the Federal Rules of Evidence. This rule states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

FED.R.EVID. 403. The advisory committee note to Rule 403 succinctly explains its function:

> "[C]ertain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail *584 risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.... 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one."

See also WEINSTEIN at § 403.02[1][a]. [62]

A determination of whether evidence should be excluded under Rule 403 falls within the those made by the court under Rule 104(a), but it is used sparingly. WEINSTEIN at § 403.02[2][a]. Generally, "[i]f there is doubt about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, it is generally better practice to admit the evidence, taking necessary precautions of contemporaneous instructions to the jury followed by additional admonitions in the charge." *Id.* at § 403.02[2][c].

Although Rule 403 may be used in combination with any other rule of evidence to assess the admissibility of electronic evidence, courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the following circumstances: (1) When the evidence would contain offensive or highly derogatory language that may provoke an emotional response. *See Monotype Corp.*, 43 F.3d at 450 (Finding that trial court properly excluded an email from a Microsoft employee under Rule 403 that contained a "highly derogatory and offensive description of ... [another company's] type director."); (2) When analyzing computer animations, to determine if there is a substantial risk that the jury may mistake them for the actual events in the litigation, *Friend v. Time Manufacturing Co.*, 2006 WL 2135807 at *7 (D.Ariz.2006)("Therefore, the question is simply whether the animation accurately demonstrates the scene of the accident, and whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Sayles*, 662 N.W.2d 1, 11 (Iowa, 2003) (Appellate court found no error in trial court's admission of computer animation slides showing effects of shaken infant syndrome, finding that trial court properly considered state version of Rule 403, and admitted evidence with a cautionary instruction that the evidence was only an illustration, not a re-creation of the actual crime); (3) when considering the admissibility of summaries of voluminous electronic writings, recordings or photographs under Rule 1006, WEINSTEIN at § 1006.08[3] ("Summary evidence is subject to the balancing test under Rule 403 that weighs the probative value of evidence against its prejudicial effect."); and (4) In circumstances when the court is concerned as to the reliability or accuracy of the information that is contained within the electronic evidence, *St. Clair v. Johnny's Oyster and Shrimp Inc.*, 76 F.Supp.2d 773 (S.D.Tx.1999) (Court expressed extreme skepticism regarding the reliability and accuracy of information posted on the internet, referring to it variously as "voodoo information". Although the court did not specifically refer to Rule 403, the possibility of unfair prejudice associated with the admissibility of unreliable or inaccurate information, as well as for confusion of the jury, makes Rule 403 a likely candidate for exclusion of such evidence).

Thus, when a lawyer analyzes the admissibility of electronic evidence, he or she should consider whether it would unfairly prejudice the party against whom it is offered, confuse or mislead the jury, unduly delay the trial of the case, or interject collateral matters into the case. If a lawyer is offering electronic evidence, particularly computer animations, that may draw a Rule 403 objection, he or she must be prepared to demonstrate why any prejudice is not unfair, when measured against the probative value of the evidence. *585 In this case, counsel did not address whether Rule 403 was implicated with respect to the electronic evidence attached to their summary judgment memoranda.

Conclusion

[3] In this case the failure of counsel collectively to establish the authenticity of their exhibits, resolve potential hearsay issues, comply with the original writing rule, and demonstrate the absence of unfair prejudice rendered their exhibits inadmissible, resulting in the dismissal, without prejudice, of their cross motions for summary judgment. The discussion above highlights the fact that there are five distinct but interrelated evidentiary issues that govern whether electronic evidence will be admitted into evidence at trial or accepted as an exhibit in summary judgment practice. Although each of these rules may not apply to every exhibit offered, as was the case here, each still must be considered in evaluating how to secure the admissibility of electronic evidence to support claims and defenses. Because it can be expected that electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial, counsel should know how to get it right on the first try. The Court hopes that the explanation provided in this memorandum order will assist in that endeavor. [63]

All Citations

241 F.R.D. 534, 73 Fed. R. Evid. Serv. 446

Footnotes

1 This case has been referred to me for all proceedings with the consent of the parties. 28 U.S.C. § 636(c)(1)(2006); Local Rule 301.4.

2 The parties do not dispute that Maryland law applies.

3 *See, e.g. Orsi v. Kirkwood,* 999 F.2d 86, 92 (4th Cir.1993)("It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment"); *Planmatics, Inc. v. Showers,* 137 F.Supp.2d 616, 620 (D.Md.2001) ("On a motion for summary judgment, a district court may only consider evidence that would be admissible at trial" (citations omitted)). *See also Maryland Highways Contractors Assoc., Inc. v. State of Maryland,* 933 F.2d 1246, 1251 (4th Cir.1991); *Wilson v. Clancy,* 747 F.Supp. 1154,1158 (D.Md.1990); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 901.02 [1] (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997) (hereinafter "WEINSTEIN").

4 Examples of internet postings include; data posted by the site owner, data posted by others with the consent of the site owner, and data posted by others without consent, such as "hackers." Examples of computer-generated documents and files include; electronically stored records or data, computer simulation, and computer animation. *See* 2 MCCORMICK ON EVIDENCE § 227 (John William Strong, et al. eds., 6th ed.2006); Gregory P. Joseph, *Internet and Email Evidence,* 13 PRAC. LITIGATOR (Mar.2002), *reprinted in* 5 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, Part 4 at 20 (9th ed.2006)(hereinafter "Joseph"); Hon. Paul W. Grimm and Claudia Diamond, *Low-Tech Solutions to High-Tech Wizardry: Computer Generated Evidence,* 37 MD. B.J. 4 (July/August, 2004).

5 It has been noted that "[t]he Federal Rules of Evidence ... do not separately address the admissibility of electronic data." ADAM COHEN AND DAVID LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 6.01 (Aspen Publishers 2007). However, "the Federal Rules of Evidence apply to computerized data as they do to other types of evidence." MANUAL FOR COMPLEX LITIGATION § 11.447 (4th ed.2004). Indeed, FED.R.EVID. 102 contemplates that the rules of evidence are flexible enough to accommodate future "growth and development" to address technical changes not in existence as of the codification of the rules themselves. Further, courts have had little difficulty using the existing rules of evidence to determine the admissibility of ESI, despite the technical challenges that sometimes must be overcome to do so. *See, e.g., In re F.P.,* 878 A.2d 91, 95 (Pa.Super.Ct.2005) ("Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages.... We believe that e-mail messages and similar forms of electronic communications can be properly authenticated within the existing framework of [the state rules of evidence].").

6 *Precision Piping and Instruments v. E.I. du Pont de Nemours and Co.,* 951 F.2d 613, 621 (4th Cir.1991); 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, 104.03[1][b] (9th ed.2006)(hereinafter "SALTZBURG"); WEINSTEIN at § 104.11[1][a]; *Id.* at § 901.06[1][c][iii] ("Rule 104(a) provides that inadmissible evidence may be considered in determining preliminary questions of admissibility under Rule 104(a). However, that provision does not extend to determinations under Rule 104(b), so the court may not consider inadmissible evidence in determinations governed by Rule 104(b). In determining the preliminary question of authenticity under Rule 104(b), therefore, a judge may only consider evidence that is itself admissible.").

7 WEINSTEIN at § 104.11[3].

8 *Id.; United States v. Branch,* 970 F.2d 1368 (4th Cir.1992).

9 WEINSTEIN at § 104.02[2].

10 *Branch,* 970 F.2d at 1370 (citing *United States v. Sliker,* 751 F.2d 477, 497-99 (2d Cir.1984)).

11 *Id.* (citation omitted). *See also,* FED.R.EVID. 901(a) advisory committee's notes ("Authentication and identification represent a special aspect of relevancy.... This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b)").

12 *Branch,* 970 F.2d at 1370 (citing FED.R.EVID. 104(b) advisory committee's note).

13 *Id.* at 1370-71.

14 *Id.* (citation omitted)

15 *Id.*

16 *See, e.g., United States v. Safavian,* 435 F.Supp.2d 36, 41-42 (D.D.C.2006) (trial judge relied on proffers of government lawyers about facts learned by FBI agents during their investigation to make preliminary determination that e-mails were admissible, but cautioned that at trial the government would have to call witnesses with personal knowledge of facts and not rely on FBI agents' testimony about what others had told them regarding the origin of the e-mails); SALTZBURG at § 901.02[5] ("In order for the trier of fact to make a rational decision as to authenticity [under Rule 104(b)], the foundation evidence must be admissible and it must actually be placed before the jury if the Judge admits the evidence").

17 FED R. EVID. 105 states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

18 FED.R.EVID. 104(e) states: "[Rule 104] does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility [of evidence that has been admitted by an adverse party]."

19 *Id.* (stating that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."); SALTZBURG at § 401.02[1]; WEINSTEIN at § 402.02[1].

20 *See, e.g., In re Vee Vinhnee,* 336 B.R. 437, 444 (9th Cir. BAP 2005) (In considering admissibility of electronically stored business records, the court noted "[o]rdinarily, because the business record foundation commonly covers the ground, the authenticity analysis [under Rule 902(11)] is merged into the business record analysis without formal focus on the question." (citation omitted)).

21 In *In re Vee Vinhnee,* the court addressed the authentication of electronically stored business records. It observed "[a]uthenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained:...." However, it quickly noted "[t]he paperless electronic record involves a difference in the format of the record that presents more complicated variations on the authentication problem than for paper records. Ultimately, however, it all boils down to the same question of assurance that the record is what it purports to be." The court did conclude, however, that "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground," before exercising a demanding analysis of the foundation needed to authenticate a paperless business record and lay the foundation for the business record exception to the hearsay rule, ultimately ruling that a proper foundation had not been established, and excluding the evidence. 336 B.R. at 444-45. *See also* MANUAL FOR COMPLEX LITIGATION at § 11.447 ("In general, the Federal Rules of Evidence apply to computerized data as they do to other types of evidence. Computerized data, however, raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling. The proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy. The judge should therefore consider the accuracy and reliability of computerized evidence, including any necessary discovery during pretrial proceedings, so that challenges to the evidence are not made for the first time at trial.").

22 "Oftentimes a witness need not be familiar with specific exhibits to be sufficiently knowledgeable to authenticate or identify them. Business records and records of government agencies, for example, are frequently authenticated by witnesses who have never seen the specific records that comprise the exhibits and know nothing about the specific information they contain. Their authentication is accomplished when a witness identifies the exhibits as documents of a type that the organization typically develops, and testifies about the procedures the organization follows in generating, acquiring, and maintaining documents of that type, and explains the method by which the specific exhibits were retrieved from the organization's files. Similarly, exhibits that are automatically produced upon the occurrence of specified events may be authenticated by the testimony of persons with knowledge of the system or process that results in the production of the exhibit." (footnote omitted).

23 Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges,* Federal Judicial Center, 2007 at 24; *see also Williams v. Sprint/United Mgmt. Co.,* 230 F.R.D. 640, 655 (D.Kan.2005).

24 *See, e.g.,* United States District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Information 20, http: //www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited April 10, 2007) (encouraging parties to discuss use of hash values or "hash marks" when producing electronic records in discovery to facilitate their authentication).

25 United States District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Information 17, http://www.m dd.uscourts.gov/news/news/ESIProtocol.pdf (last visited April 10, 2007) ("When parties have agreed or the Court has ordered the parties to exchange all or some documents as electronic files in Native File format in connection with discovery, the parties should collect and produce said relevant files in Native File formats in a manner that preserves the integrity of the files, including, but not limited to the contents of the file, the Meta-Data (including System Meta-Data, Substantive Meta-Data, and Embedded Meta-Data....")).

26 "Computer output may be authenticated under Rule 901(b)(9).... When the proponent relies on the provisions of Rule 901(b)(9) instead of qualifying the computer-generated information for a hearsay exception, it is common for the proponent

to provide evidence of the input procedures and their accuracy, and evidence that the computer was regularly tested for programming errors. At a minimum, the proponent should present evidence sufficient to warrant a finding that the information is trustworthy and provide the opponent with an opportunity to inquire into the accuracy of the computer and of the input procedures."

27 In *Vinhnee*, the court cited with approval an eleven-step foundational authentication for computer records advocated by one respected academic. *Id.* (citing EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 58-59 (LexisNexis 6th ed.2005)). Although this foundation is elaborate, and many courts might not be so demanding as to require that it be followed to authenticate computer generated records, the fact that one court already has done so should put prudent counsel on notice that they must pay attention to how they will authenticate computer generated records, and that they should be prepared to do so in a manner that complies with the Federal Rules of Evidence and any governing precedent. The price for failing to do so may be, as in *In re Vee Vinhnee*, exclusion of the exhibit. *See, e.g., Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 1998 WL 1988826, at *7 (S.D.Ind. May 13, 1998) ("[A]s a condition precedent to admissibility of computer records, the proponent must establish that the process or system used produces an accurate result, FED.R.EVID. 901(b)(9), and that foundation has not been established. In light of the above, the veracity and reliability of these reports are questionable, and thus [the summary judgment exhibit] will be stricken").

28 Because the business record exception will be discussed at some length below, the analysis of the requirements of Rule 902(11) will be deferred until that discussion.

29 The "wayback machine" refers to the process used by the Internet Archive Company, www.archive.org, to allow website visitors to search for archived web pages of organizations. *St. Luke's*, 2006 WL 1320242 at *1.

30 There, the court stated that,

> "Plaintiff's electronic 'evidence' is totally insufficient to withstand Defendant's Motion to Dismiss. While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in FED.R.EVID. 807. Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges."

Id. at 774-775.

31 The court noted that a "reduced evidentiary standard" applied to the authentication of exhibits purporting to depict the defendant's website postings during a preliminary injunction motion. The court found that the exhibits had been authenticated because of circumstantial indicia of authenticity, a failure of the defendant to deny their authenticity, and the fact that the exhibits had been produced in discovery by the defendant. The court declined to require proof that the postings had been done by the defendant or with its authority, or evidence to disprove the possibility that the contents had been altered by third parties.

32 Joseph at 21; *see also* SALTZBURG at § 901.02[12].

33 *Id.* at 22.

34 "Computerized data", however, raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling. The proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy.

> "The judge should therefore consider the accuracy and reliability of computerized evidence...."

35 "In the past, many courts have been lax in applying the authentication requirement to computer records; they have been content with foundational evidence that the business has successfully used the computer system in question and that

the witness recognizes the record as output from the computer. However, following the recommendations of the Federal Judicial Center's *Manual for Complex Litigation,* some courts now require more extensive foundation. These courts require the proponent to authenticate a computer record by proving the reliability of the particular computer used, the dependability of the business's input procedures for the computer, the use of proper procedures to obtain the document offered in court, and the witness's recognition of that document as the readout from the computer." (citation omitted).

36 IMWINKELRIED, EVIDENTIARY FOUNDATIONS at § 4.03[2].

37 In addition to their insight regarding the authentication of electronic records, these cases are also important in connection to the analysis of whether certain types of electronically stored records constitute hearsay when offered for their substantive truth.

38 MANUAL FOR COMPLEX LITIGATION at § 11.446.

39 An example of nonassertive written verbal conduct would be to write a person's name and address on an envelope. An example of nonassertive spoken verbal conduct would be to ask a question that does not contain within it a factual assertion "Is it going to rain tomorrow?"

40 "Words and actions may convey meaning even though they were not consciously intended as assertions. Sometimes the relevance of words or actions to show a particular fact depends on drawing an inference that a person would not have spoken or acted in a certain way unless the person believed a relevant fact to be true. According to the Advisory Committee, the 'key to the definition is that nothing is an assertion unless it is intended to be'. Many courts have found that words or conduct offered to show the actor's implicit beliefs do not constitute statements under the hearsay rule unless they were intended by the actor as an assertion.... Other courts, however, have noted that an oral or written declaration is hearsay if offered to show the truth of a matter implied by its contents."

41 "Common-law jurisdictions divide on whether nonverbal conduct that is not intended as an assertion is hearsay if it is introduced to show the truth of the actor's underlying beliefs.... The reasons for excluding non-assertive conduct from the hearsay rule are persuasive. A principal reason for excluding hearsay is that the veracity of the declarant cannot be tested by cross-examination. In the case of non-assertive acts, the actor by definition does not intend to make an assertion, meaning that the risk of insincerity is substantially diminished. The actor is at least not trying to lie. Moreover, non-assertive conduct is usually more reliable than the ordinary out-of-court statement, because by conduct the declarant has risked action on the correctness of his belief-he has put his money where his mouth is."

42 SALTZBURG at § 801.02[1][e].

43 *Id.* at § 801.02[1][f]; WEINSTEIN at § 801.11[5][a].

44 SALTZBURG at § 801.2[1][g]; *see also* WEINSTEIN at § 801.11[6].

45 SALTZBURG at § 801.02[1][h]. This category typically deals with statements from which the declarant's state of mind is circumstantially inferred. For example, if someone says "Woe is me" it may be inferred that they are depressed or sad. Such statements are in contrast to statements that constitute direct evidence of the declarant's state of mind, offered to prove that state of mind, for example "I feel good," offered to prove that the declarant felt good. The later example is hearsay, but covered by an exception, Rule 803(3): Then existing state of mind or condition.

46 WEINSTEIN at § 801.11[5][a], [c].

47 SALTZBURG at § 801.02[1][j].

48 WEINSTEIN at § 801.11[3]-[4].

49 *Id.* at § 801.11[2].

50 A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it. For example, the hearsay rule does not exclude relevant evidence as to what the contracting parties said or wrote with respect to the making or the terms of an agreement.

51 *See* FED.R.EVID. 803(1)-(2) advisory committee's note ("Exceptions (1) and (2) [to Rule 803]. In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between the event and statement.").

52 The majority view is that the source of the information memorialized in the business record must have a business duty to transmit the information to the maker of the record, if the maker him or herself lacks personal knowledge of the facts or events. *See, e.g.,* FED.R.EVID. 803(3) advisory committee's note ("Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with the employer reliance on the result, or in short 'in the regular course of business'. If, however, the supplier of the information does not act in the regular course, an essential link

is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail."). However, some courts have held that it may be possible to meet the requirements of the business record exception even if the source of the information had no business duty to provide it to the maker of the record, provided the recipient of the information has a business duty to verify the accuracy of the information provided. *See, e.g., Rambus,* 348 F.Supp.2d at 706-07 (Court noted that ordinarily, when the supplier of the information recorded in the business record does not act in the regular course of the business, an "essential link" in the foundation is broken, but recognized that "[w]hen the source of the information in the business record is an outsider, the only way to save the record from the jaws of the hearsay exclusion is to establish that the business recipient took precautions to guarantee the accuracy of the given information. Thus, the company must have been able in some way to verify the information provided." (citation omitted)).

53 "[T]he admissibility of market reports and commercial publications under Rule 803(17) is predicated on the two factors of necessity and reliability. Necessity lies in the fact that if this evidence is to be obtained it must come from the compilation, since the task of finding every person who had a hand in making the report or list would be impossible. Reliability is assured because the compilers know that their work will be consulted; if it is inaccurate, the public or the trade will cease consulting their product." (citation omitted).

54 Traditionally the rule has been referred to as the "Best Evidence Rule," which is a misleading title. The rule is more accurately is referred to as the "Original Writing Rule" because it does not mandate introduction of the "best" evidence to prove the contents of a writing, recording or photograph, but merely requires such proof by an "original," "duplicate" or, in certain instances, by "secondary evidence"-any evidence that is something other than an original or duplicate (such as "testimony, or a draft of a writing to prove the final version, if no original or duplicate is available.") FED.R.EVID. 1001 advisory committee's note; RICE at 190 ("Article X of the Federal Rules of Evidence codified the common law best evidence rule, terming it instead the original writing rule.").

55 "In today's commercial world, a single transaction often generates successive entries of the same information in separately prepared writings. Though the purposes of these separate records may be different, a computerized business record, prepared simultaneously with or within a reasonable time period of the written record, and containing the same or similar information, would appear to be no less an 'original' than a handwritten record. However, it seems equally clear that where a written record, prepared prior to the computer record, contains a more detailed and complete description of the transaction than that contained in the computer record, the proponent of the evidence should be required to produce the more detailed record, or account for its nonproduction under F.R.E. 1004. Similarly, where a computerized record appears to be nothing more than a summary of a more detailed written record, the written record should be produced except where the requirements of F.R.E. 1006 have been satisfied." (citations omitted).

56 *See,* for example, newly revised Fed.R.Civ.P. 37(f), which creates a limited "safe harbor" from sanctions if electronically stored information is not preserved as a result of the routine good faith operation of an electronic records management system. Sanctions may be imposed if the court finds the presence of "extraordinary circumstances" or if it determines that the loss of the ESI was the result of non-routine loss or destruction, or action taken in the absence of good faith. The new rule evidences the widespread recognition that electronically stored information is not infrequently lost or destroyed.

57 However, despite the limitation in Rule 1007 to testimonial or written admissions of a party opponent, a non-testimonial oral admission by a party opponent would still be admissible as secondary evidence to prove the contents of a writing, recording or photograph under Rule 1004 if the writing, recording or photograph was lost of destroyed, absent bad faith, beyond the reach of court ordered production, in the possession, custody of control of the adverse party, or if the writing, recording or photograph was not closely related to a controlling issue in the litigation. FED.R.EVID. 1007 advisory committee's note ("The limitation [of] Rule 1007 to testimonial or written admissions, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible."); WEINSTEIN at § 1007.03[1].

58 WEINSTEIN at § 1008.04[3]

59 *Id.* at § 1008.04[4]

60 *Id.* at § 1008.04[5]

61 *Id.* at § 1008.04[6]

62 "Rule 403 recognizes that relevance alone does not ensure admissibility. A cost/benefit analysis must often be employed. Relevant evidence may be excluded if its probative value is not worth the problems that its admission may cause. The issue is whether the search for truth will be helped or hindered by the interjection of distracting, confusing, or emotionally charged evidence."

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585 F.Supp.2d 679
United States District Court,
D. Maryland.

Jill WILLIAMS, et al., Plaintiffs
v.
Sandra LONG, Defendant.

No. 07-3459-PWG. | Nov. 7, 2008.

Synopsis

Background: Employees, on behalf of themselves and others similarly situated, filed suit alleging their employer had failed to compensate them at minimum wage and provide overtime pay in violation of Fair Labor Standards Act (FLSA), as well as claims for violation of Baltimore's Wage and Hour Law and Maryland's Wage Payment and Collection Law. Employer counterclaimed for breach of contract, breach of fiduciary duty, and invasion of privacy. The District Court, J. Frederick Motz, J., 558 F.Supp.2d 601, granted employees' motion to dismiss counterclaims. Employees moved to conditionally certify collective action.

Holdings: The District Court, Paul W. Grimm, United States Magistrate Judge, held that:

[1] though "affidavits" submitted as exhibits by plaintiffs were mere declarations, they could be considered and would alone suffice to meet initial threshold for conditional certification of collective action;

[2] exhibits in form of printed webpages from websites suggesting there were other claimants who might decide to join suit were self-authenticating; and

[3] those exhibits, while hearsay, met requirements of exception for public records and reports.

Motion granted.

West Headnotes (10)

[1] **Labor and Employment**
⇐ Notice and Opting-In

FLSA establishes "opt-in" scheme whereby potential plaintiffs must affirmatively notify court of their intention to become party to collective action. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

2 Cases that cite this headnote

[2] **Labor and Employment**
⇐ Employees Similarly Situated

Paramount issue in determining appropriateness of conditional certification of FLSA collective action is whether plaintiffs have demonstrated that potential class members are similarly situated. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

12 Cases that cite this headnote

[3] **Labor and Employment**
⇐ Employees Similarly Situated

Plaintiffs seeking conditional certification of FLSA collective action must make preliminary factual showing indicating a similarly situated group of potential plaintiffs exists; this includes factual evidence by affidavits or other means, but mere allegations in complaint will not suffice. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

14 Cases that cite this headnote

[4] **Labor and Employment**
⇐ Actions on Behalf of Others in General

On motion to certify FLSA collective action, written submissions from Assistant Attorney General to Maryland Department of Labor, Licensing and Regulation (MDLLR) and former employee of defendant were mere declarations rather than affidavits; statements were not made under oath and sworn before person with authority under law to administer oath, but rather were unsworn statements declared to be true under penalty of perjury. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

Cases that cite this headnote

[5] **Labor and Employment**
⇦ Actions on Behalf of Others in General

Courts are permitted to use other means besides submission of affidavits in reviewing motion for certification of FLSA collective action. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

1 Cases that cite this headnote

[6] **Labor and Employment**
⇦ Class Actions

Even without additional evidence, declarations from Assistant Attorney General (AAG) to Maryland Department of Labor, Licensing and Regulation (MDLLR) and former employee of defendant would alone suffice to meet initial threshold for conditional certification of FLSA collective action; former employee alleged she too was deprived of wages and was "aware of at least one other person who might be interested in joining the case....who was not paid any wages, let alone the minimum wage," and AAG's declaration noted that other claimants had sought compensation from defendant for performed work, suggesting there could be remaining claimants who would willingly join action. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

Cases that cite this headnote

[7] **Evidence**
⇦ Proof of Genuineness in General

In FLSA collective action, printed webpage from Maryland Judiciary Case Search website suggesting there were other claimants who might decide to join suit was self-authenticating online "official publication" issued by public authority; Maryland judiciary was branch of Maryland state government, URL on top of printed webpage identified that results were in fact from website, first page featured caption stating "Maryland Judiciary Case Search Results," and next page stated "District Court of Maryland." Fed.Rules Evid.Rule 902(1, 5), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

38 Cases that cite this headnote

[8] **Evidence**
⇦ Proof of Genuineness in General

In FLSA collective action, printed webpage from website of Employment Standards Service of Division of Labor and Industry in Maryland Department of Labor, Licensing and Regulation (MDLLR) could be considered self-authenticating "official publication"; website was hosted by subdivision of state agency, URL on webpage identified correct website, and agency's name was printed preceding search results. Fed.Rules Evid.Rule 902(1, 5), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

8 Cases that cite this headnote

[9] **Evidence**
⇦ Official Records and Reports

Self-authenticating exhibits in form of printed webpages from websites suggesting there were other claimants who might decide to join suit, though hearsay, met requirements of exception for public records and reports. Fed.Rules Evid.Rules 801(c), 803(8), 902(5), 28 U.S.C.A.

8 Cases that cite this headnote

[10] **Labor and Employment**
⇦ Class Actions

Exhibits suggesting there were other claimants who might desire to join FLSA minimum wage and overtime action would justify certification of case as collective action. Fair Labor Standards Act of 1938, §§ 6(a)(1), 7(a)(1), 16(b), 29 U.S.C.A. §§ 206(a)(1), 207(a)(1), 216(b).

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM

PAUL W. GRIMM, United States Magistrate Judge.

I. Background Facts

On December 27, 2007, Plaintiffs Jill Williams and Erin Dechowitz ("Plaintiffs"), on behalf of themselves and others similarly situated, filed a collective action against Defendant Sandra Long ("Defendant"), owner of Charm City Cupcakes, under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.* The Plaintiffs alleged the Defendant had violated §§ 206(a)(1) and 207(a)(1) of the FLSA by failing to compensate the Plaintiffs at the minimum wage and provide overtime pay. Pls.' Compl. ¶¶ 18-19, Paper No. 1. Additionally, the Plaintiffs contended the Defendant had violated Baltimore City's Wage and Hour Law, Balt., Md., Lab. & Empl. Code art. 11, §§ 3-1, 3-3 (2008), and Maryland's Wage Payment and Collection Law, Md.Code Ann., Lab. & Empl. §§ 3-501 *et seq.* *Id.* ¶¶ 20-22.

As alleged in the Plaintiffs' Complaint, from October 2007 to November 2007, the Plaintiffs were employed by the Defendant at various times to prepare, bake, or even serve cupcakes at the Defendant's business establishment or various sites. *Id.* ¶ 11. The Defendant allegedly promised Plaintiff Williams that she would receive an hourly wage of $15.00 an hour, and that Plaintiff Dechowitz would receive $6.25 an hour. *Id.* Supposedly, despite working a "couple hundred hours between them," the only wage either Plaintiff received was a $20.00 cash advance given to Plaintiff Dechowitz from the Defendant. *Id.*

On March 10, 2008, the Defendant filed an Answer, Paper No. 7, and brought counterclaims alleging breach of contract, breach of fiduciary duty, and invasion of privacy. Def.'s Countercl. ¶¶ 20-40, Paper No. 8. In response, the Plaintiffs moved to dismiss the Defendant's counterclaims pursuant to Fed.R.Civ.P. 12(b)(1) on the basis that the United States District Court of Maryland did not have supplemental jurisdiction over the counterclaims under 28 U.S.C. § 1367 (2008). Pls.' Mot. Dismiss 1, Paper No. 9. Subsequently, the Court ruled that the Defendant's counterclaims were merely permissive and lacked their own independent jurisdictional basis, thereby effectively granting the Plaintiffs' Motion to Dismiss. *Williams v. Long,* 558 F.Supp.2d 601, 603-06 (D.Md.2008).

Previously, on May 9, 2008, the Plaintiffs moved to conditionally certify a collective action pursuant to § 216(b) of the FLSA, and sought approval and facilitation of a notice to potential class members. Pls.' Mot. 1, Paper No. 15. This section provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party *682 plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

§ 216(b). In order to demonstrate other employees were "similarly situated," the Plaintiffs relied on *Bell v. Mynt Entm't, LLC,* 223 F.R.D. 680 (S.D.Fla.2004), stating that " 'the class certification determination is made using a fairly lenient standard, based primarily on the pleadings and any affidavits which have been submitted.' " Pls.' Mot. 3 (quoting *Bell,* 223 F.R.D. at 681). Accordingly, Plaintiffs' counsel attached to the Motion five exhibits as evidence of the Defendant's alleged actions towards others similarly situated to the existing Plaintiffs. Pls.' Exhs. # # 1-5, Paper No. 15, # # 2-6.

Exhibit # 1 was a copy of printed search results from the Maryland Judiciary Case Search website, which was not authenticated by affidavit or other extrinsic evidence. The printed webpages contained information pertaining to three independent lawsuits pending against "Charm City Cupcakes" in the "Baltimore City District Court"; however, the printed webpages merely stated that the suits were "Contract" claims and did not divulge the specific allegations of each particular suit. Pls.' Exh. # 1.

Exhibit # 2 was a copy of a civil complaint filed on behalf of Amanda Achey, another employee of the Defendant who

reportedly failed to receive adequate compensation for work done from August 14, 2007, to September 3, 2008. Pls.' Exh. # 2. At the top of Ms. Achey's complaint was a fax number, suggesting Ms. Achey's attorneys had faxed a copy of the complaint to Plaintiffs' counsel. *Id.* This exhibit was also not authenticated by any extrinsic evidence.

Exhibit # 3 was similar to Exhibit # 1, and displayed printed case search results from the website of the Employment Standards Service of the Division of Labor and Industry, in the Maryland Department of Labor, Licensing and Regulation ("MDLLR"). The search results clearly showed there were four closed claims against "Charm City Cupcakes," yet, once again, the search results did not state the nature of the claims and were not authenticated by extrinsic evidence. Pls.' Exh. # 3.

Exhibit # 4 was an affidavit from Hope Sachs, Assistant Attorney General to the MDLLR, who is responsible for representing the Commissioner of Labor and Industry to the use and benefit of individuals who have filed claims for unpaid wages with the Employment Standards Service. Pls.' Exh. # 4. In her affidavit, Ms. Sachs stated that on September 7, 2007, she received two claims for unpaid wages against "Sandra Long d/b/a Charm City Cupcakes" in the amounts of $487.07 and $517.74, and noted the claims were appropriate for litigation. *Id.* Ms. Sachs also stated she received two additional claims on April 18, 2008, in the amounts of $495.38 and $1,079.36, and also believed these claims would be appropriate for litigation. *Id.* Finally, Ms. Sachs noted she received a claim on November 15, 2006, in the amount of $558.00, but that the Defendant paid the claimant the full disputed amount on March 29, 2007. *Id.* Of the five total claims described by Ms. Sachs, only the November 15th claim appeared to be present on the printed webpage from the website of the Employment Standards Service. [1]

***683** Exhibit # 5 was an affidavit from Samantha Stuck, a former employee of the Defendant who also claimed that she was a victim of FLSA violations by the Defendant, and indicated her willingness to opt-in as a plaintiff if the case was to be certified as a collective action. Pls.' Exh. # 5.

In addition to the attached materials, the Plaintiffs also submitted a proposed notice of a collective action, Pls.' Notice, Paper No. 15, # 7, a consent form to be a class member in a suit against "Sandra Long d/b/a Charm City Cupcakes," Pls.' Consent Form, Paper No. 15, # 8, and a proposed order granting the Plaintiffs' Motion, Pls.' Proposed Order, Paper No. 15, # 9.

The Defendant filed a Memorandum in Opposition, contending the discovery process should be permitted to proceed before any certification was made. Def.'s Mem. Opp'n ¶ 8, Paper No. 16. Specifically, the Defendant urged the Court to deny the Plaintiffs' Motion without prejudice and permit the Plaintiffs to renew the Motion after a period of discovery had been completed. *Id.*

Before the August 20, 2008 hearing on Plaintiffs' Motion, the Court sought to determine the accessibility of the printed, online information marked as Exhibits # 1 and # 3. In regards to Exhibit # 1, the Maryland Judiciary Case Search website was accessed, and using the case search function on the website, "Charm City Cupcakes" was entered under "Company Name." The results obtained were virtually identical to those submitted by the Plaintiffs in support of their Motion. [2] In regards to Exhibit # 3, the uniform resource locator ("URL") printed at the top of the webpage was used to access the website; however, further access to the contents of the website was not possible without an Employment Standards Service email address and employee password.

At the hearing on the Plaintiffs' Motion, I asked Plaintiffs' counsel to proffer how he was able to access the information contained in Exhibit # 3 from the Employment Standards Service website. In response, counsel advised that he obtained a printout of the search results pursuant to a request for records under Maryland's Public Information Act ("MPIA"), Md.Code Ann., St. Gov't §§ 10-611 *et seq.* *See* Pls.' Mot. 5 n.2. At the conclusion of the hearing, I rendered an oral opinion granting the Plaintiffs' Motion, but reserved the right to file a more comprehensive opinion explaining certain aspects of my ruling, which is found herein.

II. Certification of a Class Action

[1] Under the FLSA, § 216(b) "establishes an 'opt-in' scheme whereby potential plaintiffs must affirmatively notify the court of their intention to become a party to the collective action." ***684** *Montoya v. S.C.C.P. Painting Contractors, Inc.*, No. CCB-07-455, 2008 WL 554114, at *1 (D.Md. Feb.26, 2008) (quoting *Marroquin v. Canales*, 236 F.R.D. 257, 259 (D.Md.2006)) (internal quotation marks omitted).

Most recently, the *Montoya* court provided an extensive overview of the law detailing a court's conditional

certification of a class action. As stated in the case, district courts " 'have discretion, in appropriate cases, to ... facilitat[e] notice to potential plaintiffs.' " *Id.* (alteration in original) (quoting *Camper v. Home Quality Mgt.*, 200 F.R.D. 516, 519 (D.Md.2000)). For example, the plaintiffs in *Montoya* sought the court's approval for a submitted draft of a notice to other as yet unidentified migrant workers, informing them of their right to opt-in to a suit for violations of the FLSA. *Id.* This notification is necessary to ensure unknown employees obtain " 'accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.' " *Id.* at *2 (quoting *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989)). " 'The relevant inquiry then is not whether the court has discretion to facilitate notice, but whether this is an appropriate case in which to exercise that discretion.' " *Id.* (quoting *Camper*, 200 F.R.D. at 519).

[2] [3] The paramount issue in determining the appropriateness of a conditional class certification is whether plaintiffs have demonstrated that potential class members are "similarly situated." § 216(b), *cited in Montoya*, 2008 WL 554114, at *1; *Quinteros v. Sparkle Cleaning, Inc.*, 532 F.Supp.2d 762, 770 (D.Md.2008); *Marroquin*, 236 F.R.D. at 259; *D'Anna v. M/A-COM, Inc.*, 903 F.Supp. 889, 893 (D.Md.1995). Accordingly, plaintiffs must make a preliminary factual showing indicating a similarly situated group of potential plaintiffs exists. *Montoya*, 2008 WL 554114, at *2; *Camper*, 200 F.R.D. at 519. " 'This would include factual evidence by affidavits or *other means*, but mere allegations in the complaint would not suffice.' " *Montoya*, 2008 WL 554114, at *2 (emphasis added) (quoting *Quinteros*, 532 F.Supp.2d at 772).

In *Marroquin*, thirty-seven day laborers filed suit after allegedly failing to receive sufficient compensation under the FLSA for debris removal work following Hurricane Katrina, and, in the court's view, the submission of affidavits was pivotal in demonstrating a factual basis to support certification. *See* 236 F.R.D. at 260. To demonstrate there were approximately 113 unidentified potential claimants, the plaintiffs submitted affidavits describing tales of "underpayment, unpaid overtime, and bounced paychecks." *Id.* Moreover, nearly every affiant reported that the defendants never sought to have workers fill out any applications or paperwork, resulting in an "environment where the alleged abuses [were] more possible." *Id.* at 261 n.15. Whereas the presence of a company-wide policy can often be key to the approval of a court facilitated notice, *compare D'Anna*, 903 F.Supp. at 894 (finding plaintiffs' lack of evidence of company policy to be insufficient), *with Montoya*, 2008 WL 554114, at *3 (noting "plaintiffs' sworn declarations" contained accusations of defendant supervisors enforcing a policy not to pay overtime wages, thereby resulting in class certification), the *Marroquin* court could not envision how the plaintiffs would be able to possess evidence of an explicit policy of issuing bad checks or refusing to pay wages. 236 F.R.D. at 260. Thus, plaintiffs would only need to show potential claimants had been victimized by a "common policy or scheme or plan that violated the law." *Id.*

[4] [5] Contrary to the suggestions made by Plaintiffs' counsel, Exhibits # 4 and # 5 are undoubtedly *not* affidavits; the statements were not made under oath ***685** and sworn before a person with authority under the law to administer oaths. 2A C.J.S. *Affidavits* § 1, at 214 (2003). Rather, the written submissions from Ms. Sachs and Ms. Stuck are unsworn statements declared to be true under penalty of perjury; therefore, these statements are mere declarations. *Id.* at 215. Notwithstanding this distinction, I see no reason as to why this Court should not consider them in determining whether to conditionally certify the class in this case. First, courts are permitted to use "other means" besides the submission of affidavits in reviewing a motion for certification. *Montoya*, 2008 WL 554114, at *2 (citation omitted). Second, in *Montoya*, declarations made under penalty of perjury were supplied by the plaintiffs, and the court relied on them in granting the plaintiffs' motion. *Id.* (citing Mot. Certify Class Exh. E, Aplicano Decl. ¶ 8; Mot. Certify Class Exh. D, Carrera Decl. ¶ 10; Mot. Certify Class Exh. G, Montoya Decl. ¶ 8). As a result, this Court will adhere to the practice set forth in *Montoya* and accept the declarations of Ms. Sachs and Ms. Stuck as evidence supporting the Plaintiffs' Motion.

[6] Even without any additional evidence, Exhibits # 4 and # 5 would be sufficient to meet the initial threshold for conditional certification of a collective action.[3] Ms. Stuck alleges that she worked for the Defendant in the fall of 2007, and that she too was deprived of wages. Ms. Stuck also alleges she is "aware of at least one other person who might be interested in joining the case ... who was not paid any wages, let alone the minimum wage." Pls.' Exh. # 5. Also, the declaration from Ms. Sachs notes there have been other claimants seeking compensation from the Defendant for performed work, and this suggests there could be remaining claimants who would willingly join the instant action. Pls.' Exh. # 4. However, as next will be explained, Plaintiffs' other

exhibits also merit consideration as evidence supporting their Motion.

III. Self-Authentication of Official Publications under Fed.R.Evid. 902(5)

The Plaintiffs have submitted printed webpages from websites which, if authentic and considered for their substantive truth, suggest there are other claimants who might desire to join the Plaintiffs' suit. Pls.' Exhs. 1 & 3. Defense counsel did not object to the exhibits, but, during the hearing, I observed that these exhibits were authenticated, despite the absence of extrinsic evidence to demonstrate ***686** that they were what they purported to be.

In *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 537 (D.Md.2007), this Court noted that accepting electronically stored information ("ESI") as evidence, whether at trial or in summary judgment, implicates a series of potential evidentiary hurdles. In order to successfully clear the first two hurdles, a proponent of ESI must show that it is relevant under Fed.R.Evid. 401, and afterwards, authentic under Fed.R.Evid. 901(a). Exhibits # 1 and # 3, both of which purport to be printed webpages, easily meet the relevancy requirement. The next issue is whether they have been shown to be authentic.

When analyzing the authenticity of evidence, including ESI, Rule 901(a) notes that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Extrinsic evidence, however, is not always necessary. "Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence ... because practical considerations reduce the possibility of unauthenticity to a very small dimension." Fed.R.Evid. 902 advisory committee's note to the 1972 proposed rules. Under Fed.R.Evid. 902(5), extrinsic evidence of authenticity as a condition precedent to the admissibility of evidence is not required if the evidence is a book, pamphlet, or other publication purporting to be issued by a public authority. This "common-sense provision" is based upon the following notions:

> One is that official publications seldom contain serious mistakes in the reproduction of official pronouncements or other matters of sufficient interest to warrant official publication. Another is that official publications are likely to be readily identifiable by simple inspection, and that forgery or misrepresentation of such material is unlikely. There are a number of statutes and a provision in the Federal Rules of Civil Procedure which make particular kinds of official publications self-authenticating.

5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 9:34, at 588 & n.2 (3d ed.2007) (citing Fed.R.Civ.P. 44(a)(1)-(2) (noting the admissibility of official publications of domestic and foreign records)).

Before addressing the applicability of Rule 902(5) to the website postings offered as Exhibits # 1 and # 3, we must first address two issues. First, how is "public authority" defined under the rule? Second, what exactly is an "other publication" as used in the rule?

"Rule 902(5) is silent on what level of government must authorize the publication." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 902.07[1], at 902-29 (2d ed. Supp.2008). Even though the rule may be unclear, Rule 902(5) is most often construed to cover the governmental bodies listed in Fed.R.Evid. 902(1), which provides for self-authentication of domestic publication documents under seal. As such, these entities would be regarded as public authorities: "(1) the United States, (2) any State, (3) any district, commonwealth, territory, or insular possession of the United States, (4) the Panama Canal Zone, (5) the Trust Territory of the Pacific Islands, or (6) a political subdivision, department, officer, or agency of any of the preceding bodies." 5 Weinstein & Berger, *supra*, § 902.07[2], at 902-30 & n.4 (citing Fed.R.Evid. 902(1)). As for the second inquiry, it would not be novel to interpret Rule 902(5) to include the self-authentication of "statute books and case reports," as well as "legislative ***687** reports, published transcripts of hearings, maps and surveys, collected statistics, commissioned studies, manuals," and other data compilation publications from public authorities. 5 Mueller & Kirkpatrick, *supra*, § 9:34, at 589 & n.4 (citing *Gregg v. Forsyth*, 24 How. 179, 65 U.S. 179, 16 L.Ed. 731 (1860); *Watkins v. Holman's Lessee*, 16 Pet. 25, 41 U.S. 25, 10 L.Ed. 873 (1842); *United States v. Aluminum Co. of America*, 1 F.R.D. 71 (S.D.N.Y.1939); *United States v. Shafer*, 132 F.Supp. 659, 665 (D.Md.1955), *aff'd*, 229 F.2d 124 (4th Cir.1956); *Stewart v. United States*, 211 F. 41, 45 (9th Cir.1914)); *accord Conjour v. Whitehall Twp.*, 850

F.Supp. 309, 312 n.1 (E.D.Pa.1994) (self-authentication of local ordinances and regulations); *Biggers ex rel. Key v. S. Ry. Co.*, 820 F.Supp. 1409, 1415 (N.D.Ga.1993) (self-authentication of certified copy of state map from Georgia Department of Transportation). To prove the book, statute, report, or other written material was truly published by a public authority, a proponent may identify any kind of marking or appropriate legend signifying the publication as originating from a qualifying Government Printing Office or by any state government, or a lower agency or department. 5 Mueller & Kirkpatrick, *supra*, § 9:34, at 590.

The next issue is whether, for purposes of Rule 902(5), the posting of information on a website sponsored by a public authority is the functional equivalent of publication. This evidentiary issue was first analyzed by the United States District Court of Ohio, Western Division, in *Sannes v. Jeff Wyler Chevrolet, Inc.*, No. C-1-97-930, 1999 WL 33313134 (S.D.Ohio Mar.31, 1999). In *Sannes*, the court sought to determine whether a defendant automobile dealership qualified as a "credit repair organization" for purposes of a suit filed under the Credit Repair Organization Act ("CROA"), 15 U.S.C. §§ 1679 *et seq.* 1999 WL 33313134, at *1. Claims under CROA, a consumer protection statute engineered to prevent fraud and abuses caused by credit repair organizations, typically involved a business, " 'through advertisements and oral representations,' " leading consumers to believe that " 'adverse information in their consumer reports [could] be deleted or modified regardless of its accuracy.' " *Id.* at *2 (quoting Consumer Reporting Reform Act of 1994, H.R.Rep. No. 103-486, at 57 (1994)). If the defendant was found to be such an entity, then summary judgment would automatically be granted in favor of the plaintiff. *Id.* at *1.

To prove that auto dealerships were not the "primary target" of Congress when it fashioned CROA, the defendant sought to introduce printed press releases from the Federal Trade Commission's ("FTC") website mentioning the FTC's concerns about " 'bogus credit repair organizations' " and " 'credit repair cons.' " *Id.* at *3 (citation omitted). Even though the press releases were not attached to any authenticating affidavit, the court recognized they had been printed from a "government [worldwide webpage]," and were therefore self-authenticating under Rule 902(5). *Id.* at *3 n.3. Thus, for purposes of self-authentication under Rule 902(5), the *Sannes* court implicitly recognized the FTC, an agency of a governmental body, as a public authority. As a result, information published by the FTC on its website was deemed to be self-authenticating.

Cases following *Sannes* showed approval of the decision, and a willingness to accept postings on "government websites" as inherently authentic. For example, in *Hispanic Broad. Corp. v. Educ. Media Found.*, No. CV027134CAS (AJWX), 2003 WL 22867633 (C.D.Cal. Oct.30, 2003), the court noted how "exhibits which consist of *records* from *government websites*, such as the FCC website, are self-authenticating." *Id.* at *5 n.5 (emphasis added). Subsequently, in ***688** *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWx), 2004 WL 5615656 (C.D.Cal. May 18, 2004), the court remarked that "records from government websites are self-authenticating," and permitted the plaintiff to introduce internet reports from the U.S. State Department website.[4] *Id.* at *5 n.7 (citing *Hispanic Broad. Corp.*, 2003 WL 22867633, at *5).

The case of *U.S. EEOC v. E.I. DuPont de Nemours & Co.*, No. Civ.A. 03-1605, 2004 WL 2347559 (E.D.La. Oct.18, 2004), may prove to be the most helpful case in determining what is self-authenticating ESI under Rule 902(5). In that case, the defendant sought to exclude the plaintiff's proposed exhibit-a printout of a table from the website of the U.S. Census Bureau. *Id.* at *1. The court denied the defendant's motion, holding that data posted on a government website would be self-authenticating under the rule. *Id.* at *2.

The *E.I. DuPont* court provided an explanation as to how a court might identify what types of data located on a government website could be accepted as authentic under Rule 902(5):

> Exhibit 552 is a table of information compiled by the United States Census Bureau based on data gathered in 1997 regarding employment of persons with disabilities. According to the EEOC, it shows that some 733,000 persons who required an assistive device or wheelchair to ambulate were employed in 1997 in the United States. *The exhibit has been printed from the internet website of the U.S. Census Bureau, and contains the internet domain address from which the image was printed and the date on which it was printed. The exhibit also clearly indicates that the source of the information is August-November 1997 data from the Survey of Income and Program Participation.*
>
> ....

> ... [T]he Court finds that the EEOC has submitted evidence sufficient to authenticate the exhibit. Rule 901(a) states that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *689 *The exhibit contains the internet domain address from which the table was printed, and the date on which it was printed. The Court has accessed the website using the domain address and has verified that the webpage printed exists at that location. The Court also notes that the webpage is maintained on a government website, and, according to Rule 902(5), "publications purporting to be issued by public authority" are self authenticating.* The Court thus finds that the EEOC has provided evidence sufficient to authenticate the exhibit.

Id. at *1-2 (emphasis added) (citations omitted). Clearly, the court accepted the printout containing the "internet domain address" and the "date on which it was printed" as sufficient for authentication under Rule 901(a), and because the webpage was available on a government website, concluded that this would also permit self-authentication under Rule 902(5).

These two points are not mutually exclusive, however. A proponent of ESI could use the URL, date, and/or official title on a printed webpage to show that the information was from a public authority's website, and therefore, self-authenticating. Similarly, the public authority's selection of the posted information for publication on its website will act as the necessary "seal of approval" needed to establish that the information came from a public authority for purposes of Rule 902(5). *Cf. Schaghticoke Tribal Nation v. Kempthorne,* No. 3:06-cv-00081 (PCD), 2008 WL 4000179, at *3 (D.Conn. Aug. 26, 2008) (noting government press release was self-authenticating because petitioner included the web address for press releases in its Local Rule 56(a)(1) statement, thereby allowing the court to verify that the press release in the record was a copy of an official document issued by a public authority).

IV. Plaintiffs' Exhibits # 1 and # 3 are Self-Authenticating

A. The Maryland Judiciary Case Search Results-Exhibit # 1

[7] The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under Rule 902(5) for the reasons discussed above. First and foremost, the Maryland Judiciary is a branch of the Maryland State Government; therefore, any online "official publication" issued by the Maryland Judiciary would be self-authenticating. *See* Fed.R.Evid. 902(1), (5). Second, the URL on the top of the printed webpage identifies that the results are in fact from the website. Third, the first page features a caption, stating, "Maryland Judiciary Case Search Results," and the next page states, "District Court of Maryland." Accordingly, there is no doubt that these results were published on the website of a public authority. Thus, they are self-authenticating.

B. MDLLR-Employment Standards Service Results-Exhibit # 3

[8] The printed webpage from the Employment Standards Service website could also be considered a self-authenticating "official publication." The website is hosted by a subdivision of a state agency, and the information contained in the printed webpage is comparable to the printed data found to be self-authenticating, and admissible, in *E.I. DuPont.* In particular, the URL on the webpage identifies the correct website, and the agency's name is printed preceding the search results.

As noted at the hearing, Plaintiffs' counsel was required to make a demand under the MPIA to obtain a copy of Exhibit # 3, as it is from a restricted portion of the website that is not available to the public. With this point in mind, it is important not to confuse "publication," as used by *690 Rule 902(5), with "unrestricted publication to the general public." In *Wolf Lake Terminals, Inc. v. Mutual Marine Ins. Co.*, 433 F.Supp.2d 933, 944 (N.D.Ind.2005), the court found two U.S. Government documents, both obtained through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2008), to be self-authenticating. *See also Schmutte v. Resort Condominiums Int'l, LLC,* No. 1:05-cv-0311-LJM-WTL, 2006 WL 3462656, at *14 (S.D.Ind. Nov.29, 2006) (Department of Labor file, produced pursuant to the FOIA, found to be self-authenticating under Rule 902(5)). Rule 902(5) imposes no requirement that an official publication be available without restriction to the general public, and simply because additional measures, such as an FOIA request or subpoena under Fed.R.Civ.P. 45, must be employed to gain access to the publication does not mean the document is not self-authenticating. It would serve no legitimate purpose to require a proponent of an exhibit that facially meets the requirements of Rule 902(5) to go to the added trouble and expense of calling a witness or producing an affidavit to prove how the proponent obtained a copy of the document. Thus, if information is published on a website by a public

authority and that information is obtained through the FOIA (or, as in this case, an equivalent state act), then that printed information would be self-authenticating under Rule 902(5).

V. Exhibits # 1 and # 3 Meet the Requirements of the Fed.R.Evid. 803(8) Hearsay Exception

In addition to showing relevancy and authenticity, it is also necessary to consider whether Exhibits # 1 and # 3 are hearsay, *see* Fed.R.Evid. 801-02; *Lorraine,* 241 F.R.D. at 537, and if so, whether the exhibits would fall under a recognized exception to the rule. *See* Fed.R.Evid. 803.

[9] Clearly the exhibits are hearsay, for they are proffered for the truth of their substantive content. *See* Fed.R.Evid. 801(c). However, they are admissible as public records under this section, the following are exempt from the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8). Justification for this exception derives from the trustworthiness of the documents themselves, having been made by a public office or agency, as well as the inherent necessity to avoid requiring public officials to needlessly testify as witnesses about reports, data compilations, records, or statements made in their official capacities. 4 Mueller & Kirkpatrick, *supra,* § 8:86, at 770-72. The documents are considered trustworthy due to the "duty that comes with public service," and it is presumed that public officials execute their tasks "carefully and fairly, without bias or corruption, and this notion finds support in the scrutiny and risk of exposure that surround most government functions." *Id.* at 770-71. Absent the exception found at Rule 803(8), lawyers seeking to prove facts contained within official records would be forced to call public officials as witnesses to provide testimony regarding the contents of the official records. This would, of course, be burdensome and ***691** divert the efforts of officials called as witnesses from performing their public duties. *Id.* at 771. With Rule 803(8), the information can be easily gleaned from the public records themselves, and has the added benefit of permitting proof of facts that might otherwise not be remembered by the author of the public record, or if no longer employed by the public agency, beyond the personal knowledge of any current official. *Id.*

Moreover, ample authority, long predating the current preoccupation with ESI, supports the relationship between authentication under Rule 902(5) and admissibility under Rule 803(8). *See, e.g., Citizens Against Longwall Mining v. Colt LLC,* No. 05-3279, 2008 WL 927970, at *3 (C.D.Ill. Apr.7, 2008) (Illinois State Geological Survey bulletin); *Tommaseo v. United States,* 75 Fed.Cl. 799, 806 (2007) (National Hurricane Center report); *Cherry Hill Vineyards, LLC v. Hudgins,* 488 F.Supp.2d 601, 610 (W.D.Ky.2006) (FTC report); *Mueller v. First Nat. Bank of the Quad Cities,* 797 F.Supp. 656, 657-58 (C.D.Ill.1992) (two booklets published by the Comptroller of Currency and news release of bank president's remarks); *California Ass'n of Bioanalysts v. Rank,* 577 F.Supp. 1342, 1355 n.23 (C.D.Cal.1983) (U.S. Department of Health and Human Services reports).

Finally, the *E.I. DuPont* court responded to any critics who might question the trustworthiness of public records found on the Internet, noting, " 'Public records and government documents are generally considered not to be subject to reasonable dispute,' and '[t]his includes public records and government documents available from reliable sources on the Internet.' " 2004 WL 2347559, at *1 (quoting *In re Dingle,* 270 F.Supp.2d 968, 971 (W.D.Mich.2003)); *accord Paralyzed Veterans of Am. v. McPherson,* No. C 06-4670 SBA, 2008 WL 4183981, at *7 (N.D.Cal. Sept.9, 2008) (citing *Lorraine,* 241 F.R.D. at 551). " '[I]n an age where so much information is calculated, stored and displayed on a computer, massive amounts of evidence would be inadmissible' " if courts were to willingly accept a portrayal of all potential evidence located on the Internet as "inherently unreliable." *E.I. DuPont,* 2004 WL 2347559, at *1 (quoting *Chapman v. San Francisco Newspaper Agency,* No. C-01-02305 CRB, 2002 WL 31119944, at *2 (N.D.Cal. Sept.20, 2002)). Of course, Rules 902(5) and 803(8) deal with threshold admissibility, not the weight afforded by the fact

finder to the copies of online public records. The party against whom the evidence is admitted is free to attack its credibility or weight with all the concerns about reliability that often are directed against admissibility. *See* Fed.R.Evid. 104(e).

[10] Exhibits # 1 and # 3 would justify certification in this case. With the exception of the two settled claims on each exhibit, *see supra* nn.1-2, the printed webpages indicate there are claimants who have filed suits against "Charm City Cupcakes" for unpaid wages and contract claims. Even taking into account that these suits are not overly descriptive, they do show there is at least a potential class of similarly situated plaintiffs in existence. Therefore, certification is justified.

VI. Conclusion

For the reasons stated during the hearing and expanded upon above, the Plaintiffs' Motion is granted. The Defendant is ordered to produce to the Plaintiffs the employment and wage records, containing names and last known addresses, for all of Defendant's employees, workers, or laborers of any status, from January 2006 to the present. After this production, the parties will confer and reach an agreement on the notice to be sent to the employees, and will provide the court with a copy of this notice. ***692** The notice will be sent via first-class mail to the last known addresses of the employees, who will then have thirty days to opt-in to the suit. A separate order shall issue this date.

ORDER

Upon consideration of the Plaintiffs' Motion to Conditionally Certify a Fair Labor Standards Act Collective Action Pursuant to 29 U.S.C. § 216(b) and for Approval of and Facilitation of Notice to Potential Class Members, Paper No. 15, and the opposition thereto, for the reasons stated in the accompanying Memorandum, it is this 7th day of November, 2008, by the United States District Court for the District of Maryland,

ORDERED, that Plaintiffs' Motion to Conditionally Certify a Fair Labor Standards Act Collective Action Pursuant to 29 U.S.C. § 216(b) and for Approval of and Facilitation of Notice to Potential Class Members, Paper No. 15, is **GRANTED;**

ORDERED, that the Defendant produce to the Plaintiffs the employment and wage records, containing names and last known addresses, for all of Defendant's employees, workers, or laborers of any status, from January 2006 to the present. After this production, the parties will confer and reach an agreement on the notice to be sent to the employees, who will then have thirty days to opt-in to the Plaintiffs' suit.

All Citations

585 F.Supp.2d 679, 77 Fed. R. Evid. Serv. 1408, 14 Wage & Hour Cas.2d (BNA) 453

Footnotes

1 On Exhibit # 3, "Claim No. 0611113" began on "2006.11.15," and was determined to be closed on "2007.03.29." Pls.' Exh. # 3. In the table marked "Disposition," there is a number "4," and a handwritten message stating, "Paid Wages, Employer Paid Wages." *Id.* For the other three claims on the printed webpage, there is a number "16," and a message noting, "Refer to AG's." *Id.*

2 The time stamp on each printed webpage noted that the online information was printed on "4/21/2008 6:33 PM." Pls.' Exh. # 1. The results showed Janae Aiken, Amanda Achey, and Aundrea Newman filed claims against the Defendant on "2/12/08," "2/20/08," and "8/28/07," respectively. *Id.* Although the first printed webpage noted all three cases were "Active," further details relating to Ms. Newman's suit listed the claim as having a "Judgment Entered in Favor of the Plaintiff" on "3/26/08." *Id.* As noted by Plaintiffs' counsel, the printed webpage stated that the Defendant had not yet satisfied the judgment. Pls.' Mot. 4-5 & n.1; Pls.' Exh. # 1. On August 22, 2008, the Court performed another search on the Maryland Judiciary Case Search website, and this search disclosed that Ms. Newman's claim had been switched from "Active" to "Closed." Also, Ms. Newman's claim status had been changed to "Satisfied."

3 Exhibit # 2, the copy of the complaint filed on behalf of Ms. Achey, also indicates there are other individuals who reportedly have failed to receive earned wages from the Defendant. Although Exhibit # 2 was not authenticated by extrinsic evidence, Fed.R.Evid. 901(b)(4) permits authentication based solely on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See Link v. Mercedes-Benz of North Am., Inc.*, 788 F.2d 918, 928 & n.9 (3d Cir.1986) (authentication of documents based on "company logos and other trademarks"); *Air Land Forwarders, Inc. v. United States*, 38 Fed.Cl. 547, 554 (1997) (authentication of document based on letterhead

and accompanying signature). Exhibit # 2 was signed by the two attorneys representing Ms. Achey, and the fax number for Ms. Achey's attorneys is printed at the top of the complaint. Pls.' Exh. # 2. There also is a time stamp on the complaint, which notes the date the complaint was filed in the District Court of Maryland for Baltimore City. This means that Exhibit # 2, as a copy of a court document, would also be authenticated under Fed.R.Evid. 901(b)(7) (permitting authentication of public records or reports). Consequently, Exhibit # 2 is sufficiently authenticated. Thus, the court cites Exhibit # 2, and the information contained therein, as additional justification for granting the conditional certification.

4 *See also Estate of Gonzales v. Hickman,* No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, at *2 n.3 (C.D.Cal. May 30, 2007) (holding Office of the Inspector General's report to be self-authenticating due to availability on the Internet); *but see In re Poirier,* 346 B.R. 585, 588-89 (Bkrtcy.D.Mass.2006). In the latter case, the United States Bankruptcy Court, District of Massachusetts, was asked to take judicial notice of information posted on the Department of Education's ("DOE") website. The court declined this request, noting it would result in a "relaxation of Fed.R.Evid. 902." *In re Poirier,* 346 B.R. at 589. The court remarked that the DOE website had too many links to various "documents," which although part of the website, could not reasonably be identified as "official records," "reports," or a "publication issued by a public authority." *Id.* (internal quotation marks omitted). These "documents" included: "[E]mergency planning for a pandemic flu, teaching aids, surveys to rate user satisfaction with the DOE website, advice about career colleges and technical schools in addition to information about educational loans." *Id.* The correctness of the conclusion reached by the *In re Poirier* court is questionable. Rule 902(5) provides for self-authentication of "other publications," and it is the act of posting information on the Internet by a qualifying public authority that *is* the act of publication. Because the DOE is a department of one of the governmental bodies listed in Rule 902(1), then the DOE would also be considered a public authority. Thus, when the DOE *posted* information on its site, it vouched for its authenticity, thereby making it self-authenticating under Rule 902(5). There is nothing in the rule that states the public authority publishing the information (whether in print form, or online) must originate the information posted. Rather, the publication must have actually been approved by the public authority, or, as some would say, "made official." Thus, the information's adoption by reference by the public authority seems sufficient to meet the requirements of Rule 902(5).

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2015 WL 4664606
United States Court of Appeals,
Ninth Circuit.

ARIZONA LIBERTARIAN PARTY; Arizona Green Party; James March; Kent Solberg; Steve Lackey, Plaintiffs–Appellants,
v.
Michele REAGAN, Secretary of State, Defendant–Appellee.

No. 13–16254. | Argued and Submitted Jan. 29, 2015. | Filed April 24, 2015 | Amended Aug. 7, 2015.

Synopsis

Background: Minor political party and three of its members brought action against the Arizona Secretary of State, challenging a law requiring the state's voter registration form to list the two largest political parties on the form, as well as provide a blank line for other party preferences, as violative of their First and Fourteenth Amendment rights. The United States District Court for the District of Arizona, Cindy K. Jorgenson, J., 2013 WL 1149808, granted summary judgment to the State. The political party and members appealed.

Holdings: On denial of rehearing en banc, the Court of Appeals, Tashima, Circuit Judge, held that:

[1] the law only imposed a de minimis burden, and thus was subject to rational-basis review, and

[2] the law was rationally related to the State's legitimate interests in correctly registering voters as members of parties of their choosing and cost-efficiency.

Affirmed.

Judge McKeown, Circuit Judge, filed a concurring opinion.

Opinion, 784 F.3d 611, amended and superseded.

West Headnotes (18)

[1] **Evidence**
⇐ Official Proceedings and Acts

A court may take judicial notice of official information posted on a governmental website, the accuracy of which is undisputed.

Cases that cite this headnote

[2] **Election Law**
⇐ Registration for Federal Elections

National Voter Registration Act requires States to accept and use a uniform federal form to register voters in federal elections. National Voter Registration Act of 1993, § 6, 42 U.S.C.A. § 1973gg–4.

Cases that cite this headnote

[3] **Federal Courts**
⇐ Statutes, Regulations, and Ordinances, Questions Concerning in General

Court of Appeals Court reviews the constitutionality of a statute de novo on appeal.

Cases that cite this headnote

[4] **Constitutional Law**
⇐ Voting Rights and Suffrage in General

Constitutional Law
⇐ Conduct of Elections

Constitutional Law
⇐ Voters, Candidates, and Elections

Restrictions on voting can burden equal protection rights as well as interwoven strands of liberty protected by the First and Fourteenth Amendments, namely, the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[5] **Constitutional Law**
⇦ Elections, Voting, or Ballot Access in General

Constitutional Law
⇦ Ballot Access

Election Law
⇦ Power to Regulate

Because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens, the right to vote is heavily burdened, with respect to free speech and equal protection guarantees, if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[6] **Constitutional Law**
⇦ Elections, Voting, or Ballot Access in General

Constitutional Law
⇦ Nominations; Primary Elections

Constitutional Law
⇦ Conduct of Elections

Election Law
⇦ Power to Restrict or Extend Suffrage

Every law regulating elections, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects, at least to some degree, the individual's right to vote and his right to associate with others for political ends, for purposes of determining whether a restriction on voting violates free speech or equal protection guarantees. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[7] **Constitutional Law**
⇦ Elections in General

Constitutional Law
⇦ Voters, Candidates, and Elections

In considering a constitutional challenge to an election law, a court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule. U.S.C.A. Const. Art. 1, § 4, cl. 1; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[8] **Election Law**
⇦ Constitutionality and Validity

The severity of the burden the election law imposes on a plaintiff's rights dictates the level of scrutiny applied by the court.

Cases that cite this headnote

[9] **Election Law**
⇦ Constitutionality and Validity

An election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest; by contrast, a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests.

Cases that cite this headnote

[10] **Constitutional Law**
⇦ Voting Rights and Suffrage in General

Constitutional Law
⇦ Voters, Candidates, and Elections

Election Law
⇦ In General; Power to Regulate Registration

There was no evidence that a law requiring a state's voter registration form to list the two largest political parties in the state and provide a blank line for other party preferences actually discouraged or prevented voters from registering with minor political parties, and thus the law was subject to rational basis review, as the law imposed a de minimis burden, at most, on the First and Fourteenth Amendment rights of a minor political party and its members, where the law did not articulate different criteria

for major and minor parties who sought to get their candidates on the ballot. U.S.C.A. Const.Amends. 1, 14; A.R.S. § 16–152(A)(5).

Cases that cite this headnote

[11] **Election Law**
⇦ Power to Regulate

In determining the nature and magnitude of the burden that the state's election procedures impose on the minor party, the relevant inquiry is whether reasonably diligent minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed.

Cases that cite this headnote

[12] **Election Law**
⇦ Power to Regulate

A party challenging a State's scheme for regulating ballot access bears the initial burden of showing that the state's ballot access requirements seriously restrict the availability of political opportunity.

Cases that cite this headnote

[13] **Constitutional Law**
⇦ Political Parties in General

Constitutional Law
⇦ Political Parties and Organizations

Where a state election law imposes only a de minimis burden on a party's First and Fourteenth Amendment rights, the State need demonstrate only that the statute at issue is rationally related to a legitimate state interest. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[14] **Constitutional Law**
⇦ Political Parties in General

Constitutional Law
⇦ Political Parties and Organizations

In evaluating the constitutionality of a law that imposes only a de minimis burden on a party's First and Fourteenth Amendment rights, a court may look to any conceivable interest promoted by the challenged procedures, whether or not the state cited that interest in its briefs or in the district court; furthermore, the court need not determine whether the interests served by the law can be better served by other means. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[15] **Constitutional Law**
⇦ Elections, Voting, or Ballot Access in General

Constitutional Law
⇦ Elections, Voting, and Political Rights

When a challenged rule imposes only limited burdens on the right to vote, there is no requirement, with respect to free speech and equal protection guarantees, that the rule must be the only or the best way to further a State's proffered interests. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[16] **Constitutional Law**
⇦ Particular Issues and Applications

Constitutional Law
⇦ First Amendment in General

Where a state regulation at issue imposes only a slight burden on a party's First and Fourteenth Amendment rights, that party bears the burden of demonstrating that the regulations it attacks have no legitimate rational basis. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[17] **Constitutional Law**
⇦ Voter Registration

Constitutional Law
⇦ Qualifications of Voters

Election Law
⇦ In General; Power to Regulate Registration

A State law requiring a voter registration form to list the two largest political parties in the state and provide a blank line for other party

preferences was rationally related to the State's legitimate interests in ensuring that election officials correctly registered voters as members of parties of their choosing and cost-efficiency, and such law thus did not violate free speech or equal protection guarantees, where the use of checkboxes for the largest two political parties minimized the chance that an election official would incorrectly register a voter, and since minor parties were more likely to lose their status as recognized political parties, restricting the use of checkboxes to the two largest political parties, both major parties, reduced the frequency that the State would be required to change and reprint the registration form. U.S.C.A. Const. Art. 1 § 4, cl. 1; U.S.C.A. Const.Amends. 1, 14; A.R.S. § 16–152(A)(5).

Cases that cite this headnote

[18] **Election Law**
⇐ Constitutional and Statutory Provisions

Ensuring that voters are able to participate in their preferred party's primary election is, at the very least, a legitimate state interest.

Cases that cite this headnote

Attorneys and Law Firms

David T. Hardy, Tucson, AZ, for Plaintiffs–Appellants.

Thomas C. Horne, Attorney General of Arizona, Robert L. Ellman, Deputy Attorney General (argued), Michele L. Forney and Todd M. Allison, Assistant Attorneys General, Phoenix, AZ, for Defendant–Appellant.

Appeal from the United States District Court for the District of Arizona, Cindy K. Jorgenson, District Judge, Presiding. DC No. 4:11 cv–0856–CKJ.

Before A. WALLACE TASHIMA, M. MARGARET McKEOWN, and MARSHA S. BERZON, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

*1 In 2011, the Arizona Legislature enacted a law requiring the voter registration form distributed by the Arizona Secretary of State to list the two largest parties (as measured by number of registered voters) on the form, as well as provide a blank line for "other party preferences." The Arizona Green Party, Arizona Libertarian Party, and three of their members (together, "Plaintiffs") brought this action, alleging that the new voter registration form violated their First and Fourteenth Amendment rights. The district court concluded that the amended voter registration form survived constitutional scrutiny and granted the State's motion for summary judgment. We have jurisdiction under 28 U .S.C. § 1291, and we affirm.

I.

A. Section 16–152(A)(5) and the Registration Form

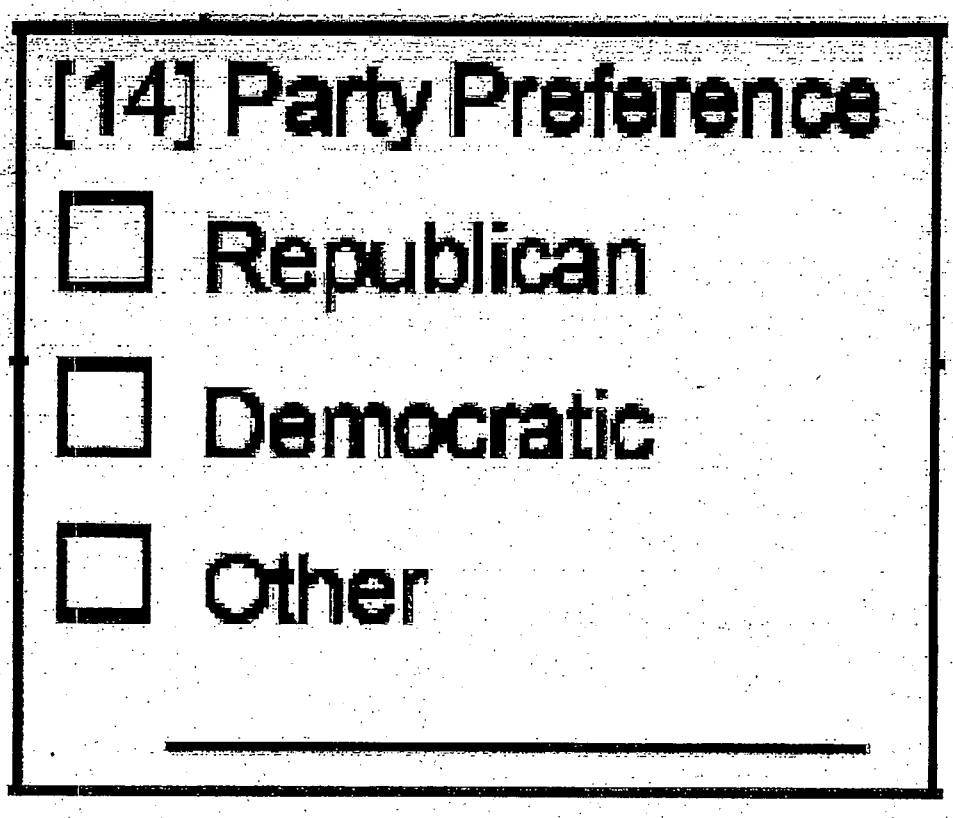
In 2011, the Arizona Legislature amended the statute that dictates the content of the voter registration form provided by the State (the "Registration Form"). *See* 2011 Ariz. Legis. Serv. Ch. 339 § 1 (West) (codified at Ariz.Rev.Stat. § 16152(A)). The amended statute provides, in relevant part:

> A. The form used for registration of electors shall contain:
>
> ...
>
> 5. The registrant's party preference. The two largest political parties that are entitled to continued representation on the ballot shall be listed on the form in the order determined by calculating which party has the highest number of registered voters at the close of registration for the most recent general election for governor, then the second highest. The form shall allow the registrant to circle, check or otherwise mark the party preference and shall include a blank line for other party preference options.

Ariz.Rev.Stat. § 16–152(A)(5). Prior to the 2011 amendment, Arizona law required only that voter registration forms include a blank space for "[t]he registrant's party preference." *See* Ariz.Rev.Stat. § 16–152(A)(5) (2010). As of January 1, 2011, the two parties with the highest number of registered voters in Arizona were the Republican Party, with approximately 35.8 percent, and the Democratic Party, with approximately 31.6 percent. The next largest party was

the Libertarian Party, with approximately 0.78 percent of registered voters. [1]

In response to the amendment, the Arizona Secretary of State revised box 14 on the Registration Form. In its current form, box 14 appears as follows:



The blank line under the "Other" checkbox is approximately 0.9 inch long. The Registration Form also provides the following instructions regarding box 14:

> Fill in your political party preference in box 14. If you leave this box blank as a first time registrant in your county, your party preference will be "Party Not Designated." If you leave this box blank and you are already registered in the county, your current party preference will be retained. Please write full name of party preference in box.

B. Arizona's Voter Registration Scheme

*2 [1] [2] Under Arizona law, qualified electors [2] may register to vote in one of three ways:

1. They may obtain, fill out, and mail in the Registration Form, which can be downloaded from the Secretary of State's website or picked up from either the Secretary of State's office or any local county recorder's office, *see* Ariz.Rev.Stat. § 16–151;

2. They may submit an online voter registration application using the "EZ Voter Registration" process, available at the Arizona Department of Transportation's service website, *see* Ariz.Rev.Stat. § 16–112(B)(4); *see also* Ariz. Dep't of Transp. Motor Vehicle Div., Service Arizona, http:// www.servicearizona.com (last visited Jan. 7, 2015); [3] or,

3. They may register in person at Arizona Motor Vehicle Division offices by filling out a section provided on the form for a driver's license or renewal for individuals who want to register to vote.

Section 16–152(A)(5) applies *only* to the first of these three options—that is, only the Secretary of State is required to provide checkboxes for the two largest parties on the Registration Form. *See* Ariz.Rev.Stat. § 16–152(E) (providing that the content regulations set forth in § 16152(A)

"do [ ] not apply to registrations received from the department of transportation"). Like the Secretary of State's form before the amendment to § 16–152(A)(5), the second and third options allow a registrant to indicate party preference by entering any party's name, including a major party. [4]

C. Arizona's Ballot Access Laws

Under Arizona law, there are two ways for a party to get its preferred candidate on the ballot. [5] First, a "new political party" becomes "eligible for recognition" upon filing a petition with the Secretary of State signed by a number of qualified electors equal to one and one-third (1#) percent "of the total votes cast for governor at the last preceding general election at which a governor was elected." Ariz.Rev.Stat. § 16–801(A). Recognition entitles a new political party to be "represented by an official party ballot at the primary election and accorded a ballot column at the succeeding general election" through at least "the next two regularly scheduled general elections for federal office immediately following recognition of the political party." Ariz.Rev.Stat. § 16801(B).

After these first two federal election cycles, a party may continue to be represented by an official party ballot during a primary election and accorded a ballot column in the succeeding general election (that is, the party is entitled to "continuing ballot access") in one of two ways. First, a party is entitled to continuing ballot access if its candidate receives "not less than five per cent of the total votes cast for governor or presidential electors" at the "last preceding general election" for certain specified offices. Ariz.Rev.Stat. § 16804(A). Second, a party is entitled to continuing ballot access if, on certain dates prescribed by statute, the party "has registered electors in the party equal to at least two-thirds of one per cent of the total registered electors in such jurisdiction." Ariz.Rev.Stat. § 16–804(B). A party that loses continuing ballot access may get it back the same way a new party would gain access to the ballot: it must submit another petition signed by a number of qualified electors equal to one and one-third (1#) percent of the total votes cast for governor at the last preceding general election at which a governor was elected. *See* Ariz.Rev.Stat. § 16–801(B).

*3 When Plaintiffs filed their complaint, five parties had continuing ballot access: Republican, Democratic, Green, Libertarian, and Americans Elect. During the pendency of this appeal, the Arizona Green Party lost its continuing ballot access. [6]

D. Procedural History

Plaintiffs' complaint, filed against defendant Ken Bennett, as Arizona Secretary of State, alleges that § 16–152(A)(5) violated their First and Fourteenth Amendment rights. Plaintiffs sought an order from the district court enjoining the State from issuing voter registration forms that failed to "treat equally the four parties with Statewide continuing ballot access." On the parties' cross-motions for summary judgment, the district court denied Plaintiffs' motion and granted the State's motion. Plaintiffs timely appeal.

II.

[3] This Court reviews the constitutionality of a statute *de novo*. *See Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir.2013).

III.

A. The Framework for Resolving Constitutional Challenges to State Election Laws

[4] [5] "Restrictions on voting can burden equal protection rights as well as 'interwoven strands of liberty' protected by the First and Fourteenth Amendments—namely, the 'right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' " *Dudum*, 640 F.3d at 1105–06 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (some internal quotation marks omitted)). [7] As the Supreme Court has recognized, these rights are generally guaranteed by ensuring that political parties, including those that are new to the political scene, are given the opportunity to place their candidate on the ballot. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) ("The freedom to associate as a political party ... has diminished practical value if the party can be kept off the ballot."). Indeed, because "an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens," *Anderson*, 460 U.S. at 788, "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

[6] "At the same time," however, " 'States retain the power to regulate their own elections.' " *Dudum,* 640 F.3d at 1106 (quoting *Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id.* at 1103 (quoting *Burdick,* 504 U.S at 433). The Constitution itself "provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives.' " *Burdick,* 504 U.S. at 433 (quoting U.S. Const. art. I, § 4, cl. 1 (brackets omitted)). And, "[t]o achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes." *Anderson,* 460 U.S. at 788. Moreover, *every* law regulating elections, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.*

*4 [7] Thus, in order to "resolve the tension between a [party's] First Amendment rights and the state's interest in preserving the fairness and integrity of the voting process," the "Supreme Court developed a balancing test." *Rubin v. City of Santa Monica,* 308 F.3d 1008, 1014 (9th Cir.2002). "In considering a constitutional challenge to an election law, we must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Nader v. Cronin,* 620 F.3d 1214, 1217 (9th Cir.2010) (per curiam) (internal quotation marks omitted).

[8] [9] Accordingly, "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Id.* (quoting *Nader v. Brewer,* 531 F.3d 1028, 1034 (9th Cir.2008) (internal quotation marks omitted)); *see also Burdick,* 504 U.S. at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."). "An election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest." *Cronin,* 620 F.3d at 1217 (quoting *Brewer,* 531 F.3d at 1035 (internal quotation marks and brackets omitted)). By contrast, "[a] state may justify election regulations imposing a lesser burden by demonstrating the state has 'important regulatory interests.' " *Id.* (quoting *Brewer,* 531 F.3d at 1035).

B. Section 16–152(A) Imposes a *De Minimis* Burden on Plaintiffs' Constitutional Rights

[10] [11] [12] In cases "previously examining differing treatments of minor and major political parties," we have held that, "in determining the nature and magnitude of the burden that the state's election procedures impose on the minor party, we must examine the entire scheme regulating ballot access." *Cronin,* 620 F.3d at 1217 (quoting *Libertarian Party of Wash. v. Munro,* 31 F.3d 759, 761–62 (9th Cir.1994) (internal quotation marks and brackets omitted)).[8] The relevant inquiry "is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Munro,* 31 F.3d at 762 (quoting *Storer v. Brown,* 415 U.S. 724, 742, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)); *see also Anderson,* 460 U.S. at 787–88 (noting that the relevant inquiry in determining the constitutionality of election regulations is the ability of voters' preferred candidates to get on the ballot). Moreover, the party challenging the law bears "the initial burden of showing that [the state's] ballot access requirements seriously restrict the availability of political opportunity." *Munro,* 31 F.3d at 762.

Plaintiffs have failed to make any such showing. Section 16–152(A)(5) does not directly inhibit the ability of any party to gain access to the ballot, nor does it articulate different criteria for major and minor parties who seek to get their candidates on the ballot. All new political parties (and parties that have lost continuing ballot access) are required to comply with the same criteria to get their candidate on the ballot. *See* Ariz.Rev.Stat. § 16–801. Moreover, all political parties, major and minor alike, are entitled to continuing ballot access if: (1) their candidates garner at least five percent of the "total votes cast for governor or presidential electors" at the "last preceding general election" for certain specified offices; or, (2) they have "registered electors ... equal to at least two-thirds of one per cent of the total registered electors" in the relevant jurisdiction by a specified date. Ariz.Rev.Stat. § 16–804.

*5 Acknowledging that § 16–152(A)(5) does not directly burden their ability to get their preferred candidate on the ballot, Plaintiffs instead assert that the statute indirectly "restrict[s] the availability of political opportunity," *Munro,* 31 F.3d at 762, by encouraging voters to register with the two major parties over all others. This encouragement, Plaintiffs contend, affects their ability to get their preferred candidate

on the ballot, because continuing ballot access is linked (at least partially) to the number of voters who are registered with the party.

Plaintiffs have failed, however, to adduce any evidence that § 16–152(A)(5) actually encourages individuals to register for major parties instead of minor ones. As an initial matter, Plaintiffs have failed to show how many new voters actually use the Registration Form to register, as opposed to using one of the other three alternative means, which do not require use of the Registration Form. Without some assessment of how many voters actually use the Registration Form, we cannot even begin to gauge the impact it may have had on party registration rolls.

Moreover, even if we were to assume that a significant number of voters used the Registration Form, Plaintiffs failed to adduce *any* evidence—statistical, anecdotal, or otherwise—that the Registration Form has, in fact, encouraged voters to register for the major parties over minor ones. Plaintiffs suggest that the Registration Form discourages voters from registering with minor parties by sending "a message to the future voter" that there are only "two [*real*] political parties in this State," and that "[r]egistering for any other party is a show of eccentricity" that must be "grudgingly tolerate[d]." However, Plaintiffs failed to introduce even an iota of evidence in support of this assertion. The alleged psychological effects that the Registration Form has on registering voters is sheer speculation.[9] Plaintiffs' other contention—that voters have been unable to register with the party of their choosing because the blank line below the word "Other" in box 14 is "too short to contain even the word 'Libertarian' "—is similarly unsupported by any evidence in the record.

In sum, by failing to adduce evidence that the Registration Form actually discourages or prevents voters from registering with minor parties, Plaintiffs have failed to meet their "initial burden of showing that [Arizona's] ballot access requirements seriously restrict the availability of political opportunity." *Munro,* 31 F.3d at 762. At most, § 16152(A)(5) imposes a *de minimis* burden on Plaintiffs' First and Fourteenth Amendment rights.

C. Section 16–152(A)(5) is Rationally Related to a Legitimate State Interest

[13] **[14]** **[15]** **[16]** Where, as here, a state election law imposes only a *de minimis* burden on a party's First and Fourteenth Amendment rights, the State "need demonstrate only that [the statute at issue] is rationally related to a legitimate state interest." *Cronin,* 620 F.3d at 1218 (quoting *Munro,* 31 F.3d at 763 (internal quotation marks omitted)).[10] In evaluating the constitutionality of such statutes, we may "look to any conceivable interest promoted by the challenged procedures, whether or not the state cited that interest in its briefs or in the district court." *Munro,* 31 F.3d at 763; *see also Dudum,* 640 F.3d at 1116 n. 28 (noting that, in sustaining an election law that did not impose a severe burden on constitutional rights, the Supreme Court in *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), "expressly relied on a state interest admittedly not advanced in its briefs, but mentioned during oral argument"). Furthermore, we need not determine whether the interests served by § 16–152(A)(5) can be better served by other means: as we recently concluded, "when a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests." *Dudum,* 640 F.3d at 1114.[11] Finally, where, as here, the regulation at issue imposes only a slight burden on a party's constitutional rights, that party "bear[s] the burden of demonstrating that the regulations [it] attack[s] have no legitimate rational basis." *Munro,* 31 F.3d at 763.[12]

*6 **[17]** **[18]** Plaintiffs have failed to meet their burden. Section 16152(A)(5) is rationally related to Arizona's legitimate interest in ensuring that election official correctly register voters as members of parties of their choosing. By providing checkboxes for the two largest political parties, the Registration Form reduces the potential that an election official will incorrectly register a voter who wishes to affiliate with one of the state's two most prominent parties. Because the overwhelming majority of Arizona voters are registered with one of the two major parties, the checkbox method ensures that most voters will be able to participate in the primary election of their choosing. *See* Ariz.Rev.Stat. § 16467 (providing that, in primary elections, voters who are registered as a member of a political party shall be given "one ballot only of the party with which the voter is affiliated"). Ensuring that voters are able to participate in their preferred party's primary election is, at the very least, a legitimate state interest. *See Kusper v. Pontikes,* 414 U.S. 51, 58, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) ("Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves

with a particular party must surely be to gain a voice in that selection process.").

Although election officials also have an interest in correctly registering applicants who wish to associate with smaller political parties, there are, as the State notes, countervailing concerns about providing checkboxes for smaller political parties that are not present with the two largest parties. For example, smaller political parties lose their status as recognized political parties under Arizona law much more frequently than the major parties do. If Arizona was required to provide checkboxes for all political parties entitled to continuing ballot access, as Plaintiffs suggest, the State would be required to change, and reprint, the Registration Form each time a party lost, or gained, continuing ballot access. [13] Thus, § 16–152(A)(5) helps to ensure that election officials will easily be able to determine the preferred party for most of Arizona's voters in a manner that the State has deemed to be cost efficient and less prone to clerical error. This cost-benefit analysis is the kind of judgment that the Legislature was entitled to make. *See Munro,* 31 F.3d at 764 ("[B]ecause the current scheme poses only a minuscule burden for minor party candidacies, the Constitution does not require [the state] to adopt a system that is the most efficient possible; it need only adopt a system that is rationally related to achieving its goals."); *Lemons v. Bradbury,* 538 F.3d 1098, 1104 (9th Cir.2008) (upholding Oregon's system for verifying that individuals who signed a referendum because it reduced the state's administrative burden); *Weber v. Shelley,* 347 F.3d 1101, 1106 (9th Cir.2003) (concluding that a state has a legitimate interest in saving money). [14]

IV.

*7 In sum, we conclude that Plaintiffs have failed to meet their burden of demonstrating that § 16–152(A)(5) is not rationally related to a legitimate state interest. Accordingly, the judgment of the district court is

AFFIRMED.

Judge McKEOWN, Circuit Judge, concurring:

I concur in the panel's judgment: Arizona's voter registration form passes constitutional muster. I write separately because I believe the rational basis review and burden-shifting standards articulated in *Libertarian Party of Washington v. Munro,* 31 F.3d 759 (9th Cir.1994), and applied by the panel in this case, are inconsistent with the Supreme Court's approach to analyzing voting rights challenges.

The majority opinion discusses at length how political parties in Arizona gain access to the ballot and states that "[t]he relevant inquiry 'is whether "reasonably diligent" minor party candidates can normally gain a place on the ballot....' " Maj. Op. at 14–15 (quoting *Munro,* 31 F.3d at 762). But this is not a ballot access case. This case focuses instead on the state's voter registration process, specifically the form that lists only the two major political parties and simply leaves a blank for a prospective voter to identify any other party. This is, of course, a change from the prior voter registration form that identified no specific parties and simply provided a write-in line for party preference. The essence of the minority parties' claim is that they are burdened because the revised form advantages the major parties. By not being listed, the minority parties claim they are unable to compete for voter registrations on an equal footing. [1]

The starting point for analyzing an election law challenge is the Supreme Court's opinion in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). The Court succinctly stated the applicable standard: "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (internal quotation marks and citations omitted).

In *Munro,* we summarized *Burdick* as follows: "If the burden is severe, the challenged procedures will pass muster only if they are narrowly tailored to achieve a compelling state interest. If the burden is slight, the procedures will survive review as long as they have a rational basis." 31 F.3d at 761 (citing, but not quoting, *Burdick,* 504 U.S. at 434). According to *Munro,* in the event plaintiffs can only demonstrate a "slight" or "*de minimis* " impairment of their rights, they then bear "the burden of demonstrating that the regulations they attack have no legitimate rational basis." *Id.* at 763. The panel recognizes that the standard articulated in *Munro* is in tension with Supreme Court precedent, but applies it nonetheless. Maj. Op. at 18–19 & n.12.

*8 Neither rational basis review nor the burden-shifting framework articulated in *Munro* is found in *Burdick*, nor in any other Supreme Court voting rights decision since. The Supreme Court has consistently employed language that rejects traditional rational basis review. In *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), for example, the Court wrote that there is no "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)).

This understanding of the Supreme Court's approach to analyzing voting rights cases is faithfully reflected in our recent decision in *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir.2011). There, we concluded that San Francisco's instant runoff voting system imposed an "extremely limited burden[ ]" on the plaintiffs. *Id.* at 1117. We nonetheless evaluated whether the government's purported interests were "substantial enough to justify" that minimal burden. *Id.* at 1114–17. This language can be read as a variation on the "sufficiently weighty" requirement. Other cases have likewise eschewed resort to traditional rational basis analysis when evaluating the constitutionality of laws that impose "nonsevere burdens" on voting rights. *See, e.g., Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir.2008) (upholding regulation imposing a "minimal burden on plaintiffs' rights" with respect to signature verification in the referendum process); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1017 (9th Cir.2002) (weighing the government's "important regulatory interest in predictable and administrable election rules" against challenge to regulation on how candidates are identified on the ballot). Indeed, neither party in this case argued that rational basis review was the appropriate standard for analyzing the minority parties' claims.

Munro, like the majority opinion, suffers another deficiency —it places the burden on the plaintiffs vis-a-vis the state's purported interests. In a situation where there is only a slight burden on a party's constitutional rights, *Munro* instructs that that party "bear[s] the burden of demonstrating that the regulations [it] attack[s] have no legitimate rational basis." 31 F.3d at 763. This turns *Burdick's* balancing standard on its head and relieves the state of its burden of putting forward "interests 'sufficiently weighty to justify the limitation.' " *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288–89). It is no accident that in introducing the balancing standard, the Court counseled lower courts that they "must weigh the character and magnitude" of plaintiffs' asserted injury "against the precise interests put forward by the State." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

*9 It may well be that the semantic distinction between the balancing test and the rational basis standard articulated in *Munro* makes little difference in many cases. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L.Rev. 313, 330 (2007) ("For now, suffice it to say that the Supreme Court typically applies something like rational basis review in [voting rights cases where the burden is nonsevere], but that the rationality standard may not be quite so lax as the one applied to ordinary economic and social legislation."). However, it is difficult to believe that the Supreme Court's articulation of the balancing standard represents anything other than a deliberate choice to eschew traditional rational basis review. The balancing standard instructs courts to be vigilant in their review of rules and regulations that disadvantage minority viewpoints. *See Anderson*, 460 U.S. at 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."). The balancing principle also recognizes that voting laws that at first glance appear to be inconsequential may unfairly distort election outcomes. *See, e.g., Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337, 1346 (Cal.1975) (holding that it is unconstitutional for a ballot to list candidates in alphabetical order because it "reserves advantageous ballot positions for candidates whose names begin with letters occurring early in the alphabet").

Any effort to apply the balancing standard to this case is hamstrung by a lack of evidence. It is remarkable that both parties rely principally on generalizations, i.e. a claimed burden, or platitudes, i.e. efficiency, rather than evidence. Other than the registration form itself and statistics that show an ambiguous decline in voter registrations across all political parties, the minority parties have not presented any evidence that demonstrates the burden on their rights.[2] Likewise, the state has not even attempted to document the administrative benefits of its voter registration form. Without any evidence regarding the practical consequences of the voter registration form, we find ourselves in the position of Lady Justice: blindfolded and stuck holding empty scales.

In light of the poorly developed record in this case, I conclude that the voter registration form passes constitutional muster. The form is constitutional, however, not because the minority parties have "failed to meet their burden" of demonstrating it "ha[s] no legitimate rational basis," Maj. Op. at 19. Rather, the voter registration form is constitutional because, even on the thin record we have before us, the state's asserted interests in reducing printing costs and easing administrative efficiency are "sufficiently weighty to justify" the speculative burden on the plaintiffs' rights. *See Crawford,* 553 U.S. at 191.

***10** I recognize that *Munro* has never been officially overruled or abrogated. However, in my view, to the extent *Munro* prescribes a different standard than what the Supreme Court articulated in *Burdick* and reiterated in *Crawford,* we should fix it.

All Citations

--- F.3d ----, 2015 WL 4664606, 15 Cal. Daily Op. Serv. 8692, 2015 Daily Journal D.A.R. 9056

Footnotes

1 Although the exact percentage of voters registered with each party has fluctuated slightly since January 1, 2011, the Republican and Democratic Parties have remained the two parties with the highest number of registered voters.

2 Arizona law sets forth certain criteria that make a resident of the state a "qualified elector." *See* Ariz.Rev.Stat. §§ 16–101, 16–121.

3 We may take judicial notice of "official information posted on a governmental website, the accuracy of which [is] undisputed." *Dudum v. Arntz,* 640 F.3d 1098, 1101 n. 6 (9th Cir.2011) (citing *Daniels–Hall v. Nat'l Educ. Ass'n,* 629 F.3d 998–99 (9th Cir.2010)).

4 In addition, "[t]he National Voter Registration Act requires States to 'accept and use' a uniform federal form to register voters in federal elections. *Arizona v. Inter Tribal Council of Ariz., Inc.,* ——U.S. ——, ——, 133 S.Ct. 2247, 2251, 186 L.Ed.2d 239 (2013). The federal form, like the second and third Arizona options described above, permits a voter to indicate a political party of choice, but does not include checkboxes for the two largest political parties. *See* U.S. Election Assistance Commission, National Mail Voter Registration Form, http://www.eac.gov/assets/1/Documents/FederalV#oter #Registration—6–25–14—ENG.pdf (last visited Mar. 20, 2015).

5 Arizona law also permits individuals who are not members of political parties to qualify for the ballot if they comply with certain criteria. *See* Ariz.Rev.Stat. § 16–341.

6 At oral argument counsel for appellants informed the court that the Green Party has again qualified for continuing ballot access by submitting a petition with a sufficient number of signatures.

7 Although Plaintiffs assert both First and Fourteenth Amendment claims, "[t]he Supreme Court has addressed such claims collectively using a single analytic framework." *Dudum,* 640 F.3d at 1106 n. 15. Plaintiffs agree that this "single analytic framework" applies here.

8 Plaintiffs urge us to forgo a severity-of-the-burden analysis, arguing that, because § 16–152(A)(5) differentiates between major and minor parties on its face, strict scrutiny automatically applies. Plaintiffs' proposed bright-line rule is at odds with both Supreme Court precedent and our own. Although the Supreme Court has expressed a generalized concern about laws that favor major parties over minor parties, *see, e.g., Anderson,* 460 U.S. at 793 n. 16; *Clingman v. Beaver,* 544 U.S. 581, 603, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring in part and concurring in the judgment), it has only applied strict scrutiny to a state election law after determining that the law imposed a severe burden on a party's constitutional rights. *See, e.g., Williams,* 393 U.S. at 25 n. 1, 31. Moreover, we have repeatedly refused to apply strict scrutiny to election laws that differentiate between major and minor parties, so long as the law at issue did not "severely burden" a minor party's constitutional rights. *See, e.g., Cronin,* 620 F.3d at 1217–18; *Munro,* 31 F.3d at 763. Accordingly, we reject Plaintiffs' contention that strict scrutiny automatically applies to all state election laws that facially distinguish between major and minor parties.

9 Both sides make much of a chart compiled by the State that details the number of qualified electors registered with the Republican, Democratic, Green, and Libertarian Parties, as well as an undefined "Other" category, at various points between January 1, 2011, and March 1, 2012. These raw data do not, by themselves, allow us to draw reliable conclusions as to whether the Registration Form actually dissuaded new voters from registering with minor parties. Party registration may ebb and flow for myriad reasons, including overall changes in the number of eligible voters, in voter mobilization activity, or in disaffection with the electoral process. Although a study isolating the effects that the Registration Form has

had on party registration might allow a fact-finder reasonably to infer that the Registration Form has discouraged voters from registering with minor parties, Plaintiffs have presented no such evidence here.

10 Alternatively, we have stated that, in cases in which an election law imposes a *de minimis* burden on constitutional rights, the challenged procedures "survive review as long as they further a state's *important regulatory interests*." *Wash. State Republican Party v. Wash. State Grange,* 676 F.3d 784, 793–94 (9th Cir.2012) (internal quotation marks omitted) (emphasis added). In this context, we have used the terms "legitimate" interests and "important regulatory" interests interchangeably. *See Cronin,* 620 F.3d at 1217, 1218; *Dudum,* 640 F.3d at 1114, 1116.

11 Although we have noted that there may be "instances where a burden is not severe enough to warrant strict scrutiny review but is serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests," *Dudum,* 640 F.3d at 1114 n. 27, for the reasons set forth above, it is clear that § 16–152(A)(5) does not impose a serious enough burden on Plaintiffs' constitutional rights to mandate this kind of comparative analysis.

12 We apply *Munro* because it is binding on us and addresses situations, like this one, in which the burden, if it exists at all, is vanishingly small. We note, however, that *Munro* 's statements that we may consider hypothetical rationales for a state's election law, and that the plaintiff alleging a *de minimis* burden must demonstrate the *lack* of a rational basis, are in tension with some of our other cases and Supreme Court precedent. *See, e.g., Burdick,* 504 U.S. at 434; *Dudum,* 640 F.3d at 1106, 1113–14. We need not resolve that tension, however, because even under the balancing of interests and burdens analysis, we would nonetheless reject this challenge. First, as noted above, Plaintiffs failed to adduce evidence of *any* burden at all; absent *any* burden, there is no reason to call on the State to justify its practice. At most, Plaintiffs established a burden on those wishing to register with a third party, limited to writing a word rather than checking a box —assuredly not an infringement of constitutional dimension. Second, the State's rationale, which we below hold justifies this law, is not hypothetical or manufactured by the court, having been specifically articulated in its brief on appeal. Third, even if the State bears the ultimate burden of persuasion with regard to the justification of this law, we are persuaded, given the very slight burden involved, that it survives constitutional scrutiny.

13 Indeed, just during the pendency of this appeal, the State would have had to alter and replace such a Registration Form when the Green Party lost its continuing ballot access, and change it again when the Green Party regained access.

14 The State also argues that § 16–152(A)(5) serves its interest of "maintaining the stability of Arizona's political system through a healthy two-party system." In light of our conclusion that § 16–152(A)(5) is rationally related to the State's legitimate interest in efficiently and accurately determining most voters' registration preference, we do not address this assertion.

1 In *Anderson v. Celebrezze,* the Supreme Court explicitly recognized that state "schemes ... govern[ing] the registration and qualification of voters" can burden "the individual's right to vote and his right to associate with others for political ends." 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). For example, it would surely be unconstitutional for a state to sponsor voter registration drives at Republican Party events, while refusing to do so at comparable Democratic gatherings. The tacit encouragement alleged by the minority parties here is of the same character, but of a different magnitude.

2 The majority states not only that the burden imposed by the voter registration form is "*de minimis,*" but also that it is "assuredly not an infringement of constitutional dimension." Maj. Op. at 19 n.12. I disagree. In the ballot context, the Supreme Court has specifically recognized the burden imposed by requiring voters to write a word rather than to check a box. *Lubin v. Panish,* 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 39 L.Ed.2d 702. ("The realities of the electoral process, however, strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."). It would be more accurate to state that any burden is slight, not that it lacks a "constitutional dimension."

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United States Court of Appeals,
Fifth Circuit.

Robert SWINDOL, Plaintiff–Appellant
v.
AURORA FLIGHT SCIENCES CORPORATION, Defendant–Appellee.

No. 14–60779. | Aug. 28, 2015.

Synopsis

Background: Former employee brought action against former employer for wrongful discharge and defamation under state law after he was fired for bringing a firearm on company property. The United States District Court for the Northern District of Mississippi, Sharion Aycock, J., 2014 WL 4914089, dismissed. Former employee appealed.

Holdings: The Court of Appeals, Leslie H. Southwick, Circuit Judge, held that:

[1] Court of Appeals would take judicial notice of public documents found on state websites to establish former employer's citizenship;

[2] former employer's principal place of business was Virginia, and thus diversity jurisdiction existed;

[3] Court of Appeals would certify to Mississippi Supreme Court question of whether Mississippi statute prohibiting enforcement of employer policy prohibiting firearms in vehicles created an exception to employment-at-will doctrine; and

[4] Court of Appeals would certify to Mississippi Supreme Court question of whether statute that immunized employers from liability arising from complying with statutory command that there be no policy barring employees from having firearms in their vehicles applied in former employee's action.

Questions certified.

West Headnotes (12)

[1] **Federal Courts**
⇦ Withholding Decision; Certifying Questions

Federal Courts
⇦ Appellate Jurisdiction and Procedure in General

If the Court of Appeals lacks jurisdiction, it can neither certify a controlling legal question to a state court nor resolve the merits itself.

Cases that cite this headnote

[2] **Federal Courts**
⇦ Pleadings and Motions

A party claiming diversity of citizenship must allege the state of incorporation and the principal place of business of corporate parties.

Cases that cite this headnote

[3] **Federal Courts**
⇦ Pleadings and Motions

Motions to amend pleadings to show jurisdiction may be considered when the Court of Appeals' discretionary examination of the record as a whole establishes at least a substantial likelihood that jurisdiction exists. 28 U.S.C.A. § 1653.

Cases that cite this headnote

[4] **Evidence**
⇦ Official Proceedings and Acts

The Court of Appeals would take judicial notice of public documents found on Mississippi Secretary of State's and Virginia State Corporation Commission's websites to establish corporate defendant's citizenship, in questioning sua sponte whether federal courts had diversity jurisdiction. Fed.Rules Evid.Rule 201(b)(2), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Courts**
⇦ Place of Business

Corporation's principal place of business was in Virginia, and thus diversity jurisdiction existed in claim against corporation for wrongful discharge and defamation brought by former employee who was a Mississippi citizen, where judicially-noticed public documents established that corporation's principal office was located in Virginia and all of its corporate officers had an office in Virginia. 28 U.S.C.A. § 1653.

Cases that cite this headnote

[6] **Federal Courts**
⇦ Place of Business

For purposes of diversity jurisdiction, the principal place of business is—where the corporation's high level officers direct, control, and coordinate the corporation's activities.

Cases that cite this headnote

[7] **Federal Courts**
⇦ Withholding Decision; Certifying Questions

Federal courts may certify an unsettled question of state law to a state's highest court when that court has a procedure permitting such questions to be posed.

Cases that cite this headnote

[8] **Federal Courts**
⇦ Pleading

The Court of Appeals gives de novo review to a district court's dismissal for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[9] **Federal Courts**
⇦ Particular Questions

The Court of Appeals would certify to the Mississippi Supreme Court the question of whether the Mississippi statute prohibiting enforcement of an employer policy prohibiting persons from storing firearms in a locked vehicle in a parking area on employer's property was sufficient to create an exception to the Mississippi employment-at-will doctrine, such that an employee could not be terminated for violating a prohibited policy banning firearms in vehicles in parking areas; there were no state-law authorities to guide federal courts in deciding how the firearm statute affected the employment-at-will doctrine, and only two exceptions to such doctrine had been recognized. Miss.Code Ann. § 45–9–55(1); Miss. R.App. P. 20.

Cases that cite this headnote

[10] **Labor and Employment**
⇦ Termination; Cause or Reason in General

Under Mississippi law, employment at will means employers may fire employees for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible.

Cases that cite this headnote

[11] **Federal Courts**
⇦ Particular Questions

The Court of Appeals would certify to the Mississippi Supreme Court the question of whether statute that immunized employers from liability arising from complying with statutory command that there be no policy barring employees from having firearms in their vehicles would immunize employer from former employee's action for wrongful termination and defamation after being terminated due to having a firearm in his vehicle parked in employer's parking lot. Section 45–9–55(5); Miss. R.App. P. 20(a).

Cases that cite this headnote

[12] **Federal Courts**
⇦ Withholding Decision; Certifying Questions

Factors that guide federal courts in deciding whether to certify a question to a state

supreme court include: (1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Mississippi.

Before WIENER, CLEMENT, and SOUTHWICK, Circuit Judges.

Opinion

LESLIE H. SOUTHWICK, Circuit Judge:

*1 The district court dismissed Robert Swindol's wrongful discharge and defamation claims under Federal Rule of Civil Procedure 12(b)(6). It held that Mississippi's employment-at-will doctrine barred the wrongful discharge claim and that falsity had not been adequately alleged for the defamation claim. The wrongful discharge claim presents an important and determinative question of state law that has not been addressed by Mississippi courts. We conclude we should certify the question to the Mississippi Supreme Court.

[1] [2] Before explaining the reasons for the certification, we address an issue of jurisdiction. If we lack jurisdiction, we can neither certify a controlling legal question to a state court nor resolve the merits ourselves. After briefing was completed, this court noticed that Swindol, a Mississippi citizen, had not alleged Aurora's principal place of business in his complaint. A party claiming diversity of citizenship, as does Swindol, must allege the state of incorporation and the principal place of business of corporate parties. *Nadler v. Am. Motors Sales Corp.*, 764 F.2d 409, 413 (5th Cir.1985). In his complaint, Swindol alleged only that Aurora "is a foreign corporation, organized and existing under the laws of the State of Delaware, qualified to do and doing business in the State of Mississippi," with an agent there for service of process.

[3] Though the complaint was deficient, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. Motions to amend under Section 1653 may be considered when "our discretionary examination of the record as a whole establishes at least a substantial likelihood that jurisdiction exists." *Nadler*, 764 F.2d at 413.

Because the appellate record was deficient, we ordered the parties to file a joint letter brief regarding jurisdiction. The parties responded by stipulating that Aurora's principal place of business is in Virginia. Further, the parties moved the court to take judicial notice of printouts of online state agency records that they submitted to us and that showed Aurora's principal office is located in Virginia. The records also list the same principal office as the business address of all of Aurora's officers and directors.

[4] We find guidance on when to take judicial notice in an older opinion in which we questioned *sua sponte* whether the federal courts had diversity jurisdiction; that case involved an individual plaintiff and a corporate defendant. *See Kaufman v. W. Union Tel. Co.*, 224 F.2d 723, 725 (5th Cir.1955). The plaintiff alleged that the defendant was "a corporation organized under law with an office and place of business in Dallas, Dallas County, Texas, where service of citation may be had." [1] *Id.* We granted the plaintiff leave to amend her complaint because "[t]he 1950 edition of the Encyclopedia Britannica ... indicates that [Western Union] is a New York corporation." *Id.* Because the court raised the jurisdictional question *sua sponte* without ordering additional briefing, it must have noticed the relevant facts listed in the encyclopedia. We follow *Kaufman* to the extent it supports the taking of judicial notice of public documents establishing Aurora's citizenship. [2]

*2 Federal Rule of Evidence 201(b)(2) provides that courts "may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." We conclude that the accuracy of these public

records contained on the Mississippi Secretary of State's and the Virginia State Corporation Commission's websites cannot reasonably be questioned. *See Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir.2005) (denying petition for rehearing en banc and explaining that panel took judicial notice of information contained on the Texas Council on Sex Offender Treatment website).

[5] [6] From those records, we discern two relevant facts. First, Aurora's principal office is located in Manassas, Virginia. Second, all of Aurora's corporate officers have an office in Virginia. The principal place of business is "where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 80, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010). Based on these facts, as confirmed by the parties' joint stipulation, we find that Aurora's principal place of business is in Virginia. Because Swindol is a citizen of Mississippi and Aurora is a citizen of Delaware and Virginia, we have jurisdiction to consider Swindol's appeal.

Finally, we exercise our discretion to grant Swindol's motion for leave to amend under Section 1653 because the judicially noticed documents persuade us that the parties are completely diverse. Consequently, the complaint "is hereby deemed to have been amended to incorporate the additional allegations of citizenship." *Firemen's Insurance*, 288 F.2d at 350.

* * *

[7] Having concluded that we have jurisdiction, we now turn to the issues surrounding certification. We may certify an unsettled question of state law to a state's highest court when that court has a procedure permitting such questions to be posed. *See* 17A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4248 (3d ed.2015) (noting that "[c]ertification first came to public attention" in the 1960 Supreme Court decision, reviewing a Fifth Circuit opinion, of *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960)). Mississippi has such a procedural rule. *See* MISS. R.APP. P. 20. We follow the guidelines of that rule in presenting this question to the Mississippi Supreme Court.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE MISSISSIPPI SUPREME COURT, PURSUANT TO MISSISSIPPI RULE OF APPELLATE PROCEDURE 20.

TO THE MISSISSIPPI SUPREME COURT AND THE HONORABLE JUSTICES THEREOF:

STYLE OF THE CASE

The style of this case is *Swindol v. Aurora Flight Sciences Corp.*, No. 14–60779, in the United States Court of Appeals for the Fifth Circuit. The case is on appeal from a judgment of the United States District Court for the Northern District of Mississippi. Federal jurisdiction is based on diversity of citizenship.

STATEMENT OF FACTS

***3** Swindol worked for Aurora Flight Sciences Corporation in Mississippi. He parked his car in Aurora's parking lot with a firearm locked inside. Aurora's managers learned about the firearm and fired Swindol later the same day for violating a company policy forbidding firearms on company property. Aurora then convened a plant-wide meeting during which its human resources manager told employees that Swindol was a security risk and instructed them to call the police if they saw him near the facility.

Swindol sued Aurora in United States District Court in Mississippi. He asserted there was diversity jurisdiction under 28 U.S.C. § 1332. He brought state-law claims for wrongful discharge and defamation. Aurora moved to dismiss Swindol's complaint under Rule 12(b)(6). The district court granted the motion, dismissing Swindol's wrongful discharge claim with prejudice and his defamation claim without prejudice. [3] Swindol appealed.

DISCUSSION

A. Wrongful Termination Claim

[8] [9] This court gives *de novo* review to a district court's dismissal under Rule 12(b)(6). *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007). Swindol's wrongful termination claim is governed by Mississippi law in this diversity action. *See Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1145 (5th Cir.1997).

Swindol was terminated because he violated company policy by having a firearm in his vehicle in the company parking lot. He argues that a Mississippi statute prohibits the enforcement of such a policy:

> Except as otherwise provided in subsection (2) of this section, a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area.

MISS.CODE ANN. § 45–9–55(1). The cross-referenced subsection (2) provides a different rule for certain secured parking lots. Neither party claims that rule applies here. Also relevant is the final section of the statute, subsection (5), which exempts the employer from liability in some circumstances: "A public or private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." *Id.* at § 45–9–55(5).

The district court dismissed the wrongful discharge claim, concluding that Mississippi state courts would not recognize discharging an employee for possession of a weapon in his car in a manner compliant with this statute as an exception to that state's employment-at-will doctrine. Because of its ruling on subsection (1), the court did not analyze the effect of subsection (5).

Swindol contends that we should interpret Section 45–9–55 to create a "separate and additional public policy exception to the at-will doctrine" because doing so would fortify Mississippi's public policy supporting the right to bear arms. Such a policy, he argues, is also found in the Mississippi Constitution's provision protecting "[t]he right of every citizen to keep and bear arms." MISS. CONST. art. III, § 12.

*4 **[10]** We have discovered no Mississippi case law addressing the effect of Section 45–9–55. It is evident that the statute expresses a policy in favor of allowing employees to have weapons in their vehicles in workplace parking areas, with certain exceptions. It is undisputed that Aurora had a firearms policy that is inconsistent with the statute. Those facts still leave as questions whether the firing violated the statute and whether it can be remedied in this action despite the employment-at-will doctrine. We hesitate to intrude into such a seemingly well-settled area of state law. As the Mississippi Supreme Court has held, employment at will means employers may fire employees "for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible." *McArn v. Allied Bruce–Terminix Co., Inc.*, 626 So.2d 603, 606 (Miss.1993) (citation and quotations omitted). The two exceptions to the Mississippi employment-at-will doctrine identified by the *McArn* court over 20 years ago remain the only two recognized so far. Neither *McArn* exception applies here. *See id.* at 607.

Though the Mississippi Supreme Court has not expanded the exceptions after *McArn*, the court has been clear that the legislature has the authority to create new exceptions. *See, e.g., Kelly v. Miss. Valley Gas Co.*, 397 So.2d 874, 876 (Miss.1981). In *Kelly*, the court held that the employment-at-will doctrine barred the plaintiff's claims for retaliatory discharge based on his employer's firing him for exercising his statutory right to file a workmen's compensation claim. *Id.* The *Kelly* court based its decision largely on the lack of a statutory provision expressly making it a crime for an employer to discharge an employee for filing such a claim. *Id.* The Mississippi statute here, though, goes beyond just giving rights to employees. It is express that an employer may not *enforce* a policy prohibiting employees from having weapons in their locked vehicles. *See* § 49–9–55. The issue as we see it is whether that prohibition is sufficient to create an exception to the Mississippi employment-at-will doctrine.

[11] We also conclude we would benefit from the state court's analysis of whether Section 45–9–55(5) bars this suit. One reading of the subsection is that it only immunizes employers from liability that would arise from complying with the statutory command that there be no policy barring employees from having weapons in their cars. The release from liability that Aurora seeks, though, is from the act of terminating an employee for reasons allegedly inconsistent with the statute. We also find some interpretive assistance in the doctrine that the legislatively adopted title of a bill is an appropriate source of meaning. *Aikerson v. State*, 274 So.2d 124, 128 (Miss.1973), *overruled on other grounds by Conley v. State*, 790 So.2d 773 (Miss.2001). The legislation that became this statute included in its title the statement that the Act provided "Immunity for Employers with Respect to the Transportation or Storage of a Firearm on Employer's Property." 2006 MISS. LAWS Ch. 450 caption.

If immunity applies simply to employer liability arising from the transportation and storage of firearms, it may not apply to an employer's enforcement of a policy prohibiting transportation or storage.

*5 We conclude that these questions are "determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court," MISS. R.APP. P. 20(a). Therefore, it is appropriate under state law to pose the questions for certification.

[12] Even when permitted by state law, our own list of factors guides us in deciding whether to certify a question to a state supreme court: (1) "the closeness of the question and the existence of sufficient sources of state law"; (2) "the degree to which considerations of comity are relevant in light of the particular issue and case to be decided"; and (3) "practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir.1998) (quoting *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274–75 (5th Cir.1976)). We will apply what we term the *Shevin* factors to this case.

Section 45–9–55 clearly expresses a public policy prohibiting employers from barring employees from possessing firearms in the manner the plaintiff claims he did. Yet there are no state-law authorities to guide us in deciding how this statute affects the employment-at-will doctrine. Mississippi state courts have not identified any exceptions to the doctrine beyond those in *McArn*. That consistency raises compelling comity interests that stay our hand from adding an exception in federal court even were we to decide an exception had been statutorily created. The Mississippi Supreme Court is the only court that can definitively decide whether the well-settled *McArn* doctrine has been affected by Section 45–9–55. Though there may be unknown problems caused by delay, there is no difficulty in framing the question to the court.

We also note that this issue is not unique to the present appeal. Another panel of this court recently issued an opinion discussing the effect of the same statute on similar claims. *See Parker v. Leaf River Cellulose, L.L.C.*, No. 15–60034, 2015 WL 4523743 (5th Cir. July 27, 2015). In light of our certification of this question, the mandate in *Leaf River* has been held pending the Mississippi Supreme Court's response to this certification.

We hold that the *Shevin* factors justify our certifying the question.

QUESTION CERTIFIED

Whether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45–9–55.

We do not mean the Mississippi Supreme Court must only reply to the precise question certified. The answer provided by that court will help decide the issue on appeal in this case. Under Mississippi Rule of Appellate Procedure 20(d), the Mississippi Supreme Court will notify this court what it requires and in what form from the record of the case.

*6 This panel retains cognizance of the appeal in this case pending the response from the Mississippi Supreme Court.

QUESTION CERTIFIED TO THE MISSISSIPPI SUPREME COURT.

All Citations

--- F.3d ---, 2015 WL 5090578

Footnotes

1 At the time, the federal diversity statute defined a corporation's citizenship according to the location of its principal place of business. *See Firemen's Ins. Co. of Newark, N.J. v. Robbins Coal Co.*, 288 F.2d 349, 350 (5th Cir.1961).

2 Our holding is also consistent with the decisions of the majority of circuits that have considered whether judicial notice can be used to resolve jurisdictional questions on appeal. *Compare Wallace v. Media News Grp., Inc.*, 568 F. App'x 121, 123 n. 2 (3d Cir.2014) (taking judicial notice of a corporation's state of incorporation and principal place of business and holding that diversity jurisdiction existed), *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 974 (11th Cir.2002) (taking judicial notice of fact that no plaintiffs "st[ood] to recover more than $75,000 in actual damages from th[e] litigation" and remanding to state court), *Caffery v. N.Y. Cent. R.R. Co.*, 324 F.2d 711, 712 (2d Cir.1963) (taking judicial notice of the

defendant's principal place of business and dismissing for lack of jurisdiction), *Berkowitz v. Phila. Chewing Gum Corp.*, 303 F.2d 585, 587–88 (3d Cir.1962) (taking judicial notice of the plaintiff's appointment as guardian ad litem rather than general guardian, and because relevance of guardian ad litem status to diversity jurisdiction required further fact-finding, remanding for further consideration of jurisdictional issue), *and Town of Bethel v. Atl. Coast Line R.R. Co.*, 81 F.2d 60, 60–61, 61 n. 1 (4th Cir.1936) (taking judicial notice of state statutes to determine citizenship of company and dismissing for lack of jurisdiction), *with Penteco Corp. Ltd. P'ship–1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1522 n. 2 (10th Cir.1991) (refusing to take judicial notice of document showing that diversity jurisdiction did not exist). We have also taken judicial notice of a county appraisal, which raised further doubt that the amount-in-controversy requirement was satisfied in that case, and remanded for further consideration of the jurisdiction issue. *Statin v. Deutsche Bank Nat'l Trust Co.*, 599 F. App'x 545, 547–48 (5th Cir.2014) (per curiam).

3 The district court dismissed the defamation claim for failure to make sufficient allegations as required by *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We need not review the dismissal prior to the Mississippi Supreme Court's response to this certification.

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2015 WL 5120242
Only the Westlaw citation is currently available.
Court of Appeal,
First District, Division 3, California.

David JOHNSON et al., Plaintiffs and Appellants,
v.
UNITED STATES STEEL CORPORATION,
Defendant and Respondent.

A142485 | Filed September 1, 2015

Synopsis

Background: Auto mechanic filed products liability action based on design defect theory against supplier of fabricator with benzene-containing coal residue that was once the principal ingredient in fabrication of solvent for loosening rusted bolts and machine parts, contending that mechanic's chronic exposure to benzene-containing products led him to develop acute myeloid leukemia. The Superior Court, Alameda County, No. RG13669270, Wynne S. Carvill, J., granted supplier summary judgment and awarded supplier costs. Mechanic appealed.

[**Holding:**] The Court of Appeal, Pollak, Acting P.J., held that fact issue as to whether fabricator was defective and whether defect caused mechanic's injury precluded summary judgment.

Judgment reversed, postjudgment order vacated, and remanded with directions.

West Headnotes (20)

[1] **Evidence**
⇦ Official proceedings and acts

Court of Appeal would take judicial notice of government report on toxicological profile for benzene on review of auto mechanic's product's liability action against supplier of fabricator with benzene-containing coal residue that was once the principal ingredient in fabrication of solvent for loosening rusted bolts and machine parts, contending, under design defect theory, that mechanic's chronic exposure to benzene-containing products led mechanic to develop acute myeloid leukemia. Cal. Evid. Code § 452(h).

Cases that cite this headnote

[2] **Products Liability**
⇦ Strict liability

Products Liability
⇦ Negligence or fault

One may seek recovery in a products liability case on theories of both negligence and strict liability.

Cases that cite this headnote

[3] **Products Liability**
⇦ Strict liability

Strict products liability insures that costs of injuries resulting from defective products are borne by manufacturers that put such products on the market, rather than by injured persons who are powerless to protect themselves.

Cases that cite this headnote

[4] **Negligence**
⇦ Elements of Strict Liability

Strict liability is not absolute liability.

Cases that cite this headnote

[5] **Products Liability**
⇦ Strict liability

Products Liability
⇦ Nature of Product and Existence of Defect or Danger

Products Liability
⇦ Proximate Cause

Manufacturer is not an insurer for all injuries that may result from the use of its product in strict products liability action; it is liable for injuries caused by a product defect.

Cases that cite this headnote

[6] **Products Liability**
⇐ Nature of Product and Existence of Defect or Danger

Products Liability
⇐ Proximate Cause

When injury is in no way attributable to a defect, there is no basis for strict liability in products liability action.

Cases that cite this headnote

[7] **Products Liability**
⇐ Nature of Product and Existence of Defect or Danger

Strict product liability seeks to hold manufacturers and others in the stream of commerce accountable when there is something wrong with the product.

Cases that cite this headnote

[8] **Products Liability**
⇐ Manufacturing defect

Product has "manufacturing defect," as would support holding manufacturer liable in strict products liability case, if it differs from manufacturer's intended result or from other ostensibly identical units of the same product line.

Cases that cite this headnote

[9] **Products Liability**
⇐ Warnings or Instructions

"Warning defect," as would support determination holding manufacturer liable in strict products liability case, occurs when manufacturer does not adequately warn consumer of a particular risk that was known or knowable in light of the generally recognized and prevailing scientific and medical knowledge available at the time of manufacture and distribution.

Cases that cite this headnote

[10] **Products Liability**
⇐ Design

Products Liability
⇐ Consumer expectations

Product has "design defect," as would support determination holding manufacturer liable in strict products liability case, if product fails to meet ordinary consumer expectations as to safety or design is not as safe as it should be. Restatement (Third) of Torts, Products Liability, § 2.

Cases that cite this headnote

[11] **Products Liability**
⇐ Consumer expectations

Consumer expectations test, which is rooted in theories of warranty and is used to identify design defects in strict product liability actions, recognizes that implicit in a product's presence on the market is a representation that it is fit to do safely the job for which it was intended. Restatement (Third) of Torts, Products Liability, § 2.

Cases that cite this headnote

[12] **Products Liability**
⇐ Consumer expectations

Products Liability
⇐ Foreseeable or intended use

Products Liability
⇐ Design defect

Where product is one of common experience, encountered generally in everyday life, jury can rely on its own expectations of safety in applying consumer expectations test, asking whether product performed as safely as an ordinary consumer would expect when used in intended and reasonably foreseeable manner, to identify design defect in strict products liability action. Restatement (Third) of Torts, Products Liability, § 2.

Cases that cite this headnote

[13] **Products Liability**
⇐ Consumer expectations

Where product is in such specialized use that general public is not familiar with its safety characteristics, manufacturer may still be liable in strict products liability action under consumer expectations test if safe performance of product fell below the reasonable, widely shared minimum expectations of those who do use it.

Cases that cite this headnote

[14] **Products Liability**
⇐ Risk-utility test

Products Liability
⇐ Consumer expectations

Consumer expectations test, used to identify design defect by asking whether product performed as safely as ordinary consumer would expect when used in intended and reasonably foreseeable manner, is not suitable in all strict product liability cases and is reserved for those cases where circumstances of product's failure permit inference that product's design performed below legitimate, commonly accepted minimum safety assumptions of its ordinary consumers; if the facts do not permit such inference, risk-benefit test must be used to determine whether, on balance, benefits of challenged design outweigh risk of danger inherent in the design. Restatement (Third) of Torts, Products Liability, § 2.

Cases that cite this headnote

[15] **Products Liability**
⇐ Persons Liable

Seller of completed product is strictly liable for any defect in the completed product, regardless of the source of the defect.

Cases that cite this headnote

[16] **Products Liability**
⇐ Components and raw materials; bulk suppliers

Manufacturer of completed product cannot escape strict liability by tracing defect to component part supplied by another. Restatement (Third) of Torts, Products Liability, §§ 5, 19.

Cases that cite this headnote

[17] **Products Liability**
⇐ Components and raw materials; bulk suppliers

Seller of a component part is not strictly liable for any defect in completed product, but only for those defects in component part it sold. Restatement (Third) of Torts, Products Liability, §§ 5, 19.

Cases that cite this headnote

[18] **Products Liability**
⇐ Components and raw materials; bulk suppliers

Component manufacturers and suppliers, as sellers of products, are subject to products liability. Restatement (Third) of Torts, Products Liability, §§ 5, 19.

Cases that cite this headnote

[19] **Products Liability**
⇐ Components and raw materials; bulk suppliers

"Component parts doctrine" provides that manufacturer of component part is not liable in products liability action for injuries caused by finished product into which component has been incorporated unless component itself was defective and caused harm. Restatement (Third) of Torts, Products Liability, §§ 5, 19.

Cases that cite this headnote

[20] **Judgment**
⇐ Tort cases in general

Genuine issues of material fact existed as to whether fabricator with benzene-containing coal residue that was once the principal component of solvent for loosening rusted bolts and machine parts was defective and whether defect caused auto mechanic's acute myeloid leukemia, precluding summary judgment in

favor of supplier of fabricator under component parts doctrine in mechanic's strict product liability action based on design defect theory. Restatement (Third) of Torts, Products Liability, §§ 2, 5, 19.

See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1449 et seq.

Cases that cite this headnote

Superior Court of the County of Alameda, RG13669270, Hon. Wynne S. Carvill, Judge. (Alameda County Super. Ct. No. RG13669270)

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Counsel for Defendant and Respondent: Hogan Lovells U.S. LLP, Barry J. Thompson, David W. Skaar, Los Angeles, and Catherine E. Stetson, The Cairone Law Firm PLLC, Matt Cairone.

Opinion

Pollak, Acting P.J.

*1 Plaintiffs David and Laura Johnson filed a products liability action against suppliers, manufacturers and retailers of various paints, adhesives, lubricants, solvents, and other products containing benzene. They contend that David's chronic exposure as an auto mechanic to benzene-containing products led him to develop acute myeloid leukemia (AML). Among the defendants is United States Steel Corporation (U.S. Steel), which supplied a fabricator with a benzene-containing coal residue called "raffinate" that was once the principal ingredient in the fabrication of Liquid Wrench, a solvent for loosening rusted bolts and machine parts.

In somewhat unorthodox proceedings, the trial court granted summary judgment to U.S. Steel, finding insufficient evidence to support causes of action for negligence and strict products liability under a design defect theory. The finding rests on the so-called "component parts doctrine" (or, as in this case, the "bulk supplier defense"), under which "the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 355, 135 Cal.Rptr.3d 288, 266 P.3d 987.) Distinguishing cases that have held raw asbestos to be inherently defective and to contain a design defect under the consumer expectations test, the court held that raffinate is not inherently defective so that U.S. Steel could not be liable under a design defect theory.

We agree with the trial court that the supplier of a raw material used in the manufacture of another product can be held liable for a design defect under the consumer expectations test only if the raw material is itself inherently defective. However, summary judgment was granted erroneously because the record does not contain evidence negating the existence of a design defect under this test of the coal raffinate produced and sold by U.S. Steel.

Statement of Facts [1]

[1] Benzene was first discovered and isolated from coal tar in the 1800's but, today, is derived mostly from petroleum. (U.S. Dept. of Health & Human Services, Toxicological Profile for Benzene (2007) <http:// www.atsdr.cdc.gov/toxprofiles/tp3.pdf> [as of Sep. 1, 2015], p. 2 (Benzene Profile).) [2] It is a colorless liquid with a sweet odor that is widely used in the United States in the manufacture of lubricants, plastic, rubber, and pesticides. (*Id.* at pp. 1–2.) It "ranks in the top 20 in production volume for chemicals produced in the United States." (*Id.* at p. 2.)

*2 "Benzene is commonly found in the environment," mostly from industrial processes. (Benzene Profile, *supra,* at p. 2.) "Everyone is exposed to a small amount of benzene every day.... The major sources of benzene exposure are tobacco smoke, automobile service stations, exhaust from motor vehicles, and industrial emissions. Vapors (or gases) from products that contain benzene, such as glues, paints, furniture wax, and detergents, can also be a source of exposure." (*Id.* at p. 3.) "Individuals employed in industries that make or use benzene may be exposed to the highest levels of benzene." (*Id.* at p. 4.) Benzene is a carcinogen. (*Id.* at p. 6.) Long-term exposure can cause leukemia, AML in particular. (*Ibid.*)

U.S. Steel manufactures steel, which is an alloy of iron and carbon. The company converts coal to coke for use in steel

production. A byproduct of the coking process is light oil, from which U.S. Steel extracts benzene, toluene and xylene. U.S. Steel sells these chemicals for industrial use. Raffinate is what remains of the light oil and its constituent chemicals after most of these "more saleable" chemical compounds are extracted. "Raffinate" is a chemistry term, defined as "a liquid product resulting from extraction of a liquid with a solvent" or "the less soluble residue that remains after extraction (as in refining lubricating oil)." (Webster's 3d New Internat. Dict. (2002) p. 1874.) U.S. Steel extracts the benzene, toluene and xylene capable of being distilled from the light oil but some of these chemicals remain in the raffinate.

From 1960 to 1978, U.S. Steel sold its raffinate to Radiator Specialty Company (Radiator). Raffinate was less expensive than the refined chemical compounds of benzene, toluene and xylene. Radiator purchased U.S. Steel's raffinate in bulk, in 10,000– and 20,000–gallon railroad tank cars. The total amount of raffinate purchased by Radiator is unstated but a Radiator executive estimates the amount to be "hundreds of thousands of pounds."

Radiator is a "formulator;" it does not manufacture or refine chemicals itself. Radiator formulates Liquid Wrench, which it markets as a "penetrating oil" or liquid solvent for loosening rusted bolts and machine parts. Radiator introduced Liquid Wrench in 1941. In the period from 1960 to 1978, Radiator sold at least two different formulations of Liquid Wrench. One formulation of Liquid Wrench contained as its principal ingredient raffinate that was supplied solely by U.S. Steel. Raffinate comprised "about 89 or 90 percent" of the raffinate-based Liquid Wrench. Another formulation of Liquid Wrench contains petroleum distillates. Radiator markets its petroleum-based product as "deodorized" Liquid Wrench. The raffinate-based formula was withdrawn from the market in 1978 but the petroleum-based product continues to be sold today. Radiator distributes its Liquid Wrench formulations nationwide and internationally to hardware stores, auto parts stores, and other retail outlets.

In 1960, Congress enacted the Federal Hazardous Substances Act (FHSA) to " ' "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." ' " (*People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal.App.4th 1373, 1387, 62 Cal.Rptr.2d 368, italics omitted; see 15 U.S.C.S. § 1261 et seq.) In response to the new labeling requirements, Radiator hired chemist consultants to test Liquid Wrench for toxicity. Chemical tests found the raffinate supplied by U.S. Steel to contain various amounts of benzene, ranging from 1 to 14 percent. Radiator asked U.S. Steel to detail the chemical composition of raffinate. In 1963, a manager in U.S. Steel's coal chemical sales division wrote to Radiator, stating that the company did "not have positive control over the composition of this material since it is derived from an extraction process." The U.S. Steel manager estimated the composition of raffinate to be benzene (5 percent minimum), toluene and xylene (25 percent minimum) and aliphatics and cycloparaffins (70 percent maximum). At the time, U.S. Steel knew benzene to be "one of the most toxic industrial poisons. When inhaled, it acts principally on the nerve tissue and the blood forming organs," "especially the bone marrow and blood vessels."

***3** Radiator placed warning labels on Liquid Wrench. The label on the petroleum-based product said "contains Petroleum Distillate" and the label on the raffinate-based product said "contains benzol," another term for benzene. Both labels cautioned users to avoid prolonged breathing of vapors and stated the products were "harmful or fatal if swallowed." The raffinate-based Liquid Wrench label contained additional warnings, including a skull and crossbones symbol and the word "poison." No Liquid Wrench product label or advertisement warned that the product was carcinogenic or could cause cancer.

David Johnson testified he first used Liquid Wrench around 1968 when, at age 10, he began helping his stepfather with auto repairs. In 1971, he became a "shop kid" at a local service station, where he helped disassemble and clean auto engines, among other tasks. He used Liquid Wrench "almost daily" to loosen bolts. He applied the solvent "liberally" to saturate the bolts and surrounding area. Johnson sometimes applied Liquid Wrench while working under a car and the solvent ran down his arm into his armpit; it would "get all over" him. Johnson continued to use Liquid Wrench in subsequent employment from 1972 through 1979, as a service station attendant and mechanic. While working at a salvage yard in 1975, he used one or two bottles of Liquid Wrench a day. He testified, with equivocation, that there was a skull and cross bones symbol on the Liquid Wrench container he used at a worksite, which identifies it as the raffinate-based formula.[3] Johnson left automotive mechanical work in 1980. In 1994, Johnson returned to work as a mechanic and continued in that occupation until 2012, when he was diagnosed with AML.

Procedural History

In February 2013, Johnson and his wife filed an action against U.S. Steel, Radiator, and numerous other defendants alleging Johnson's personal injury from chronic exposure to benzene-containing products. The operative first amended complaint states four cause of action: negligence, strict products liability (design defect and failure to warn), fraudulent concealment, and loss of consortium.

U.S. Steel filed a motion for summary judgment or, in the alternative, summary adjudication. U.S. Steel claimed the evidence was insufficient to show Johnson was exposed to raffinate-formula Liquid Wrench, thus negating the element of causation on all causes of action and entitling it to summary judgment. Alternatively, U.S. Steel sought summary adjudication of the negligence and product liability causes of action to the extent they are based on a failure to warn. U.S. Steel argued it was a bulk supplier of a raw material and any duty to warn of the material's health hazards was discharged when it provided adequate warnings to Radiator. The trial court ultimately held that there was a triable issue of fact as to Johnson's exposure to raffinate-based Liquid Wrench but that U.S. Steel satisfied its duty to warn of health hazards when it provided adequate warnings to Radiator, thus negating the causes of action for fraudulent concealment, negligence, and strict products liability based on the alleged failure to warn. Johnson does not challenge this ruling on appeal. For present purposes, therefore, we proceed on the assumption that U.S. Steel provided adequate warnings of the health hazards of the raffinate.

*4 In its trial court reply brief, U.S. Steel argued for the first time that it was entitled to summary judgment on all causes of action because it is a "bulk supplier" that provided a raw material that was added to other ingredients, packaged and sold by an intermediary. The court requested and received supplemental briefing on the issue, but the statements of undisputed facts were not supplemented and no additional evidence addressed to the consumer expectations theory of design defect or to the inherent defectiveness of U.S. Steel's raffinate was submitted. Johnson argued that U.S. Steel, as a component supplier, may be liable for the sale of its benzene-containing raffinate because the raffinate was defective in design when it left U.S. Steel's factory, before its incorporation in a finished product. U.S. Steel argued that raffinate and the benzene it contains are not defective, as they can be safely used with proper handling, unlike asbestos that is "inherently defective" and has no safe application. The trial court granted summary judgment to U.S. Steel, holding that in contrast to asbestos, which "is an inherently defective product," Johnson "ha[d] not cited any decisional authority for the proposition that benzene is inherently defective, or that raffinate is inherently defective because it contains benzene. The potentially hazardous nature of a substance does not equate to an inherent defect. (See, e.g., *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669, 674 [96 Cal.Rptr. 803].)"

Johnson and his wife timely filed a notice of appeal from the judgment and subsequent order awarding costs to U.S. Steel. They challenge only the design defect ruling and, as indicated above, do not contest dismissal of their failure to warn claims.

Discussion

1. *Basic principles in the law of products liability*

[2] " 'Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products.' " (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 478, 110 Cal.Rptr.2d 370, 28 P.3d 116, quoting Prosser & Keeton, Torts (5th ed. 1984) § 95, p. 677.) One may seek recovery in a products liability case on theories of both negligence and strict liability. (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387, 93 Cal.Rptr. 769, 482 P.2d 681.)

[3] The doctrine of strict liability for products was adopted to address the realities of an industrial society, where "handicrafts have been replaced by mass production" and a consumer may not have the "means or skill to investigate for himself [or herself] the soundness of a product" (*Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 467, 150 P.2d 436 (conc. opn. of Traynor, J.)) nor sufficient knowledge of the manufacturing process to prove negligence (*id.* at p. 463, 150 P.2d 436). Strict products liability "insure [s] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63, 27 Cal.Rptr. 697, 377 P.2d 897.)

Strict products liability was originally applied to manufacturers of consumer goods but has been extended to

retailers, distributors, suppliers and other entities in the chain of distribution of a product that causes harm to a person or to property other than the product itself. (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 476–478, 127 Cal.Rptr.2d 614, 58 P.3d 450; *Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564, 575–576, 90 Cal.Rptr.3d 414.) A "product" is broadly defined to include any "tangible personal property distributed commercially for use or consumption." (Rest.3d Torts, Products Liability, § 19, subd. (a).)

[4] [5] [6] [7] Strict liability is not absolute liability (*Anderson v. Owens–Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 994, 281 Cal.Rptr. 528, 810 P.2d 549.) A manufacturer is not an insurer for all injuries that may result from the use of its product; it is liable for injuries caused by a product *defect*. (*Ibid.*) As Justice Traynor observed: "A bottling company is liable for the injury caused by a decomposing mouse found in its bottle. It is not liable for whatever harm results to the consumer's teeth from the sugar in its beverage. A knife manufacturer is not liable when the user cuts himself with one of its knives. When the injury is in no way attributable to a defect there is no basis for strict liability." (Traynor, *The Ways and Meanings of Defective Products and Strict Liability* (1965) 32 Tenn. L.Rev. 363, 367.) Strict product liability seeks to hold manufacturers (and others in the stream of commerce) accountable when there is "something wrong" with the product. (*Id.* at p. 366.)

*5 [8] [9] [10] "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 427, 143 Cal.Rptr. 225, 573 P.2d 443.) Three general types of defects have been discerned: manufacturing defects, warning defects, and design defects. (*Anderson v. Owens–Corning Fiberglas Corp., supra,* 53 Cal.3d at p. 995, 281 Cal.Rptr. 528, 810 P.2d 549.) A product has a manufacturing defect if it "differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." (*Barker, supra,* at p. 429, 143 Cal.Rptr. 225, 573 P.2d 443.) A warning defect occurs when a manufacturer does not adequately warn the consumer of "a particular risk that was known or knowable in light of the generally recognized and prevailing scientific and medical knowledge available at the time of manufacture and distribution." (*Anderson, supra,* at p. 1002, 281 Cal.Rptr. 528, 810 P.2d 549.) In California, a product is defective in design if "the product fails to meet ordinary consumer expectations as to safety" or "the design is not as safe as it should be." (*Barker, supra,* at p. 432, 143 Cal.Rptr. 225, 573 P.2d 443; accord *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 566–570, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

[11] [12] [13] [14] The California Supreme Court has set out two alternative tests for identifying a design defect: "first, whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner and, second, whether on balance the benefits of the challenged design outweigh the risk of danger inherent in the design." (*Anderson v. Owens–Corning Fiberglas Corp., supra,* 53 Cal.3d at p. 995, 281 Cal.Rptr. 528, 810 P.2d 549.) The consumer expectations test, which is "rooted in theories of warranty, recognizes that implicit in a product's presence on the market is a representation that it is fit to do safely the job for which it was intended." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120, 123 Cal.Rptr.2d 303.) "In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers." (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 569, 34 Cal.Rptr.2d 607, 882 P.2d 298.) Where the product is one of "common experience," encountered generally in everyday life, the jury can rely on its own expectations of safety in applying the test. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, 184 Cal.Rptr. 891, 649 P.2d 224.) Where a product is in such "specialized use" that the general public is not familiar with its safety characteristics, a manufacturer may still be liable if "the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who do use it." (*Soule, supra,* at p. 567, fn. 4, 34 Cal.Rptr.2d 607, 882 P.2d 298, italics omitted.) The consumer expectations test is not suitable in all cases. It is reserved for those cases where "the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Id.* at pp. 568–569, 34 Cal.Rptr.2d 607, 882 P.2d 298.) If the facts do not permit such an inference, the risk-benefit test must be used. (*Id.* at p. 568, 34 Cal.Rptr.2d 607, 882 P.2d 298.)[4]

*6 [15] [16] [17] Sellers of all products are responsible for defects that exist in the product when it leaves the seller's control and is placed on the market. Thus, the seller of a completed product is strictly liable for any defect in the completed product, regardless of the "source" of the defect; "a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied

by another." (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261, 37 Cal.Rptr. 896, 391 P.2d 168.) But the seller of a component part is *not* strictly liable for any defect in the completed product but only for those defects in the component part *it sold*. (*Jimenez v. Superior Court, supra,* 29 Cal.4th at p. 480, 127 Cal.Rptr.2d 614, 58 P.3d 450.)

2. The component parts doctrine

[18] "Component parts are products, whether sold or distributed separately or assembled with other component parts." (Rest.3d Torts, Products Liability, § 19, com. b, p. 268; see *Jimenez v. Superior Court, supra,* 29 Cal.4th at p. 480, 127 Cal.Rptr.2d 614, 58 P.3d 450 [citing definition]). "Product components include raw materials, bulk products, and other constituent products sold for integration into other products." (Rest.3d Torts, Products Liability, § 5, com. a, p. 130.) Component manufacturers and suppliers, as sellers of "products," are subject to products liability. (*Jimenez, supra,* at p. 479, 127 Cal.Rptr.2d 614, 58 P.3d 450.) "Like manufacturers, suppliers, and retailers of complete products, component manufacturers and suppliers are 'an integral part of the overall producing and marketing enterprise,' and may in a particular case 'be the only member of that enterprise reasonably available to the injured plaintiff,' and may be in the best position to ensure product safety." (*Ibid.*)

[19] "The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co., supra,* 53 Cal.4th at p. 355, 135 Cal.Rptr.3d 288, 266 P.3d 987.) "If the component itself is not defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." (Rest.3d Torts, Products Liability, § 5, com. a, p. 131.) The component parts doctrine " 'rests on "a line of cases holding an entity supplying a *nondefective* raw material or a component part is not strictly liable for defects in the final product over which it had no control." [Citations.] Under the rule of these cases, the manufacturer of a product component or ingredient is not liable for injuries caused by the finished product unless it appears that the component itself was "defective" when it left the manufacturer.' " (*Tellez–Cordova v. Campbell–Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, 581, 28 Cal.Rptr.3d 744, italics added.)

[20] U.S. Steel contends the component parts doctrine absolves it of liability for injuries caused by its raffinate that was integrated into Liquid Wrench. Under the component parts doctrine, U.S. Steel bears no responsibility for damages caused by Liquid Wrench if the raffinate was not itself defective when delivered to Radiator for incorporation into the finished product. But U.S. Steel is liable if the raffinate was defective and its defect caused Johnson's injuries. Many if not most of the cases questioning the strict liability of component suppliers concern either alleged manufacturing defects or alleged failures to provide adequate warnings of the risks attendant to use of the product. Here, as previously mentioned, the only issue is whether, under the consumer expectations test, the raffinate was defective in design when delivered to Radiator.

*7 Application of the consumer expectations standard to identifiable self-contained components of larger products into which the component is integrated is conceptually not difficult. In *Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 157 Cal.Rptr. 248, for example, summary judgment was granted to an automotive tire manufacturer sued for manufacturing and design defects upon evidence that the cause of a fatal accident was a valve stem attached to the tire *after* the tire left the factory. (*Id.* at pp. 625, 627, 629–630, 157 Cal.Rptr. 248.) The tire, a component of the automobile, was itself not defective and thus the tire manufacturer was not liable. (*Id.* at pp. 629–630, 157 Cal.Rptr. 248.) In *Jimenez v. Superior Court, supra,* 29 Cal.4th at page 476, 127 Cal.Rptr.2d 614, 58 P.3d 450, on the other hand, the California Supreme Court held a manufacturer of windows installed in mass-produced homes strictly liable for harm resulting from manufacturing and design defects in the windows. The court rejected the window makers' claim that it should not be subject to strict products liability because it "merely supplied component parts" that were assembled and installed by others. (*Id.* at pp. 479–480, 127 Cal.Rptr.2d 614, 58 P.3d 450.) "The issue is not whether the product was sold fully assembled or in parts, but rather whether the defect that resulted in the alleged damage existed when the windows left the manufacturers' control." (*Id.* at p. 480, 127 Cal.Rptr.2d 614, 58 P.3d 450.)

Application of the consumer expectations test to raw materials that become an indistinguishable part of another product presents a more difficult conceptual problem, which is at the nub of the present case. Raw materials are often basic building block materials with multiple uses. They include "products, whether manufactured, such as sheet

metal; processed, such as lumber; or gathered and sold or distributed in raw condition, such as unwashed gravel and farm produce." (Rest.3d Torts, Products Liability, § 19, com. b, p. 268.) How does one determine there is "something wrong" with these products? (Traynor, *The Ways and Meanings of Defective Products and Strict Liability, supra,* 32 Tenn. L.Rev. at p. 366.) According to a comment in the Restatement, "a basic raw material such as sand, gravel, or kerosene cannot be defectively designed. Inappropriate decisions regarding the use of such materials are not attributable to the supplier of raw materials but rather to the fabricator that puts them to improper use." (Rest.3d Torts, Products Liability, § 5, com. c, p. 134.) Yet, in *Arena v. Owens–Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1186, 74 Cal.Rptr.2d 580, another division of this court pointed out that a supplier of raw asbestos was using "the terms 'design defect' in too literal a manner when arguing that asbestos cannot be defectively designed. The term 'design defect' as described in *Barker v. Lull Engineering Co., supra,* 20 Cal.3d 413, 429, 143 Cal.Rptr. 225, 573 P.2d 443 relates more to a legal conclusion that a product has deviated in some manner from what is reasonably expected, than it does to a description of a specific mechanical shortcoming or flaw."[5]

Under the consumer expectations test, raw asbestos has been found to be defective in design and suppliers of raw asbestos held strictly liable for the product. (E.g., *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 658–662, 74 Cal.Rptr.3d 359; *Arena v. Owens–Corning Fiberglas Corp., supra,* 63 Cal.App.4th at pp. 1184–1191, 74 Cal.Rptr.2d 580; *Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224, 1226–1232, 53 Cal.Rptr.2d 642.) In *Jenkins,* the court held, "As a matter of law, a bulk supplier of raw asbestos fiber incorporated into a finished product can be subject to strict products liability to an individual suffering from a disease caused by exposure to the supplier's asbestos." (45 Cal.App.4th at p. 1231, 53 Cal.Rptr.2d 642.) The court reached this decision after quoting from an opinion of the Illinois Supreme Court holding that "[t]he evidence showed clearly that handling asbestos in any form produces dust. Liability may be imposed in a products case if the injury results from a condition of the product and the condition is unreasonably dangerous and existed when the product left the defendant's control." (*Id.* at p. 1229, 53 Cal.Rptr.2d 642, italics deleted.) The court found that the evidence presented at trial established that "raw asbestos fibers do not change after becoming a component part of pipe insulation" (*ibid.*) so that the raw asbestos was properly treated as a "product" subject to strict products liability.

*8 In *Arena,* the court found a supplier of raw asbestos subject to strict products liability under the consumer expectations test of a design defect. (*Arena v. Owens Corning Fiberglas Corp., supra,* 63 Cal.App.4th at p. 1181, 74 Cal.Rptr.2d 580.) The court noted that "incorporating raw asbestos into an insulation product does not substantially alter" the asbestos and contrasted asbestos with other raw materials the physical composition of which is changed by an intermediary in the process of producing another product that is unsafe. (*Id.* at p. 1188, 74 Cal.Rptr.2d 580, citing, among other cases, *Walker v. Stauffer Chemical Corp., supra,* 19 Cal.App.3d at p. 672, 96 Cal.Rptr. 803 [sulfuric acid in drain cleaner] and *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 71 Cal.Rptr.2d 817 [silicone in breast implant].) "[I]t is not the manufacturing process that creates the dangerous propensity of the asbestos, nor does the manufacturing process change the nature of the asbestos." (*Arena, supra,* at p. 1189, 74 Cal.Rptr.2d 580.) Unlike the "sand, gravel, or kerosene" that the comment to the Restatement stated "cannot be defectively designed" (Rest.3d Torts, Products Liability, § 5, com. c, p. 134), the court observed that "asbestos is not a component material that is usually innocuous, such as sand [or] gravel" (*Arena, supra,* at p. 1191, 74 Cal.Rptr.2d 580) and that an injury caused by exposure to the product in which it is incorporated is not caused by an intermediary's use of the material but by "a defect in the raw asbestos contained in the product" (*ibid.*).

In *Garza,* this court followed *Arena* in holding that the consumer expectations test was properly applied to a raw asbestos supplier. (*Garza v. Asbestos Corp., Ltd., supra,* 161 Cal.App.4th at pp. 658–660, 74 Cal.Rptr.3d 359.) We noted that "raw asbestos fibers do not change when they become a component part of another asbestos product," unlike the sulfuric acid in *Walker* that was substantially altered when used to make a drain cleaner. (*Garza,* p. 660, 74 Cal.Rptr.3d 359.)

In *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 117 Cal.Rptr.3d 791, the court affirmed a judgment imposing liability for personal injuries on the supplier of asbestos used in the manufacture of joint compound based on several theories, including "design defect/consumer expectations." (*Id.* at p. 27, 117 Cal.Rptr.3d 791.) The court rejected application of the "supplier/component parts doctrine," pointing out that "[a]sbestos suppliers have sought the protection of that rule, but it has not been afforded to them,

because raw asbestos is a defective product," citing *Jenkins, Garza, and Arena*. (*Stewart*, p. 29, 117 Cal.Rptr.3d 791.)

Raw asbestos has been deemed defective under the consumer expectations test because factually it has been shown to be inherently injurious, whether or not incorporated into another product, and because, without a change in its composition, it causes products into which it is incorporated to perform less safely than ordinary consumers would expect. As stated in *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 93, 136 Cal.Rptr.3d 630, "Asbestos itself is dangerous when handled in any form even if it is unchanged by the manufacturer. Indeed, asbestos is dangerous when it leaves the supplier's control." Although *Maxton* considered raw asbestos to be "[t]he one notable exception" to the rule that raw materials generally cannot by themselves be defective unless they are contaminated (*id.* at p. 94; 136 Cal.Rptr.3d 630), there may be other exceptions. In *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 110 Cal.Rptr.2d 722, for example, the court held that Dow Chemical Company, the manufacturer of chemicals used by others to produce pesticides that were defective under the consumer expectations test, could be strictly liable to those injured by exposure to those pesticides (*id.* at p. 727, 110 Cal.Rptr.2d 722). In holding both the manufacturer of the finished product and Dow as the supplier of the chemical component allegedly causing the harmful effects to be potentially liable, the court noted that a pesticide, like asbestos insulation, is "within the ordinary experience and understanding of a consumer" (*ibid.*) and a consumer may "reasonably believe that pesticides are designed to eliminate pests within homes occupied by humans, without causing significant harm to the humans" (*id.* at p. 717, 110 Cal.Rptr.2d 722).

Two features thus distinguish the cases in which component raw materials have been found to be defective under the consumer expectations test from cases absolving the seller of the raw material from liability: first, the raw material in question is itself harmful and, without change in its composition, remains so when incorporated into other products and, second, the raw material renders the product into which it is incorporated harmful, contrary to ordinary consumer expectations. *Walker v. Stauffer Chemical Corp., supra,* 19 Cal.App.3d 669, 96 Cal.Rptr. 803, a case emphasized by U.S. Steel and distinguished in several of the asbestos cases cited above, highlights these distinctions. In *Walker*, the physical composition of the bulk sulfuric acid claimed to be defective was "substantially altered" in the process of manufacturing the drain cleaning product into which it was incorporated. (*Id.* at p. 672, 96 Cal.Rptr. 803.) "The ultimate product Clear–All can in no way be considered to be one and the same bulk sulfuric acid manufactured by Stauffer and sold to [the manufacturer of the Clear–All]." (*Ibid.*) And sulfuric acid, although potentially dangerous, is "both a useful and desirable product" that can be incorporated into other products that presumably are not defective under the consumer expectations or any other test. (*Id.* at p. 674, 96 Cal.Rptr. 803.) Similarly, in *Maxton,* metal products that were alleged to be defective "were substantially changed during the manufacturing process" (*Maxton v. Western States Metals, supra,* 203 Cal.App.4th at p. 93, 136 Cal.Rptr.3d 630) and "can be used in innumerable ways" that (implicitly) are not harmful (*id.* at p. 94, 136 Cal.Rptr.3d 630). The court affirmed pretrial judgments for the suppliers of the metal products upon concluding the products were not defective when they left the suppliers' control and "only became dangerous because of the manufacturing process controlled by [plaintiff's] employer." (*Id.* at p. 93, 136 Cal.Rptr.3d 630.)[6] In both cases, there was thus no design defect in the raw material.[7]

***9** In the present case, the trial court held that the raffinate sold by U.S. Steel to Radiator was not defective because Johnson "has not cited any decisional authority for the proposition that benzene is inherently defective, or that raffinate is inherently defective because it contains benzene." Initially, it must be emphasized that the product in question is not benzene but U.S. Steel's coal-based raffinate.[8] The benzene contained in the raffinate may render the raffinate harmful, but it is the raffinate that is claimed to be defective under the consumer expectations test. Whether that product is defective is a question of fact, not to be decided by "decisional authority" unless by application of collateral estoppel. So far as indicated by the authorities brought to our attention, no case has determined whether the coal-based raffinate produced and sold by U.S. Steel is a defective product, and the record contains no evidence from which this factual determination can be made. The record contains no evidence tending to disprove the toxicity of raffinate or of the products into which it is incorporated in ways that would not be apparent to most people, no evidence showing that the composition of the raffinate was altered in the process of formulating Liquid Wrench, and no evidence showing that it was possible to incorporate the raffinate into Liquid Wrench or any other product without rendering that product less safe than ordinary consumers would expect. Raffinate may well be a substance with which ordinary consumers are unfamiliar

and have no expectations concerning its properties or effects. Nonetheless, should the evidence show that its incorporation into Liquid Wrench, and indeed into any finished product, without change in its chemical structure causes that product to be less safe than ordinary consumers would expect, the raffinate will have been shown to contain a design defect under the consumer expectation test.

To obtain summary judgment, it was U.S. Steel's burden to present evidence negating the existence of a design defect in the raffinate. Having failed to do so, the burden of presenting contrary evidence never shifted to Johnson. Nonetheless, the record does contain evidence creating a triable issue of this material fact. "[T]he threshold for withstanding a motion for summary judgment or nonsuit, thus permitting the jury to determine whether the allegedly defective product satisfied ordinary consumer expectations, is quite low." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1311, 144 Cal.Rptr.3d 326.) There is evidence the raffinate contained between 1 and 14 percent benzene, a known carcinogen. A U.S. Steel manager estimated its raffinate to contain at least 5 percent benzene. Johnson says the raffinate lacked "any objective features (a burning sensation instead of no sensation, or a foul smell instead of a sweet smell) that would alert ordinary consumers that its intended use was extremely dangerous." Radiator bottled the raffinate and sold it as Liquid Wrench, apparently with little modification—raffinate comprised "about 89 or 90 percent" of the raffinate-based Liquid Wrench. U.S. Steel presented no evidence that Radiator added any chemical or did anything in formulating or packaging Liquid Wrench that increased the toxicity or danger of the final product from that existing when the raffinate was delivered to Radiator by U.S. Steel.

Johnson contends raffinate is a "toxic waste," without social utility or safe applications, that should have been sent to a hazardous waste site rather than sold to an intermediary for consumer use. We express no opinion as to the accuracy of this assertion. We hold only that U.S. Steel failed to present evidence negating this allegation and that summary judgment in its favor therefore should not have been granted.

Disposition

The judgment is reversed. The postjudgment order awarding costs is vacated. The case is remanded to the trial court with directions to deny the motion for summary judgment and to conduct further proceedings consistent with this opinion. Plaintiffs shall recover costs incurred on appeal upon timely application in the trial court.

We concur:

Siggins, J.

Jenkins, J.

All Citations

--- Cal.Rptr.3d ----, 2015 WL 5120242

Footnotes

1 The statement of facts is based on the parties' pleadings, separate statements of undisputed facts and supporting evidence submitted on the motion for summary judgment. We have considered all of the evidence with the exception of the John Masaitis affidavit to which an evidentiary objection was sustained. This ruling and other evidentiary rulings are not challenged on appeal.

2 We have taken judicial notice of this government report, which was introduced by U.S. Steel, without objection, in the trial court and on appeal. (Evid. Code, § 452, subd. (h).)

3 Johnson was uncertain about product packaging. He described using plastic containers of Liquid Wrench at a time when Liquid Wrench was packaged exclusively in metal containers. Johnson testified he saw a skull and crossbones symbol on Liquid Wrench labels but later said he was "not sure."

4 The current Restatement of Torts also recognizes three categories of defects but defines a design defect to include only instances in which the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design, i.e., the risk-benefit test. (Rest.3d Torts, Products Liability, § 2, subd. (b).) However, comment e to this section of the Restatement recognizes the possibility that there may be product liability absent a reasonable alternative design if the product design is "manifestly unreasonable." (*Id.* at p. 21.) Comment g states that "although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe." (*Id.* at p. 28.) The previous

edition of the Restatement of Torts provided, in a comment, that to be defective, "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (Rest.2d, Torts, Strict Liability, § 402A, com. i, p. 352.)

5 The court there went on to state, "To the extent that the term 'design' merely means a preconceived plan, even raw asbestos has a design, in that the miner's subjective plan of blasting it out of the ground, pounding and separating the fibers, and marketing them for various uses, constitutes a design." (*Arena v. Owens–Corning Fiberglas Corp., supra,* 63 Cal.App.4th at pp. 1186–1187, 74 Cal.Rptr.2d 580.)

6 A recent case, currently under review, disagreed with *Maxton* and held a foundry worker sufficiently alleged direct harm from metal and other raw materials to state a products liability claim against the suppliers. (*Ramos v. Brenntag Specialties, Inc.* (2014) 224 Cal.App.4th 1239, 169 Cal.Rptr.3d 513, review granted July 9, 2014, S218176; accord *Uriarte v. Scott Sales Co.* (2014) 226 Cal.App.4th 1396, 172 Cal.Rptr.3d 886, review granted Sept. 17, 2014, S220088 [strict liability claims stated by sandblaster against sand supplier].) A central issue in these cases is whether workers exposed to hazardous raw materials in the course of their work suffered injury caused by a defect in the material or by inadequate safety precautions of their employer. That issue is not presented in this case, in which Johnson alleges injury from exposure to a finished product incorporating what he alleges to be a defective raw material.

7 In holding that the supplier of bulk silicone compounds, safe for many applications, had no duty to warn arising out of the sale of the compound to the manufacturers of breast implants who substantially altered the compounds in the manufacturing process, the court in *Artiglio v. General Electric Co., supra,* 61 Cal.App.4th at page 839, 71 Cal.Rptr.2d 817 held that the authorities "establish that component and raw material suppliers are not liable to ultimate consumers when the goods or material they supply are not inherently dangerous, they sell goods or materials in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product."

8 U.S. Steel notes that benzene is "a familiar and important commodity" with widespread industrial uses (*Industrial Union Dept., AFL–CIO v. American Petroleum Inst.* (1980) 448 U.S. 607, 615, 100 S.Ct. 2844, 65 L.Ed.2d 1010) that has been found, in at least one case, to be nondefective under a risk-benefit test because its utility outweighs its dangers (*Cole v. Ashland Chemical, Inc.* (E.D.La. Dec. 10, 2010, No. 09–6584) 2010 WL 5141248, 2010 U.S. Dist. Lexis 131215). Other cases have found benzene to be "unavoidably unsafe" and defective only if there is a failure to warn of its hazards. (E.g., *Hall v. Ashland Oil Co.* (D.Conn.1986) 625 F.Supp. 1515, 1518, citing Rest.2d Torts, Strict Liability, § 402A, com. k, pp. 353–354.) California has found a limited number of products to qualify for such treatment—that is, specifically prescription drugs, vaccines, blood, and medical devices. (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 562, 101 Cal.Rptr.3d 726). U.S. Steel does not invoke that doctrine here.

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2015 WL 4397421
United States District Court,
N.D. California,
San Jose Division.

Securities and Exchange Commission, Plaintiff,
v.
Barbra Alexander, et al., Defendants.

Case No. 10–CV–04535–LHK | Signed July 17, 2015

Synopsis

Background: Securities and Exchange Commission (SEC) brought action against officers of corporation, asserting securities fraud claims in connection with investment funds managed by corporation. SEC moved for summary judgment.

Holdings: The District Court, Lucy H. Koh, J., held that:

[1] officers' convictions for criminal securities fraud collaterally estopped them from denying liability on § 10(b) claims;

[2] convictions also estopped officers from denying liability on Securities Act fraud claims;

[3] officers were liable for sale of unregistered securities in violation of Securities Act;

[4] permanent injunction was warranted against officers' future violations of federal securities law;

[5] disgorgement was not warranted; and

[6] third-tier penalties, the most severe, were warranted.

Motion granted in part and denied in part.

West Headnotes (26)

[1] **Evidence**
⇦ Records and decisions in other actions or proceedings

District court would take judicial notice of court records in criminal prosecutions of officers of corporation for securities fraud, in Securities and Exchange Commission (SEC) civil action against officers for securities fraud in connection with investment funds managed by corporation. Fed. R. Evid. 201(b)(2).

Cases that cite this headnote

[2] **Evidence**
⇦ Corporations and Associations and Members Thereof

Evidence
⇦ Official proceedings and acts

District court in securities fraud action would take judicial notice of Securities and Exchange Commission (SEC) attestations that a search of SEC records and files did not reveal any registration documents related to action, which was brought by SEC against officers of corporation in connection with investment funds managed by corporation. Fed. R. Evid. 201(b)(2).

Cases that cite this headnote

[3] **Judgment**
⇦ Persons not parties or privies

"Offensive nonmutual collateral estoppel doctrine" allows non-party to previous action to prevent defendant in subsequent action from relitigating issues which defendant previously litigated and lost against another plaintiff if: (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action.

Cases that cite this headnote

[4] **Judgment**
⇦ Persons not parties or privies

District courts are afforded broad discretion to determine when offensive nonmutual collateral estoppel should be applied.

Cases that cite this headnote

[5] **Judgment**
⇦ Civil or criminal proceedings

Criminal conviction may be used to establish issue preclusion in a subsequent civil suit.

Cases that cite this headnote

[6] **Judgment**
⇦ Civil or criminal proceedings

Criminal conviction's issue preclusion in a subsequent civil suit extends only to questions distinctly put in issue and directly determined in the criminal prosecution.

Cases that cite this headnote

[7] **Judgment**
⇦ Civil or criminal proceedings

Convictions for § 10(b) criminal securities fraud collaterally estopped corporation's officers from denying liability on § 10(b) claims in Securities and Exchange Commission (SEC) civil action against in connection with investment funds managed by corporation; officers' § 10(b) liability relating to funds was actually litigated and finally decided against them by juries in criminal trials, and there were no indices of unfairness weighing against estoppel because SEC actively opposed staying civil action during criminal proceedings, officers had every incentive to avoid criminal liability, and there was no risk of inconsistent judgments. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b), 17 C.F.R. § 240.10b-5.

Cases that cite this headnote

[8] **Judgment**
⇦ Civil or criminal proceedings

District court determining whether offensive nonmutual collateral estoppel should be applied in civil action based on prior criminal proceedings must determine whether there are any indices of unfairness or potential shortcomings in the criminal proceedings that would weigh against estoppel.

Cases that cite this headnote

[9] **Judgment**
⇦ Civil or criminal proceedings

Convictions for securities fraud under Securities Exchange Act collaterally estopped corporation's officers from denying liability on Securities Act fraud claims in Securities and Exchange Commission (SEC) civil action against in connection with investment funds managed by corporation; evidence that would be used in civil action substantially overlapped with evidence in criminal trials showing officers used Ponzi scheme to defraud investors, diverted investor funds, and misrepresented investor returns in fraudulent mailings, statutes in criminal and civil cases prohibited same conduct, cases involved application of same rule of law, and pretrial preparation and discovery for criminal cases would reasonably be expected to have embraced civil claim. Securities Act of 1933 § 17, 15 U.S.C.A. § 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b), 17 C.F.R. § 240.10b-5.

Cases that cite this headnote

[10] **Judgment**
⇦ What constitutes identity of issues

To determine whether two issues are identical as required for application of collateral estoppel, district court considers: (1) whether there is substantial overlap between evidence or argument to be advanced in second proceeding and that advanced in first; (2) whether new evidence or argument involves the application of same rule of law as that involved in prior proceeding; (3) whether pretrial preparation and discovery related to matter presented in first action could reasonably be expected to have embraced matter sought to be presented in second; and (4) how closely related claims involved in two proceedings are.

Cases that cite this headnote

[11] **Securities Regulation**
⇦ Registration Requirement in General

To establish a prima facie case for sale of unregistered securities in violation of Securities Act, plaintiff must show: (1) the defendant directly or indirectly sold or offered to sell securities; (2) no registration statement was in effect as to the securities; and (3) the sale or offer was made through interstate commerce. Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[12] **Securities Regulation**
⇦ Persons Subject to Regulation or Liability

In addition to the one who passes title to a security, other "participants" to the sale may also be held liable for the sale of unregistered securities in violation of the Securities Act, provided that such a person is both a necessary participant and substantial factor in the sales transaction. Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[13] **Securities Regulation**
⇦ Persons Subject to Regulation or Liability

Officers of corporation directly or indirectly sold or offered to sell securities, as required for their liability for sale of unregistered securities in violation of Securities Act in connection with investment funds managed by corporation; officers were both necessary participants and substantial factors in sale of securities, as they personally made communications and representations with respect to the terms of the sale of the securities and actively solicited individual buyers. Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[14] **Securities Regulation**
⇦ Persons Subject to Regulation or Liability

Securities sold by officers of corporation were unregistered, as required for officers' liability for sale of unregistered securities in violation of Securities Act in connection with investment funds managed by corporation; securities sold by officers were never registered with Securities and Exchange Commission (SEC). Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[15] **Securities Regulation**
⇦ Use of mails or instrumentalities of commerce

Securities sold by officers of corporation were sold or offered through interstate commerce, as required for officers' liability for sale of unregistered securities in violation of Securities Act in connection with investment funds managed by corporation; officers used the mails in connection with their sale of securities and they also sold securities to investors across state line. Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[16] **Securities Regulation**
⇦ Persons Subject to Regulation or Liability

Securities Regulation
⇦ Exempt Securities

Unregistered securities sold by corporation's officers in interstate commerce were not entitled to registration exemption, and thus officers were liable for sale of unregistered securities in violation of Securities Act in connection with investment funds managed by corporation. Securities Act of 1933 § 5, 15 U.S.C.A. § 77e(a).

Cases that cite this headnote

[17] **Securities Regulation**
⇦ Nature and grounds of injunction in general

Permanent injunction was warranted against future violations of federal securities law by corporate officers who engaged in securities fraud in connection with investment funds managed by corporation; officers acted with

at least deliberate recklessness in defrauding fund investors, their actions were part of ongoing pattern, not isolated incidents, they never publicly acknowledged wrongfulness of their conduct, for which they were criminally convicted, they were imprisoned and in their sixties, but might enter business world in future, and they provided no assurances against future violations. Securities Act of 1933 § 20, 15 U.S.C.A. § 77t(b); Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(1).

Cases that cite this headnote

[18] **Securities Regulation**
⇐ Nature and grounds of injunction in general

Granting or denying of permanent injunction against violation of federal securities laws rests within the sound discretion of district court. Securities Act of 1933 § 20, 15 U.S.C.A. § 77t(b); Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(1).

Cases that cite this headnote

[19] **Securities Regulation**
⇐ Insiders' Profits, Recovery of

District court has broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of federal securities laws.

Cases that cite this headnote

[20] **Securities Regulation**
⇐ Insiders' Profits, Recovery of

Amount of any disgorgement for violation of federal securities law should include all gains flowing from the illegal activities.

Cases that cite this headnote

[21] **Securities Regulation**
⇐ Insiders' Profits, Recovery of

Disgorgement for violation of federal securities laws need only be a reasonable approximation of profits causally connected to the violation.

Cases that cite this headnote

[22] **Securities Regulation**
⇐ Presumptions and burden of proof

Securities and Exchange Commission (SEC) bears the burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment obtained by defendants as result of violation of federal securities law, and once SEC establishes such reasonable approximation of defendants' actual profits, burden shifts to defendants to demonstrate that the disgorgement figure was not a reasonable approximation.

Cases that cite this headnote

[23] **Securities Regulation**
⇐ Insiders' Profits, Recovery of

Disgorgement by corporate officers was not warranted as equitable remedy in civil securities fraud action brought by Securities and Exchange Commission (SEC), which sought disgorgement in total amount of loss previously adjudicated against officers in criminal securities fraud proceedings in connection with investment funds managed by officers' corporation; while there was no dispute as to amount of total loss for which officers were responsible, SEC failed to carry its burden of showing that total amount of loss was reasonable approximation of officers' actual profits, and disgorgement would be redundant with restitution ordered in criminal proceedings.

Cases that cite this headnote

[24] **Securities Regulation**
⇐ In general; nature and form of remedy

Objectives of civil penalties for federal securities law violations are to both punish individual misconduct and deter future misconduct. Securities Act of 1933 § 20, 15 U.S.C.A. § 77t(d); Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3).

Cases that cite this headnote

[25] **Securities Regulation**
⇐ Relief granted in general

Third-tier penalties, the most severe, were warranted against corporate officer in civil action by Securities and Exchange Commission (SEC) for violation of federal securities law in connection with investment funds managed by officer's corporation, in total amount of $300,000, which represented $150,000 for each of two counts of securities fraud for which officer had previously been criminally convicted; while keeping in mind magnitude of ordered criminal restitution, civil penalty underscored seriousness of officer's conduct, which involved fraud and deliberate or reckless disregard of regulatory requirements and put dozens of investors at significant risk of substantial loss. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3).

Cases that cite this headnote

[26] **Securities Regulation**
⇐ Relief granted in general

Third-tier penalty, the most severe, was warranted against corporate officer in civil action by Securities and Exchange Commission (SEC) for violation of federal securities law in connection with investment funds managed by officer's corporation, in amount of $150,000 corresponding to single count of securities fraud for which officer had previously been criminally convicted; while keeping in mind magnitude of ordered criminal restitution, civil penalty underscored seriousness of officer's conduct, which involved fraud and deliberate or reckless disregard of regulatory requirements and put dozens of investors at significant risk of substantial loss. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3).

Cases that cite this headnote

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

LUCY H. KOH, United States District Judge

*1 Before the Court is Plaintiff Securities and Exchange Commission's ("Plaintiff") motion for summary judgment against Barbra Alexander and Michael E. Swanson (collectively, "Defendants"). ECF No. 65, ("Mot."). [1] Defendants have not filed an opposition. Having considered Plaintiff's motion, the relevant law, and the record in this case, the Court hereby GRANTS in part and DENIES in part Plaintiff's motion for summary judgment.

I. BACKGROUND

In the instant case, Plaintiff alleges that from 2006 to 2009, Defendants Barbra Alexander, Michael Swanson, and Beth Piña [2] misappropriated millions of dollars raised from investors through the fraudulent sale of interests in two real estate investment funds. Compl. ¶ 1. According to the complaint, from November 2006 to February 2008, Alexander and Piña were principals of A & P Properties, Inc., the predecessor to APS Funding, Inc. *Id.* ¶ 13. Swanson provided consulting services to Alexander, Piña, and A & P Properties during this time. *Id.* ¶ 12. In February 2008, A & P Properties was renamed APS Funding, with Alexander serving as President, Swanson as Vice President, and Piña as Secretary/Chief Financial Officer of the corporation. *Id.* ¶¶ 10–13. APS managed two funds, the GCF Investment Fund and the Greenlight Fund. *Id.* ¶¶ 14–16. Both funds were created to raise capital to be used for short-term financing. *Id.* ¶¶ 14, 16.

More specifically, the GCF Investment Fund and the Greenlight Fund purported to make "short-term, fixed rate

loans typically used for property acquisitions, enhancements, improvements, and new construction." *United States v. Alexander,* No. 10–CR–00730–LHK; *United States v. Swanson,* No. 10–CR–00730–LHK, Ex. 8 at 4, 11. Defendants solicited investors from inside and outside of California. *See* ECF No. 229, 97:13–98:2 (10–CR–00730–LHK). To encourage investors to invest with the funds, Defendants represented to investors that the annual rate of return would amount to 12%. *See* ECF No. 228, 221:12–222:22 (10–CR–00730–LHK). Defendants also represented that the loans made by the funds would be secured by deeds of trust, and that "[a]ll of the Offering Proceeds will be used for investment in the Company to fund the pool that will be used for various loans that the Company makes to its clients and customers." ECF 67–2 at 25, 27 (GCF Investment Private Placement Memorandum).

From January 2007 to December 2009, Defendants raised approximately $5.4 million from investors, which they used to make payments to investors and for personal benefit. ECF No. 229, 41:14–44 (10–CR–00730–LHK); ECF No. 232, 93:4–95:14 (10–CR–00730–LHK); Exhs. 128, 219(a). In addition to the $5.4 million from investors, Defendants also acquired an additional $1.5 million from borrowers. *See* Exh. 219(a). Defendants sent investors fraudulent statements showing 1% monthly increases in their investments and continued to actively solicit new investments in the funds. ECF No. 228, 124:11–125:17 (10–CR–00730–LHK); ECF No. 230, 128:13–133:10 (10–CR–00730–LHK); Exhs. 19, 20, 21.

*2 On October 6, 2010, a grand jury returned an indictment charging Defendants and Beth Piña with (1) one count of conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349; (2) thirteen counts of mail fraud under 18 U.S.C. § 1341; (3) fourteen counts of wire fraud under 18 U.S.C. § 1341; (4) two counts of securities fraud under 15 U.S.C. § 78j(b) ("Section 10(b)"), 15 U.S.C. § 78ff, 17 C.F.R. §§ 240.10b–5 ("Rule 10b–5"), 17 C.F.R. § 240.10b5–2, and 18 U.S.C. § 2; and (5) thirteen counts of engaging in monetary transactions in property derived from specified unlawful activities under 18 U.S.C. § 1957(a). *See* ECF No. 1 (10–CR–00730–LHK), ("Indictment").

On October 7, 2010, Plaintiff filed a civil complaint against Defendants, Piña, and APS Funding, in the instant civil action. As relevant here, Plaintiff alleges that Defendants violated Section 10(b), 15 U.S.C. § 78ff, Rule 10b–5, 17 C.F.R. § 240.10b5–2, and 15 U.S.C. § 77q(a) ("Section 17(a)"). *See generally* Compl. The complaint also alleges that Defendants, Piña and APS Funding violated 15 U.S.C. §§ 77e(a), (c) ("Section 5") and seeks permanent injunctions under 15 U.S.C. §§ 77t(b), 78u(d), (e); disgorgement with prejudgment interest; and civil penalties with regard to all parties. *See id.*

On November 10, 2010, Defendant Swanson filed a motion to stay his answer to the civil complaint and discovery in the instant action until his criminal trial was resolved. *See* ECF No. 16. Plaintiff filed an opposition on November 30, 2010. *See* ECF No. 20. Defendant Swanson filed a reply on December 8, 2010. *See* ECF No. 23. The Court granted Defendant Swanson's motion on December 22, 2010, staying all discovery including answers and initial disclosures for all Defendants. *See* ECF No. 25, ("Stay Order").

Defendant Swanson's parallel criminal case was resolved on September 3, 2013, following a ten day jury trial. *See* ECF No. 192 (10–CR–00730–LHK). A federal jury found Defendant Swanson guilty of (1) one count of securities fraud under Section 10(b), 15 U.S.C. § 78ff, Rule 10b–5, 17 C.F.R. § 240.10b5–2, and 18 U.S.C. § 2; (2) one count of conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349; (3) twelve counts of mail fraud under 18 U.S.C. § 1341; and (4) fourteen counts of wire fraud under 18 U.S.C. § 1341. *See* ECF No. 193 (10–CR–00730–LHK), ("Swanson Verdict"). Defendant Swanson was sentenced to a term of 37 months imprisonment, which consists of 37 month terms on each count of conviction, to be served concurrently. ECF No. 378 at 3 (10–CR–00730–LHK), ("Swanson Am. Judgment"). Defendant Swanson was also ordered to pay $2,838,100.36 in restitution. *Id.* at 6.

Defendant Alexander's parallel criminal case was resolved on February 21, 2014, following a ten day jury trial. *See* ECF No. 299 (10–CR–00730–LHK). A federal jury found Defendant Alexander guilty of (1) two counts of securities fraud under Section 10(b), 15 U.S.C. § 78ff, Rule 10b–5, 17 C.F.R. § 240.10b5–2, and 18 U.S.C. § 2; (2) one count of conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349; (3) eleven counts of mail fraud under 18 U.S.C. § 1341; and (4) fourteen counts of wire fraud under 18 U.S.C. § 1341. *See* ECF No. 300 (10–CR–00730–LHK), ("Alexander Verdict"). Defendant Alexander was sentenced to a term of 108 months imprisonment, which consists of 108 months on each count of conviction, to be served concurrently. ECF No. 379 at 3 (10–CR–00730–LHK) ("Alexander Am.

Judgment"). Defendant Alexander was also ordered to pay $6,305,638.72 in restitution. *Id.* at 6.

*3 On July 29, 2014, Plaintiff filed a motion to lift the stay on the instant civil action in light of the resolution of the criminal cases. *See* ECF No. 50. The Court granted Plaintiff's motion to lift the stay on September 25, 2014. *See* ECF No. 52.

[1] [2] Plaintiff filed the instant motion for summary judgment on April 30, 2015. *See* Mot. Plaintiff requests summary judgment on its Section 10(b), Rule 10b–5, Section 17(a), and Section 5(a) and (c) civil claims with regard to Defendants. *See* Mot. Plaintiff also requests that the Court order permanent injunctions under 15 U.S.C. §§ 77t(b), 78u(d), (e); disgorgement with prejudgment interest; and civil penalties against Defendants. *See id.* Plaintiff also filed a request for judicial notice.[3] On May 27, 2015, after Plaintiff discovered that its attempt to serve copies of the instant motion on Defendants had failed, the Court granted Plaintiff's administrative motion to continue the hearing date to allow Defendants an opportunity to respond to Plaintiff's motion. *See* ECF No. 77. Plaintiff filed a certificate of service for its motion for summary judgment as to both Defendants on May 28, 2015. ECF No. 78. More than 40 days have passed since Plaintiff served Defendants, and Defendants have failed to file any opposition to Plaintiff's motion.

On June 15, 2015, Plaintiff and Piña stipulated to the entry of a final judgment against Piña, which the Court granted. ECF No. 82.

On June 19, 2015, Plaintiff filed a "notice of non-receipt of opposition to motion," ECF No. 84, as Defendants had failed to file any opposition to the instant motion.

On June 22, 2015, Plaintiff voluntarily dismissed its claim for disgorgement and prejudgment interest against APS Funding under Federal Rule of Civil Procedure 41(a)(1).

II. LEGAL STANDARD

Summary judgment is appropriate if, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). At the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." *House v. Bell*, 547 U.S. 518, 559–60, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). A fact is "material" if it "might affect the outcome of the suit under the governing law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and a dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party, *id.* "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*

*4 The moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party, but on an issue for which the opposing party will have the burden of proof at trial, the party moving for summary judgment need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S.Ct. 2548; *accordSoremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007). Once the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505.

III. DISCUSSION

In the instant case, Plaintiff moves for summary judgment on two issues: (1) whether, in light of Defendants' criminal convictions under Section 10(b) and Rule 10b–5, the doctrine of collateral estoppel precludes Defendants from litigating their liability under Section 10(b), Rule 10b–5, and Section 17(a); and (2) whether Plaintiff is entitled to summary judgment on its claims against Defendants for alleged violations of Section 5. *See* Mot. Plaintiff also requests the entry of permanent injunctions under 15 U.S.C. §§ 77t(b), 78u(d), (e); disgorgement with interest; and civil penalties pursuant to 15 U.S.C. § 77t(d) and 15 U.S.C. § 78u(d). *See id.* The Court addresses each argument below.

A. Summary Judgment on the Section 10(b), Rule 10b–5, and Section 17(a) claims

Plaintiff moves for summary judgment on its Section 10(b), Rule 10b–5, and Section 17(a) claims against Defendants.

More specifically, Plaintiff argues that Defendants' criminal convictions under Section 10(b) and Rule 10b–5 preclude Defendants from litigating their liability under Section 10(b), Rule 10b–5, and Section 17(a) in the instant case.

[3] [4] The doctrine of offensive nonmutual collateral estoppel allows a non-party to a previous action to prevent a defendant in a subsequent action "from relitigating the issues which [the] defendant previously litigated and lost against another plaintiff." *Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir.2007) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). The party seeking to invoke offensive nonmutual collateral estoppel must show that the four factors established by the United States Supreme Court in *Parklane* are satisfied: (1) "there was a full and fair opportunity to litigate the identical issue in the prior action"; (2) "the issue was actually litigated in the prior action"; (3) "the issue was decided in a final judgment"; and (4) "the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Seeid.* at 1078. District courts are afforded "broad discretion" to determine when offensive nonmutual collateral estoppel should be applied. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir.2007).

[5] [6] Moreover, it is well established that a criminal conviction may be used to establish issue preclusion in a subsequent civil suit. *SeeHinkle Nw., Inc. v. SEC*, 641 F.2d 1304, 1308 (9th Cir.1981); *see alsoSEC v. Reyes*, No. C 06–04435 CRB, 2008 WL 3916247, at *2 (N.D.Cal. Aug. 25, 2008) ("[A] criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case.") (quoting *United States v. Podell*, 572 F.2d 31, 35 (2d Cir.1978)). However, "[s]uch estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 569, 71 S.Ct. 408, 95 L.Ed. 534 (1951).

*5 In the instant case, Plaintiff argues that Defendants' prior criminal convictions for securities fraud under Section 10(b) and Rule 10b–5 preclude Defendants from relitigating their liability under Section 10(b), Rule 10b–5, and Section 17(a). The Court first addresses the propriety of applying offensive nonmutual collateral estoppel with respect to Plaintiff's Section 10(b) and Rule 10b–5 claims, before turning to Plaintiff's Section 17(a) claims.

1. Section 10(b) and Rule 10b–5 Claims

As to Plaintiff's claims under Section 10(b) and Rule 10b–5, the Court finds the *Parklane* factors are satisfied for the reasons discussed below.

[7] Defendants were indicted and convicted of committing securities fraud under Section 10(b) and Rule 10b–5 in their respective criminal trials. Swanson Am. Judgment at 2; Indictment at 1; Alexander Am. Judgment at 2. Defendants have not identified any defect in those criminal jury trials. More specifically, the juries in the criminal trials necessarily found that Defendants:

> [1] used a device or scheme to defraud someone, or [2] made an untrue statement of a material fact, or [3] failed to disclose a material fact that resulted in making the defendant's statements misleading, or [4] engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

Alexander Final Jury Instructions, ECF No. 268, at 30 (10–CR–00730–LHK); Swanson Final Jury Instructions, ECF No. 183, at 33–34 (10–CR–00730–LHK). This instruction is a verbatim quotation of Rule 10b–5. *See*17 C.F.R. § 240.10b–5. The juries also necessarily found that Defendants' "acts were or failure to disclose was in connection with the sale of investments into or shares [of the funds]" '; that Defendants "directly or indirectly used the mails in connection with these acts or failures to disclose"; and that Defendants acted "for the purpose of defrauding buyers or sellers of investments into or shares of the GCF LLC Fund or the Greenlight Fund."*Id.* As one court put it, Defendants' convictions for the "very offenses in [their] criminal prosecution has a binding estoppel effect against [Defendants] in the instant civil action." *SEC v. McCaskey*, No. 98 CIV. 6153, 2001 WL 1029053, at *3 (S.D.N.Y. Sept. 6, 2001).

While Defendants failed to oppose Plaintiff's motion for summary judgment, the Court independently concludes that the *Parklane* factors for applying nonmutual offensive collateral estoppel are satisfied here. Defendant Swanson had the benefit of a ten day jury trial, at the conclusion of which a jury convicted him of securities fraud under Section 10(b) and Rule 10b–5. *See* ECF Nos. 192, 193 (10–CR–00730–

LHK). Defendant Alexander also had the benefit of a ten day jury trial, at the conclusion of which a jury convicted her of securities fraud under Section 10(b) and Rule 10b–5. *See* ECF Nos. 299, 300 (10–CR–00730–LHK). Consequently, there can be no dispute that "the issue was actually litigated in the prior action[,] ... the issue was decided in a final judgment[,] ... [and] the party against whom issue preclusion is asserted was a party ... to the prior action." *Syverson,* 472 F.3d at 1078; *see alsoMcCaskey,* 2001 WL 1029053, at *3–4 (criminal convictions under Section 10(b) and Rule 10b–5 estopped defendant from denying civil liability under same provisions). Defendants' criminal convictions for violating Section 10(b) and Rule 10b–5 therefore estop Defendants from denying liability as to Plaintiff's 10(b) and Rule 10b5 claims in the instant action. *See, e.g.,Reyes,* 2008 WL 3916247, at *2 ("[A] criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case.").

*6 [8] In addition to the four *Parklane* factors, the Court must also determine whether there are any "indices of unfairness" or "potential shortcomings" in the underlying criminal proceedings that would weigh against applying offensive nonmutual collateral estoppel. *SeeSyverson,* 472 F.3d at 1078–79. Such indices include whether:

> (1) 'the plaintiff had the incentive to adopt a wait and see attitude in the hope that the first action by another plaintiff would result in a favorable judgment' which might then be used against the losing defendant; (2) the defendant had the incentive to defend the first suit with full vigor, especially when future suits are not foreseeable; (3) one or more judgments entered before the one invoked as preclusive are inconsistent with the latter or each other, suggesting that reliance on a single adverse judgment would be unfair; and, (4) the defendant might be afforded procedural opportunities in the later action that were unavailable in the first 'and that could readily cause a different result.'

Id. at 1079 (quoting *Parklane,* 439 U.S. at 330–31, 99 S.Ct. 645). Here, Plaintiff actively opposed staying the instant civil litigation during the pendency of Defendants' criminal proceedings; Defendants had every incentive to avoid the imposition of criminal liability; there is no risk of inconsistent judgments; and Defendants each had the procedural protections of full criminal jury trials. Accordingly, the Court concludes there are no indices of unfairness that would weigh against the application of collateral estoppel.

In sum, the Court finds that Defendants' criminal convictions for violations of Section 10(b) and Rule 10b–5 estop Defendants from denying liability in the instant civil action. As such, Plaintiff is entitled to judgment as a matter of law on its Section 10(b) and Rule 10b–5 claims. *SeeEmich,* 340 U.S. at 569, 71 S.Ct. 408 (1951); *see alsoUnited States v. Real Property,* 412 Fed.Appx. 961 (9th Cir.2011) (citing *Emich* and affirming summary judgment for government as a matter of law based on prior criminal judgment). Accordingly, the Court grants Plaintiff's motion for summary judgment against Defendants as to Plaintiff's Section 10(b) and Rule 10b–5 claims.

2. Section 17(a) Claims

[9] In contrast to Defendants' convictions for violations of Section 10(b) and Rule 10b–5, Defendants were neither indicted nor convicted of violations of Section 17(a). For the reasons stated below, however, the Court finds that Plaintiff is also entitled to summary judgment on its Section 17(a) claims against Defendants.

As a general matter, Section 17(a), Section 10(b), and Rule 10b–5 "forbid making a material misstatement or omission in connection with the offer or sale of a security by means of interstate commerce." *SEC v. Dain Rauscher, Inc.,* 254 F.3d 852, 855–56 (9th Cir.2001). Specifically, Section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> *7 (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). As the Ninth Circuit has explained, to state a claim under Section 17(a) and Section 10(b)/Rule

10b–5, the SEC must therefore show that a defendant made: "(1) a material misstatement or omission (2) in connection with the offer or sale of a security (3) by means of interstate commerce." *SEC v. Phan,* 500 F.3d 895, 907–08 (9th Cir.2007) (quoting *Dain Rauscher,* 254 F.3d at 856).

As discussed above, Defendants are collaterally estopped from denying liability under Section 17(a) if all four *Parklane* factors are satisfied: (1)"there was a full and fair opportunity to litigate the identical issue in the prior action"; (2) "the issue was actually litigated in the prior action"; (3) "the issue was decided in a final judgment"; and (4) "the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Syverson,* 472 F.3d at 1078. Despite Defendants' failure to oppose Plaintiff's motion for summary judgment, the Court addresses whether the issues litigated with respect to Defendants' violations of Section 10(b) and Rule 10b–5 are "identical" to Plaintiff's claims that Defendants violated Section 17(a)(1), (a)(2) and (a)(3). If the issues are "identical," then there can be no dispute as to the second, third, and fourth factors, as Defendants had full criminal jury trials where Defendants were convicted by their respective juries for violations of the securities laws.

[10] To determine whether two issues are identical for purposes of collateral estoppel, the Court considers (1) whether there is "a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first"; (2) whether "the new evidence or argument involve[s] the application of the same rule of law as that involved in the prior proceeding"; (3) whether "pretrial preparation and discovery related to the matter presented in the first action [could] reasonably be expected to have embraced the matter sought to be presented in the second"; and (4) "how closely related ... the claims involved in the two proceedings [are]." *Resolution Trust Corp. v. Keating,* 186 F.3d 1110, 1116 (9th Cir.1999).

Defendants' convictions for violations of Section 10(b) and Rule 10b–5 required the government to prove beyond a reasonable doubt that Defendants:

> [1] used a device or scheme to defraud someone, or [2] made an untrue statement of a material fact, or [3] failed to disclose a material fact that resulted in making the defendant's statements misleading, or [4] engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

See 17 C.F.R. § 240.10b–5; Alexander Final Jury Instructions, ECF No. 268, at 30 (10–CR–00730–LHK); Swanson Final Jury Instructions, ECF No. 183, at 33–34 (10–CR–00730–LHK). In support of its case, the government put forth evidence that Defendants used a Ponzi scheme purporting to make "short-term, fixed interest rate loans secured by real estate" to defraud investors, diverted investor funds to support their other businesses and for personal gain, misrepresented investor returns through fraudulent mailings, and continued to solicit new investments while continuing to misappropriate funds. *See* ECF No. 228, 139:10–140:12, 157:3–160:11 (10–CR–00730–LHK); ECF No. 229, 41:14–44:7 (10–CR–00730–LHK); ECF No. 232, 93:4–95:14 (10–CR–00730–LHK); Exhs. 138, 219(e), 219(h), 219(i).

**8 As Plaintiff notes, these facts, on which the jury necessarily relied in finding that Defendants violated Section 10(b) and Rule 10b–5, are the same underlying facts that would support a finding of liability under Section 17(a). As the Ninth Circuit described it, Section 17(a), Section 10(b), and Rule 10b–5 all "forbid making a material misstatement or omission in connection with the offer or sale of a security by means of interstate commerce." *Dain Rauscher,* 254 F.3d at 855–56; *see alsoPhan,* 500 F.3d at 907–08 (citing same elements for Section 17(a), Section 10(b), and Rule 10b–5 claims); *accordSEC v. Monarch Funding Corp.,* 192 F.3d 295, 308 (2d Cir.1999) (noting "[e]ssentially the same elements are required under Section 17(a)(1)–(3) ... as under section 10(b) and Rule 10b–5").

There would therefore be "a substantial overlap between the evidence or argument" used to establish Defendants' criminal culpability under Section 10(b) and Rule 10b–5 and Defendants' civil liability under Section 17(a). *SeeResolution Trust Corp.,* 186 F.3d at 1116. In addition, as the two statutes prohibit the same conduct, they "involve the application of the same rule of law" and the "pretrial preparation and discovery" for the Section 10(b)/Rule 10b–5 claims would "reasonably be expected to have embraced" the Section 17(a) claim. *Id.* Other courts addressing instances where the SEC moved for summary judgment on Section 17(a) claims based on convictions for violations of Section 10(b) and Rule 10b–5 have similarly concluded that collateral estoppel is appropriate and granted summary judgment in the SEC's favor. *See, e.g.,McCaskey,* 2001 WL 1029053, at *4 (facts underlying Section 10(b) and Rule 10b–5 convictions "form[ed] the basis for a Section 17(a) civil violation"); *see*

alsoSEC v. Monarch Funding Corp., No. 85 CV 7072, 1996 WL 348209, at *8 (S.D.N.Y. June 24, 1996) (same). For the purposes of collateral estoppel, Plaintiff's Section 17(a) claim is thus "identical" to the adjudicated Section 10(b)/Rule 10b–5 claims.

The Court therefore concludes that the *Parklane* factors are satisfied with respect to Plaintiff's Section 17(a) claim. For the reasons discussed above, the Court also concludes there is no reason why application of offensive nonmutual collateral estoppel would be unfair to Defendants. In addition, applying the doctrine to bar Defendants from relitigating the same material facts that underlie Plaintiff's Section 10(b), Rule 10b–5, and Section 17(a) claims would serve the purpose of the doctrine by "promoting judicial economy by preventing needless litigation." *Parklane,* 439 U.S. at 326, 99 S.Ct. 645.

Accordingly, the Court grants Plaintiff's motion for summary judgment with respect to Plaintiff's Section 17(a) claim.

B. Section 5 Claims

Plaintiff further contends that it is entitled to summary judgment on its claims that Defendants violated Section 5 of the Securities Act, which prohibits any person from selling unregistered securities in interstate commerce unless those securities qualify for a registration exemption. *See*15 U.S.C. § 77e(a), (c). As with Plaintiff's Section 10(b), Section 17(a), and Rule 10b–5 claims, Plaintiff relies on facts and issues litigated during Defendants' criminal trials to support its motion for summary judgment. Plaintiff also relies on additional evidence it has submitted in support of its motion for summary judgment.

[11] "Sections 5(a) and (c) of the Securities Act, 15 U.S.C. § 77e(a), (c), make it unlawful to offer or sell a security in interstate commerce if a registration statement has not been filed as to that security, unless the transaction qualifies for an exemption from registration." *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir.2010). To establish a prima facie case for violation of Section 5, Plaintiff must show (1) "the defendant directly or indirectly sold or offered to sell securities"; (2) "no registration statement was in effect as to the securities"; and (3) "the sale or offer was made through interstate commerce." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir.2013). The Court addresses each element in turn.

*9 [12] Under the first element, Plaintiff must show that "the defendant directly or indirectly sold or offered to sell securities." *Id.* The terms "offer" and "sell" are defined as including "every contract of sale or disposition of a security or interest in a security, for value. The term 'offer to sell,' 'offer for sale,' or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(3). In addition to the "person who passes title to the security," other "participants" to the sale may also be held liable under Section 5. *SEC v. Murphy,* 626 F.2d 633, 652 (9th Cir.1980). A "participant" in the sale may be liable under Section 5 if the defendant was "both a 'necessary participant' and 'substantial factor' in the sales transaction." *Phan,* 500 F.3d at 906.

[13] Here, the Court finds that Plaintiff has shown that Defendants "directly or indirectly sold or offered to sell securities" as required under Section 5, as Defendants were both "necessary participant[s]" and "substantial factor[s]" in the sales transactions. First, Defendants' convictions for violations of Section 10(b) and Rule 10b–5 required the government to prove that Defendants' "acts were or failure to disclose was in connection with the sale of investments into or shares [of the funds]." *See* Alexander Final Jury Instructions, ECF No. 268, at 30 (10–CR–00730–LHK); Swanson Final Jury Instructions, ECF No. 183, at 33–34 (10–CR–00730–LHK). In order to satisfy that element, the government introduced evidence that Defendant Alexander, the President of APS Funding, and Defendant Swanson, the Vice President of APS Funding, sold securities to individual investors. Individual investors testified about Defendants' communications and representations with respect to the terms of the sale of the securities as well as Defendants' active solicitation of individual buyers. *See, e.g.,* ECF No. 68, Exh. A at 12 (Alexander Trial Tr. 124:11–125:24); ECF No. 68 ("Swanson Trial Tr. 155:1–157:18). In sum, there can be no dispute that Defendants were responsible for personally selling securities to investors and, consequently, were both necessary participants and substantial factors in the sales transactions. *See, e.g.,SEC v. Loomis,* 969 F.Supp.2d 1226, 1238 (E.D.Cal.2013); *see alsoCMKM Diamonds,* 729 F.3d at 1255 (holding that "sellers ... responsible for the distribution of unregistered securities" are liable under Section 5).

[14] Under the second element, Plaintiff must show that "no registration statement was in effect as to the securities." *CMKM Diamonds,* 729 F.3d at 1255. As to the registration of the securities, the Court concludes that there can be no genuine material dispute that Defendants sold unregistered securities. Plaintiff has put forth evidence that the securities Defendants sold through A & P Funding, APS Funding, GCF

Investment LLC, and Greenlight Funds were never registered with the SEC. *See* ECF No. 67, Exh. G. Moreover, the Private Placement Memoranda issued by GCF Investment, LLC explicitly provide on the face of the documents that "THESE SECURITIES HAVE NOT BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION." *See* ECF No. 67–2 at 38.

[15] As to the third element, Plaintiff must show that "the sale or offer was made through interstate commerce." *CMKM Diamonds,* 729 F.3d at 1255. With respect to the interstate commerce requirement, the Court finds that the government introduced evidence showing that Defendants used the mails in connection with the sale of securities and Defendants' fraudulent scheme, as required to prove that Defendants violated Section 10(b) and Rule 10b–5. *See, e.g.,* ECF No. 67, Exh. B at 88. Moreover, it cannot be disputed that Defendants sold securities to investors outside of California, which would also satisfy the interstate commerce requirement. ECF No. 229 at 97:13–20 (10–CR–00730–LHK). Thus, Plaintiff has satisfied its burden as to the second and third elements of Plaintiff's Section 5 claims.

***10** [16] The Court therefore finds that Plaintiff has established prima facie Section 5 claims against Defendants Swanson and Alexander. As Plaintiff has made a prima facie showing, the burden of proof shifts to Defendants to show that the securities are entitled to a registration exemption. *SeeMurphy,* 626 F.2d at 641. As Defendants failed to file any opposition to the instant motion for summary judgment, Defendants have not identified any relevant exemption, and therefore cannot rely on a registration exemption. As a general matter, it is not the task of the district court to "scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir.1996). [4] Here, Defendants bear the burden of showing that a genuine issue of material fact exists as to the applicability of a registration exemption. Defendants have failed to do so.

Accordingly, the Court grants Plaintiff's motion for summary judgment on its Section 5 claims against Defendants.

C. Injunctions from Further Violation of Securities Laws

[17] Plaintiff also requests that the Court permanently enjoin Defendants from future violations of Section 10(b), Rule 10b–5, Section 17(a), and Section 5. For the reasons discussed below, the Court grants Plaintiff's request.

[18] The SEC may bring an action in any district court of the United States to enjoin any person who it appears to the SEC "is engaged or about to engage in any acts or practices which constitute or will constitute a violation of" the securities laws. 15 U.S.C. § 77t(b); *see also*15 U.S.C. § 78u(d)(1). "[U]pon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." 15 U.S.C. § 77t(b); *see also*15 U.S.C. § 78u(d)(1). "The granting or denying of injunctive relief rests within the sound discretion of the trial court." *SEC v. Fehn,* 97 F.3d 1276, 1295 (9th Cir.1996) (quotation marks omitted).

In *Fehn,* the court articulated the SEC's burden to obtain an injunction:

> To obtain a permanent injunction, the SEC ha[s] the burden of showing there [i]s a reasonable likelihood of future violations of the securities laws.... [T]here is no per se rule requiring the issuance of an injunction upon the showing of a past violation, but ... the existence of past violations may give rise to an inference that there will be future violations; and the fact that the defendant is currently complying with the securities laws does not preclude an injunction.
>
> In predicting the likelihood of future violations, [the court] must assess the totality of the circumstances surrounding the defendant and his violations, and [the court] consider[s] such factors as (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; (5) and the sincerity of his assurances against future violations.

Fehn, 97 F.3d at 1295–96 (citations, quotation marks, and alteration marks omitted).

First, the Court considers the "degree of scienter involved" in Defendants' violations. *Seeid.* at 1295. To demonstrate "a reasonable likelihood that the wrong will be repeated ... it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence." *Aaron v. SEC,* 446 U.S. 680, 703, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). In the instant case, scienter was found by the jury. *See* Alexander Verdict; Swanson Verdict; *Phan,* 500 F.3d at 908. More specifically,

Defendants' respective juries found that Defendants acted "for the purpose of defrauding buyers or sellers of investments into or shares of the GCF LLC Fund or the Greenlight Fund."Alexander Final Jury Instructions, ECF No. 268, at 30; Swanson Final Jury Instructions, ECF No. 183, at 33–34. Thus, Defendants acted with at least deliberate recklessness. *SeeIn re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1053 (9th Cir.2014). This factor weighs in favor of entering injunctions against Defendants.

*11 Second, the Court considers whether Defendants' past violations were "isolated or recurrent" in nature. *SeeFehn*, 97 F.3d at 1295. As a threshold matter, " 'first offenders' are not immune from injunctive relief." *SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir.1974); *accordSEC v. Gowrish*, No. C 09–05883 SI, 2011 WL 2790482, at *5 (N.D.Cal. July 14, 2011), *aff'd*, 510 Fed.Appx. 588 (9th Cir.2013). In the instant case, a jury found Defendants guilty of multiple counts of mail and wire fraud, conspiracy to commit mail and wire fraud, and violations of securities laws in a scheme that spanned nearly two years and impacted dozens of investors. *See* Alexander Verdict; Alexander Am. Judgment; Swanson Verdict; Swanson Am. Judgment. Defendants' violations were therefore "part of an ongoing pattern of conduct rather than isolated incidents." *SeeSEC v. Jasper*, 883 F.Supp.2d 915, 929 (N.D.Cal.2010). This factor weighs in favor of entering injunctions against Defendants.

Third, the Court considers the degree to which Defendants have recognized the wrongful nature of their conduct. *SeeFehn*, 97 F.3d at 1295. "[L]ack of remorse" can be "apparent in" the person's "continued insistence on the validity of his [or her]" conduct for which he or she has been convicted. *Seeid.* at 1296. In the instant case, both Defendants have argued that they played a minor role, were unaware of the fraud, had no fraudulent intent, and attempted to displace culpability. Neither has ever "publicly acknowledged the wrongfulness" of their conduct. *Jasper*, 883 F.Supp.2d at 929; *see also* Swanson Sentencing Memo.; ECF No. 357 (10–CR–00730–LHK), ("Alexander Sentencing Memo"); ECF No. 377, 48:8–50:21 (10–CR–00730–LHK); ECF No. 419, 43:3–17, 50:18–23 (10–CR–00730–LHK). This factor weighs in favor of entering injunctions.

Fourth, the Court considers the likelihood that future offenses might occur due to Defendants' occupations. *SeeFehn*, 97 F.3d at 1295–96. Although Defendants are in prison and no longer work for APS Funding, they may enter the business world in the future. *SeeSEC v. Small Bus. Capital Corp.*, No. 5:12–CV–03237–EJD, 2013 WL 5955669, at *2 (N.D.Cal. Nov. 6, 2013) (noting that the defendant "did not show that he would not re-enter the brokerage industry if he were able"). The Court does note, however, that both Defendants are in their late sixties. This factor therefore weighs only slightly in favor of entering injunctions.

Fifth, Defendants have provided no assurances against future violations. *SeeFehn*, 97 F.3d at 1295–96. This factor weighs in favor of entering injunctions against Defendants.

Based on the five *Fehn* factors, all of which weigh in favor of entering an injunction, the Court finds a "reasonable likelihood" that defendant will violate the securities laws in the future. Accordingly, the Court grants Plaintiff's request for permanent injunctions against Defendants, the terms of which shall be set forth in the Court's final judgment.

D. Disgorgement and Prejudgment Interest

Plaintiff also requests that the Court order disgorgement equal to the gross proceeds that Defendants raised from investors during the duration of Defendants' participation in their fraudulent scheme. The Court addresses this request below.

[19] [20] [21] [22] The Court has "broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of the securities laws.... [T]he amount of disgorgement should include all gains flowing from the illegal activities." *Platforms Wireless Int'l Corp.*, 617 F.3d at 1096 (citations and internal quotation marks omitted). Disgorgement need only be a "reasonable approximation of profits causally connected to the violation." *Id.* (citation omitted). The SEC bears the burden of persuasion that its disgorgement figure "reasonably approximates the amount of unjust enrichment." *Id.* (citation omitted). "Once the SEC establishes a reasonable approximation of defendants' actual profits ... the burden shifts to the defendants to 'demonstrate that the disgorgement figure was not a reasonable approximation.' " *Id.* (citation omitted).

*12 [23] Here, Plaintiff contends that Defendants should be ordered to disgorge the total amount of loss previously adjudicated against Defendants in their underlying criminal convictions. According to Plaintiff, this amount represents the net total of investments contributed by victims of Defendants' fraudulent scheme from January 2007 to December 2009. More specifically, Plaintiff requests that the Court order that Defendant Alexander disgorge $6,305,684, which is the total

amount of loss from January 2007 through December 2009, ECF No. 379 (10–CR–00730–LHK), and that Defendant Swanson disgorge $2,838,100, ECF No. 378 (10–CR–00730–LHK). Defendant Swanson's lesser amount of loss calculation was based on Swanson's earliest-in-time count of conviction of May 2008.

In support of its motion, Plaintiff offers evidence that Defendants took loans and "management fee advances" from APS Funding. Swanson Transcript 1 at 159:7–160:5; ECF No. 323 at 94:5–95:7 (10–CR–00730–LHK). Plaintiff cites no other evidence with respect to Defendants' use, control, or benefit from the total funds raised, including any evidence that may have been submitted at Defendants' criminal trials. *See* Mot. at 15–16. While Plaintiff makes cursory reference to the Court's findings with respect to the total loss amounts calculated in the criminal cases, Plaintiff's single statement that Defendants "financed their personal and unrelated business' expenses" is insufficient to establish that disgorgement of the total funds raised is required as a matter of law. *SeeCelotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548. While there is no dispute as to the amount of total loss for which each Defendant is responsible, the Court finds that Plaintiff has failed to carry its burden of showing that the total amount of loss is a "reasonable approximation of defendants' actual profits," for disgorgement purposes. *SeePlatforms Wireless Int'l Corp.*, 617 F.3d at 1096; *see alsoSEC v. JTWallenbrock & Assocs.*, 440 F.3d 1109, 1113–16 (9th Cir.2006) (ordering disgorgement of all funds where defendants controlled expenditures of the funds "at their sole discretion"); *SEC v. Presto Telecomm., Inc.*, 237 Fed.Appx. 198, 200 (9th Cir.2007) (affirming finding that "the SEC presented insufficient evidence to calculate the appropriate amount of disgorgement").

Moreover, the Court notes that other courts have denied requests for disgorgement in subsequent civil proceedings where disgorgement would be "redundant with the restitution [the defendant] will be required to pay as a consequence of his [or her] criminal conviction." *SEC v. Pace*, 173 F.Supp.2d 30, 34 (D.D.C.2001); *accordCommodity Futures Trading Comm'n v. White Pine Trust Corp.*, No. 04CV2093 J(NLS), 2007 WL 1754819, at *9 (S.D.Cal. Apr. 20, 2007). As Plaintiff seeks disgorgement of the very amount that Defendants have already been ordered to pay in restitution to the actual victims of Defendants' wrongful conduct, the Court concludes denial of Plaintiff's request would not allow Defendants to unjustly benefit from their "ill-gotten gains." *JTWallenbrock*, 440 F.3d at 1113.

Accordingly, the Court denies Plaintiff's request for disgorgement. Plaintiff's request for pre-judgment interest is therefore denied as moot.

E. Civil Penalties

[24] Plaintiff requests that the Court impose "third tier" civil penalties against Defendants. As a general matter, the Court may impose civil monetary penalties against any person who violates the securities laws. *See*15 U.S.C. §§ 77t(d), 78u(d)(3). Third tier penalties, the most severe of the civil penalties, are available when the securities law violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement [and] such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial loss to other persons." 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(ii). The Court may impose penalties of up to $150,000 per violation for a natural person, and up to $725,000 per violation for any other person, 17 C.F.R. 201.1004 (2009); 17 C.F.R. 201, Subpt. E, Tbl. IV, or the "gross amount of pecuniary gain" per violation. 15 U.S.C. § 78u(d)(3)(B)(iii). The objectives of civil penalties are to both punish individual misconduct and deter future misconduct. *SeeSEC v. Mellert*, No. C03–0519, 2006 WL 927743, at *1–2 (N.D.Cal. Mar. 29, 2006); *SEC v. Global Health*, No. 04CV1802, 2006 WL 4005575, at *3 (S.D.Cal. Dec. 11, 2006).

*13 [25] [26] As an initial matter, the Court finds that Plaintiff has shown that third tier civil penalties are appropriate. Defendants' respective juries found Defendants liable for violations involving fraud and deliberate or reckless disregard of regulatory requirements. *See* Swanson Am. Judgment; Alexander Am. Judgment; *Phan*, 500 F.3d at 908; *see alsoSEC v. Global Express Capital Real Estate Inv. Fund, I, LLC*, 289 Fed.Appx. 183, 189 (9th Cir.2008) ("Because [defendant] committed securities fraud, she satisfied the fraud requirement for third tier civil penalties."). Moreover, Defendants' fraudulent actions resulted in a significant risk of substantial loss to dozens of investors. *See* Swanson Am. Judgment (finding Defendant Swanson liable for $2,838,100.36 in restitution to investors); Alexander Am. Judgment (finding Defendant Alexander liable for $6,305,683.72 in restitution to investors). Thus, the Court finds that a "third tier" penalty is appropriate in the instant case.

Plaintiff has requested that the Court "impose a substantial and meaningful penalty," but does not request a specific

action. *See, e.g.,L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F.Supp.2d 932, 937–38 (C.D.Cal.2011) (public records search). The Court therefore GRANTS Plaintiff's request for judicial notice.

4 In any event, Defendants' failure to oppose Plaintiff's motion for summary judgment would constitute waiver with respect to any exemption argument. *See, e.g.,Freeman v. City of Seattle*, 18 Fed.Appx. 519 (9th Cir.2001).

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Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Victoria CLEMENTS, Plaintiff,
v.
SANOFI–AVENTIS, U.S., INC., Aventis Pharmaceuticals, Inc., and John Doe A to Z, individually, jointly, and/or severally, Defendants.

Civ. No. 14–cv–1423 (KM). | Signed June 10, 2015. | Filed June 11, 2015.

Synopsis

Background: Consumer, who allegedly sustained injuries following the administration of medical device consisting of injectable substance intended to treat the loss of facial fat, brought action in state court against medical device manufacturer for breach of express and implied warranty, negligence, strict liability, and violations of the New Jersey Products Liability Act (PLA). After removal, manufacturer moved for summary judgment.

Holdings: The District Court, Kevin McNulty, J., held that:

[1] district court would treat summary judgment motion as motion to dismiss;

[2] claims for breach of implied warranty, negligence, and strict liability were subsumed by the PLA;

[3] Medical Device Amendments (MDA) preempted manufacturing defect and inadequate warnings claims brought pursuant to the PLA; and

[4] consumer failed to plead facts that would plausibly support a cause of action for breach of express warranty.

Ordered accordingly.

West Headnotes (28)

[1] **Federal Civil Procedure**
⇦ Fact Issues

Contentions concerning matters of law that are directed to the face of the complaint are appropriate for consideration under the standards a motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[2] **Evidence**
⇦ Official Proceedings and Acts

Facts about the Food and Drug Administration (FDA) approvals of a medical device, consisting of an injectable substance intended to treat the loss of facial fat, are matters of public record, appropriate for judicial notice. Federal Food, Drug, and Cosmetic Act, § 1 et seq., 21 U.S.C.A. § 301 et seq.; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

Cases that cite this headnote

[3] **Removal of Cases**
⇦ Trial, Judgment, and Review

District court would treat summary judgment motion brought by medical device manufacturer as motion to dismiss in consumer's action against manufacturer for injuries allegedly sustained following the administration of medical device consisting of injectable substance intended to treat the loss of facial fat, although consumer failed to comply with federal summary judgment procedures, requiring affidavit establishing genuineness of exhibits, responsive statement of material facts not in dispute, and affidavit in support of additional discovery claim; consumer brought claim in state court, shortly after manufacturer removed action, it filed summary judgment motion when there had been only minimal discovery, and manufacturer made arguments of law in its motion. Fed.Rules Civ.Proc.Rules 1, 12(b)(6), 56, 28 U.S.C.A.

Cases that cite this headnote

[4] **Federal Civil Procedure**
⇦ Time for Consideration of Motion

An opposing party's affidavit or declaration, submitted in opposition to summary judgment motion to show that it cannot present facts essential to justify its opposition due to an undeveloped factual record, must identify with specificity what particular information is sought, how, if uncovered, it would preclude summary judgment, and why it has not been previously obtained. Fed.Rules Civ.Proc.Rule 56(d), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**
⇦ Time for Consideration of Motion

Bare conclusions or mere conjecture regarding facts that may be uncovered through discovery are insufficient to show by affidavit that party opposing summary judgment motion cannot present facts essential to justify its opposition due to an undeveloped factual record. Fed.Rules Civ.Proc.Rule 56(d), 28 U.S.C.A.

Cases that cite this headnote

[6] **Federal Courts**
⇦ Summary Judgment

Except in rare cases, failure to comply with summary judgment rule provision, requiring nonmovant to show by affidavit that it cannot present facts essential to justify its opposition due to an undeveloped factual record, is fatal to a claim of insufficient discovery on appeal. Fed.Rules Civ.Proc.Rule 56(d), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Civil Procedure**
⇦ Motion and Proceedings Thereon

The moving party in a motion to dismiss for failure to state a claim bears the burden of showing that no claim has been stated. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[8] **Federal Civil Procedure**
⇦ Construction of Pleadings

Federal Civil Procedure
⇦ Matters Deemed Admitted; Acceptance as True of Allegations in Complaint

For the purposes of a motion to dismiss for failure to state a claim, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[9] **Federal Civil Procedure**
⇦ Claim for Relief in General

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do; thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is plausible on its face. Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[10] **Federal Civil Procedure**
⇦ Insufficiency in General

The facial-plausibility standard used to determine a motion to dismiss for failure to state a claim is met when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged; while the plausibility standard is not akin to a probability requirement it asks for more than a sheer possibility. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[11] **Federal Civil Procedure**
⇦ Matters Considered in General

Federal Civil Procedure
⇦ Motion

When deciding a motion to dismiss for failure to state a claim, a court may consider facts appropriate for judicial notice without converting the motion into a motion for summary

judgment. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[12] **Products Liability**
⇐ Implants and Prosthetic Devices
Products Liability
⇐ Nature and Form of Remedy
Sales
⇐ Right of Action

Consumer's common-law claims for breach of implied warranty, negligence, and strict liability were subsumed by the New Jersey Products Liability Act (PLA) in consumer's action against medical device manufacturer for injuries allegedly sustained following the administration of medical device consisting of injectable substance intended to treat the loss of facial fat; PLA created exclusive statutory cause of action for claims falling within its purview, it subsumed any cause of action for harm caused by a product except actions for breach of express warranty, and former common-law causes of action merged into single cause of action under the PLA. N.J.S.A. 2A:58C–1(b)(3).

Cases that cite this headnote

[13] **Products Liability**
⇐ Nature and Form of Remedy

New Jersey Products Liability Act (PLA) established the sole method to prosecute a product liability action such that only a single product liability action remains. N.J.S.A. 2A:58C–2.

Cases that cite this headnote

[14] **Products Liability**
⇐ Elements and Concepts
Products Liability
⇐ Nature and Form of Remedy

The language chosen by the legislature in enacting the New Jersey Products Liability Act (PLA) is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products; it effectively creates an exclusive statutory cause of action for claims falling within its purview. N.J.S.A. 2A:58C–2.

Cases that cite this headnote

[15] **Products Liability**
⇐ Strict Liability
Products Liability
⇐ Negligence or Fault
Sales
⇐ Right of Action

New Jersey law no longer recognizes breach of implied warranty, negligence, and strict liability as viable separate claims for harm deriving from a defective product. N.J.S.A. 2A:58C–2.

Cases that cite this headnote

[16] **Health**
⇐ Preemption
Products Liability
⇐ Medical Devices and Appliances in General
States
⇐ Product Safety; Food and Drug Laws

A two-step analysis is used to determine whether the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA) expressly preempts a state law claim: first, a court must determine whether the Food and Drug Administration (FDA) has established requirements applicable to the particular medical device at issue, and if it has, then the second step requires a court to determine whether the state law claims in question are based on state requirements that relate to the safety or effectiveness of the device and are different from, or in addition to the federal requirements. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[17] **Products Liability**
⇐ Medical Devices and Appliances in General
States

⇦ Product Safety; Food and Drug Laws

The Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA) preempts state tort claims to the extent that they would impose requirements on device manufacturers that deviate from those imposed by federal law, particularly, those imposed in the premarket approval process. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[18] **Products Liability**

⇦ Medical Devices and Appliances in General

States

⇦ Product Safety; Food and Drug Laws

State law claims that parallel, rather than add to Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA), must show a link between a specific violation of the regulation and the plaintiffs injury in order to protect state law claims from preemption by the regulation. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[19] **Products Liability**

⇦ Medical Devices and Appliances in General

States

⇦ Product Safety; Food and Drug Laws

The parallel claim exception to preemption of a state law claim by the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA) requires more than just a change of terminology; a plaintiff cannot simply incant the magic words that defendant violated Food and Drug Administration (FDA) regulations. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[20] **Products Liability**

⇦ Medical Devices and Appliances in General

Products Liability

⇦ Pleading

States

⇦ Product Safety; Food and Drug Laws

To plead a state law claim parallel to the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA), which is not preempted by the MDA, the plaintiff must plead facts showing action or inaction in the defendants' efforts to take part in the premarket approval process or implement its results; a parallel claim is subject to the federal pleading standards. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[21] **Products Liability**

⇦ Manufacturing Defect

Products Liability

⇦ Warnings or Instructions

Products Liability

⇦ Implants and Prosthetic Devices

Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA) preempted manufacturing defect and inadequate warnings claims brought pursuant to New Jersey Products Liability Act (PLA) against manufacturer of medical device consisting of injectable substance intended to treat the loss of facial fat; medical device was cleared for sale through MDA's premarket approval process, Food and Drug Administration (FDA) determined during that process that device's manufacture, design, and warnings were safe and effective, and manufacturer was only liable under PLA if device was not reasonably fit, suitable, or safe for its intended purpose. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a); N.J.S.A. 2A:58C–2, 2A:58C–4.

Cases that cite this headnote

[22] **Products Liability**

⇦ Nature of Product and Existence of Defect or Danger

Under the New Jersey Products Liability Act (PLA), a manufacturer is liable only

if the claimant proves that the device was not reasonably fit, suitable or safe for its intended purpose because it deviated from design specifications. N.J.S.A. 2A:58C–2, 2A:58C–4.

Cases that cite this headnote

[23] **Products Liability**
⇐ Implants and Prosthetic Devices
Products Liability
⇐ Pleading
States
⇐ Product Safety; Food and Drug Laws

Consumer failed to plead facts that would plausibly support a cause of action, as required to meet federal pleading rule, against manufacturer of medical device, consisting of injectable substance intended to treat the loss of facial fat, for violations of New Jersey Products Liability Act (PLA), based on allegations that state law claims were not preempted by misbranding provisions of Federal Food, Drug, and Cosmetic Act (FDCA) as duties imposed under PLA were parallel to duties imposed under FDCA; consumer only recited legal elements of the claim, did not plead any supporting facts from which reader could conclude that manufacturer's design, warnings, or off-label promotion violated the FDCA, and did not cite the relevant federal provisions. Federal Food, Drug, and Cosmetic Act, §§ 301(a, g, k, n), 502(f, n), 21 U.S.C.A. §§ 331(a, g, k, n), 352(f, n); Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.; N.J.S.A. 2A:58C–2, 2A:58C–4.

Cases that cite this headnote

[24] **Federal Civil Procedure**
⇐ Amendments by Briefs or Motion Papers

Inadequate factual allegations in a complaint are not remedied by statements in a plaintiff's briefs. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

Cases that cite this headnote

[25] **Products Liability**
⇐ Representations or Concealment; Fraud
Products Liability
⇐ Warnings or Instructions
Products Liability
⇐ Medical Devices and Appliances in General

An off-label promotion of medical device theory based on misbranding provisions of Federal Food, Drug, and Cosmetic Act (FDCA) may fail to state a cause of action to the extent that it illegitimately shifts the risk of off-label use from prescribing doctors and patients to manufacturers. Federal Food, Drug, and Cosmetic Act, §§ 301(a, g, k, n), 502(f, n), 21 U.S.C.A. §§ 331(a, g, k, n), 352(f, n); 21 C.F.R. § 801.4.

Cases that cite this headnote

[26] **Sales**
⇐ Right of Action
States
⇐ Particular Cases, Preemption or Supersession

An express warranty claim under New Jersey law is not necessarily preempted under the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA), at least not if the plaintiff can show that the defendant manufacturer made voluntary statements that were not approved by the Food and Drug Administration (FDA) or mandated by the FDA about the use or effectiveness of a medical device. Medical Device Amendments of 1976, § 2(a), 21 U.S.C.A. § 360k(a).

Cases that cite this headnote

[27] **Sales**
⇐ Allegations of Breach as Cause of Action

Consumer failed to plead facts that would plausibly support a cause of action, as required by federal pleading rule, for breach of express warranty under New Jersey law against manufacturer of medical device consisting of injectable substance intended to treat the loss of facial fat; consumer alleged, in boilerplate fashion, the essential elements of express warranty claim, did not assert any supporting facts, and did not allege that manufacturer ever made any identifiable, unapproved statements to

consumer or her physician regarding the safety, effectiveness, or proper applications of medical device. Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.; N.J.S.A. 12A:2–313.

Cases that cite this headnote

[28] **Federal Civil Procedure**
⇐ Pleading Over

Where a complaint is dismissed for failure to state a claim, a district court must permit a curative amendment, unless an amendment would be inequitable or futile. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

Benjamin M. Del Vento, Livingston, NJ, for Plaintiff.

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OPINION

KEVIN McNULTY, District Judge:

*1 This is a personal injury action brought by plaintiff Victoria Clements for injuries allegedly sustained following the administration of Sculptra, a medical device consisting of an injectable substance intended to treat the loss of facial fat. Now before the Court is the motion of the defendants (collectively, "Sanofi") for summary judgment. For the reasons set forth below, the motion is denied as presented, but granted to the extent that the complaint is dismissed without prejudice.

Sanofi has styled its motion as one for summary judgment under Federal Rule of Civil Procedure 56. Plaintiff Clements has not submitted a responsive Statement of Material Facts Not in Dispute, as required by Local Rule 56.1(a). Nor has Clements really made any substantial factual showing in opposition to Sanofi's summary judgment motion. Clements's explanation is that she has not had the opportunity to complete discovery, and that Sanofi's summary judgment motion is therefore premature.

[1] If Clements's explanation were properly presented, and if I accepted it, I might simply terminate Sanofi's motion and permit discovery to proceed. Sanofi's contentions, however, are arguments of law. For example, Sanofi argues that the state law causes of action pled in the complaint are either preempted by federal law or subsumed by the New Jersey Products Liability Act. Such contentions, directed to the face of the complaint, are appropriate for consideration under the standards for a Rule 12(b)(6) motion to dismiss. The only extrinsic facts relevant to such a motion pertain to the FDA approvals of Sanofi's medical device. Those approvals are admitted by the plaintiff in her brief, and in any event are readily susceptible of judicial notice. *See* p. 4 n. 2, *infra*.I also observe that Clements's complaint is not pleaded with the factual specificity required by the Federal Rules. I therefore may profitably treat this as the equivalent of a motion to dismiss. [1]

The complaint as presented should be dismissed. I conclude, however, that neither summary judgment nor a dismissal with prejudice would be procedurally fair. This state-law complaint was removed from state court to federal court by Sanofi. When Clements filed it, she was not reasonably on notice that she would be held to federal pleading standards. Her brief in opposition to Sanofi's motion also asserts facts, not pled in the complaint, that she says would support a non-preempted claim. I do not rule on those contentions in advance. I do, however, provide that this order of dismissal is without prejudice to the filing of an amended complaint within 30 days.

I. BACKGROUND

Statutory Background

Congress passed the Medical Device Amendments (MDA) to the FDCA in 1976 to impose uniform requirements for the introduction of new medical devices into the market. *See*21 U.S.C. § 301 *et seq.* The MDA established three levels of federal oversight depending on the risks presented by a particular medical device. The devices that receive the highest level of scrutiny are Class III medical devices: those "purported or represented to be for a use in supporting human life or for a use which is of substantial importance in preventing impairment of human health, or presents a potential unreasonable risk of illness or injury."21 U.S.C. § 360(1)(c)(ii).

*2 The MDA subjects Class III medical devices to a rigorous premarket approval ("PMA") process. The PMA process is designed to "provide reasonable assurance" of the device's safety and efficacy. 21 U.S.C. § 360(a)(C)(ii)(II). PMA review requires, among other things, the following:

> [F]ull reports of all studies and investigation of the device's safety and effectiveness that have been published or should reasonably be known to the applicant; a "full statement" of the device's "components, ingredients, and properties and of the principle or principles of operation"; "a full description of the methods used in, and the facilities and the facilities and controls used for, the manufacture, processing, and when, when relevant, packing and installation of, such device"; samples or device components required by the FDA; and a specimen of the proposed labeling.

Riegel v. Medtronic, Inc., 552 U.S. 312, 317, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (quoting 21 U.S.C. § 360e(c)(1)). PMA review also requires the Food and Drug Administration ("FDA") to "determine that the [device's] proposed labeling is neither false nor misleading."*Id.* at 318, 128 S.Ct. 999 (quoting 21 U.S.C. § 360e(d)(1)(A)). A manufacturer cannot manufacture or sell a device unless it receives PMA. Once a device has been approved, "the MDA forbids the manufacturer to make, without FDA permission, changes in design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness."*Id.* at 319, 128 S.Ct. 999.

FDA Approval of Sculptra[2]

[2] Sculptra, a Class III medical device, was approved through the PMA process on August 3, 2004, after a nine-month review. (Def. Statement of Undisputed Facts Pursuant to Local Rule 56.1, Dkt. No. 9–1, ¶ 1) Sculptra was initially approved "for the restoration and/or correction of the signs of lipoatrophy—commonly known as facial fat loss—in people with human immunodeficiency virus ('HIV')". (*Id.*)

On July 28, 2006, Sanofi filed a supplemental PMA application to allow Sculptra to be used for cosmetic purposes, regardless of whether its recipients suffered from HIV. (*Id.* at ¶ 2)

On July 28, 2009, after a three-year review, the FDA granted PMA, approving Sculptra's use in "immune competent people as a single regimen for correction of shall to deep nasolabial fold contour deficiencies and other facial wrinkles in which deep dermal grip pattern injection technique is appropriate."(*Id.*) Although marketed under a different name —"Sculptra Aesthetic"—Sanofi states that the device is identical to Sculptra. (*Id.* at ¶ 5)

The FDA has never revoked, suspended, or otherwise interrupted its approval of Sculptra or Sculptra Aesthetic. (*Id.* at ¶ 4)

Clements's Use of Sculptra

The facts in this section are not contained in the Complaint. I refer to them as background, and also because they are relevant to my decision that the dismissal of the complaint should be without prejudice.

*3 According to Clements's brief, in 2004 Sculptra was approved for use on HIV/AIDS patients. (Dkt. No. 14 at 5) She alleges that the defendants acknowledged this single approved use in a pamphlet. (*Id.* at 6) Defendants, however, were allegedly determined that Sculptra would be prescribed "off-label" for cosmetic use as a "wrinkle-buster." (*Id.* at 7)

In 2007, Clements was prescribed Sculptra. (*Id.* at 8) She alleges in her brief (and her complaint) that she relied on unspecified representations that the product was safe and effective. (*Id.*) In an interrogatory response, Clements added that she "relied upon the oral representation of Dr. Marilyn Berzin," her dermatologist. (Decl. of Michael Rato in Support of Def.'s Mot. for Summ. J. ("Rato Decl."), Ex. F, Dkt. No. 9–9, at 8–9).

Sanofi confirms that Clements's dermatologists were Drs. Marilyn Berzin and Dale Isaacson. (Rato Decl., Ex. E, Dkt. No. 9–8, at 2) Sanofi attaches a consent form, dated October 26, 2007, allegedly signed by Clements. (*Id.*) That form, entitled "Informed Consent for Sculptra® Therapy," states, *inter alia*:"Sculptra therapy has been approved by the United States Food and Drug Administration (FDA) for the restoration and/or correction of facial fat loss (lipoatrophy) in people with HIV. Sculptra® therapy *has not been specifically approved by the FDA for aesthetic (cosmetic) use.*"(*Id.* at 3) (emphasis added).

Clements states in her brief that Sculptra was not approved for cosmetic use until two years after it was prescribed to her, *i.e.*, in 2009. (Dkt. No. 14, at 9).

The Present Action

Clements commenced this action on April 2, 2013, in the Superior Court of New Jersey, Essex County. The Complaint (Dkt. No. 1–2) asserts against Sanofi state-law causes of action for breach of express and implied warranty (Count I), negligence (Count II), strict liability (Count III), violations of the New Jersey Products Liability Act (Count IV), and punitive damages deriving from those violations (Count V).

Clements's complaint is virtually devoid of relevant facts. Count One, for example, recites that Sanofi is the manufacturer of Sculptra. It alleges that Clements used the product at an unspecified "aforementioned time and place." It alleges in boilerplate fashion that Sanofi "warranted, both implied and expressed, that such product was reasonably safe, fit and suitable for its intended use and reasonably foreseeable misuses and was of merchantable quality"; that she relied on those warranties; and that the Sanofi breached such warranties, causing her damage. The other counts follow the same pattern. They recite the bare legal elements of causes of action, with no supporting facts.

On March 6, 2014, Sanofi removed this action to federal court. Some limited discovery occurred. On May 29, 2014, Sanofi filed this motion for summary judgment. (Dkt. No. 9) In support, Sanofi submitted a memorandum of law; a properly supported statement of undisputed facts pursuant to Local Rule 56.1; and a declaration attaching certain exhibits, including publicly filed documents evidencing the FDA's premarket approval of Sculptra, as well as certain medical records and Clements's response to initial interrogatories. (Dkt. No. 9–3)

*4 In response, Clements filed a memorandum of law. (Dkt. No. 14) She did not file affidavits of potential witnesses or sponsors of exhibits. Nor did she file the statement of uncontested facts required by Local Rule 56.1: Rather, Clements's counsel attached to her brief a copy of "a 24–page pamphlet for Sculptra entitled 'Prescribing Information.' " (*Id.* at 6; *see also* Ex. A, Dkt. No. 14–3) Also attached to the brief is a copy of what appears to be an affidavit of Dr. Amy Newburger, filed in a New York state court case. (Ex. B, Dkt. No. 14–3) Newburger's affidavit states, *inter alia*, that a Sanofi sales person promoted Sculptra to her off-label as a "wrinkle-filler." Dr. Newburger, however, is not alleged to have ever treated Clements, the plaintiff in *this* case.

Sanofi filed a reply memorandum of law. (Dkt. No. 16) It later filed supplemental letters alerting the court to recently-decided opinions in Sculptra-related cases. (Dkt. Nos. 19, 21)

Sanofi filed a motion to stay discovery on the same day it moved for summary judgment. (Dkt. No. 10) On July 15, 2014, Clements agreed to the stay of discovery pending resolution of the summary judgment motion. (Dkt. Nos. 12, 13)

II. JURISDICTION

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a), as there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.

III. GOVERNING STANDARDS

A. Summary Judgment

[3] Sanofi has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. Rule 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."FED. R. CIV. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the moving party meets its threshold burden, the opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *see also*FED. R. CIV. P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist).

[4] [5] Where the factual record is not developed, Rule 56(d) permits the party opposing summary judgment to "show by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition."In such a case, the court may "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."*See*FED. R. CIV. P. 56(d). The opposing party's affidavit or declaration "must identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment, and why it has not been previously obtained."*Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir.1989) (internal quotation omitted)."[B]are conclusions or mere conjecture regarding facts that *may* be uncovered through discovery" are insufficient. *New Cmty.*

Corp. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc., 2011 WL 4020941, *3 (D.N.J. Sept. 9, 2011), *report and recommendation adopted*, 2011 WL 4594293 (D.N.J. Sept. 30, 2011).

*5 [6] Clements, faced by a motion for summary judgment, has failed to comply with federal procedures. She has not submitted any affidavit properly establishing the genuineness of exhibits; she merely attaches them to her brief. She has not submitted the responsive Statement of Material Facts Not in Dispute required by Local Rule 56.1(a).[3] Although she claims that she needs more discovery, she has not filed a Rule 56(d) affidavit. That was a risky omission. Except in rare cases, "failure to comply with [Rule 56(d)] is fatal to a claim of insufficient discovery on appeal." *Bradley v. United States*, 299 F.3d 197, 207 (3d Cir.2002); *see also LaBarre v. Bristol–Myers Squibb Co.*, 544 Fed.Appx. 120, 124 (3d Cir.2013) ("Because [the plaintiff] did not submit a Rule 56(d) affidavit requesting additional time to obtain [discovery], the District Court ha[s] no reason to lift the discovery stay or withhold deciding the summary judgment motion based on a potential need for [such discovery]"); *Dowling v. City of Phila.*, 855 F.2d 136, 139–40 (3d Cir.1988). It is true, however, that Sanofi filed its summary judgment motion very early in the case, when there had been only minimal discovery.[4]

Plaintiff did not choose this federal forum, and I will be lenient in this instance, relaxing the Federal Rules of Civil Procedure to achieve substantial justice under the circumstances. *See generally* FED. R. CIV. P. 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Clements and her counsel will be expected to comply with the rules and procedures of this court going forward. Nevertheless, for the reasons stated at pp. 1–2, above, I have determined that the fairest procedure is to treat Sanofi's motion as a motion to dismiss the complaint.

B. Motion to Dismiss

[7] [8] Rule 12(b)(6), Fed.R.Civ.P., provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n. 9 (3d Cir.2011). For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir.2014).

[9] [10] Federal Rule of Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiffs obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570, 127 S.Ct. 1955; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir.2008). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). While "[t]he plausibility standard is not akin to a 'probability requirement'... it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

*6 [11] When deciding a motion to dismiss, a court may consider facts appropriate for judicial notice without converting the motion into a motion for summary judgment. *See Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993) ("We now hold that a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."); *In re Wellbutrin SR/Zyban Antitrust Litig.*, 281 F.Supp.2d 751, 755 n. 2 (E.D.Pa.2003) (taking notice of and considering reports published on the FDA's website in addition the facts alleged in the complaint).

IV. ANALYSIS

Sanofi argues that Clements's claims are either subsumed under the New Jersey Products Liability Act ("PLA"), N.J.S.A. § 2A:58C–2, or preempted in their entirety by the MDA, as interpreted by the Supreme Court in *Riegel*, 552 U.S. at 330, 128 S.Ct. 999. Clements does not address the PLA argument, but contends that certain existing or potential claims are not preempted by the MDA because they are valid "parallel claims" under *Riegel's* preemption regime.

A. Subsumption by the Products Liability Act

[12] As an initial matter, Clements's claims for breach of implied warranty (Count I), negligence (Count II), and strict liability (Count III) are subsumed by the PLA. Because they do not constitute viable separate claims under New Jersey law, they must be dismissed as a matter of law.

[13] [14] The PLA "established the sole method to prosecute a product liability action" such that "only a single product liability action remains."*Tirrell v. Navistar Int'l, Inc.*, 248 N.J.Super. 390, 398–99, 591 A.2d 643 (App.Div.1991)."The language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products."*In re Lead Paint Litig.*, 191 N.J. 405, 436–47, 924 A.2d 484 (2007). It "effectively creates an exclusive statutory cause of action for claims falling within its purview."*Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991). It subsumes any cause of action "for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty."N.J.S.A. § 2A:58C–1(b)(3). In short, those former common-law causes of action (with the exception of breach of express warranty) have merged into a single cause of action under the PLA.

[15] Thus New Jersey law no longer recognizes breach of implied warranty, negligence, and strict liability as viable separate claims for harm deriving from a defective product. Recognizing as much, the Third Circuit, this district court, and the state courts of New Jersey have consistently dismissed product liability claims based on those common-law theories. [5]

I follow suit. Count I (to the extent it alleges breach of implied warranty), [6] Count II, and Count III will be dismissed as matter of law.

B. Preemption Under the MDA

*7 I next focus on Count IV (PLA claim), and Count V (derivative claim for punitive damages). Because those claims are preempted by federal law, they will be dismissed.

1. ***Riegel's* Preemption Regime**

Section 360k(a) of the MDA contains an express preemption provision:

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a).

[16] In *Riegel*, the Supreme Court set forth a two-step analysis for courts to determine whether the MDA expressly preempts a state law claim within the meaning of § 360k(a). First, a court must determine whether the FDA has established "requirements"—the term used in § 360k(a)—applicable to the particular medical device at issue. 552 U.S. at 321, 128 S.Ct. 999. If it has, then the second step requires a court to determine whether the state law claims in question are based on state "requirements" that "relate to the safety or effectiveness of the device"*and* are "different from, or in addition to" the federal requirements. *Id.* at 321–22, 128 S.Ct. 999.

Riegel concluded that the first prong of the preemption test is automatically satisfied where a medical device has received premarket approval. *Id.* at 321–23, 128 S.Ct. 999. The PMA process necessarily imposes federal requirements, the Court found, because the FDA requires that a medical device be "made with almost no deviations from the specifications in [the PMA] application."*Id.* at 323, 128 S.Ct. 999. Turning to state law, the Court considered whether common law tort claims for negligence, strict liability, and breach of warranty establish requirements, and, if so, whether those requirements are "different from, or in addition to" the federal PMA requirements. *Id.* at 323, 128 S.Ct. 999. The Court answered yes. It reasoned that safety and effectiveness are "the very subjects" of such tort causes of action. *Id.* Thus, the Court held, those duties imposed by common law must be regarded as state law requirements. *Id.* at 324, 128 S.Ct. 999. And those state tort-based requirements of safety and effectiveness implicate the core concerns of the federal PMA process.

[17] The upshot of *Riegel*, then, is that the MDA preempts state tort claims to the extent that they would impose requirements on device manufacturers that deviate from those imposed by federal law—particularly, those imposed in the

PMA process. Accordingly, courts within the Third Circuit have consistently held that tort claims based on negligence, manufacturing and design defects, strict liability, breach of warranty, and failure to warn, including such claims as subsumed by the New Jersey PLA, are preempted by MDA. [7]

[18] **[19]** **[20]** Not *all* state law claims, however, are expressly preempted by the MDA. *Riegel* left the door ajar for a narrow category of state law claims that "parallel," rather than add to, federal requirements. *Id.* at 330, 128 S.Ct. 999. Such parallel claims must show a link between a specific violation of an FDA regulation and the plaintiffs injury. *See Smith v. Depuy Orthopaedics, Inc.*, 2013 WL 1108555, at *12 (D.N.J. Mar. 18, 2013) ("State claims 'premised on a violation of FDA regulations,' however, are parallel to federal requirements, and thus, are not preempted.") (quoting *Riegel,* 552 U.S. at 330, 128 S.Ct. 999) The parallel claim exception to preemption, however, requires more than just a change of terminology; a plaintiff "cannot simply incant the magic words '[Defendant] violated FDA regulations' in order to avoid preemption."*In re Medtronic,* 592 F.Supp.2d 1147, 1158 (D.Minn.2009); *see also Smith,* 2013 WL 1108555, at *12 ("[B]road references to federal regulations in pleadings are insufficient" to properly plead a parallel claim) (citations omitted). Rather, the plaintiff must plead "facts showing action or inaction in [the] defendants' efforts to take part in the PMA process or implement its results."*Smith,* 2013 WL 1108555, at *12 (citations omitted). In short, a "parallel claim," like any other, is subject to the pleading standards of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)

2. Application to Counts IV and V of the Complaint

*8 **[21]** Counts IV and V of the Complaint are premised upon violations of the PLA. Count IV alleges that Sanofi violated the PLA because Sculptra's design and manufacture were defective and its warnings inadequate. Count V seeks punitive damages for the harm allegedly caused by the PLA violations. From the face of the complaint, it is apparent that these counts, at least as currently alleged, are preempted by the MDA and thus should be dismissed as a matter of law. [8]

Since Sculptra was cleared for sale through the PMA process, it is subject to federal requirements within the meaning of § 360k(a) of the MDA. *See Riegel,* 552 U.S. at 322, 128 S.Ct. 999 ("Premarket approval ... imposes 'requirements' under the MDA"). By approving Sanofi's PMA application, the FDA determined that Sculptra's manufacture, design, and warnings were safe and effective.

Under the PLA, a "manufacturer or seller of a product" is liable:

> [O]nly if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

N.J.S.A. 2A:58C–2.

The PLA further provides:

> [A] manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction.

N.J.S.A. 2A:58C–4.

[22] Under the PLA, then, a manufacturer is liable "only if the claimant proves that the device was not reasonably fit, suitable or safe for its intended purpose because it deviated from design specifications."*Smith v. Depuy Orthopaedics, Inc.*, 2013 WL 1108555, at *9 (D.N.J. Mar. 18, 2013)*affd. in part,* 552 Fed.Appx. 192 (3d Cir.2014). However, by granting PMA, the FDA determined that Sculptra's manufacture, design, and warnings *were* safe and effective. To subject Sanofi to liability under the PLA would thus impose requirements regarding the safety and effectiveness of Sculptra that are "different from, or in addition to" the federal requirements. *See, e.g., Desai,* 2013 WL 163298, at *4–

6 (finding that the plaintiffs PLA claims were preempted). As a result, Count IV and the derivative claim for punitive damages under Count V are preempted under § 360k(a).

As set forth above, there is a narrow exception for a "parallel" claim, *e.g.*,"a damages remedy for claims premised on a violation of FDA regulations."*Riegel,* 552 U.S. at 330, 128 S.Ct. 999. But nowhere in her Complaint does Clements even purport to set forth any allegation of a violation of a federal standard. Therefore, Counts IV and V, as pled, cannot escape preemption under *Riegel's* parallel claims exception. Accordingly, the claims are preempted as a matter of law and must be dismissed.

3. "Off–Label" Promotion

*9 [23] In her moving papers, Clements attempts to salvage Counts II, IV, and V from preemption by depicting them as "parallel" claims based on Sanofi's alleged off-label promotion of Sculptra. (Pl.'s Mem. of Law in Opp'n to Corp. Defs.' Mot. for Summ. J. ("Pl.'s Opp'n"), Dkt. No. 14, 22–33) Her brief argues that, even though Sculptra had not been approved for cosmetic use at the time she received her injection, Sanofi engaged in an "off-label usage advertising campaign" to promote the use of Sculptra for cosmetic purposes. (*Id.* at 22) This promotional activity, she asserts, violated several provisions of the Food, Drug, and Cosmetics Act (FDCA) (21 U.S.C. § 331(a), (g), (k) and (n)), and 21 U.S.C. § 352(f), (n), and (q) 0, as well as a related federal regulation (21 C.F.R. § 801.4). Taken together, those cited provisions list certain conditions under which a medical device may be deemed "misbranded" within the meaning of the FDCA, and prohibit the manufacture, sale and marketing of any such "misbranded" device.

Clements claims that the duties imposed by state law under Counts II, IV, and V parallel the duties imposed by the federal misbranding provisions. Therefore, she says, her claims under those counts would be valid, parallel claims which are not preempted by the MDA. There are at least three problems with that contention.

First, Count II, the negligence claim, is still invalid as a matter of law. Because it is subsumed by the PLA, it fails to state a valid claim under New Jersey state law, irrespective of whether it is preempted by federal law.

Second, Counts IV and V, to the extent they are intended to state parallel, "off label" claims, fail to meet the minimal pleading standards of Fed.R.Civ.P. 8(a) and *Twombly.*See pp. 9–10, *supra.*Those counts, in boilerplate fashion, recite the legal elements of a PLA claim and a derivative claim for punitive damages. Thus, Count IV alleges that Sanofi marketed a product that was not "reasonably fit, suitable or safe for its intended purpose because it: a) deviated from the design specifications, formulae or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae and/or b) failed to contain adequate warnings or instructions, and/or c) was designed in a defective manner."No supporting facts are pled. Counts IV and V say literally nothing about any off-label promotional campaign. They do not cite 21 U.S.C. § 331(a), (g), (k) and (n), 21 U.S.C. § 352(f), (n), and (q), or 21 C.F.R. § 801.4. And the Complaint contains no facts from which the reader could conclude that Sculptra's manufacture, design, warnings, or alleged off-label promotion actually violated any of the federal provisions Clements cites in her brief.

[24] Counts IV and V embody the kind of conclusory recitals of legal elements, unsupported by factual allegations, that are barred by *Twombly.*Parallel claims, like others, must contain more than "labels and conclusions." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955; *see also Parker v. Stryker Corp.*, 584 F.Supp.2d 1298, 1301 (D.Colo.2008) (conclusory allegations are insufficient to state a parallel claim). Clements does not plead facts which, if proven, would link any alleged violation of federal standards to her injury. *See Purcel v. Advanced Bionics,* 2008 WL 3874713, *1 (N.D.Tex. Aug. 13, 2008) (plaintiff successfully stated a parallel by alleging that a supplier's modification of a component part of the regulated device at issue caused the injury). And inadequate factual allegations in a complaint are not remedied by statements in the plaintiffs briefs. *See, e.g., Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir.1988) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citation omitted). Counts IV and V must be dismissed, albeit without prejudice, for the reasons expressed above.

*10 [25] For Clements's guidance in drafting any amended complaint, I point out a third potential flaw. An off-label promotion theory may fail to state a cause of action to the extent that it illegitimately shifts the risk of off-label use from prescribing doctors and patients to manufacturers. Congress spoke directly to off-label use in 21 U.S.C.

§ 396. There, as the Tenth Circuit Court of Appeals recently stated, the legislators went out of their way "to protect the liberty of doctors and patients to use approved devices in any manner they wish—including off-label—instructing that '[n]othing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device.'"*Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1344 (10th Cir.2015) (quoting 21 U.S.C. § 396). In protecting this liberty to use approved devices off-label, Congress appeared to intentionally place "a good deal of the risk on [doctors and patients] rather than on manufacturers."*Id.* Indeed, as the Tenth Circuit points out, despite acknowledging—and perhaps even tacitly encouraging—off-label usage in § 396, Congress nonetheless proceeded to enact the robust the preemption provision found in § 360k(a)."Given that Congress well understood the difference between on—and off-label uses and exhibited its facility with those terms in § 396, the absence of any mention of them in § 360k(a) becomes all the harder to ignore[.]"*Id.*

Nothing in § 360k(a) suggests that the preemption analysis somehow depends on *how* the device in question is being used. *See, e.g., Caplinger v. Medtronic, Inc.*, 921 F.Supp.2d 1206, 1215 (W.D.Okla.2013) ("plaintiffs off-label promotion allegations do not somehow turn [her] claims into parallel claims.") A hypothetical claim (not pled in the current complaint) that Sanofi's design, manufacture, or warnings were defective because they ignored the possibility that doctors would prescribe Sculptra for off-label cosmetic use, would not necessarily constitute a non-preempted, "parallel" state-law claim. It might well constitute a state law requirement that is expressly preempted by § 360k(a). An allegation that a product's warnings were inadequate, for example, may be tantamount to a requirement that Sanofi must do something "different from, or in addition to" what the FDA had already approved. *See Thorn v. Medtronic Sofamor Danek, USA, Inc.*, ——F.Supp.3d ——, ——, 2015 WL 328885 at *7 (W.D.Mich. Jan. 23, 2015). That is to say, "a jury would have to find either that Defendants were required to include warnings beyond those in the FDA-approved label ... or that Defendants were obligated to issue post-sale warnings about potential adverse effects of using [the product] in an off-label manner."*Id.* (internal quotations omitted). As I say, I do not prejudge the matter, but state these principles for Clements's guidance in drafting any amended complaint.

***11** Counts II, IV and V fail to state a cause of action and must be dismissed; under established pleading standards, they cannot be saved by Clements's allegations and arguments in her brief. Any amended pleading, moreover, should take into account the standards of law stated above.

C. Express Warranty

[26] **[27]** What remains of the Complaint, then, is Count I, to the extent it pleads a breach of express warranty. Unlike other claims in the complaint, the express warranty claim is not subsumed by the PLA. *See*N.J.S.A. 2A:58C–1(b)(3). Likewise, an express warranty claim is not necessarily preempted under the MDA—at least not if the plaintiff can show that the defendant-manufacturer made "voluntary statements" that were "not approved by the FDA or mandated by the FDA about the use or effectiveness" of a medical device. *See Cornett v. Johnson & Johnson*, 211 N.J. 362, 392, 48 A.3d 1041 (2012). I therefore consider whether the express warranty claim in Count I meets the minimal pleading standards of Fed.R.Civ.P. 8 and *Twombly*. *See* pp. 9–10, *supra*.I conclude that it does not, and that it must therefore be dismissed.

Under New Jersey law, a claim for breach of express warranty has three essential elements: "(1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description."*Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 721 (D.N.J.2011) (citing N.J. Stat. Ann. § 12A:2–313).

Count I of the Complaint recites that Sanofi is the manufacturer of Sculptra. It alleges that Clements used the product at an unspecified "aforementioned time and place," although it is unclear what "time and place" that might refer to. Count I alleges in boilerplate fashion that the defendants "warranted, both implied and expressed, that such product was reasonably safe, fit and suitable for its intended use and reasonably foreseeable misuses and was of merchantable quality"; that the plaintiff relied; and that the defendants breached such warranties, causing her damage.

Count I asserts no supporting facts. The content of any such "warranty" is not given. Who said what to whom, where, when, and how, are left unexpressed. There is no factual allegation in the Complaint that Sanofi ever made any identifiable, unapproved statements to Clements or

her physician regarding the safety, effectiveness or proper applications of Sculptra. In short, this is "a formulaic recitation of the elements of a cause of action," which *Twombly* tells us "will not do." 550 U.S. at 556, 127 S.Ct. 1955.

For the reasons stated above, such allegations do not come close to meeting the federal requirement that the complaint plead facts that would plausibly support a cause of action. Count I, to the extent it asserts an express warranty claim, will be dismissed.[9]

D. Dismissal Without Prejudice

*12 [28] Finally, I must decide whether the dismissal of the Complaint will be with or without prejudice. As noted above, Clements filed her complaint in State court, and therefore may not have given sufficient attention to federal substantive and procedural standards. Of course, even when dismissing a complaint initially filed in federal court, a court will commonly provide that such dismissal is without prejudice. The Third Circuit has liberally permitted pleading amendments to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir.1990). Indeed, where a complaint is dismissed on Rule 12(b)(6) grounds, "a District Court must permit a curative amendment, unless an amendment would be inequitable or futile." *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir.2004).

There are some initial barriers to Clements's claims—most prominently, preemption. I cannot now say, however, that to give her a chance to formulate a valid complaint would be "futile." I will therefore permit the plaintiff to file an amended complaint within 30 days. Any amended complaint should conform to the standards of *Twombly* and Rule 8(a), and should take into account the substantive legal principles discussed above. Before embarking on summary judgment or a trial, it is necessary to ensure that plaintiff has filed a complaint that meets federal pleading standards and sets forth a valid legal claim.

V. CONCLUSION

For the reasons set forth above, Sanofi's motion for summary judgment is denied as presented but, considered as a motion to dismiss the complaint, is **GRANTED** without prejudice to the filing of an amended complaint within 30 days after the date of this opinion.

An appropriate order will issue.

All Citations

--- F.Supp.3d ----, 2015 WL 3648911

Footnotes

1 *See generally Dolan v. Nicoll*, 2005 WL 1657029 at *1 (D.N.J. July 13, 2005) ("Defendant [ ] filed a summary judgment motion, which this Court treats as a motion to dismiss"). Alternatively, I might assume *arguendo* that there are issues of fact and construe the facts in Clements's favor, but nevertheless consider whether Sanofi "is entitled to judgment as a matter of law" under Rule 56(a). Either way, there are potentially dispositive issues of law that are appropriate for consideration now.

2 Clements, although she does not plead these facts about the regulatory process in her Complaint, relies on them in her brief. (*See* Dkt. No. 14, at 4–9)

These facts about the FDA approvals of Sculptra are also matters of public record, appropriate for judicial notice under Federal Rule of Evidence 201. *Desai v. Sorin CRM USA, Inc.*, 2013 WL 163298, at *4 (D.N.J. Jan. 15, 2013) (Walls, J.) (court "takes judicial notice of the FDA's website, and holds that it establishes premarket approval of the Biotronik lead" medical device); *see also Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n. 5 (3d Cir.2004) (taking judicial notice of PTO notice of allowance of trademark for drug); *Novartis Pharmaceuticals Corp. v. Wockhardt*, 2013 WL 5770539, at *4 (D.N.J. Oct. 23, 2013) (Wigenton, J.) (taking judicial notice of Novartis's citizen petition to block approval of generic drug and of the FDA's response).

3 Local Rule 56.1 states: "The opponent of summary judgment shall furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant's statement, indicating agreement or disagreement and, if not agreed, stating each material fact in dispute and citing to the affidavits and other documents submitted in connection with the motion."

4 Sanofi removed this action to federal court on March 6, 2014. On March 27, 2014, Clements proposed a joint discovery plan. (Dkt. No. 8) On March 29, 2014, Sanofi simultaneously moved for summary judgment and to stay discovery pending

the resolution of its summary judgment motion. On June 6, 2014, then-Magistrate Judge Madeline Arleo entered a scheduling order directing the parties to complete fact discovery by February 28, 2015. On July 14, 2014, Clements stipulated to Sanofi's motion to stay discovery pending resolution of the summary judgment motion.

5 *See, e.g., Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 313 (3d Cir.1999) (dismissing negligence claim, stating that "[u]nder New Jersey law negligence is no longer viable as a separate claim for harm caused by a product"); *Repola*, 934 F.2d at 489–94 (dismissing claims of negligence and negligent failure to warn); *Thomas v. Ford Motor Co.*, 70 F.Supp.2d 521, 528–29 (D.N.J.1999) (dismissing common-law claim for negligent manufacture); *Reiff v. Convergent Techs.*, 957 F.Supp. 573, 583 (D.N.J.1997) (dismissing negligence and breach of warranty claims); *McWilliams v. Yamaha Motor Corp. USA*, 780 F.Supp. 251, 262 (D.N.J.1991) (dismissing claims of negligence and breach of implied warranty), *aff'd in part, rev'd in part on other grounds*, 987 F.2d 200 (3d Cir.1993); *Tirrell*, 248 N.J.Super. at 399, 591 A.2d 643 (dismissing negligence claim); *see also, e.g., Green v. Gen. Motors Corp.*, 310 N.J.Super. 507, 517, 709 A.2d 205 (App.Div.1998) (stating that "causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action" under the PLA); *Ramos v. Silent Hoist & Crane Co.*, 256 N.J.Super. 467, 473, 607 A.2d 667 (App.Div.1992) (stating that "Legislature has consolidated the negligence, breach of warranty and strict liability theories for product liability claims" into single product liability action under PLA).

6 Count I's claim of breach of express warranty is addressed in Section IV.C., *infra*.

7 *See, e.g., Williams v. Cyberonics, Inc.*, 388 Fed.Appx. 169, 171 (3d Cir.2010) ("Appellant's allegations of strict products liability based on manufacturing defect and breach of warranty are preempted by the MDA"); *Millman v. Medtronic*, 2015 WL 778779, *6 (D.N.J. Fed. 24, 2015) (holding that common law fraud, strict liability, failure to warn, breach of warranty, design defect, and manufacturing defect claims "are all preempted because they ... seek to impose additional requirements"); *Desai v. Sorin CRM USA, Inc.*, 2013 WL 163298, at *4–*6 (D.N.J. Jan. 15, 2013) (finding that the plaintiffs' claims under the PLA were preempted); *Gross v. Stryker*, 858 F.Supp.2d 466, 490 (W.D.Pa.2012) (stating that breach of implied warranty is a state claim "that imposes requirements that are different [from], or in addition to, specific federal requirements"); *Bentzley v. Medtronic, Inc.*, 827 F.Supp.2d 443, 453 (E.D.Pa.2011) (deciding that design defect claims are preempted); *Hayes v. Howmedica Osteonics Corp.*, 2009 WL 6841859, at *6 (D.N.J. Dec. 15, 2009) (finding that a failure to warn claim is preempted); *Delaney v. Stryker Orthopaedics*, 2009 WL 564243, at *3 (D.N.J. Mar. 5, 2009) (holding that "the MDA preempts products liability claims, including" failure to warn, defective design, negligence and breach of implied warranty).

8 Because preemption may often be determined from the face of the complaint, "many PMA preemption motions are decided without any discovery." *Smith v. Depuy Orthopaedics Inc.*, 552 Fed.Appx. 192, 196 (3d Cir.2014) (citing *Bass v. Stryker Corp.*, 669 F.3d 501, 508 n. 1 (5th Cir.2012); *Gross v. Stryker, Corp.* 858 F.Supp.2d 466, 505 (W.D.Pa.2012); *Lewkut v. Stryker Corp.*, 724 F.Supp.2d 648, 653 n. 1 (S.D.Tex.2010); *Desai v. Sorin CRM USA, Inc.*, 2013 WL 163298, at *9 (D.N.J. Jan. 15, 2013); *Hayes v. Howmedica Osteonics Corp.*, 2009 WL 6841859, at *6–8 (D.N.J. Dec. 15, 2009); *Delaney v. Stryker Orthopaedics*, 2009 WL 564243, at *4 (D.N.J. Mar. 5, 2009))

9 Clements's counsel attaches to her brief a copy of an affirmation of Dr. Amy Newberger. That affirmation states that in March 2004, a sales representative from a subdivision of Sanofi "contacted [Dr. Newberger] and described [Sculptura] as a 'wrinkle filler.' " (Dkt. No. 14–3, at 3) This affirmation, executed in August 2011, seems to have been simply copied from the docket in an unrelated case in New York State court. In this case, any amended claim must allege that such an express warranty was made in connection with the medical treatment of Clements, not of someone else.

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United States District Court,
C.D. California.

UNITED STATES of America, ex rel. Doris MODGLIN and Russ Milko, Plaintiffs,
v.
DJO GLOBAL INC., DJO LLC, DJO Finance LLC, Orthofix, Inc., Biomet, Inc. and EBI, LP, Defendants.

Case No. CV 12–07152 MMM (JCGx). | Signed May 8, 2015.

Synopsis

Background: Qui tam relators brought action against manufacturers and distributors of durable medical equipment, alleging defendants violated False Claims Act (FCA) by submitting fraudulent reimbursement claims to Medicare and Medicaid for bone-growth stimulators that they knew had been prescribed for an off-label use. Defendants moved to dismiss.

Holdings: The District Court, Margaret M. Morrow, J., held that:

[1] relators failed to allege fraud with particularity on their implied false certification claim;

[2] FCA liability could not be premised on alleged violations of certification requirements for Medicare billing privileges applications;

[3] relators failed to allege scienter; and

[4] relators failed to allege fraud with particularity on their claim for fraudulent Medicaid reimbursement.

Motion granted.

West Headnotes (21)

[1] **Federal Civil Procedure**
⇦ Matters Considered in General

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, a court generally looks only to the face of the complaint and documents attached thereto. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**
⇦ Matters Considered in General

Federal Civil Procedure
⇦ Motion

A court normally must convert a motion to dismiss for failure to state a claim upon which relief can be granted into a motion for summary judgment if it considers evidence outside the pleadings; however, a court may consider certain materials, including documents attached to the complaint, documents incorporated by reference in the complaint, and matters of judicial notice, without converting the motion. Fed.Rules Civ.Proc.Rules 12(b)(6), 56, 28 U.S.C.A.

Cases that cite this headnote

[3] **Evidence**
⇦ Official Proceedings and Acts

A court can take judicial notice of public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

Cases that cite this headnote

[4] **United States**
⇦ False Claims

The False Claims Act (FCA) provides for the recovery of civil penalties from those who knowingly present a false or fraudulent claim to the federal government for payment, or knowingly use a false record to avoid or decrease an obligation to pay the federal government. 31 U.S.C.A. § 3729 et seq.

Cases that cite this headnote

[5] **United States**

⇦ False Claim

The False Claims Act (FCA) does not define false; rather, courts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law. 31 U.S.C.A. § 3729 et seq.

Cases that cite this headnote

[6] **United States**

⇦ Elements

A civil action for False Claims Act (FCA) liability requires four essential elements: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[7] **United States**

⇦ False Claim

The plaintiff in an action for False Claims Act (FCA) liability must show an actual false claim for payment being made to the government, as evidence of an actual false claim is the sine qua non of a FCA violation. 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[8] **United States**

⇦ False Claim

United States

⇦ False Certification

Relators who assert that a defendant has made a false claim in violation of the False Claims Act (FCA) can allege that the defendant has submitted a factually false claim, or that defendant has given a false certification. 31 U.S.C.A. § 3729(a)(1–3).

1 Cases that cite this headnote

[9] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

United States

⇦ False Certification

To show that claims were false under a false certification theory, a complaint alleging a False Claims Act (FCA) violation must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant explicitly undertook to comply with a law, rule or, regulation that is implicated in submitting a claim for payment, and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule, or regulation. 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[10] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

Claims brought under the False Claims Act (FCA) must fulfill the requirements of the rule that fraud be alleged with particularity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; 31 U.S.C.A. § 3729 et seq.

Cases that cite this headnote

[11] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

A pleading is sufficient under the rule requiring that fraud be alleged with particularity if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer to the allegations. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[12] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

While statements of the time, place, and nature of the purported fraudulent activities are sufficient to allege fraud with particularity, mere conclusory allegations of fraud are insufficient. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[13] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

To satisfy the rule that fraud be alleged with particularity, a plaintiff must specify the content of the fraudulent representation, the person who made it, when and where the representation was made, and the manner in which it was untrue and misleading, or the circumstances indicating that it was false. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[14] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

The knowledge or scienter element of a fraud claim need not be pleaded with particularity, but may be alleged generally under the rule that fraud be alleged with particularity; however, knowledge must still be pleaded sufficiently to make entitlement to relief plausible. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[15] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

The rule that fraud be alleged with particularity does not allow a complaint merely to lump multiple defendants together, but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[16] **Federal Civil Procedure**

⇦ Fraud, Mistake and Condition of Mind

Qui tam relators failed to allege fraud with particularity on their implied false certification claim under False Claims Act (FCA) against manufacturers and distributors of durable medical equipment by alleging that manufacturers and distributors, who had submitted reimbursement claims to Medicare, had corporate-wide policies of training their sales representatives to tell physicians that their bone-growth stimulators could safely be used for off-label purposes, where relators did not identify who made allegedly false statements or when/where those statements were made. 21 C.F.R. § 814.39; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[17] **United States**

⇦ Materiality

False Claims Act (FCA) liability could not be premised on alleged violations of a regulation setting forth certification requirements for Medicare billing privileges applications by manufacturers and distributors of durable medical equipment, where even if regulation obligated manufacturers and distributors to file a pre-market approval supplement for their purported off-label promotion of bone-growth stimulators, certification was not a condition or prerequisite of payment, and, thus, any violation of regulation did not render their reimbursement claims materially false. 31 U.S.C.A. § 3729(a)(1–3); 42 C.F.R. § 424.57.

1 Cases that cite this headnote

[18] **United States**

⇦ Pleading; Complaint Filed Under Seal

Qui tam relators' allegation that manufacturers and distributors of durable medical equipment knew that they were falsely and/or fraudulently claiming Medicare reimbursements for bone-growth stimulators that were being sold for off-label uses was insufficient to allege scienter, as required to state an implied false certification claim under False Claims Act (FCA), where relators failed to cite any Medicare statute, regulation, or claim form indicating that manufacturers and distributors were required to disclose fact that they sought reimbursement for devices prescribed for off-label uses. 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[19] **Federal Civil Procedure**
⇦ Fraud, Mistake and Condition of Mind

Qui tam relators failed to allege fraud with particularity on their implied false certification claim under False Claims Act (FCA) against manufacturers and distributors of durable medical equipment by alleging that manufacturers and distributors, who had submitted reimbursement claims to Medicare, made false certifications of their compliance with requirements for Medicare billing privileges applications, where relators did not allege with particularity when certifications took place. 42 C.F.R. § 424.57; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; 31 U.S.C.A. § 3729(a)(1–3).

1 Cases that cite this headnote

[20] **Federal Civil Procedure**
⇦ Fraud, Mistake and Condition of Mind

Qui tam relators failed to allege fraud with particularity on their claim under False Claims Act (FCA) that manufacturers and distributors of durable medical equipment submitted false reimbursement claims to Medicaid for bone-growth stimulators that were being sold for off-label uses, where relators did not allege that manufacturers and distributors submitted claims or otherwise made false statements in states that limited Medicaid coverage to durable medical equipment used for purposes approved by Food and Drug Administration. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.; 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

[21] **Federal Civil Procedure**
⇦ Form and Sufficiency of Amendment; Futility

Leave to amend qui tam relators' third-amended complaint would be futile and was not warranted in their action against manufacturers and distributors of durable medical equipment under False Claims Act (FCA), where relators could not add any particularized allegations concerning manufacturers' and distributors' alleged off-label promotion of bone-growth stimulators to support their implied false certification claim despite having had well over a year to plead their case. 31 U.S.C.A. § 3729(a)(1–3).

Cases that cite this headnote

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE CORRECTED THIRD AMENDED COMPLAINT

MARGARET M. MORROW, District Judge.

*1 *Qui tam* relators Doris Modglin and Russ Milko filed this action against defendants DJO Global Inc. ("DJO Global"), DJO, LLC ("DJO"), DJO Finance LLC ("DJO Finance"), Orthofix, Inc. ("Orthofix"), Biomet, Inc. ("Biomet"), and EBI, LP ("EBI") under seal and *in camera* on August 20, 2012. Relators invoked the court's federal question jurisdiction under 28 U.S.C. § 1331, and alleged a single claim for violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)(A), (B).[1] On December 26, 2012, they filed a first amended complaint, realleging the federal FCA claim and alleging state FCA claims under the equivalent statutes of twenty-nine states: California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee,

Texas, Virginia, and Wisconsin.[2] On May 17, 2013, the United States declined to intervene in the case.[3] On July 19, 2013, each of the twenty-nine states declined to intervene.[4] The court unsealed the amended complaint that day.[5]

On October 3, 2013, pursuant to a request by relators, the court dismissed Orthofix.[6] On November 8, 2013, relators filed a second amended complaint, restating their federal and state FCA claims and adding EBI, LLC (with EBI, LP, "EBI") as a defendant.[7] On January 22, 2014, the parties stipulated to dismiss DJO Global and DJO Finance as defendants;[8] the court entered an order on the stipulation on January 28, 2014.[9] On February 20, 2014, the court granted defendants' motion to stay discovery[10] until it decided their pending motion to dismiss the second amended complaint.[11] On May 5, 2014, the court held a hearing on the motion to dismiss the second amended complaint. Following that hearing, the court took the motion under submission and directed the parties to file supplemental briefs addressing four questions.[12] After the parties did so on July 7, 2014,[13] the court issued an order dismissing the second amended complaint on September 2, 2014.[14] The court dismissed the federal Medicare FCA claim based on submission of false claims and false certifications with prejudice except to the extent it was premised on the theory that defendants made implied false certifications by unlawfully promoting their devices for off-label uses.[15] The court dismissed the federal FCA claim without prejudice to the extent based on allegedly false claims submitted to Medicaid, the Federal Employees Health Benefit Program, the Federal Workers Compensation Programs, the Civilian Health and Medical Program of the Department of Veterans Affairs ("CHAMPVA"), and/or Tricare.[16] Finally, the court declined to exercise supplemental jurisdiction over relators' state law claims.[17]

On September 22, 2014, relators filed a third amended complaint; subsequently, on September 29, 2014, they filed a corrected third amended complaint.[18] On October 7, 2014, the court entered an order setting a briefing schedule and hearing date for defendants' motions to dismiss the corrected third amended complaint.[19] That motion was filed jointly by defendants on October 22, 2014.[20] Relators oppose the motion.[21]

I. FACTUAL BACKGROUND

*2 Relators assert that defendants—manufacturers and distributors of durable medical equipment ("DME")—fraudulently caused the government to disburse money by filing claims with Medicare and other federal healthcare plans[22] for reimbursement related to their provision of non-invasive, bone-growth stimulators ("stimulators") that they knew had been prescribed by physicians for an off-label purpose, i.e., one not specifically approved by the Food and Drug Administration ("the FDA"). Defendants allegedly failed to reveal to Medicare and other federal healthcare plans that the stimulators were going to be used for off-label purposes. As the court explained in its order dismissing the second amended complaint, before one can understand the allegations in the complaint, it is necessary to provide an overview of the statutory and regulatory scheme that governs both FDA approval of medical devices and the coverage of such devices by Medicare and other federal programs. The court begins by describing FDA approval of medical devices.

A. Background Regarding FDA Approval of Medical Devices

One of the "core objectives" of the Food, Drug, and Cosmetic Act ("the FDCA"), 21 U.S.C. § 301 *et seq.*, is to ensure that "there is reasonable assurance of the safety and effectiveness of devices intended for human use." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–34, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citing 21 U.S.C. § 393(b)(2)). To that end, the FDCA classifies medical devices in three categories: Classes I, II, and III. 21 U.S.C. § 360c(a). Class III devices include those that present a potentially unreasonable risk of illness or injury. *Id.*, § 360c(a)(1)(C). Because of the risk associated with such devices, the FDA has determined that the manufacturers of such devices must submit premarket approval ("PMA") applications to the FDA and obtain premarket clearance before offering the devices for sale.[23] 42 C.F.R. § 405.201(b). Class III devices that do not have PMA approval cannot be marketed and are considered "adulterated." 21 U.S.C. § 351(f)(1)(B) ("A ... device shall be deemed to be adulterated ... if it is a class III device ... which ... is required to have in effect an approved application for premarket approval ... and ... which has an application which has been suspended or is otherwise not in effect"); 42 C.F.R. § 405.201(b).

The FDA gives a device PMA approval if it determines that the PMA application contains sufficient valid scientific evidence to assure that the device is safe and effective for its intended use. 21 C.F.R. § 814.2(a). It is "a 'rigorous' process in which the manufacturer submits extensive study reports, design specifications and descriptions, samples of the device, and proposed labeling to the FDA, and the FDA conducts a comprehensive review and evaluation of all the submitted documents and materials[.]" *Kashani–Matts v. Medtronic, Inc.*, No. SACV 13–01161–CJC (RNBx), 2013 WL 6147032, *1 (C.D.Cal. Nov. 22, 2013).

*3 If a medical device is used for a purpose other than that for which it has obtained PMA approval, the usage is "off-label." *Carson v. Depuy Spine, Inc.*, 365 Fed.Appx. 812, 815 (9th Cir.2010) (Unpub.Disp.) ("Drugs and medical devices are approved or cleared by the FDA for marketing with labels describing the uses and the patient conditions which have been reviewed in the approval or clearance process. Any use by a physician which differs from the use described in the label or from the patient conditions described in the label is called 'off-label' "). The FDCA explicitly protects physicians' ability to prescribe devices for off-label use. 21 U.S.C. § 396 ("Nothing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship"); see also *Houston v. Medtronic, Inc.*, No. 2:13–cv–01679–SVW (SHx), 2014 WL 1364455, *1 n. 1 (C.D.Cal. April 2, 2014) ("Physicians are permitted to use Class III devices in off-label manners"). Indeed, off-label use of medical devices is "generally accepted" within the medical community, and § 396 of the FDCA "expressly disclaims any intent to directly regulate the practice of medicine." *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 351 & n. 5, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (citing Beck & Azari, FDA, Off–Label Use, and Informed Consent: Debunking Myths and Misconceptions, 53 FOOD & DRUG L.J. 71, 72 (1998) ("Off-label use is widespread in the medical community and often is essential to giving patients optimal medical care, both of which medical ethics, FDA, and most courts recognize")); see also *Kashani–Matts*, 2013 WL 6147032 at *1 n. 4 ("The FDA does not prohibit or regulate off-label use of medical devices by medical professionals, and the Supreme Court has emphasized that off-label use is not merely legitimate but important in the practice of medicine," citing *Buckman Co.*, 531 U.S. at 350, 121 S.Ct. 1012).

The FDCA does, however, expressly prohibit Class III device manufacturers from marketing a PMA-approved device for an off-label use. 21 U.S.C. § 331 (proscribing, *inter alia*, "[t]he introduction ... into interstate commerce of any ... device ... that is adulterated or misbranded"); 21 C.F.R. § 814.80 (stating that once the FDA has approved a PMA application, the manufacturer of the approved device may not manufacture, package, store, label, distribute, or advertise the device in a manner that is inconsistent with any conditions of approval specified in the PMA approval order for the device). Because off-label usage of medical devices "is an accepted and necessary corollary of the FDA's mission to regulate in th[e] [medical field] without directly interfering with the practice of medicine," however, *Buckman Co.*, 531 U.S. at 349–50, 121 S.Ct. 1012, "a manufacturer is not liable [for having violated the FDCA] merely because it sells a device with knowledge that the prescribing doctor intends an off-label use," *Carson*, 365 Fed.Appx. at 815. The manufacturer can only be liable for violating the FDCA if it markets or promotes the device for that purpose. If a device manufacturer wishes to market a device for an off-label purpose, it must submit a PMA supplement for review and approval by the FDA. 21 C.F.R. § 814.39.

B. Facts Alleged in the Corrected Third Amended Complaint Regarding FDA Approval of Defendants' Stimulators

*4 Relators allege that DJO, Biomet, and EBI—a wholly owned subsidiary of Biomet—manufacture and market DME, including stimulators, throughout the United States.[24] They assert that the FDA categorizes stimulators as Class III devices, meaning that they must receive PMA approval before they can be marketed.[25] More specifically, they allege that DJO manufactures and markets a stimulator called the SpinaLogic,[26] and that the FDA has approved the SpinaLogic as an adjunct electrical treatment to primary lumbar[27] spinal fusion surgery under PMA Number P910066.[28] Biomet and EBI allegedly manufacture and market a stimulator called the SpinalPak.[29] The FDA has approved the SpinalPak as an adjunct electrical treatment to primary lumbar spinal fusion surgery under PMA Number P850022.[30]

C. Background Regarding Medicare Coverage of Medical Devices

1. Coverage Determinations by Medicare

The Medicare program is a federally funded health insurance program for the aged and disabled created by the Social Security Act ("the Medicare Act"), 42 U.S.C. § 1395 *et seq.* See *International Rehabilitative Sciences Inc. v. Sebelius,* 688 F.3d 994, 997 (9th Cir.2012) ("Medicare is the federal health insurance program for the elderly and disabled"). Part B of the Medicare Act provides medical insurance for medical and other health services needed by individual plan participants; this includes stimulators and other DME provided to Medicare patients by a DME provider. *Id.* (citing 42 U.S.C. §§ 1395j, 1395k(a)(2), 1395m). Under Part B, "Medicare beneficiaries receive medical treatment and the providers submit claims for government reimbursement."*Id.* (citing § 1395n). Under the Medicare Act, only devices that are "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member" can be reimbursed. 42 U.S.C. § 1395y(a)(1)(A). This limitation on coverage is intended to control Medicare costs. *International Rehabilitative Sciences,* 688 F.3d at 997. The Act states that

> "[a] device is not 'reasonable and necessary'—and thus is not eligible for Medicare coverage—if it is: [(1)] Not 'safe' and 'effective'—that is, if the device has not 'been proven safe and effective based on authoritative evidence' or is not 'generally accepted in the medical community as safe and effective for the condition for which it is used'; [(2)] '[E]xperimental'—that is, 'investigational'; [(3)] Not '[a]ppropriate' for the individual beneficiary's needs; or [(4)] '[S]ubstantially more costly than a medically appropriate and realistically feasible alternative pattern of care.' " *Id.* (citing § 1395y(a)(1)(A) and 54 Fed.Reg. 4302, 4303–04 (Jan. 30, 1989); 60 Fed.Reg. 48417, 48418 (Sept. 19, 1995)).

Cf. Medicare Program Integrity Manual § 13.7.1. (stating that "[i]n order of preference, [local coverage determinations] should be based on: [1] Published authoritative evidence derived from definitive randomized clinical trials or other definitive studies, and [2] General acceptance by the medical community (standard of practice), as supported by sound medical evidence"). [31] "[The Centers for Medicare and Medicaid Services ('CMS')] use[ ] the FDA categorization of a device as a factor in making Medicare coverage decisions."42 C.F.R. § 405.201(a)(1). Thus, "FDA clearance [ ] is necessary, but not sufficient, for Medicare coverage.... To be 'reasonable and necessary' for treatment, a device must be 'safe and effective,' but other considerations are also relevant—like whether there are less costly but equally effective devices available."*International Rehabilitative Sciences,* 688 F.3d at 1002 (emphasis omitted).

*5 In its Medicare Benefit Policy Manual ("the Medicare Manual"), the Department of Health and Human Services ("HHS") considered the FDA categorization of devices and determined generally that "[d]evices that may be covered under Medicare include the following categories: [1] Devices approved by the FDA through the Pre–Market Approval (PMA) process; [2] Devices cleared by the FDA through the 510(k) process; [3] FDA-approved IDE Category B devices; and [4] Hospital Institutional Review Board (IRB) approved IDE devices." [32]

Within these general categories of devices eligible for coverage, HHS "may make [Medicare] coverage determinations [for certain types of devices] via up-front rules."The agency, however, has "discretion ... whether to make [broad] determinations [as to whether a particular device is reimbursable] ... or [whether to have Medicare contractors make that decision based on a] case-by-case adjudication."*Id.* at 1001. When HHS engages in rulemaking regarding the scope of coverage for certain devices, it issues National Coverage Decisions ("NCDs")."An NCD is a determination ... of whether a particular item or service is covered nationally under Medicare."42 C.F.R. § 405.1060(a)(1). NCDs are compiled in the Medicare Manual. "Once published ..., an NCD is binding on all Medicare carriers." [33] *Almy v. Sebelius,* 679 F.3d 297, 299 (4th Cir.2012) ("[T]he Secretary [of HHS] can make a 'national coverage determination' (NCD) binding throughout the Medicare system and not subject to review by administrative law judges"); see also 42 C.F.R. § 405.1060(a)(4) ("An NCD is binding on fiscal intermediaries, carriers, ... [administrative law judges], and the [Medicare Appeals Council]," among others). Additionally, individual carriers—the private insurance carriers with whom HHS contracts to administer claims—can issue Local Coverage Determinations ("LCDs"). LCDs address local coverage issues. *Almy,* 679 F.3d at 299–300. If no NCD or LCD

addresses a particular device, contractors determine coverage on a case-by-case basis. *Id.* at 300 ("Finally, if no NCD or LCD is in place, 'contractors may make individual claim determinations,' including whether a particular DME meets the statutory requirement of being 'reasonable and necessary' " (citing 68 Fed.Reg. 63,693)).

The reimbursement of stimulators is covered by NCD 150.2.[34] NCD 150.2 states that stimulators are covered by Medicare for six uses, one of which is "as an adjunct to spinal fusion surgery" for certain patients.[35] There are also four LCDs that address the coverage of stimulators. Each mirrors the criteria set forth in NCD 150.2, in that it provides that stimulators are covered, *inter alia*, "as an adjunct to spinal fusion surgery."[36] Neither NCD 150.2 nor the four LCDs covering stimulators distinguish between stimulators used on one part of the spine, e.g., the cervical spine, versus another, e.g., the lumbar spine. Nor do they distinguish between stimulators based on on-label versus off-label use.[37]

*6 NCD 280.1, the "Durable Medical Equipment Reference List" is a "quick reference tool" that applies "(where appropriate) to all DME national coverage determinations (NCDs)."[38] It provides a list of

> "generic categories of equipment on which NCDs have been made by ... CMS.... In the case of equipment categories that have been determined by CMS to be covered under the DME benefit, the list outlines the conditions of coverage that must be met if payment is to be allowed for the rental or purchase of the DME by a particular patient, or cross-refers to another section of the manual where the applicable coverage criteria are described in more detail. With respect to equipment categories that cannot be covered as DME, the list includes a brief explanation of why the equipment is not covered.... When the contractor receives a claim for an item of equipment which does not appear to fall logically into any of the generic categories listed, the contractor has the authority and responsibility for deciding whether those items are covered under the DME benefit. These decisions must be made by each contractor based on the advice of its medical consultants, taking into account: [1] The Medicare Claims Processing Manual, Chapter 20, 'Durable Medical Equipment, Prosthetics and Orthotics, and Supplies (DMEPOS) [;] [2] Whether the item has been approved for marketing by the Food and Drug Administration (FDA) and is otherwise generally considered to be safe and effective for the purpose intended; and [3] Whether the item is reasonable and necessary for the individual patient."[39]

NCD 280.1 thus serves as a first point of reference for contractors attempting to determine whether a certain device or a certain use of a device is covered. Specifically, it provides an index of some of the national coverage determinations Medicare has made. It lists some devices that are covered and refers the reader to the NCD controlling that device. It also lists some devices that are not covered and articulates why HHS has determined that that device cannot be covered. For devices that HHS has not explicitly declared covered or uncovered, NCD 280.1 sets forth the factors a contractor must consider in making a case-by-case coverage determination. NCD 280.1 is not comprehensive, however. Certain devices that are covered by a particular NCD are not referenced in NCD 280.1. This is because NCD 280.1 was meant only to aid in determining coverage for "certain pieces of DME and especially for those items commonly referred to by both brand and generic names."[40] As the NCDs are binding on Medicare contractors, the contractors must follow an NCD dictating coverage for a certain device, even if that device is not listed in NCD 280.1.

2. The Reimbursement Process

To submit a claim for reimbursement, DME providers fill out and submit to Medicare CMS Form 1500.[41] Section 23 of the form includes a space for the provider to list any PMA approval number covering the device for which it seeks reimbursement.[42] Providers seeking reimbursement for stimulators must also include a "KF" modifier on CMS Form 1500, which indicates that the provider is billing Medicare for a Class III device.[43]

*7 Together with CMS Form 1500, the provider must submit a Certificate of Medical Necessity.[44] The Certificate of Medical Necessity used for Class III stimulators is CMS 847.[45] CMS 847 has four sections. Section A seeks general information concerning the patient, physician, and supplier.[46] Section B requests information regarding the medical necessity for the device, and states: "Information in this Section May Not Be Completed by the Supplier of the Items/Supplies."Section C provides space for a "Narrative Description of Equipment and Cost."[47] Section C instructs

the person completing the form to provide a "(1) Narrative description of all items, accessories and options ordered; (2) [the] Supplier's charge; and (3)[the] Medicare Fee Schedule Allowance for each item, accessory, and option."[48] Section D is the physician's attestation and signature.[49]

The DME provider must also include a Healthcare Common Procedure Coding System ("HCPCS") number for the device for which it is requesting reimbursement on both CMS Form 1500 and CMS 847.[50] There is a generic HCPCS code number for all stimulators: E0748.[51]

By regulation, DME providers seeking reimbursement must furnish sufficient information to Medicare's claim processing contractors that they can determine whether payment is due. 42 C.F.R. § 424.5(a)(6) ("As a basis for Medicare payment, the following conditions must be met: ... The provider, supplier, or beneficiary, as appropriate, must furnish to the intermediary or carrier sufficient information to determine whether payment is due and the amount of payment").

D. Facts Alleged in the Second Amended Complaint Regarding Defendants' Submission of Claims to the Medicare Program

Relators allege that defendants are approved Medicare DME providers.[52] They assert that when a physician prescribes a stimulator manufactured by one of the defendants, a local distributor under contract to the defendant collects relevant medical records and prescriptions and forwards them to an insurance administrator at the defendant's home office.[53] The insurance administrator and claims processor then prepare and submit claims to Medicare and other insurance carriers.[54] Relators assert that since approximately September 18, 2001, defendants have routinely submitted false or fraudulent claims for stimulators to Medicare. Specifically, they allege that defendants have requested reimbursement for stimulators approved for lumbar spine use when they knew, and did not reveal, that the stimulators had been distributed for off-label cervical spinal use.[55] Relators contend that the stimulators are not reimbursable if they are not distributed for the use for which they have PMA approval.[56] They allege that, by indicating on CMS Form 1500 a PMA approval number for a stimulator approved only for lumbar, and not for cervical, spine use, defendants expressly or implicitly misrepresent the device's intended use. Stated differently, they contend that by reporting their stimulator's PMA approval number on CMS Form 1500, defendants affirmatively represent that the stimulator will be used on the lumbar spine when they know it will be used on the cervical spine instead.[57] Relators assert that, because there is only one HCPCS code covering stimulators used on all parts of the spine, and because defendants' stimulators are only approved for use on the lumbar spine, unless defendants specifically indicate in the narrative description portion of CMS 847 that the device has been distributed for an off-label use, they violate the requirement that they furnish sufficient information to permit Medicare's claim processing contractors to determine whether payment is due. Relators also contend that by failing to indicate in the narrative description portion of CMS 847 that the stimulator is being distributed for an off-label use, defendants expressly and/or impliedly misrepresent that the stimulator is being distributed and used for the use that is PMA-approved and use of the device is therefore reimbursable.[58]

*8 As proof that defendants have submitted such claims for reimbursement, relators plead facts concerning their interactions with defendants over the years. They allege that in 1997, relator Milko was hired as a direct sales representative for Orthofix to promote and sell stimulators.[59] Orthofix is a major manufacturer and distributor of stimulators and defendants' primary competitor.[60] Orthofix manufactures and distributes the only stimulator with PMA approval for cervical use: the Cervical–Stim.[61] Orthofix developed the Cervical–Stim after the FDA issued a public warning in 1997 stating that Orthofix had been unlawfully marketing its Physio–Stim stimulator for cervical use because it did not have PMA approval to use the device in that manner. Orthofix's PMA approval for the Physio–Stim covers only use for "the treatment of nonunion of long bone fractures acquired secondary to trauma and for the treatment of flat bones, excluding vertebra."[62] The warning letter stated that use of the Physio–Stim for treatment of cervical spine fusion was "a change in indication that required a PMA [s]upplement" if Orthofix intended to continue marketing the device for that purpose.[63]

Relators allege that on July 1, 2005, Milko became an Orthofix distributor and that he has continued in that capacity since, marketing and selling the Cervical–Stim and Orthofix's other, non-cervical stimulators.[64] They assert that because of his position with Orthofix, Milko learned that defendants were distributing their stimulators for off-label,

cervical use.[65] Specifically, they allege that Milko heard that DJO sales personnel verbally instructed patients to use the SpinaLogic by folding it up, placing a pillow over it, and lying their head on the pillow for 30 minutes and that they reassured doubtful patients that the device worked better on the cervical spine than on the lumbar spine, although not approved for that use, because the cervical spine was a smaller area to heal.[66]

In April 2011, a sales associate working for Milko left his employ and went to work for DJO; the associate sold the SpinaLogic in the same geographic area in which Milko sold Orthofix products. Milko allegedly lost "some of his best physician referral sources, including physicians who regularly referred Medicare patients for cervical bone growth stimulators, even though [as noted,] Orthofix sold the only approved cervical device."[67] As a result, Milko concluded that DJO must have filled cervical stimulator prescriptions for his former physician clients with the SpinaLogic and charged Medicare and other federally sponsored health care programs for it.[68]

Relators assert that Milko sued his former associate for violating a non-competition agreement.[69] During the lawsuit, Milko deposed two referring physicians, both of whom are Medicare providers who perform lumbar and cervical spine fusion surgeries. Both doctors testified that they had ordered stimulators from Milko's former associate.[70]

*9 Relators allege that on June 21, August 30, and September 1, 2011, the Spine and Brain Institute in Las Vegas, Nevada, faxed prescriptions on behalf of Dr. John Anson, the ordering physician, to the local DJO sales representative for SpinaLogic; the institute indicated that the patients were Medicare beneficiaries and were diabetic.[71] On February 2, 2012, DJO submitted a claim to the Minnesota Health Care Programs for a stimulator to be used following cervical fusion surgery. The Minnesota program paid DJO $835.82.[72]

In August 2012, DJO's Regional Sales Director and a DJO sales representative told relator Modglin, a private investigator licensed by the state of California, that DJO routinely billed federally sponsored health care programs like Medicare and Medicaid for off-label distribution of SpinaLogic for use on the cervical spine.[73] In March 2013, Milko attended the national convention of the American Academy of Orthopedic Surgeons in Chicago. There, he spoke with DJO representatives, who told him that in some areas of the country, at least 75% of DJO's business came from selling the SpinaLogic for cervical use.[74] Relators assert that at some point, two patients told Milko when he fitted them with lumbar stimulators that they had previously been fitted with the SpinaLogic following prior, cervical spinal surgeries.[75]

In May 2013, an Orthofix sales representative in Temecula, California, switched companies and began to sell the SpinaLogic. After two weeks, the representative returned to Orthofix. Relators contend that while working for DJO, DJO upper management told the sales representative that 40% of the company's SpinaLogic business involved off-label, cervical spine applications.[76]

As respects the SpinalPak manufactured by Biomet and EBI, relators allege that Milko has provided replacement Cervical–Stims to Medicare patients who complained that their use of the SpinalPak on the cervical spine caused skin irritation on their necks.[77] Relators assert that Milko confirmed these complaints by observing large, red skin irritations on the patients.[78] The patients purportedly said that Biomet and EBI representatives told them to use the SpinalPak only for a couple of hours per day, as tolerated.[79]

On February 16 and March 10, 2010, and again on March 18, 2011, Biomet and EBI submitted claims to the Minnesota Health Care Programs for off-label stimulators under Code E0748, for use following cervical spinal fusion surgery. They were paid $817.05, $3,901.41, and $3,897.50 on the claims, respectively.[80]

Relators allege that on September 5, 2012, Dr. David Ketroser, a neurologist, contacted the office of a neurosurgeon in Minnesota. An employee confirmed that the office routinely prescribed the SpinalPak for cervical and lumbar fusions, for both Medicare and non-Medicare patients, and that it had done so for a particular patient Ketroser had referred.[81]

On May 20, 2013, Milko asked a former Biomet distributor who now sells Orthofix devices how Biomet succeeded in securing Medicare payment for a lumbar-only device when the physician's order indicated cervical application. The individual purportedly told him that neither the CMS 847 Form nor the E0748 billing code reveal the level of the spine

for which the device was ordered.[82] On May 29, 2013, a former Biomet sales representative told Modglin that she had sold Biomet's devices off-label to Medicare patients for use on the cervical spine.[83] On May 31, 2013, a former Biomet sales representative told Modglin that he had sold the SpinalPak to Medicare and Medicaid patients in Texas between 2009 and 2011 for use on the cervical spine.[84]

E. Defendants' Request for Judicial Notice

*10 [1] [2] Defendants request that the court take judicial notice of certain documents they contend are relevant to this motion.[85] All of the applications are unopposed. In deciding a Rule 12(b)(6) motion, the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990). A court normally must convert a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment if it "considers evidence outside the pleadings.... A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion...." *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir.2003). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (a court may consider "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Branch v. Tunnell* 14 F.3d 449, 453 (9th Cir.1994) (noting that a court may consider a document whose contents are alleged in a complaint, so long as no party disputes its authenticity), overruled on other grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002). Under Rule 201, the court may judicially notice a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED.R.EVID. 201(b).

[3] Defendants ask the court to take judicial notice of three exhibits. The first contains excerpts of the October 1, 2011 Michigan Medicaid Provider Manual. The second contains excerpts of the October 1, 2005 Michigan Medicaid Provider Manual, while the third contains excerpts of the Nevada Medicaid Services Manual.[86] Each of the exhibits is found on the state's medicare websites. Under Rule 201, the court can take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet," such as websites run by governmental agencies. See *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08–CV–1166–IEG, 2009 WL 6597891, *1 (S.D.Cal. Dec. 23, 2009) (citing *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999)). See also *Daniels–Hall v. National Education Association*, 629 F.3d 992, 999 (9th Cir.2010) (taking judicial notice of information on the websites of two school districts because they were government entities); *Paralyzed Veterans of Am. v. McPherson*, No. C 06–4670, 2008 WL 4183981, *5 (N.D.Cal. Sept. 8, 2008) ("Information on government agency websites has often been treated as properly subject to judicial notice"). The court therefore grants defendants' request for judicial notice.

II. DISCUSSION

A. Legal Standard Governing Motions to Dismiss

*11 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory," or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988). The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir.1995).

The court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations.[87] See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). Thus, a plaintiff's complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'...A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678,

129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); see also *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citations omitted)); *Moss v. United States Secret Service*, 572 F.3d 962, 969 (9th Cir.2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief," citing *Iqbal* and *Twombly*).

B. Relators' Federal FCA Claim

Because relators' FCA claim provides the only basis for subject matter jurisdiction, the court addresses it first.

1. Legal Standard Governing Federal FCA Claims

[4] The FCA, 31 U.S.C. §§ 3729 *et seq.*, provides for "the recovery of civil penalties from those who knowingly present a false or fraudulent claim to the federal government for payment, or knowingly use a false record to avoid or decrease an obligation to pay the federal government."*Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1467 n. 1 (9th Cir.), cert. denied, 519 U.S. 865, 117 S.Ct. 175, 136 L.Ed.2d 116 (1996). Originally enacted to punish and prevent massive frauds perpetrated by large contractors during the Civil War, the FCA's chief goal was to provide for restitution to the government of money taken from it by fraud. See *United States v. Bornstein*, 423 U.S. 303, 309, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976). The Supreme Court has refused to adopt a restrictive reading of the statute, however, holding that the FCA is a "remedial statute [that] reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money."*United States v. Neifert–White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); *United States v. McLeod*, 721 F.2d 282, 284–85 (9th Cir.1983).

*12 [5] The FCA authorizes individuals, known as "relators," to file civil suits, known as "qui tam actions," against persons who present false claims to the government.[88] 31 U.S.C. § 3730. It makes liable any person who has (1) knowingly presented or caused to be presented a false or fraudulent claim; (2) knowingly made, used or caused to be made or used a false record or statement to get a false or fraudulent claim paid; or (3) conspired to defraud the government by getting a false or fraudulent claim paid. 31 U.S.C. § 3729(a)(1)-(3). The FCA defines "knowing" as having actual knowledge of information, or acting in either deliberate ignorance or reckless disregard of the information's truth or falsity. 31 U.S.C. § 3729(b). Congress amended the FCA to include this definition to make " 'firm ... its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence.'"*United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir.1998) (quoting S.Rep. No. 99–345 at 7 (1986), 1986 U.S.C.C.A.N. 5266, 5272); see also *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir.1991) ("[T]he statutory definition of 'knowingly' requires at least 'deliberate ignorance' or 'reckless disregard' "). Thus, "[t]he phrase 'known to be false' ... means [known to be] 'a lie.' "*Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir.1992); see *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815–16 (9th Cir.1995)."The FCA does not define false. Rather, courts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law."*United States v. Bourseau*, 531 F.3d 1159, 1170–71 (9th Cir.2008).

[6] [7] "A civil action for False Claims Act liability requires four essential elements: '(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.'"*United States ex rel. Ruhe v. Masimo Corp.*, 977 F.Supp.2d 981, 991 (C.D.Cal.2013) (citing *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1174 (9th Cir.2006)); see also *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 997 (9th Cir.2010) (same). A plaintiff "must show an actual false claim for payment being made to the Government"; "[e]vidence of an actual false claim is the *sine qua non* of a False Claims Act violation."*United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir.2002); see also *Cafasso, United States ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir.2011) (" 'It seems to be a fairly obvious notion that False Claims Act suit ought to require a false claim.''[T]he [FCA] attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the "claim for payment," ' " citing *Aflatooni*, 314 F.3d at 997, and *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir.1995) (internal alterations original)); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266–67 (9th Cir.1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government

benefit..., [Thus there is no FCA liability] where regulatory compliance was not a *sine qua non* of receipt of state funding").

*13 [8] Relators who assert that a defendant has made a false claim can allege that defendant has submitted a factually false claim, or that defendant has given a false certification. The prototypical false claims action alleges a factually false claim, i.e., an explicit lie in a claim for payment, such as an overstatement of the amount due. See *Maa v. Ostroff,* No. 12–cv–00200–JCS, 2013 WL 1703377, *15 n. 3 (N.D.Cal. Apr. 19, 2013) ("The 'factually false' theory refers to the 'archetypal *qui tam* False Claims Action' in which 'a private company overcharges under a government contract, [and] the claim for payment itself is literally false or fraudulent,' " citing *Hendow,* 461 F.3d at 1170 (alteration original)). Relators relying on a false certification theory allege that defendant's claim is false because defendant certified to a government agency that it had complied with laws, rules, or regulations governing the reimbursement of claims or other provision of benefits when it had not. See *Hopper,* 91 F.3d at 1266 ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance [with those rules] which creates liability when certification is a prerequisite to obtaining a government benefit"). There are two types of false certification claims—expressly false certification and impliedly false certification.

> "Express certification simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted. Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim."*Ebeid,* 616 F.3d at 998.

[9] To show that claims were false under a false certification theory, a complaint "must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant explicitly undertook to comply with a law, rule or regulations that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation."*Id.*

[10] [11] [12] Like other allegations of fraud in federal court, claims "brought under the FCA must fulfill the requirements of Rule 9(b)" of the Federal Rules of Civil Procedure. *United States ex rel. Lee v. SmithKline Beecham, Inc.,* 245 F.3d 1048, 1051 (9th Cir.2001); see also *Cafasso,* 637 F.3d at 1054 ("The heightened pleading standard of Rule 9(b) governs FCA claims"). Under Rule 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."FED.R.CIV.PROC. 9(b). Conclusory allegations are insufficient, and the facts constituting the fraud must be alleged with specificity. *Moore v. Kayport Package Exp., Inc.,* 885 F.2d 531, 540 (9th Cir.1989)."A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer to the allegations. While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient."*Id.* at 540 (citation omitted). See also *Cooper v. Pickett,* 137 F.3d 616, 627 (9th Cir.1997) (to satisfy Rule 9(b), "the complaint [must] identif[y] the circumstances of the alleged fraud so that defendants can prepare an adequate answer" (internal quotations omitted)); *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.1990) ("Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how"); *Walling v. Beverly Enters.,* 476 F.2d 393, 397 (9th Cir.1973) (concluding that allegations stating the time, place, and nature of allegedly fraudulent activities met Rule 9(b)'s particularity requirement).

*14 [13] Thus, to satisfy Rule 9(b), a plaintiff must specify the content of the fraudulent representation, the person who made it, when and where the representation was made, and the manner in which it was untrue and misleading, or the circumstances indicating that it was false. See *In re GlenFed Securities Litigation,* 42 F.3d 1541, 1548 (9th Cir.1994) (en banc). See also *Vess v. Ciba–Geigy Corp.,* 317 F.3d 1097, 1107 (9th Cir.2003) (plaintiff "alleges that the APA misrepresented its connection to Novartis, but he does not identify any specific misrepresentations or specify when and where they occurred. These allegations are not particular enough to satisfy Rule 9(b)").

[14] "The knowledge or scienter element of a fraud claim need not be pleaded with particularity, but may be [ ] alleged generally pursuant to Rule 9(b). However, knowledge must still be pleaded sufficiently to make entitlement to relief plausible."*Owens v. Bank of America, N.A.,* No. 11–cv–4580–YGR, 2013 WL 1820769, *4 (N.D.Cal. Apr. 30, 2013); see also *Odom v. Microsoft Corp.,* 486 F.3d 541, 554 (9th

Cir.2007) ("While the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged more generally"); *In re GlenFed Inc. Securities Litigation*, 42 F.3d at 1547 ("We conclude that plaintiffs may aver scienter generally, just as the rule states—that is, simply by saying that scienter existed").

2. FCA Liability Premised on Implied False Certifications

The second amended complaint alleged that Medicare covers defendants' stimulators only when prescribed for on-label use, and that defendants' failure affirmatively to disclose the fact that the stimulators had been prescribed for off-label use constituted the submission of a false claim. Relators also alleged that defendants made an implied false certification because they had an affirmative obligation—under 21 C.F.R. §§ 801.4 and § 814.39—to seek a PMA supplement given knowledge that the devices were prescribed from time to time for off-label uses. The court disagreed that these allegations were sufficient to plead the submission of a false claim or making of a false certification.

With regard to relators' argument that failure to disclose that the stimulators had been prescribed for off-label use, the court explained that because "the Medicare regulations and the Medicare Manual do not bar reimbursement of devices supplied for off-label use, the fact that defendants have allegedly not filed a PMA supplement or obtained PMA approval for cervical use of their stimulators does not bar them from obtaining reimbursement for the devices if HHS has otherwise determined that they are 'reasonable and necessary.' "[89] See *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F.Supp.2d 310, 348 (D.Mass.2011) ("Nowak relies almost entirely upon the flawed rationale that because the biliary stents are unapproved for use in the biliary tree, they are 'categorically' or 'statutorily' nonreimbursable under the various federal health care programs"); *United States ex rel. Ruhe v. Masimo Corp.*, 977 F.Supp.2d 981, 993 (C.D.Cal.2013) ("In the context of False Claims Act cases involving promotion of medical devices, courts have recognized that 'off-label use of a medical device is not the same as a medically unnecessary use of that drug or device' ").

*15 The court also found defendants' false certification argument unavailing. It noted that although § 801.4 appears, at first blush, to support relators' theory, courts in the Ninth Circuit and elsewhere have not construed § 801.4 as imposing an affirmative duty on manufacturers to file a PMA supplement under § 814.39 whenever time they know or should know that a patient intends to use, or that a physician has prescribed or will prescribe, a device for off-label use.[90] The court observed that the Ninth Circuit had unequivocally concluded in *Carson v. Depuy Spine, Inc.*, 365 Fed.Appx. 812, 815 (9th Cir.2010) (Unpub.Disp.), that "a manufacturer is not liable [under the FCA] merely because it sells a device with knowledge that the prescribing doctor intends an off-label use."Although not binding, the court found this explicit Ninth Circuit holding highly persuasive, and thus declined to accept relators' theory. The court also discussed *Riley v. Cordis Corp.*, 625 F.Supp.2d 769, 781 (D.Minn.2009), in which a Minnesota district court directly addressed whether § 801.4 imposed an affirmative duty on manufacturers to file a PMA supplement whenever they know that their products are being used for off-label purposes, and concluded that it did not. The court noted that even without *Carson*, it would find *Riley* persuasive and would adopt its reasoning. As a result, the court found that relators' false certification claim failed. The court therefore dismissed relators' Medicare FCA claim with prejudice to the extent it was premised on these theories.

The court nonetheless concluded that relators might be able to allege an FCA claim under an implied false certification theory based on off-label promotion of the stimulators by defendants. Stated differently, the court noted it was possible that relators could allege that defendants engaged in off-label promotion of the type that would trigger a duty to file PMA supplement, and hence permit them to plead submission of false claims based on an implied false certification theory.[91] Accordingly, the court granted "narrow" leave to amend "limited to this one theory."[92] The initial question, therefore, is whether relators have adequately alleged that defendants engaged in off-label promotion of the stimulators.

a. Whether the Corrected Third Amended Complaint Sufficiently Alleges that Defendants Engaged in Off–Label Promotion

Defendants contend that as alleged in the corrected third amended complaint, relators' assertion that they were required to file a PMA supplement is flawed for two reasons. First, defendants maintain that to the extent relators rely on the false claim and false certification theories they pled in the second

amended complaint—allegations the court dismissed with prejudice—the claim once again fails.[93] The court agrees. Relators devote a significant portion of their opposition to discussion of § 814.39, but appear to misunderstand the order dismissing the second amended complaint and granting limited leave to amend the Medicare FCA claim. Relators contend that "nowhere does the [court's prior order] state that the *only* way that an affirmative obligation to comply with PMA [s]upplement requirements can arise is through off-label 'marketing.' "[94] While this may be true, what relators fail to appreciate is that the court granted leave to amend only to the extent they could plead implied false certification due to defendants' off-label promotion of the stimulators and failure to submit a PMA.[95] To the extent relators attempt to replead an FCA Medicare claim based on the fact that defendants submitted claims without affirmatively disclosing that their stimulators would be used for off-label purposes and/or based on the fact that defendants purportedly certified compliance with all applicable rules and regulations falsely because they had not submitted a PMA supplement to cover known off-label prescription or use, therefore, they exceeded the scope of the leave to amend granted. The court therefore dismisses these allegations again with prejudice. *See Raiser v. City of Los Angeles,* No. CV 13–2925 RGK (RZ), 2014 WL 794786, *4 (C.D.Cal. Feb. 26, 2014) ("When a district court grants leave to amend for a specified purpose, it does not thereafter abuse its discretion by dismissing any portions of the amended complaint that were not permitted"); *Haines v. Brand,* No. CV 11–01335 YGR, 2012 WL 2237366, *7 (N.D.Cal. June 14, 2012) ("Judge Chen previously dismissed Plaintiff's claim for intentional infliction of emotional distress with prejudice on the basis that the Brand is immune from this state tort law claim.... Therefore, Plaintiff's claim for intentional infliction of emotional distress, which already was dismissed with prejudice, is Dismissed With Prejudice, again."); *Kennedy v. Full Tilt Poker,* No. CV 09–07964 MMM (AGRx), 2010 WL 3984749, *1 (C.D.Cal. Oct. 12, 2010) (noting that the court had stricken a third amended complaint because plaintiffs' new claims and the addition of new defendants "exceeded the authorization to amend the court granted," and plaintiffs had not sought leave to add new claims or defendants as required by Rule 15); *PB Farradyne, Inc. v. Peterson,* No. C 05–3447 SI, 2006 WL 2578273, *3 (N.D.Cal. Sept. 6, 2006) (striking, without leave to amend, a new theory of liability alleged in third amended complaint because the new claim was "outside the scope of the leave to amend granted" when court dismissed second amended complaint); *Serpa v. SBC Telecommunications, Inc.,* No. C 03–4223 MHP, 2004 WL 2002444, *3 (N.D.Cal. Sept. 7, 2004) (striking a claim asserted for the first time in an amended complaint, since the new claim exceeded the scope of the court's order granting limited leave to amend); cf. *Siskiyou Regional Education Project v. United States Forest Service,* 565 F.3d 545, 559–60 (9th Cir.2009) (affirming a district court's decision to strike intervenor's answer/counterclaims because allegations "exceeded the bounds" of the limited intervention granted).[96]

***16** As respects the only portion of the federal Medicare FCA claim in the corrected third amended complaint that relators were granted leave to plead—i.e., an implied false certification claim premised on off-label promotion and failure to submit a PMA supplement—defendants contend that relators have failed to allege with the requisite specificity under Rule 9(b) that defendants in fact marketed their devices for off-label use.[97] Defendants assert that the corrected third amended complaint does not describe with specificity any instance in which a DJO or EBI sales representative marketed the SpinaLogic or SpinaPak for cervical spine use. Nor, they note, does it identify any sales representatives who engaged in off-label promotion, or any manager or executive who directed or sanctioned off-label promotion. Finally, defendants contend that no allegations suggest when the purported marketing occurred, where it occurred, or under what circumstances it occurred.[98] As noted, to satisfy Rule 9(b), relators must specify the content of the fraudulent representation or omission, the person who made it, when and where the representation or omission was made, and the manner in which it was untrue and misleading, or circumstances indicating that it was false. See *GlenFed Securities Litigation,* 42 F.3d at 1548; *Ebeid,* 616 F.3d at 999 (holding that FCA claims cannot be pled under a "relaxed" Rule 9(b) standard).[99]

Given the theory on which a claim of implied false certification due to off-label promotion and failure to submit a PMA supplement is based, pleading specific facts concerning any off-label promotion by defendants is necessary to provide the "particular details of [the] scheme to submit false claims."*Ebeid,* 616 F.3d at 998–99; see *United States ex rel. Bennett v. Medtronic, Inc.,* 747 F.Supp.2d 745, 779 (S.D.Tex.2010) ("In addition, the relators have failed to plead with sufficient particularity the alleged false claims. The relators have not identified any Medtronic employees who engaged in off-label promotion nor specific physicians or hospitals who received the promotions. They have not alleged the 'who' or 'where' of the alleged fraud"); cf. *Hawkins*

v. Medtronic, Inc., No. CV 13–00499 AWI SK, 2014 WL 346622, *13 (E.D.Cal. Jan. 30, 2014) ("Plaintiff fails to allege not only the content of the off-label promotion directed at his spine surgeon and on which the surgeon relied, but he also fails to allege who made those representations to his surgeon and when the representations were made. Rule 9(b) requires more than the generalized allegations made here.").

In their opposition, relators argued that the corrected third amended complaint satisfied Rule 9(b). At the hearing, however, they disclaimed any intention of pleading an implied false certification claim based on off-label promotion. The court nonetheless addresses the off-label promotion arguments made in their opposition, as this is the only theory on which the court granted leave to amend upon dismissal of the second amended complaint. In their opposition, relators contend they adequately alleged that it was defendants' corporate-wide policy and practice to train their representatives to tell physicians that all stimulators are the same and therefore that their lumbar devices could be safely used on the cervical spine. [100] In particular, they cite paragraphs 131 and 143. Paragraph 131 alleges that Milko "learned from DJO personnel that its sales representatives are instructed to tell physicians that [it is] permissible to use their lumbar device on the cervical spine." [101] Paragraph 143 states that Milko "was also informed by EBI personnel at trade conventions that its sales representatives routinely tell physicians that it is permissible to use their lumbar device on the cervical spine." [102] Neither allegation satisfies Rule 9(b).

***17** Although both paragraphs sufficiently allege the "content" of the purported promotional statements, neither identifies who made the statements. Where fraud has allegedly been perpetrated by a corporation, a plaintiff must allege the names of the employees or agents who purportedly made the statements or omissions that give rise to the claim, or at a minimum identify them by title and/or job responsibility. See, e.g., *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir.2001) (holding that Rule 9(b) was not satisfied, *inter alia*, because plaintiff did not "identify the [defendant's] employees who performed the tests, or provide any dates, times, or places the tests were conducted"); *Arch Ins. Co. v. Allegiant Prof'l Bus. Servs., Inc.*, No. CV 11–1675 CAS (PJWx), 2012 WL 1400302, *3 (C.D.Cal. Apr. 23, 2012) ("The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written"); *Dooms v. Fed. Home Loan Mortgage Corp.*, No. CV F 11–0352 LJO DLB, 2011 WL 1232989, *14 (E.D.Cal. Mar. 31, 2011) ("In a fraud action against a corporation, a plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written' "); *Flowers v. Wells Fargo Bank, N.A.*, No. C 11–1315 PJH, 2011 WL 2748650, *6 (N.D.Cal. July 13, 2011) (same). The corrected third amended complaint does not do this. It simply states that unidentified "DJO personnel" and "EBI personnel" informed Milko of defendants' purported policy and practice. [103] At a minimum, relators must identify the speakers by their job titles and/or responsibilities. See *Bennett*, 747 F.Supp.2d at 779 ("The relators have not identified any Medtronic employees who engaged in off-label promotion nor specific physicians or hospitals who received the promotions. They have not alleged the 'who' or 'where' of the alleged fraud."). Because they do not, the allegations do not adequately plead off-label promotion, and thus the submission of a false claim or false certification, under Rule 9(b).

The allegations also fail to state with particularity when and/or where the alleged statements were made. Although relators allege that Milko attended the national convention of the American Academy of Orthopedic Surgeons in Chicago in March 2013, and spoke with DJO representatives there, they do not allege that Milko learned about alleged off-label promotion at the convention. All that is alleged in paragraph 131 is that Milko "has *also* learned from DJO personnel that sales representatives are instructed to tell physicians that [it is] permissible to use their lumbar devices on the cervical spine," i.e., that it is permissible to use its devices off-label. [104] This allegation provides no information as to where or when the statements were made, let alone by whom they were made. Similarly, although paragraph 143 alleges that EBI personnel told Milko that the company's sale representatives advise physicians that it is permissible to use its devices on the cervical spine "at trade conventions," the conventions are not identified by name, location or date. [105] For this reason as well, paragraphs 131 and 143 fail adequately to plead off-label promotion such as would support their allegations of an impliedly false certification.

***18** Relators also allege that Milko "became aware over time that DJO and Biomet were distributing their spinal, lumbar only, non-invasive bone growth stimulators off-label for cervical use." [106] He purportedly "heard that cervical

patients fitted with SpinaLogic bone growth stimulators by DJO sales personnel were verbally instructed to use the DJO device by folding it up, placing a pillow over it and lying their head on the pillow for 30 minutes"; he allegedly "also heard" that DJO personnel told patients who questioned the off-label use that "it would work even better on the cervical spine since that was a smaller area to heal." [107] As with the previous allegations, however, there is no indication of who made the statements Milko "heard." Nor is there any indication when or where the statements were made. Although a plaintiff can plead a reasonable range of dates under Rule 9(b), relators do not provide even a range of time during which the promotional statements were purportedly made. Compare *Interserve, Inc. v. Fusion Garage PTE. Ltd.*, No. CV–09–5812–RS–PSG, 2011 WL 500497, *3 (N.D.Cal. Feb. 9, 2011) (denying a motion to dismiss where allegations of "purported fraud [were] limited to a narrow window of time"); *United States v. Hempfling*, No. CV 05–00594–OWW–SMS, 2005 WL 2334713, *6 (E.D.Cal. Sept. 23, 2005) ("While Rule 9(b)'s particularity requirement is not as stringently applied where fraud is alleged to have occurred over a longer period of time, Plaintiff's complaint lacks even a range of dates during which [defendant] held his seminars, posted information on his website, and sold his products"). Accordingly, this allegation is also insufficient to plead off-label promotion. [108]

[15] Finally, paragraph 32 of the corrected third amended complaint also fails under Rule 9(b). It contains no particularized allegations; instead, it states generally that "Defendants' agents and employees ... are not licensed physicians, but [ ] nevertheless advised patients on dosage ... and provided ad hoc instructions on how to modify the use of the device in order to use it in this unapproved anatomical location." [109] The paragraph also states that "[d]efendants' agents and employees ... provided verbal assurances regarding the purported safety and effectiveness of these devices when used in [an] off-label manner." [110] Like the previous allegations, this falls far short of the required particularity demanded by Rule 9(b). Not only are the agents or employees unidentified, but the allegation fails to distinguish between defendants. Rule 9(b)"does not allow a complaint ... merely [to] lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'"*Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir.2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D.Fla.1998)); *Moore*, 885 F.2d at 541 (holding that in the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme"). Moreover, there is no suggestion of when or where the advice and assurances were given. As a result, the allegation does not adequately plead any false certification due to off-label promotion.

*19 [16] Relators assert that defendants place the pleading bar too high; they contend that defendants' motion to dismiss is premised on the absence of "exemplar details relating to claims from each government program." [111] Defendants nowhere suggest exemplar detail is required, and the court agrees with relators that it is not. See *Ebeid*, 616 F.3d at 998 ("We do not embrace the district court's categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits."). Rather, defendants clearly contend that relators have failed to allege facts concerning their purported off-label marketing with the specificity demanded by Rule 9(b). They note, correctly, that the "general sort of fraudulent conduct" relators plead, which "specifies no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude."See *Cafasso*, 637 F.3d at 1057 (affirming the dismissal of an FCA claim based on failure to comply with Rule 9(b)); *Bennett*, 747 F.Supp.2d at 782 ("In the complaint filed in the present case, the relators have not cited 'particular patients, dates, and corresponding medical records' for the alleged upcoding. Nor have the relators alleged with particularity that any physician or hospital submitted a false claim for reimbursement. These allegations do not plead fraud with the particularity required by Rule 9(b)"). The court thus dismisses relators' federal FCA claim premised on false Medicare claims.

b. Whether the Corrected Third Amended Complaint Sufficiently Alleges that Medicare Conditioned Payment on Compliance with the FDA's PMA Supplement Regulation

To allege an FCA implied false certification claim adequately, relators must plead that the claimant failed to comply with a law, rule, or regulation upon which payment of the claim was conditioned. *Ebeid*, 616 F.3d at 998 ("a

complaint alleging implied false certification must plead with particularity allegations that provide a reasonable basis to infer[, *inter alia,*] that the defendant explicitly undertook to comply with a law, rule or regulation that is *implicated in submitting a claim for payment"* (emphasis added)). Defendants contend that even had relators adequately pled that they engaged in off-label marketing of their stimulators, they do not—and cannot—plausibly allege that Medicare conditions payment for medical devices on the device manufacturer's compliance with the FDA's PMA supplement regulation. [112] Again, the court must agree with defendants.

Nowhere in the complaint do relators cite any Medicare statute, regulation, or program requirement that states Medicare conditions payment for medical device claims on a manufacturer's compliance with PMA supplement requirements. Relators dispute this, arguing that they have adequately alleged that defendants "undertook to comply with all applicable laws." [113] The only certifications identified in the complaint (or raised in relator's opposition), however, have nothing to do with FDA PMA supplement regulations. Some of the allegations merely allege that defendants signed Medicare certification statements, which in and of itself says nothing about whether Medicare requires manufacturers to comply with FDA PMA supplement regulations. [114]

***20** [17] Relators appear to contend that 42 C.F.R. § 424.57 is a regulation that requires manufacturers to comply with the FDA's PMA supplement rules. [115] Specifically, they cite § 424.57(c). This regulation requires that a manufacturer applying for billing privileges from Medicare certify that it meets and will continue to meet "[f]ederal regulatory requirements that specify requirements for the provision of [DME] and ensure accessibility for the disabled."See 42 C.F.R. § 424.57(c)(1)(i). There is no case law that addresses directly whether this provision requires that manufacturers of a medical device prescribed or used for an off-label purpose comply with the FDA's requirement that they file a PMA supplement if they engage in off-label promotion of the device. Assuming, without deciding, that § 424.57(c) required defendants to file a PMA supplement if they were engaged in off-label promotion of the stimulators, the court cannot find that violating § 424.57(c) will support the imposition of FCA liability on defendants. The Sixth Circuit addressed this question in *United States ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518, 531–32 (6th Cir.2012). There, defendant dialysis suppliers argued that their alleged violation of the certification requirements set forth in § 424.57(c) for billing privileges applications did not render their claims "materially false," because the certification of compliance was not a condition or prerequisite of payment and thus could not subject them to FCA liability. *Id.* at 532 (quoting *United States ex rel. Gross v. AIDS Research Alliance–Chicago*, 415 F.3d 601, 604 (7th Cir.2005)). The Sixth Circuit agreed. It stated:

> "The defendants are correct, irrespective of whether they in fact violated the regulations. The [FCA] is not a vehicle to police technical compliance with complex federal regulations.... The regulations set forth in[§ 424.57(c)] are conditions of participation, the violation of which do not lead to [FCA] liability. Consequently, the district court erred in granting summary judgment in favor of the United States on this claim, and the defendants' motion for summary judgment as to Count Two is granted."*Id.*

See also *Gross*, 415 F.3d at 604 ("An FCA claim premised upon an alleged false certification of compliance ... also requires that the certification of compliance be a condition of or prerequisite to government payment"); *United States v. Chubb Inst.*, No. CIVA 06 3562, 2010 WL 1076228, *5 (D.N.J. Mar. 22, 2010) ("Consequently, the overwhelming majority of courts have extended False Claims Act liability to a party's knowingly false certification of compliance with applicable regulations when such regulations are a condition of payment"); *Hansen v. Freedom Mobility, Inc.*, No. 5:08–CV–131, 2009 WL 3784958, *2 (W.D.N.C. Nov. 10, 2009) ("Failure to comply with regulations regarding billing or insurance might result in removal of Medicare billing privileges by the government, see 42 C.F.R. § 424.57(c), but would not establish any tort or negligence liability here"); *United States ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F.Supp.2d 972, 978–79 (W.D.Tenn.2007) (holding that there was no FCA liability for violations of conditions of participation, which are "the requirements providers must meet to participate in the Medicare program," because CMS forms do not expressly or impliedly condition payment on compliance with participation conditions); *United States ex rel. Cooper v. Gentiva Health Servs., Inc.*, No. CV 01–0508, 2003 WL 22495607, *9 (W.D.Pa. Nov. 4, 2003) ("In sum, Section 424.57 makes abundantly clear that the proper redress for violations of the standards established therein is not the denial of payment, but the revocation of the supplier's billing privileges, with or without the assistance of beneficiary complaint procedures. Thus, the Plaintiff may not properly proceed under the implied certification theory for alleged violations of Section 424.57").

*21 *Williams* and the other authority cited is persuasive. Section 424.57 does not concern reimbursement, and contains its own internal sanction—i.e., loss of billing privileges. See 42 C.F.R. § 424.57(e) ("CMS will revoke a supplier's billing privileges if it is found not to meet the [applicable standards]"); see also *Williams*, 696 F.3d at 531–32 (noting same). Accordingly, to the extent premised on the notion that § 424.57(c) requires that manufacturers promoting stimulators for off-label use comply with the PMA supplement process in order accurately certify compliance with Medicare, realtors' FCA Medicare claim must be dismissed. [116]

Relators also assert that the Medicare Benefit Policy Manual states that Medicare may cover "[d]evices approved by the FDA through the [PMA] process." [117] Because the Medicare Manual describes PMA approval as a "process," relators contend that PMA approval is not a one-time event, and that compliance with PMA supplement regulations is also required as part of the overall "PMA process." The court agrees with defendants that this argument lacks merit. [118] The court, in fact, has already found this argument unavailing. In its prior order dismissing the second amended complaint, the court explained that the Medicare Benefit Policy Manual clearly "states that 'devices' approved through the PMA process are eligible for coverage, not that 'the use of a device' that has been approved by the FDA is eligible for coverage." [119] Indeed, as the court discussed in its prior order, CMS' December 17, 2003 coverage decision memorandum reconsidering coverage of the use of electrostimulation devices for the treatment of chronic wounds supports the conclusion that the "device approved by the FDA" language in the Medicare Benefit Policy Manual means that if a device has been approved for any use by the FDA, CMS can conclude that a particular use is reimbursable even if that use is off-label. In the memorandum, CMS stated:

> "The FDA [ ] considers the use of [electrostimulation] devices for the treatment (healing) of wounds to be significantly different than the use of these devices for the indications currently covered under a 510(k) clearance. When used to treat wounds, these devices are considered by the FDA to be Class III devices, which requires the manufacturer to go through the Premarket Approval (PMA) process. Therefore, manufacturers would have to submit valid scientific evidence to show that their products provide reasonable assurance of safety and effectiveness for the treatment of wounds before the FDA would approve a PMA application. As of this time, the law prohibits manufacturers from marketing the use of electromagnetic devices for wound healing. Lack of approval for this particular indication, however, does not preclude physicians and other health care providers from providing this therapy for an unapproved use. *In addition, lack of FDA approval or clearance for a specific non-labeled indication, when there are other labeled indications, is not an automatic disqualification for Medicare coverage.* In addition, CMS assesses relevant health outcomes, above and beyond the safety and effectiveness regulatory mandate of the FDA. Although a device must receive FDA approval or clearance for at least one indication to be eligible for Medicare coverage ..., FDA approval/clearance alone does not entitle that device to coverage.... CMS has the authority to conduct a separate assessment of a device's appropriateness for Medicare coverage, including whether it is reasonable and necessary specifically for its intended use for Medicare beneficiaries" [120]

*22 This passage makes it clear that if the FDA has approved a device for at least one purpose, an off-label use can be reimbursed by Medicare. Cf. Medicare Benefit Policy Manual, § 50.4.2 ("An unlabeled use of a drug is a use that is not included as an indication on the drug's label as approved by the FDA. FDA approved drugs used for indications other than what is indicated on the official label may be covered under Medicare if the carrier determines the use to be medically accepted, taking into consideration the major drug compendia, authoritative medical literature and/or accepted standards of medical practice. In the case of drugs used in an anti-cancer chemotherapeutic regimen, unlabeled uses are covered for a medically accepted indication as defined in § 50.5"). It therefore supports the court's conclusion that CMS' use of the phrase "device approved by the FDA" in the Medicare Benefit Policy Manual does not mean "a use of a device that has been approved by the FDA," and that there is no categorical ban on the coverage of devices for off-label uses.

The explicit terms of certain of the NCDs and LCDs also support the court's conclusion that the Medicare Manual's use of the term *devices* approved by the FDA does not mean the *particular use of a device* approved by the FDA. Some NCDs and LCDs, for example, specifically limit the reimburseable use of particular devices to those for which they have been approved by the FDA. See NCD 20.9, § B.1–B.3 (stating that ventricular assist devices ("VADs") "used for support of blood circulation post-cardiotomy are covered

only if they have received approval from the [FDA] for that purpose, and are used according to the FDA-approved labeling instructions.... VADs used for bridge-to-transplant are covered only if they have received approval from the FDA for that purpose, and the VADs are used according to the FDA-approved labeling instructions.... VADs used for destination therapy are covered only if they have received approval from the FDA for that purpose"); [121] NCD 50.3 § B.1 (stating that cochlear implants for the treatment of certain types of hearing loss are only covered if "used in accordance with [FDA]-approved labeling"); [122] LCD L30312 (providing coverage for an ablative device only if it is "FDA-approved for the indications used"); [123] see also NCD 20.32, § B (stating that the Transcatheter Aortic Valve Replacement ("TAVR") is covered when used "for the treatment of symptomatic aortic valve stenosis when furnished according to a[FDA]-approved indication," and only if, *inter alia*,"[t]he procedure is furnished with a complete aortic valve and implantation system that has received FDA premarket approval (PMA) for that system's FDA approved indication"). [124]

Some LCDs specify that both on-label use and off-label use of devices is covered when supported by peer-reviewed literature. See, e.g., LCD L35084 (covering non-coronary vascular stents"only when an FDA-approved stent is" either (1) "[u]sed for the FDA-approved indications" or (2) for certain other enumerated indications "supported by the peer medical literature"); [125] LCD L33500 (stating that the contractor would "continue to limit payment for Vertebral Augmentation to those diagnostic indications which are either part of the FDA labeling or which are supported by appropriate peer-reviewed literature"). [126] Finally, other LCDs specifically exclude coverage for off-label uses. See LCD L32220 (excluding coverage for "any off-label uses" of FDA-cleared transcranial magnetic stimulation devices); [127] LCD L32028 (stating that the contractor "considers repetitive transcranial magnetic stimulation (rTMS) not medically necessary regardless if used for its FDA-approved indication or for any off-label uses"). [128]

*23 As the court previously concluded, none of these distinctions would be required if coverage for off-label use of devices were categorically prohibited. [129] These exemplar NCDs and LCDs provide further support for the conclusion that the Medicare Manual's use of the term "devices approved by the FDA" does not mean "use of a device approved by the FDA."Consequently, the court concludes that relators misinterpret the section of the Medicare Manual on which they rely, and to the extent their claim is based on that interpretation, it is not viable. See *Nowak*, 806 F.Supp.2d at 347–48 ("[T]o the extent that Nowak's claim alleges that the claims for off-label use are 'categorically' false because the device is unapproved for that use (and thus 'misbranded' or 'adulterated' or 'investigational'), she fails adequately to state a claim for relief in accordance with Rule 12(b)(6)"); see also *Bennett*, 747 F.Supp.2d at 752 ("Medicare reimbursement[ ] for off-label uses of medical devices [is] not addressed within the Medicare Act itself").

In sum, relators have failed to identify any Medicare statute, regulation, or program requirement that conditions payment for medical device claims on the manufacturer's compliance with PMA supplement requirements. They therefore fail plausibly to allege that Medicare conditions payment for medical devices on the device manufacturer's compliance with the FDA's PMA supplement regulation. Thus, even had they adequately alleged that defendants engage in off-label promotion of their stimulators, the court would dismiss the Medicare FCA claim for this reason.

c. Whether the Corrected Third Amended Complaint Adequately Alleges That Defendants Acted with Scienter

The deficiencies the court has noted in relators' pleading of falsity also render inadequate their allegations of scienter. The court previously found that relators failed to allege scienter sufficiently because none of the statutes, regulations, NCDs, LCDs, or claim forms referenced in the second amended complaint or discovered independently by the court indicated that defendants were required to disclose the fact that they sought reimbursement for devices prescribed for off-label use. Consequently, none put defendants on notice that they needed to do so. [130] Relators have not cured the deficiencies in the pleading of scienter noted in the prior order, and offer only a minimal response to defendants' argument on this point in their opposition.

Relators' only argument is that intent and knowledge can be alleged generally in an FCA case. [131] It is true that Rule 9(b) does not require particularized allegations of knowledge or intent. Relators' allegations, however, fall short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*.They allege that defendants "knew that they were falsely and/or fraudulently claiming reimbursements" and "knew [their

devices] were being unlawfully sold for unapproved off-label cervical use." [132] None of the facts relators plead, however, support their conclusory allegation that defendants knowingly submitted false claims.

*24 [18] As in the second amended complaint, relators do not cite any Medicare statute, regulation, NCD, LCD, or claim form that indicates manufacturers like defendants must disclose the fact that they seek reimbursement for devices prescribed for off-label use, or that they must file a PMA supplement before seeking reimbursement. No facts alleged by relators give rise to a reasonable inference that defendants were on notice they were filing false claims. In the absence of any factual allegations supporting relators' assertion that defendants acted with the requisite scienter, their allegations that defendants "knew that they were falsely and/or fraudulently claiming reimbursement" and "knew [their devices] were being unlawfully sold for unapproved off-label cervical use" are too conclusory to plead a plausible claim for relief, even under the relaxed standard of Rule 8(a). Accordingly, the court again concludes that relators have failed adequately to allege scienter, and dismisses their Medicare FCA claim on this basis as well.

d. Whether the Corrected Third Amended Complaint Adequately Alleges that Defendants Made False Certifications

[19] In addition to the basis for dismissal already discussed, the court also concludes that relators have failed to plead with particularity when any of defendants' purported certifications of compliance occurred. [133] This is because relators have failed to plead facts satisfying *Ebeid*.To plead an implied false certification claim adequately under *Ebeid,* relators must allege that "(1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation."*Ebeid,* 616 F.3d at 998. As was the case in their second amended complaint, relators have not sufficiently alleged the first of the three elements identified forth in *Ebeid*.Relators plead that every three years defendants signed a Medicare Enrollment Application, pursuant to 42 C.F.R. § 424.57, that certified compliance with all applicable rules and regulations, and stated that defendants "underst[oo]d that payment of a claim-by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions." [134] Relators, however, have not alleged with particularity when the certifications took place. They plead only that "[i]n order to obtain and retain billing privileges as a Medicare provider, DJO [and Biomet] ha[ve] certified every three years covering all periods of time relevant to the allegations in this complaint, including the period of September 18, 2001 to the present, that [they] meet[ ] and will continue to meet all applicable federal and state licensure and regulatory requirements." [135] An identical allegation was included in the second amended complaint. [136] As the court determined with respect to the earlier allegations, pleading that defendants made the certifications on "unspecified dates in unspecified years does not satisfy the heightened pleading requirement of Rule 9(b)." [137] Relators do not appear to address this point in their opposition. For the same reason it earlier found this allegation insufficient, the court does so again. The court therefore dismisses relators' Medicare FCA claim on this basis as well.

e. Conclusion Regarding Relators' Ability to State a FCA Claim Based on Defendants' Submission of Claims to Medicare

*25 Because relators have failed (i) to plead with particularity facts showing that defendants engaged in off-label promotion of their stimulators; (ii) to allege facts demonstrating that defendants were required to file a FDA PMA supplement as a prerequisite to obtaining reimbursement for off-label use of their stimulators; [138] (iii) to allege scienter plausibly; and (iv) to state with particularity when defendants made the allegedly false certifications, the court grants defendants' motion to dismiss relators' federal Medicare FCA claim.

3. FCA Liability Premised on Submission of False Claims to Medicaid and other Federal Reimbursement Programs

a. Whether the Corrected Third Amended Complaint Adequately Alleges that Defendants Submitted False Claims for Medicaid Reimbursement

The federal government reimburses a portion of the cost of DME under the Medicaid program, Federal Employees

Health Benefit Program, Federal Worker's Compensation Programs, CHAMPVA, and Tricare. Relators contend that defendants submitted false claims to these programs as well. [139] Defendants argue that relators have not adequately alleged an FCA claim based on their submission of claims to these programs because the complaint contains no allegations indicating that the programs reimburse defendants' devices any differently than Medicare. [140]

As noted, relators' FCA claim must satisfy the heightened pleading requirements of Rule 9(b). Relators must therefore "set forth what is false or misleading about [the] statement and why it is false." *Ebeid*, 616 F.3d at 998. Relators' complaint contains a cursory review of the Medicaid laws of forty-four states and the District of Columbia. Defendants contend these allegations are insufficient, because they (i) contain no reference medical devices or state that medical devices are covered only when prescribed for FDA-approved uses; and (ii) do not indicate that any state considered defendants' devices experimental or investigational. [141] Defendants concede that some states cover only "medically necessary" services and devices, and/or exclude "experimental" services or devices; they contend, however, that there are no facts alleged that would support a finding that these programs exclude physician-prescribed cervical use of the SpinalPak or SpinaLogic. [142] The court agrees. Relators identify only six states that allegedly exclude payment for DME that has not received FDA PMA approval for its intended use. The court addresses each in turn.

Relators allege that Florida limits Medicaid coverage to medically necessary DME, which is defined as "not experimental or investigational." "Experimental or investigational" in turn is defined as "used for a purpose that is not approved by the FDA." [143] Although this allegation can be read to cover defendants' devices, they contend the allegation fails under Rule 9(b) because relators do not plead: (i) the time period during which this limitation has been in effect, (ii) that either defendant submitted claims for its device to Florida's Medicaid program, (iii) that either defendant made false statements to Florida's Medicaid program about FDA approval of its device, or (iv) that either defendant acted with the requisite scienter. [144] The court must agree with defendants. Relators allege no facts indicating that either defendant submitted a claim to the Florida Medicaid program, and no facts indicating that the limitation on coverage cited in the complaint was in effect when the claim was submitted. Any claim based on the submission of a false claim to Florida's Medicaid program is therefore deficient under Rule 9(b). [145]

***26** The same is true of relators' allegations concerning the Hawaii, Michigan, Nebraska, and Nevada Medicaid programs; although relators allege that these states require that intended uses be FDA approved, relators do not allege that either defendant submitted a claim or otherwise made false statements to the Medicaid programs in these states. [146] Consequently, they have not satisfied Rule 9(b).

Relators contend that Minnesota's Medicaid Manual dated April 8, 2014 states that bone growth stimulators "should only be used in a way that is consistent with the FDA approved package insert," and that the device must be "requested for an FDA approved indication." [147] Relators allege that defendants submitted claims in 2010 and 2012, however, two to four years before the effective date of the Medicaid Manual they reference. [148] They do not allege that this regulation was in effect at the time the claims were submitted. They therefore fail to plead that Minnesota required FDA approval of the intended use of the device at the time claims were submitted, and fail to satisfy Rule 9(b) as a result. Moreover, as noted in the court's prior order, relators do not allege that defendants' claims to the Minnesota Medicaid program failed to disclose that their stimulators had been prescribed for off-label use. [149] This deficiency too requires dismissal.

[20] In sum, the court concludes that relators have failed to allege with particularity that defendants submitted any claim that was inconsistent with any state's Medicaid program requirements. The court therefore dismisses the state Medicaid aspects of the FCA claim.

b. Whether the Corrected Third Amended Complaint Adequately Alleges Submission of False Claims to Other Government Agencies

Defendants argue that the court dismissed relators' FCA claim in the second amended complaint to the extent based on the submission of claims to other federal government programs for at least four reasons: (i) relators did not allege the reimbursement rules for these programs, and thus failed to plead with particularity that they did not cover off-label uses of the stimulators; [150] (ii) they failed to plead that defendants made certifications to these programs or what

the content of such certifications was; [151] (iii) they did not plausibly plead scienter; [152] and (iv) the second amended complaint did not allege with particularity any representative sample of false claims submitted to these programs or reliable indicia that supported a strong inference that false claims were submitted. [153] Defendants maintain that relators added no new allegations to cure any of these deficiencies, despite the fact that the court offered suggestions as to how they might do so. [154] The court agrees.

Relators have not included any allegations concerning the rules governing reimbursement under any of these programs in the third amended complaint; this renders allegations that defendants submitted false claims conclusory and implausible. There are, likewise, no allegations that defendants ever made certifications to these programs; no representative examples are pled, nor any reliable indicia that supporting a strong inference that false claims were submitted. Relators not only failed to add allegations on these subjects in their corrected third amended complaint, but failed to address the deficiencies noted by defendants in their motion to dismiss in their opposition. The court must therefore dismiss these claims yet again.

c. Scienter

*27 Even had relators adequately alleged defendants' submission of false claims or certifications to these programs, they have not cured the deficiencies the court earlier found in their allegations of scienter. As discussed in some detail in addressing relators' Medicare allegations, they do not plead facts that support their conclusory assertion that defendants acted with scienter. The allegations are thus insufficient under Rule 8(a). Consequently, relators' FCA claim premised on submission of false claims to federal programs other than Medicare must be dismissed.

C. Whether the Court Should Exercise Supplemental Jurisdiction over Relators' State Law Claims

Relators' federal FCA claim provides the sole basis for federal subject matter jurisdiction in this case. Because relators have not stated a viable federal claim, the court declines to exercise jurisdiction over their state law claims at this time. See *Wade v. Regional Credit Association,* 87 F.3d 1098, 1101 (9th Cir.1996) ("Where a district court dismisses a federal claim, leaving only state claims for resolution, it should decline jurisdiction over the state claims and dismiss them without prejudice"); *Harrell v. 20th Century Insurance Co.,* 934 F.2d 203, 205 (9th Cir.1991) ("[I]t is generally preferable for a district court to remand remaining pendent claims to state court"); *Anderson v. Countrywide Financial,* No. 2:08–cv–01220–GEB–GGH, 2009 WL 3368444, *6 (E.D.Cal. Oct. 16, 2009) ("Since state courts have the primary responsibility to develop and apply state law, and the [*United Mine Workers v.*] *Gibbs* values do not favor continued exercise of supplemental jurisdiction over Plaintiff's state claims, Plaintiff's state claims are dismissed under 28 U.S.C. § 1367(c)(3)"); 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a [state-law] claim [if] ... the district court has dismissed all claims over which it has original jurisdiction"). See also *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law").

D. Whether the Court Should Grant Relators Leave to Amend

Defendants previously asked that the court dismiss relators' federal claim with prejudice, and reiterate that request in their motion. [155] The court's earlier grant of leave to amend was narrow, and its order offered specific suggestions as to how relators could cure deficiencies in the complaint. Much of relators' opposition reargues theories that the court previously concluded could not support an FCA claim and that are beyond the scope of the leave to amend granted. Although they added new allegations, relators failed to cure the deficiencies the court noted in its order dismissing the second amended complaint.

Relators have now had four opportunities to plead a viable FCA claim against defendants; although the court has reviewed the allegations only twice, it concludes, based on the allegations in the corrected third amended complaint, the arguments asserted in their opposition, and the fact that they disclaim any reliance on defendants' off-label promotion of the devices, that relators will not be able to amend to state a viable federal FCA claim based on the submission of claims to Medicare. Compare *Orion Tire Corp. v. Goodyear Tire & Rubber Co.,* 268 F.3d 1133, 1137 (9th Cir.2001) ("Where counsel is able to posit possible amendments that would be consistent with the operative complaint and could also possibly state a

claim for relief, the complaint should not be dismissed on its face with prejudice"). Specifically, relators do not state that they can add additional particularized allegations concerning defendants' alleged off-label promotion, despite having been advised that particularity was required for its implied false certification claim, [156] and despite having had well over a year to plead their case. Nor do relators suggest that they can plead additional allegations that would render their assertion that defendants knowingly submitted false claims plausible. Finally, relators do not assert that they can make particularized allegations concerning defendants' certifications of compliance. Given the number of deficiencies in relators' federal FCA Medicare claim, and the number of opportunities they have had to plead it, the court concludes that relators will not be able to state a viable claim if given leave to amend.

*28 Defendants' FCA claim based on submissions to state Medicaid pleads no particularized allegations that defendants ever submitted any false claims. Relators' response to defendants' argument in this regard is that it rests on a semantic quibble that most state Medicaid provisions lack the term "device." [157] Defendants' argument concerning particularity does not rest on whether the Medicaid provisions include the term "device," however. The only other argument relators advance is that defendants' challenges are "ludicrous and merits no response." [158] This suggests they can offer no substantive response to defendants' critique of the allegations. Finally, as respects relators' contention that defendants submitted false claims to Federal Employees Health Benefit Program, Federal Worker's Compensation Programs, CHAMPVA, and Tricare, the corrected third amended complaint is identical to the second amended complaint. They do not, moreover, address defendants' arguments concerning these allegations in their opposition. Their failure to defend the adequacy of their allegations concerning the submission of false claims to state Medicaid programs, the Federal Employees Health Benefit Program, the Federal Worker's Compensation Programs, CHAMPVA, and Tricare causes the court to conclude that granting leave to amend would be futile.

[21] For these reasons, the court dismisses all aspects of relators' federal FCA claim with prejudice. See *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir.2008) ("Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment"); *California ex rel. California Department of Toxic Substances Control v. Neville Chemical Co.*, 358 F.3d 661, 673 (9th Cir.2004) ("[D]enial of leave to amend is appropriate if the amendment would be futile," citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

III. CONCLUSION

For the reasons stated, the court grants defendants' motion to dismiss the corrected third amended complaint. Relators' federal FCA claim is dismissed in its entirety with prejudice. The court declines to exercise supplemental jurisdiction over relators' state law claims, and dismisses them without prejudice to refiling in state court.

All Citations

--- F.Supp.3d ----, 2015 WL 4111709

Footnotes

1 Complaint, Docket No. 1 (Aug. 20, 2012).
2 First Amended Complaint, Docket No. 8 (Dec. 26, 2012).
3 The United States' Election to Decline Intervention, Docket No. 9 (May 17, 2012).
4 United States' Election to Decline Intervention, Docket No. 13 (July 19, 2013).
5 Docket (July 19, 2013).
6 Request to Dismiss Defendant Orthofix, Inc., Docket No. 18 (Oct. 2, 2013); Order Dismissing Action Against Defendant Orthofix Without Prejudice, Docket No. 19 (Oct. 3, 2013).
7 Second Amended Complaint ("SAC"), Docket No. 43 (Nov. 8, 2013).
8 Stipulation to Dismiss Defendants DJO Finance and DJO Global, Docket No. 49 (Jan. 22, 2014).
9 Order Dismissing Defendants DJO Global and DJO Finance, Docket No. 50 (Jan. 28, 2014).
10 Order Granting Defendants' Motion to Stay Discovery, Docket No. 57 (Feb. 20, 2014).
11 Motion to Dismiss Second Amended Complaint, Docket No. 46 (Jan. 20, 2014).
12 Order Directing Parties to File Supplemental Briefing, Docket No. 67 (June 20, 2014).

13 Relators' Responses to the Questions Presented in the Court's June 20, 2014 Order, Docket No. 71 (July 7, 2014); Defendants' Joint Supplemental Brief in Support of Motion to Dismiss Second Amended Complaint, Docket No. 72 (July 7, 2014).

14 Order Granting Defendants' Motion to Dismiss the Second Amended Complaint ("Order"), Docket No. 74 (Sept. 2, 2014).

15 *Id.* at 66–67.

16 *Id.* at 67.

17 *Id.* at 68.

18 Third Amended Complaint, Docket No. 75 (Sept. 22, 2014); Corrected Third Amended Complaint ("TAC"), Docket No. 78 (Sept. 29, 2014). All citations or references to the third amended complaint refer to the corrected third amended complaint.

19 Order Setting Briefing Schedule, Docket No. 80 (Oct. 7, 2014).

20 Joint Motion to Dismiss Corrected Third Amended Complaint ("Motion"), Docket No. 81 (Oct. 22, 2014).

21 Opposition to Joint Motion to Dismiss Corrected Third Amended Complaint ("Opposition"), Docket No. 86 (Nov. 24, 2014).

22 These other plans are Medicaid, the Federal Employees Health Benefit Program, the Federal Worker's Compensation Programs, CHAMPVA, and Tricare.

23 All manufacturers that wish to market Class III devices must submit a PMA supplement prior to marketing unless the FDA clears a Form 510(k) in which the manufacturer successfully argues that the device should be reclassified as a Class I or II device "because it is substantially equivalent to an existing device so categorized." *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 754 (6th Cir.1999). Manufacturers that wish to market Class I or II devices must also, except in rare circumstances, submit a Form 510(k) to the FDA in order lawfully to market the device. (Defendants' Request for Judicial Notice in Support of Supplemental Brief ("Defendants' Prior Supp. RJN"), Docket No. 73 (July 7, 2014), Exh. 10 at 447 (Medical Devices: Premarket Notification (510k)).)

The court took judicial notice of various documents cited in this section in its prior order granting defendants' motion to dismiss the second amended complaint. (Order at 20–29.) The court takes judicial notice of the same documents again to provide adequate background for understanding of the parties' dispute. Citations are to the parties' prior requests for judicial notice.

24 TAC, ¶¶ 5–6.

25 *Id.*, ¶ 20.

26 *Id.*, ¶ 5.

27 The "lumbar spine" refers to the vertebrae in an individual's lower back. (Merriam–Webster Dictionary, www.merriam-webster.com/dictionary/lumbar (accessed on Apr. 21, 2014) ("relating to or lying near the lower back").)

28 TAC, ¶ 5.

29 *Id.*, ¶ 6.

30 *Id.*

31 The court takes judicial notice of the contents of the Medicare Program Integrity Manual. See http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/pim83c13.pdf (accessed on December 31, 2014).

32 Relators' Request for Judicial Notice in Support of Opposition to Defendants' Motion to Dismiss Second Amended Complaint ("Relators' Prior RJN"), Docket No. 61 (Mar. 19, 2014), Exh. J at 136–137 (Medicare Manual Chapter 14–Medical Devices).

33 *Id.*, Exh. H at 94 (Medicare Program Integrity Manual, Chapter 13—Local Coverage Determinations, § 13.1.1).

34 Defendants' Request for Judicial Notice in Support of Joint Motion to Dismiss Second Amended Complaint ("Defendants' Prior RJN"), Exh. 1 (National Coverage Determination for Osteogenic Stimulators (150.2) ("NCD 150.2")). The court takes judicial notice of this document, *infra*.

35 *Id.* at 7.

36 *Id.*, Exhs. 3 at 15 (Local Coverage Determination (LCD): Osteogenesis Stimulators (LCD L11501), covering Connecticut, D.C., Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont ("LCD L11501") ("A spinal electrical osteogenesis stimulator (E0748) is covered only if any of the following criteria are met ... Following spinal fusion surgery")); Exh. 4 at 33 (Local Coverage Determination (LCD): Osteogenesis Stimulators (LCD L11490), covering Alaska, American Samoa, Arizona, California, Guam, Hawaii, Iowa, Idaho, Kansas, Missouri, Montana, North Dakota, Nebraska, Nevada, Oregon, South Dakota, Utah, Washington, Wyoming, Northern Mariana Islands ("LCD L11490") ("A spinal electrical osteogenesis stimulator (E0748) is covered only if any of the following criteria are met ... Following spinal fusion surgery")); Exh. 5 at 52 (Local Coverage Determination (LCD): Osteogenesis Stimulators (LCD L5012), covering Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi,

North Carolina, New Mexico, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, Virgin Islands, West Virginia ("LCD L5012") ("A spinal electrical osteogenesis stimulator (E0748) is covered only if any of the following criteria are met ... Following spinal fusion surgery")); Exh. 6 at 67 (Local Coverage Determination (LCD): Osteogenesis Stimulators (LCD L27026), covering Illinois, Indiana, Kentucky, Michigan, Minnesota, Ohio, and Wisconsin ("LCD L27026") ("A spinal electrical osteogenesis stimulator (E0748) is covered only if any of the following criteria are met ... Following spinal fusion surgery")). The court takes judicial notice of these documents *infra*.

37 See Defendants' Prior RJN, Exhs. 1 (NCD 150.2); 3 (LCD L11501), 4 (LCD L11490), 5 (LCD L5012), and 6 (LCD L27026). The "cervical spine" refers to the vertebrae in an individual's neck. (Merriam–Webster Dictionary, www.merriam-webster.com/dictionary/cervical (accessed on Apr. 21, 2014) ("of or relating to the neck").)

38 Relators' Prior RJN, Exh. F (Medicare Manual, Chapter 1, Part 4, Coverage Determinations, § 280.1—Durable Medical Equipment Reference List ("NCD 280.1")).

39 *Id.*

40 *Id.*

41 Relators' Prior RJN, Exh. R (Health Insurance Claims Form 1500 ("CMS Form 1500")). The court takes judicial notice of this document *infra*.

42 *Id.*

43 CMS Manual System, Pub. 100–04 Medicare Claims Processing, Transmittal 236, at 3, http: //www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R236CP.pdf (accessed on April 24, 2014) ("Modifier KF is a pricing modifier. The description for modifier KF is as follows: Item designated by FDA as class III device"). The court takes judicial notice of this fact based on an official document available on the CMS website.

44 Defendants' Prior RJN, Exh. 2 at 11 (Certificate of Medical Necessity CMS–847–Osteogenesis Stimulators ("CMS 847")).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Relators' Prior RJN, Exh. R (CMS Form 1500); Defendants' RJN, Exh. 2 (CMS 847).

51 Defendants' Prior RJN, Exhs. 3 (LCD L11501), 4 (LCD L11490), 5 (LCD L5012), and 6 (LCD L27026).

52 TAC, ¶¶ 5–6.

53 *Id.*, ¶ 111.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*, ¶ 115.

58 *Id.*, ¶ 114.

59 *Id.*, ¶ 126.

60 *Id.*, ¶ 58.

61 *Id.*, ¶ 61.

62 *Id.*, ¶ 60.

63 *Id.*

64 *Id.*, ¶ 126.

65 *Id.*, ¶ 127.

66 *Id.*

67 *Id.*, ¶ 128.

68 *Id.*

69 *Id.*

70 *Id.*, ¶ 129. Relators allege these physicians testified that they did not complete CMS 847 forms in connection with these orders. (*Id.*) They do not plead, however, that defendants forged the physicians' signatures on the form, that defendants wrongfully completed Section B, or that when a manufacturer completes the form instead of the physician, this alone means the manufacturer has made a false claim to the government by submitting the form.

71 *Id.*, ¶ 45.

72 *Id.*
73 *Id.*, ¶¶ 3, 135.
74 *Id.*, ¶ 130.
75 *Id.*, ¶ 133.
76 *Id.*, ¶ 130.
77 *Id.*, ¶ 141.
78 *Id.*
79 *Id.*
80 *Id.*, ¶ 146.
81 *Id.*, ¶ 144.
82 *Id.*, ¶ 142.
83 *Id.*, ¶ 145.
84 *Id.*, ¶ 146.
85 Defendants' Request for Judicial Notice ("RJN"), Docket No. 82 (Oct. 22, 2014).
86 RJN, Exhs 1–3.
87 For this reason, although the complaint contains many allegations concerning the applicable law, the court does not accept them as true.
88 An FCA action can be commenced in one of two ways. The government can file a civil action against the alleged false claimant. 31 U.S.C. § 3730(a). Alternatively, a private person, a relator, can commence a qui tam civil action against the alleged false claimant "for the person and for the United States Government ... in the name of the Government."31 U.S.C. § 3730(b)(1). When a private person files a false claims action, the government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and material evidence and information supporting the complaint. 31 U.S.C. § 3730(b)(2). If the government declines to assume responsibility for the action, the relator has the right to conduct the action in the government's name. 31 U.S.C. § 3730(b)(4)(B). If the government elects to prosecute the action, the relator will receive 15 to 25 percent of any recovery, depending on the extent to which he substantially contributes to prosecution of the action. 31 U.S.C. § 3730(d)(1). If the government chooses not to intervene, the relator will receive 25 percent to 30 percent of any recovery. 31 U.S.C. § 3730(d)(2).
89 Order at 45–46.
90 *Id.* at 54–55.
91 *Id.* at 67.
92 *Id.*
93 Motion at 10.
94 Opposition at 23.
95 Order at 68 ("Relators' federal FCA claim is dismissed with prejudice to the extent it is based on defendants' submission of claims to Medicare; *the only exception* is a claim alleging that defendants made impliedly false certifications to Medicare that they were in compliance with all applicable regulations when they had an affirmative duty to file a PMA supplement because their employees were promoting use of the stimulators for the cervical spine."(emphasis added)).
96 Alternatively, the court could strike the allegations under Rule 12(f). See FED.R.CIV.PROC. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading"); *Barker v. Avila*, No. 2:09–cv–00001–GEB–JFM, 2010 WL 3171067, *1–2 (E.D.Cal. Aug. 11, 2010) (striking an amendment to a federal law claim where the court had granted leave to amend only state law claims); *PB Farradyne, Inc. v. Peterson*, No. CV 05–3447 SI, 2006 WL 2578273, *3 (N.D.Cal. Sept. 6, 2006) (striking allegations exceeding scope of leave to amend).
97 *Id.* at *11–14.
98 *Id.* at *12.
99 In *Ebeid*, the Ninth Circuit rejected the relator's argument that "the traditional pleading standards for fraud under Rule 9(b) should be relaxed [in implied false certification cases] because the alleged fraud was of an extended duration and 'the billing information is solely in Lungwitz's possession.'"*Ebeid*, 616 F.3d at 999. The court held that:

> To be sure, Ebeid is not privy to the details of patient billing. As he points out, in the securities fraud context we have held that 'Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence

is within a defendant's exclusive possession. We are not persuaded that this limited principle should be applied in this case. To jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."

100 Opposition at 8.

101 TAC, ¶ 131.

102 *Id.*, ¶ 143.

103 TAC, ¶¶ 131, 143.

104 *Id.*, ¶ 131.

105 *Id.*, ¶ 143.

106 TAC, ¶ 127.

107 *Id.*

108 Relators appear to suggest that paragraphs 134–36, 138, 141–44, and 146 support their off-label promotion theory. The court disagrees. These paragraphs do not concern off-label promotion. Indeed, as defendants note, this is confirmed by the fact that these paragraphs appear almost verbatim in the second amended complaint, i.e., a complaint that relators asserted did not allege off-label promotion. (Order at 59 n. 186 ("As the court has noted multiple times, however, relators explicitly state that they *do not assert that defendants unlawfully marketed their devices*.... Indeed, there are no allegations of unlawful marketing in the complaint" (emphasis added)); Opposition to Motion to Dismiss Second Amended Complaint, Docket No. 60 (Mar. 19, 2014) at 26–27.)

109 TAC, ¶ 32.

110 *Id.*

111 Opposition at 7.

112 Motion at 14.

113 Opposition at 39.

114 TAC, ¶¶ 9–10.

115 See Opposition at 6 (citing TAC ¶¶ 96–110 for proposition that defendants "undertook to comply with all applicable laws"). See also TAC, ¶¶ 96–110 (referring to 42 C.F.R. § 424.57).

116 At the hearing, relators argued that their implied false certification claim was based on defendants' failure to comply with Medicare's overarching "reasonable and necessary" requirement. At the same time, they disclaimed any claim based on off-label promotion, twice arguing that this was "not their theory." Rather, relators assert that defendants' submission of claims for off-label use of their devices was unlawful because the devices are not medically accepted for such uses, i.e. reasonable and necessary. The court previously found this argument unavailing because it concluded that off-label use of defendants' devices is not categorically prohibited. (See Order at 46–50.)

As the court explained in the order dismissing the second amended complaint, HHS "may make [Medicare] coverage determinations [for certain types of devices] via up-front rules" and has "discretion [to decide] whether to make [broad] determinations [as to whether a particular device is reimbursable] ... or [whether to have Medicare contractors make that decision based on a] case-by-case adjudication." *International Rehabilitative Sciences*, 688 F.3d at 1001. When HHS engages in rulemaking regarding the scope of coverage for certain devices, it issues NCDs, which are "a determination ... of whether a particular item or service is covered nationally under Medicare." 42 C.F.R. § 405.1060(a)(1). NCDs outline the conditions under which a device or service will be covered (or not covered), and are binding on all contractors. See 42 C.F.R. § 405.1060(a); *Almy*, 679 F.3d at 299; *Erringer v. Thompson*, 189 F.Supp.2d 984, 987 (D.Ariz.2001) ("An NCD is binding on all carrier[ ]s, fiscal intermediaries, and ALJs"); see also *Fratellone v. Sebelius*, No. 08 Civ. 3100(RMB)(RLE), 2009 WL 2971751, *5 (S.D.N.Y. Sept. 16, 2009) ("NCDs are binding on fiscal intermediaries, carriers, QICs, ALJs, and the MAC"). They reflect CMS's determination as to whether a particular device or service is reasonable and necessary; this includes a determination concerning the device's or service's safety and efficacy.

In the prior order, the court noted that NCD 150.2 covers stimulators, and states that "[t]he noninvasive stimulator device is covered only for the following indications: ... as an adjunct to spinal fusion surgery." (*Id.* at 47.) The court observed that LCDs for stimulators provide identical coverage; it stated that nothing in NCD 150.2 or LCDs limits coverage for stimulators to those supplied for on-label use, nor otherwise differentiates between stimulators used on different areas of the spine. (*Id.*) Consistent with this reading of NCD 150.2 and the LCDs covering stimulators, CMS 847 does not ask where on the spine the device for which reimbursement is sought was to be used or for what use(s) the FDA has approved the device. Similarly, the HCPCS code for stimulators—E0748—is the same whether the device

is used on the lumbar or cervical spine. Further supporting the fact that the broad language of NCD 150.2 covers *all* noninvasive stimulators used as an adjunct to spinal fusion surgery (including stimulators approved only for use on a part of the spine different than that for which they were prescribed) is the fact that numerous NCDs and LCDs explicitly limit reimbursable use of particular devices to on-label uses, see NCD 290.9, § B.1–B.3; NCD 50.3, § B.1; NCD 20.32, § B; LCD L30312; provide coverage for both on-label and off-label uses under certain specified conditions, see LCD L35084; LCD L33500; or explicitly exclude coverage for off-label uses, see LCD L32220; LCD L32028. These NCDs and LCDs demonstrate that CMS understands how to limit coverage of devices to on-label uses when it determines that doing so is reasonable and necessary. Where an NCD make no such distinction, as is the case here, it must be interpreted to cover both on- and off-label uses of the devices in question. Additionally, the court did not grant relators leave to amend this aspect of their earlier implied false certification claim. Relators' opposition is thus a motion for reconsideration which the court denies.

Finally, even were there merit to relators' argument, as discussed *infra*, their allegations of scienter fail in light of the existence of the NCDs and LCDs cited above. For all of these reasons, the court finds relators' reasonable and necessary argument is unpersuasive.

117 Opposition at 38 (citing Medicare Benefit Policy Manual, Ch. 14, § 10).

118 Reply at 8.

119 Order at 40.

120 Defendants' Prior Supp. RJN, Exh. 2 at 358–359 (at 6–7) (emphasis added).

121 *Id.*, Exh. 1 at 39 (Medicare National Coverage Determinations Manual).

122 *Id.* at 83.

123 *Id.*, Exh. 4 at 388 (LCD L30312).

124 *Id.*, Exh. 1 at 65 (Medicare National Coverage Determinations Manual).

125 *Id.*, Exh. 5 at 403 (LCD L32641).

126 *Id.*, Exh. 6 at 417 (LCD L33500).

127 *Id.*, Exh. 3 at 378 (LCD L32220).

128 *Id.*, Exh. 7 at 430 (LCD L32038).

129 Order at 43.

130 Order at 60–61.

131 Opposition at 20.

132 TAC, ¶ 150.

133 Order at 57.

134 TAC, ¶¶ 99–100.

135 *Id.*

136 SAC, ¶¶ 5–6.

137 Order at 56.

138 For the same reason, relators have failed to allege adequately that defendants' failure to disclose that the stimulators were prescribed for off-label use was material. "To establish materiality ... the question is merely whether the false certification —or assertion, or statement—was relevant to the government's decision to confer a benefit." *Ebeid*, 616 F.3d at 997 (citing *Hendow*, 461 F.3d at 1173). As the court previously noted, the fact that Medicare does not limit coverage of stimulators to on-label uses indicates the failure to disclose that a stimulator was going to be used for an off-label use was not material to the government's reimbursement decision. (Order at 58 n. 182.) This conclusion is reinforced by the fact that neither CMS Form 1500 nor CMS 847 includes a question regarding the use to which the stimulator will be put or the scope of FDA approval of the stimulator. See *United States ex rel. Hess v. Sanofi–Synthelabo, Inc.*, No. 4;05CV570MLM, 2006 WL 1064127, *7 (E.D.Mo. Apr. 21, 2006) ("According to Plaintiff's Complaint, ¶ 13, although 'the Medicare claim form has a line for indicating the patient's diagnosis,' it 'does not require a doctor to indicate what stage cancer the patient has.' As such, the stage of a patient's cancer is not material to a doctor's seeking reimbursement for his or her prescribing Eloxatin for treatment of cancer. The stage of a patient's cancer, therefore, was not material to [the government] in making a decision to reimburse doctors for their prescription of Eloxatin").

139 TAC, ¶ 117.

140 Motion at 18.

141 *Id.*

142 *Id.*
143 TAC, ¶ 121.
144 *Id.* at 19.
145 The court notes that relators allege that the District of Columbia Medicaid program also prohibits "experimental procedures." (*Id.*) Relators do not allege that "experimental procedures" are linked to compliance with FDA rules, however. Even if they did, these allegations fail for the same reasons as the allegations concerning the Florida Medicaid program, i.e., relators allege no facts indicating that either defendant submitted a claim to the District of Columbia Medicaid program, nor any facts indicating that the limitation on coverage cited in the complaint was in effect when the claim was submitted.
146 TAC, ¶ 121.
147 *Id.*
148 *Id.*, ¶¶ 139, 146.
149 *See id.* See also Order at 62.
150 Order at 59.
151 *Id.* at 60 n. 187.
152 *Id.* at 60. Scienter is addressed separately in subsection (c) of the order.
153 *Id.* at 62–66.
154 Motion at 23.
155 Motion at 25.
156 Order at 56 (noting that relators had not alleged it made certifications with the particularity demanded by Rule 9(b)).
157 Opposition at 35.
158 *Id.*

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STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030
Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	)	**PLAINTIFF'S FINAL BRIEF IN OPPOSITION TO DEFENDANT'S POST-TRIAL MOTIONS**

Plaintiff, Win Myat, by and through his undersigned counsel, submits this brief in opposition to Defendant Tuomey Regional Medical Center's various post-trial motions.[1] More specifically, Plaintiff submits this memorandum in support of the following three principles:

1. Tuomey's motion seeking the protections offered under the South Carolina Solicitation of Charitable Funds Act should be denied. Because of the organization's conduct, Tuomey Regional Medical Center does not qualify to receive a limitation of its liability under the Act. The verdict should not be reduced, and the $2,500,000 verdict that was awarded to the Plaintiff, for his severe and life changing injuries, should be entered by the Court.

2. Tuomey's motion for a directed verdict and JNOV, arguing that Plaintiff's case was based wholly on speculation, should be denied. Plaintiff presented more than ample evidence on which a reasonable jury could find that, by a preponderance of the evidence, a Tuomey employee created a dangerous condition (spilled a clear liquid) that caused Plaintiff Win Myat to slip, fall and suffer injury. Viewing the evidence in the light most favorable to the Plaintiff, there existed, at bare minimum, a scintilla of evidence through which a reasonable inference was created that a Tuomey employee spilled ice or water

1: Currently, three motions are pending before the Court: (1) Plaintiff's Motion to Reconsider Defendant's Motion to Amend Its Answer (2) Plaintiff's Motion to Reconsider Reopening the Case and (3) Defendant's PostTrial Motions.

Leave to Amend: Plaintiff maintains and reiterates his objections to Tuomey's last-minute amendment of its answer to assert the protections of the Solicitation of Charitable Funds Act, which have been briefed separately and are the subject of Plaintiff's Motion to Reconsider the Amendment.

Leave to Reopen the Evidence: Plaintiff maintains and reiterates his objections to permit Defendant to reopen the evidence after his motion for a directed verdict had been made on the grounds that Defendant presented no evidence of its tax exempt status to qualify for the protections of the Solicitation of Charitable Funds Act. Plaintiff's objection has been previously briefed separately, and is the subject of Plaintiff's Motion to Reconsider Reopening the Evidence.

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on the floor. Because evidence was presented by which a reasonable juror could find for the Plaintiff, the Court should honor the jury's decision and allow its verdict to stand.

3. Contrary to Tuomey's assertion, there were no errors made by the Court regarding the admission of evidence. Nurse William Whitehouse properly gave lay opinion testimony and there was no "falsified evidence" presented at closing. Nothing in the presentation or admission of evidence was improper or would otherwise warrant that a new trial be granted.

I. TUOMEY IS NOT ENTITLED TO THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT

South Carolina law is clear that the protections of the Solicitation of Charitable Funds Act are affirmative defenses that must be pled and proven at trial in order to be received. *See* James v. Lister, 331. S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998). Defendant Tuomey is not entitled to the protections under the Solicitation of Charitable Funds Act, for it: (1) has failed to timely plead the affirmative defense; (2) prior to the close of the evidence at trial, did not submit any evidence of its qualification for the charitable defense; and (3) as established by United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 976 F. Supp. 2d 776, 784 (D.S.C. 2013) aff'd, 792 F.3d 364 (4th Cir. 2015) (hereinafter "Drakeford" or "the Drakeford case"), has not conducted itself as required of a charitable entity seeking the protections of the Act.

In Drakeford, Defendant Tuomey was found to have violated the Stark Law (anti-kickback laws) and the False Claims Act (antifraud laws) due to improper and illegal contracts and arrangements with physicians employed by the hospital.[2] The District Court entered a judgment against Tuomey that, including penalties and fines, totaled $237,454,195.00. This judgment has

2. Specifically, the government claimed and proved that "payment[s] were unlawful under the Stark Law, 42 U.S.C. § 1395m, and thus violative of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq. U.S. ex rel. Drakeford v. Tuomey, 976 F. Supp. 2d 776, 780 (D.S.C. 2013) aff'd, 792 F.3d 364 (4th Cir. 2015).

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been affirmed by the Fourth Circuit Court of Appeals.

For these reasons, Plaintiff respectfully requests the Court deny Tuomey's Post Trial Motion seeking the protections of the cap, thereby respecting the jury's verdict and entering a judgment against the Defendant in the amount of $2,500,000.00.

A. SOLICITATION OF CHARITABLE FUNDS ACT

1. *Strict Interpretation/Construction Required*

At common law, there is no liability cap that could be sought by "charitable institutions."[3] Thus, because the limitation of liability that Defendant Tuomey is seeking under the Solicitation of Charitable Funds Act is in derogation of the common law, the statute **must be strictly construed**. Major v. National Indemnity, 267 S.C. 517, 229 S.E.2d 849 (S.C. 1976), *see also* Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004) ("A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent.") Therefore, since the protection Tuomey is seeking is in derogation of the common law, in making a determination of whether to apply a cap to the jury's verdict, the statute at issue should be strictly construed against Tuomey and in favor of the Plaintiff.

Our courts have held that "a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Doe at 473, 605 S.E.2d at 561 (*citing* Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1992)). Thus, since the statute can reasonably be construed in a manner that would not be in derogation of the Plaintiff's common law right to have the jury's verdict entered without a limitation in amount, the Court should construe the statute in so as not to limit the jury's award.

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3. Under the common law, by the early 1980's charitable immunity had been completely abrogated by the Supreme Court in an opinion authored by Justice Ness in Fitzer v. Greater Greenville South Carolina Young Mens Christian Ass'n, 277 S.C. 1, 282 S.E.2d 230 (1981).

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2. Language of the SCFA

The South Carolina Solicitation of Charitable Funds Act ("SCFA") caps the tort liability of qualifying "charitable organizations" at the same liability limits imposed by the South Carolina Tort Claims Act. S.C. Code Ann. § 33-56-180(A). The Tort Claims Act, more specifically S.C. Code Ann. § 15-78-120, sets this limit at $300,000 for a single occurrence of liability.

The relevant portion of the SCFA, the section stating what organizations can claim the protection of a cap on liability, gives no deference to whether or not the IRS has previously made a determination regarding entity's tax-exempt status. The language of the statute preserves the Court's historic role in reviewing the activities of the organization claiming charitable status. The distinction in the statutory language, compared to other parts of the SCFA, is of the utmost importance.

The governing section of the SCFA defines "charitable organization" as:

> [A]ny organization, institution, association, society, or corporation **which is exempt from taxation pursuant to Section 501(c)(3)** or 501(d) of Title 26 of the United States Code, as amended.

S.C. Code Ann. § 33-56-170 (emphasis added). In other words, this section states that the cap can be claimed by an organization only if the organization is entitled to be "exempt from taxation pursuant to Section 501(c)(3) or 501(d) of [the United States Tax Code]." This provision incorporates the Tax Code and governing law and does not provide that the liability protection is in any way impacted by whether or not the IRS has determined the organization to have tax exempt status. Notably, other sections of the SCFA do give deference to a determination by the IRS. By way of example, S.C. Code Ann. § 33-56-20 provides:

> As used in this chapter, unless a different meaning is required by the context:
> (1)(a) "Charitable organization" means a person, as defined in item (7):
> (i) **determined by the Internal Revenue Service to be a tax exempt** organization pursuant to Section 501(c)(3) of the Internal Revenue Code;

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As shown above, the Legislature used alternate language and an entirely different definition in the Code section governing when the cap can be asserted, as S.C. Code § 33-56-170 discusses organizations that should be exempt from taxation pursuant to the tax code and does not discuss organizations that have been determined by the IRS to be exempt. This difference/distinction in the statutory language is critically important.

When interpreting a statutory term, a court must read the statute as a whole, and sections that are part of the same statutory scheme must be construed together. Hughes v. West Carolina Reg. Sewer Auth., 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2009). Our courts also apply the canon of construction *expressio unius est exclusion alerius*, which provides that "to express or include one thing implies the exclusion of another, or of the alternative." Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002); Hughes, 386 S.C. at 647, 689 S.E.2d at 642; State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002).

In Hughes, the Court of Appeals reviewed the trial court's interpretation of the term "motor truck" as being synonymous with "truck" under the South Carolina motor vehicle code. 386 S.C. at 647, 689 S.E.2d at 642. The Court of Appeals disagreed with the trial court's interpretation, finding that when the statute is read as a whole and the term "motor truck" is examined in context with other sections, the term is not synonymous with "truck." Id. "As the legislature specifically defines the term truck and clearly employs the term truck in other sections of the statute, the *maxim expressio unius est exclusion alerius* suggests motor truck and truck are not synonymous." Id. at 648, 689 S.E.2d at 642. Importantly, the Court noted that if the legislature had intended that particular section to encompass trucks, then the drafters would not have elected to employ a different term ("motor truck") instead. Id. The addition of the adjective "motor" ahead of the term "truck" signified that the class of vehicles covered in the statute was narrower than merely a

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truck. Id.

In this case, the Legislature's choice of different language in the Solicitation of Charitable Funds Act is significant. As established in Hughes, *supra*, statutory provisions must be read as they relate to the statutory scheme as a whole. The Legislature's decision to use different language in defining a "charitable organization" under section 33-56-170 (when compared to section 33-56-20) signifies legislative intent that the sections have distinct applications. Had the Legislature intended the two definitions to be synonymous, the drafters would have employed the same language in the respective provisions. More specifically, if the Legislature intended for the definition of a charitable organization under section 33-56-170 to be solely determined by the IRS, then the drafters would have simply used the same language they chose to use in section 33-56-20, or simply not included the altered definition under section 33-56-170. However, instead, section 33-56-170 makes no mention of or even a reference to a determination by the IRS being of any importance in determining whether an institution qualifies to receive a limitation on liability.

By using different operative language in section 33-56-170, the Legislature has signaled that "charitable organization" is not synonymous with the definition found in section 33-56-20. Accordingly, in construing the provisions of section 33-56-170, the Court should find that qualifying as a "charitable organization" eligible for protections of a cap on its liability is not wholly dependent on whether the organization has received an IRS determination of tax-exempt status. Rather, the proper inquiry is whether the organization meets the provisional requirements of an organization that is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.[4] Thus, whether a Defendant has or has not been previously determined by the

4. To this point, Plaintiff submits that, by the wording of the statute, the Legislature intended that entity's actual qualifications to be exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Tax Code is what is the determination of eligibility for the liability cap hinges upon. Thus, an entity could have never applied for 501(c)(3) status, but, if it properly plead the protections of the SCFA and could prove that, by its

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IRS to be a Section 501(c)(3) or 501(d) entity is not dispositive as to whether or not it is entitled to the protections of the Solicitations of Charitable Funds Act.

3. The Qualification for the Protections of the Solicitation of Charitable Funds Act under S.C. Code § 33-56-170 is a legal determination that must be made by this Court.

As explained above, the SCFA defines "charitable organization" as "any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended." S.C. Code Ann. § 33-56-170 (2015). Defendant proffers a letter from 1991 purportedly from the Internal Revenue Service and urges the Court to defer to the Secretary of the Treasury to make the determination as to whether Tuomey qualifies and continues to qualify for the protections of S.C. Code § 33-56-170. Defendant relies on tax assessment cases from the federal courts to urge that only the Treasury Secretary has the sole authority to revoke or rescind its tax exempt status. This may be true in tax assessment matters that arise under federal law, but this is not a tax assessment case. Here, the state statute requires the Court to conduct an analysis to determine whether the entity qualifies for the protections of the Solicitation of Charitable Funds Act by reference and incorporation of Section 501(c)(3) of Title 26 of the U.S. Code. The language of the statute itself belies the Defendant's argument that the U.S. Treasury Secretary makes the determination. The plain language of the statute dictates that the qualification for the protections of the SCFA is a legal determination that must be made by this Court. The statutory language preserves the historic role of the trial court in making this determination.[5]

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purpose/behavior, it was qualified to exempt from taxation pursuant to the Tax Code, then South Carolina's lawmakers intended for the entity to receive the protections of the charitable immunity statute.

5 *See e.g.* Eiserhardt v. State Agr. & Mech. Soc. of S. C., 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959)(highlighting the Court's historic role of examining charitable operations to determine whether qualified for charitable immunity protections).

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4. *Judicial Notice*

The Court should not take judicial notice of the IRS's prior determination of Tuomey having Section 501(c)(3)status as a means to decide whether to apply the SCFA.Rule 201 of the SCRE governs the taking of judicial notice, and provides that a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[6]

A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. Moss v. Aetna Life Ins. Co., 267 S.C. 370, 228 S.E.2d 108 (1976). A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability. Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002). A trial court must distinguish between facts and regulations proper for judicial notice and the application of those facts to the case, which may be improper for judicial notice. *See* Martin v. Bay, 400 S.C. 140, 732 S.E.2d 667, 674 (2012) (holding it was proper for master to take judicial notice of county land development regulations but not proper to take judicial notice of movement of setback line). "Ordinarily, the internal affairs and transactions of a private corporation are not a proper subject for judicial notice." Moss at 377, 228 S.E.2d at 112.

In the present case, it would be improper for the Court to take judicial notice of the tax

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6. There are significant differences between the state and federal rules governing judicial notice. *See* Rule 201, SCRCP (2015) and Rule 201, FRCP (2015); State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) (noting large differences in the rules, including that the federal rule is permissive and the fact finder is not bound by the judicially noticed fact, which differs from the state rule). Thus, Defendant's reliance on federal authority for facts proper for judicial noticed is misplaced.

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status and the mode and manner of operations of the Defendant. These are not facts of such notoriety or common knowledge to assume their existence without proof and is precisely the type of internal affairs of a corporation that are not proper subjects for judicial notice.

5. Qualification for 501(c)(3)(3) Status

Section 501(c)(3) of Title 26 of the United States Code provides that, in order to qualify and keep tax exempt status, an organization must not permit any part of its net earnings to "inure[] to the benefit of any private shareholder or individual [....]" 26 USCA § 501(c)(3). In its entirety, the relevant portion of Section 501(c)(3) defines an exempt organization as:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual...

Further, IRS Publications further explain this principle:

> No part of an organization's net earnings may inure to the benefit of an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, ***or a key employee***. This means that an organization is prohibited from allowing its income or assets to accrue to insiders. An example of prohibited inurement would include payment of unreasonable compensation to an insider. Any amount of inurement may be grounds for loss of tax-exempt status.

IRS Pub. 4421, *Compliance Guide for 501(c)(3) Public Charities*, p. 4 (Rev. July 2014) (emphasis added); *see also*, IRS Pub. 557, *Tax-Exempt Status for Your Organization* (Rev. Feb. 2015).

To qualify as a § 501(c)(3) nonprofit, a corporation: (1) must have a charitable purpose; (2) cannot permit any of its earnings or assets to inure to the benefit of a private individual; (3) cannot engage in substantial lobbying activities; (4) cannot participate in political campaigns; and (5) it must be approved by the IRS. Martin McWilliams, Jr., et al, *Sculpting a Nonprofit: Part II*,

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SOUTH CAROLINA LAWYER, March/April 1996. Failure to comply with **any** of these elements, which comprise the "operational test," will result in the organization losing its eligibility for tax exempt status. Church of Scientology of California v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987). If an organization does not demonstrate that it is operated **exclusively** for exempt purposes, then it is not eligible for § 501(c)(3) status. 26 C.F.R. § 1.501(c)(3)-1(a).

Courts addressing the issue have held that a corporation's § 501(c)(3) status should be revoked or denied, pursuant to the Tax Code, "if even a small part of its income inures" to the benefit of a private shareholder or individual. *See* Orange County Agr. Soc., Inc. v. C.I.R., 893 F.2d 529, 534 (2nd Cir. 1990); Church of Scientology of California, 823 F.2d at 1316. A "private shareholder or individual" is defined broadly as "having a personal and private interest in the activities of the organization." Presbyterian and Reformed Publishing Co. v. Comm'r, 743 F.2d 148, 153 (3rd Cir. 1984). The payment of excessive salaries or the "unaccounted for diversions of an organization's resources 'by one who has complete and unfettered control can constitute inurement.'" Arlie Foundation v. United States of America, 826 F.Supp. 537, 550 (D.D.C. 1993) (quoting Church of Scientology of California, 823 F.2d at 1316). Likewise, earnings are found to inure to an individual in instances where a limited number of individuals "reap commercial benefits from the operation of the instrumentality, though they do not do so by direct acquisition or payment over to them of its earnings." Harding Hospital v. United States, 505 F.2d 1068, 1072 (6th Cir. 1974).

The Drakeford case conclusively established that Defendant Tuomey is guilty of paying its physicians "in excess of the fair market value for their services" in violation of the provisions of the Stark Laws and False Claims Act. Thus, these findings are established by the doctrine of collateral estoppel, particularly issue preclusion, as is well recognized by our courts. *See e.g.*

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Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) ("collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same"). Tuomey has offered two letters from the IRS in support of the proposition that it qualifies for tax-exempt status (see **Exhibit A, 7**, Letters dated July 3, 1991 and July 13, 1998), which states that Tuomey was in 1922 recognized as an organization exempt from federal income tax under 501(c)(31) of the Internal Revenue Code. However, these writings come long before Tuomey was found guilty of Stark Law and False Claims Act violations in the Drakeford case. Further, as discussed below, due to Tuomey's failure to properly disclose the details of the case, the IRS has never even been made aware of Drakeford's ultimate outcome and has misrepresented key aspects of the 2010 jury verdict to the IRS.

Because of its wrongdoing Defendant Tuomey does not meet and/or no longer meets the qualifications set forth in 26 USCA § 501(c)(3) to remain tax exempt, and thus is not entitled to the protections of S.C. Code § 33-56-170 & 180. The Federal Government created a tax-exempt category under Section 501(c)(3) as a means to assist charitable organizations – such as the Red Cross, Soup Kitchens, American Lung Association, and animal shelters – that were providing benefits to the communities thorough the United States. It did not intend to offer this benefit to organizations that operate outside the law and in such an unscrupulous manner that a nearly quarter billion dollar judgment is levied against them by the federal government. Similarly, the South Carolina Legislature did not intend for the Solicitation of Charitable Funds Act to be used to protect unscrupulous entities with unqualified limitations on liability.

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B. TUOMEY NO LONGER QUALIFIES TO RECEIVE TAX EXEMPT STATUS

1. *The Drakeford Case*

In October 2005, Michael Drakeford, M.D., filed a *qui tam* complaint against Tuomey Hospital. Dr. Drakeford and the U.S. Government alleged that the compensation packages that Tuomey paid some of its key physicians were in excess of the fair market value for their services and were thus in violation of the anti-kickback provisions of the Stark Law and antifraud laws of the False Claims Act.

On March 29, 2010, a jury returned a verdict in favor of the Government and finding that Tuomey had violated the Stark Law but had not violated the False Claims Act. ***See Exhibit B***, the March 2010 Drakeford Jury Verdict Form. The District Court granted a new trial on the issue of the FCA and issued an order finding that: (1) pursuant to the jury verdict, Tuomey violated the Stark Law; and (2) Tuomey submitted claims in violation of the Stark Law, and the United States paid those improper claims to Tuomey in the amount of $44,888,651.00. The Court concluded that the United States was entitled to judgment in its favor as to its equitable claims in that amount.

Tuomey appealed that Order, and, in 2012, the Fourth Circuit Court of Appeals remanded the case to District Court instructing:

> the jury must determine on remand whether the contracts took into account the volume or value of referrals. If it so finds, the jury must further determine whether Tuomey could bear its burden of proof with respect to the indirect compensation arrangement exception. Finally, if the jury finds that the contracts created a financial relationship—as defined by the Stark Law—between Tuomey and the physicians, it must determine the number and value of claims Tuomey presented to Medicare for payment of facility fees resulting from the facility component referrals made by the physicians, and for which it received payment.

United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 675 F.3d 394, 405 (4th Cir. 2012), attached hereto as ***Exhibit H***.

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The case proceeded to trial a second time, and, in May of 2013, the jury returned a verdict finding that Tuomey had violated both the Stark Law and the False Claims Act. The jury found that Tuomey had submitted 21,730 patient claims in violation of the FCA, and that the value of these claims totaled $39,313,065.00. Applying statutory penalties for the antifraud violations, in October of 2013, the District issued a judgment against under the FCA in the amount of $237,454,195.00.[7] Tuomey appealed, and on July 2015, the Fourth Circuit Court of Appeals issued an order affirming the District Court's decision and the nearly quarter of a billion dollar judgment against Tuomey.[8]

The Stark Law and False Claims Act embody important federal policies to prevent illegal referral fees and to prevent fraud upon the taxpayers by those entities that submit claims to the federal government. Summarizing the Government's claims against Tuomey in the Drakeford case, the District Court wrote: "According to the Government, the compensation packages paid physicians 31% above and beyond their total net collections as independent contractors, and thus in excess of the fair market value for their services." Drakeford, 976 F. Supp. 2d at 781. As described in greater detail later in this brief, the jury found for the Government and against Tuomey. Summarizing the jury's finding, the District Court's Order states: "On May 8, 2013, the jury returned a verdict finding that Tuomey had violated the Stark Law, that Tuomey had violated the FCA, that 21,730 claims were submitted in violation of the FCA, and that the value of the claims submitted in violation of the FCA equals $39,313,065.00." Id. at 783.

For having overpaid key physicians/employees, deceived the United States government in violation of both anti-kickback and antifraud laws law, Tuomey no longer qualifies to receive tax-exempt treatment by the IRS (and therefore does not qualify to receive the limitations of

7 ***See Exhibit A, 8.***
8 ***See Exhibit A, 9.***

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liability under the SCFA).[9] However, this matter has never been adjudicated by the Internal Revenue Service, for, as described below, Tuomey has not properly reported its violations of the Stark Laws and the False Claims Act to the IRS.

2. Tuomey's Failure to Properly Report Drakeford to the IRS

By failing to properly report the Drakeford violations to the Internal Revenue Service (as discussed below), Tuomey does not qualify to receive a limitation of liability under the SCFA.

It is axiomatic that the tax collection in the United States is done through a self-assessment and self-reporting system by the taxpayers. *See* 26 USCA § 6201(a)(1) ("The Secretary shall assess all taxes **determined by the taxpayer** [....]") While Defendant Tuomey may have documentation showing that, back in 1922, the IRS granted the hospital exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code, Tuomey has offered nothing to prove that its behavior since that time qualifies the organization to be "exempt from taxation pursuant to Section 501(c)(3)." In the nearly century that has passed, no audit regarding Tuomey's conformity with section 501(c)(3) has ever been performed by the IRS, and if Tuomey's conduct since 1922 would, if known by the IRS, cause the hospital to no longer qualify for exemption from taxation, then it would be up to Tuomey to report this. In fact, Tuomey has failed to report important court decisions regarding very egregious and unethical actions that would disqualify it from receiving an exemption from taxation.

Since the time the Drakeford litigation began, Tuomey's principle and practically sole means of communication with the IRS has been through its annual Form 990 filings. This fact was established by Tuomey's representative for a deposition taken under Rule 30(b)(6), SCRCP:

> Q. Other than these 990s which have been provided to the IRS by Tuomey over the past few years -- and I'm saying roughly four or five years for these documents we have in front of us – has there been any other written

9. *See infra* "Unclean Hands and Public Policy" at pp. 23-24

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communication between Tuomey and the IRS during that time period?

A. Not to my knowledge.

Q. Is it accurate that the 2013 Tuomey 990, when that was prepared and filed with the IRS was the last written communication that Tuomey Hospital has had with the IRS?

A. To my knowledge.

Q. Is that: "Yes, to my knowledge"?

A. Sorry. Yes, to my knowledge.

Q. Other than these written filings, the 990s over the past few years, since 2010, to your knowledge as the Tuomey 30(b)6 designee, has Tuomey had any oral communications with the Internal Revenue Service regarding any matters outside these 990 filings?

A. Not to my knowledge.

(***Exhibit A***, Tuomey Rule 30(b)(6) Depo., pp. 9-10)

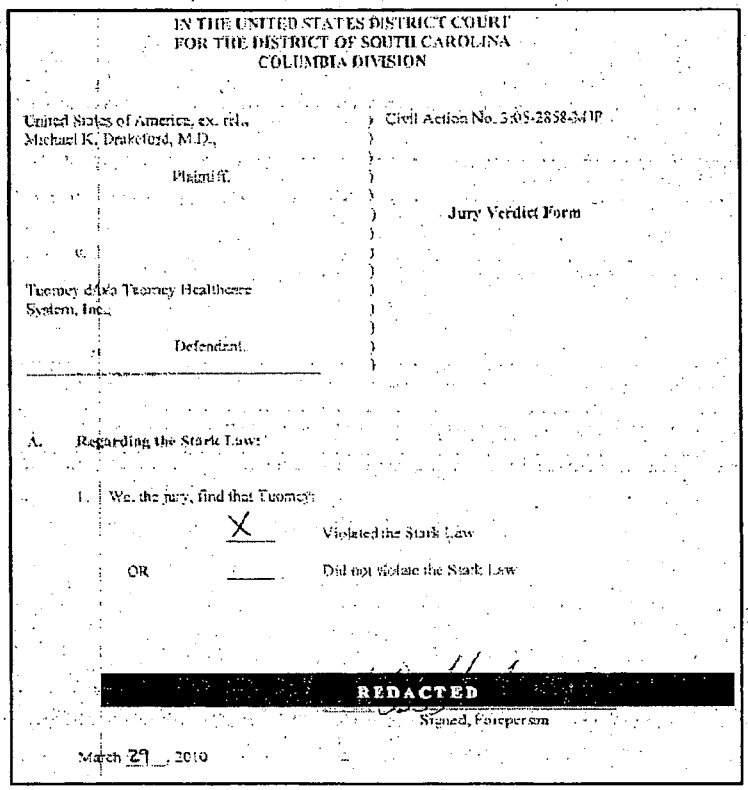
Tuomey' Form 990 filings, which are included herein as ***Exhibit A, 2*** (2010), ***Exhibit A, 3*** (2011), ***Exhibit A, 4*** (2012) and, ***Exhibit A, 5*** (2013), evidence Tuomey's shameful withholding of information from the IRS and outright deception as to the findings in the Drakeford case.

For example, Tuomey's 2010 Form 990 Filing, after a federal jury had specifically found that Tuomey had violated the Stark Law Tuomey's disclosure to the IRS read as follows:

> The System is currently a defendant in a civil suit brought by a physician on its medical staff under the qui tam provisions of the federal False Claims Act ("FCA"). The suit alleges that the System violated the FCA as a result of part-time employment contracts between the System and certain other physicians on its medical staff The United States Government intervened in the suit After a three week trial in federal court, the jury rendered a verdict that the System did not violate the FCA However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651. The court also granted the Government a new trial on its FCA claims. The System has appealed the trial court's equitable judgment to the Fourth Circuit Court of Appeals. The trial court stayed its judgment pending appeal but required the System to place $49,384,687 into escrow pending appeal. The trial court also stayed its new trial order pending the outcome of the appeal On January 20, 2012 Tuomey presented its oral arguments to support its appeal before a three judge panel of the Fourth Circuit Court of Appeals.

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(***Exhibit A, 2***, Form 990 for 2010, p. 86). This disclosure wholly omits that the *qui tam* lawsuit alleged that Tuomey violated the Stark Law's anti-kickback provisions and that the jury had specifically found the hospital to be in violation of the Stark Law. See 2010 Drakeford Jury Verdict Form p. 1 (below) and attached as ***Exhibit B***.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America, ex. rel., Michael K. Drakeford, M.D., Plaintiff, v. Tuomey d/b/a Tuomey Healthcare System, Inc., Defendant.

Civil Action No. 3:05-2858-MJP

Jury Verdict Form

A. Regarding the Stark Law:

1. We, the jury, find that Tuomey:

X Violated the Stark Law

OR ___ Did not violate the Stark Law

REDACTED

Signed, Foreperson

March 29, 2010

Tuomey's statement to the IRS is a dishonest mischaracterization of the jury's finding, portraying the finding as some sort of innocuous equitable restitution matter and gives no indication that the Hospital was found to have violated federal anti-kickback laws.

This same gross mischaracterization is reflected in the recent deposition taken under Rule 30(b)(6), SCRCP, wherein Tuomey's representative, who was designated to be knowledgeable on the topic of "Details and particulars of the litigation in United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc." (*see* ***Exhibit A, 1***, Tuomey 30(b)(6) Depo, Ex. 1 Notice Deposition Under Rule 30(b)(6), Topic No. 7) seemed to be relatively unfamiliar with the gravamen of the ultimate

findings by the judge and jury:

Q. Would you agree that the gravamen of those claims asserted by the Government under the Stark Law and under the False Claims Act involve the alleged overpayment of certain part-time physicians under contracts that those physicians had with Tuomey? Is that an accurate statement?

A. Overpayment?

Q. Yes.

A. No. I don't -- I wouldn't say that constitutes the gravamen. There's a lot of claims.

A. Point it out to me and I'll --

Q. We can --

A. -- I'll read it.

Q. The order says what it says.

A. May I read it?

Q. You can read the entire thing if you'd like.

A. Well, in order to say what Judge Seymour said, I've got to read it.

Q. Sure.

A. I'm reading Fourth Circuit. You want me to find --

Q I want you to read hers.

A. I'm sorry. You want me to read hers? I'm sorry. I don't see the word "overpayment" nor the argument that -- I'm sorry. Repeat the question.

Q. My question was: Was the gravamen of the case the payment in excess of fair market value to certain physicians under part-time contracts between Tuomey and those physicians

A. Does not appear to be.

Q. Have you read that opinion before today?

A. Yes.

Q. Okay. You've been -- we've been provided what is marked as Exhibit 6, which was represented to me was a list of the part-time employment contracts that were at issue in the Drakeford case and the corresponding amount of those payments from 2006, I believe, to 2011; is that accurate?

A. Yes. I'm sorry. That's W-2 compensation, yes.

Q. Right. And this was the list of physicians whose compensation was at issue in the Drakeford case?

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A. Correct.

Q. All right. Do you disagree that one of the major issues in the case which Judge Seymour issued an order was whether or not the jury concluded whether or not those part-time physicians were paid in excess of fair market value of their services?

A. Whether the Government claimed that to be an issue?

Q. That was the allegation made.

A. I don't see the allegation in the opinion -- either opinion.

Q. Can I hold the opinion?

A. Sure.

Q. On page 5 of what we've provided -- or this exhibit, Judge Seymour's opinion, there's an indication that: "According to the Government, the compensation packages paid physicians 31 percent above and beyond their total net collections as independent contractors, and thus is in excess of the fair market value for their services." You see that was one of the allegations made by the Government --

A. Let me look. Let me read this.

Q. -- according to Judge Seymour?

A. Correct. That appears to be an allegation, yes.

Q. And the jury verdict was in favor of the Government.

A. Which jury verdict?

Q. Sure. The second jury verdict was in favor of the Government on the False Claims Act and on the Stark Law claims?

A. Correct.

Q And that jury verdict and the ultimate judgment entered by Judge Seymour by way of this order was affirmed on via the Fourth Circuit?

A. Correct.

(***Exhibit A***, Tuomey Rule 30(b)(6) Depo., pp. 26-29) .

Compared to its 2010 Form 990, Tuomey's disclosure to the IRS in its Form 990 for 2011 (which, due to extensions, was not filed until 2012) was equally as deceptive and devoid of critically important information regarding the 2010 Drakeford Jury findings:

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> The System is currently a defendant in a civil suit brought by a physician on its medical staff under the qui tam provisions of the federal False Claims Act ("FCA"). The suit alleges that the System violated the FCA as a result of part-time employment contracts between the System and certain other physicians on its medical staff The United States Government intervened in the suit. After a three week trial in federal court, the jury rendered a verdict that the System did not violate the FCA. However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651. The court also granted the Government a new trial on its FCA claims based on a perceived error made by the court during the trial. The System appealed the trial court's equitable judgment to the Fourth Circuit Court of Appeals On March 20, 2012, the Fourth Circuit Court of Appeals reversed the trial court's equitable judgment. The $44,888,651 plus interest was returned to Tuomey The case was remanded to federal district court in Columbia, SC for a retrial on all issues The case is set for retrial for April 16, 2013. It is expected to be a four to five week trial.
>
> Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2012 and 2011 As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term.

(***Exhibit F***, Form 990 for 2011, p. 83). Once again, Tuomey failed to even so much as mention the jury's findings regarding the Stark Law violation. Further, after having had a judgment of more than $44 million rendered against it, and for which a new trial had been granted (and would later result in a more than $237 million judgment), Tuomey wrote to the IRS saying that less $1.8 million was set aside to address the long term liability. In short, Tuomey grossly mischaracterized the Drakeford action, going to great efforts to conceal the significance and nature of the accusations (and findings against the hospital).

This mischaracterization continued in Tuomey's 2012 filing with IRS (which, due to extensions, was not filed until 2013):

> The System is a defendant in a qui tam lawsuit filed against it by a physician on its medical staff on behalf of the United States Government in the United States District Court for the District of South Carolina. The Government subsequently intervened in this suit. The Government contends that certain

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> part-time employment contracts between the System and physicians on its medical staff that were in effect from 2005-2010 violated the so-called Stark Law (42 USC §1395nn), and thus resulted in the System filing claims for reimbursement from Medicare and other federal health care programs in violation of the False Claims Act. In the first trial in this matter in 2010, a jury rendered a verdict that the System did not violate the False Claims Act.
>
> Subsequent to the jury verdict in favor of the System, the Court awarded the Government a judgment on its equitable claims in the amount of $44,888,651, plus pre judgment interest of $4,040,134, with post-judgment interest of $5,123 per day. The Court also granted the Government a new trial on its False Claims Act claims. In 2012, the Fourth Circuit Court of Appeals reversed the trial court's judgment and the money paid by the System into escrow was refunded to the System, with interest.
>
> [....]
>
> Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2013 and 2012. As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term .

(***Exhibit A,*** **4,** Form 990 for 2012, p. 83-84). The hospital's statement continues to flagrantly omit the fact that the 2010 jury found Tuomey guilty of a Stark Law violation and even says, "[s]ubsequent to the jury verdict in favor of the System [...]," as if to imply that Tuomey was victorious in the 2010 trial.

Although the 2013 jury's finding of a Stark Law violation and False Claims Act violation are mentioned, Tuomey buries this with discussion of the Hospital's appeal of the order, the Government having "agreed to forbear collection efforts on its judgment for a period of time," and stays being granted. Despite a nearly quarter of billion judgment having been entered against Tuomey, it makes the following claim to the IRS: "Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2013 and 2012. As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in

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the near term."

In Tuomey's 2013 filing with IRS (which, due to extensions, was not filed until 2014), Tuomey finally admits to the IRS that the 2010 jury found the hospital guilty of having violated the Stark Law: "In the first trial in this matter in 2010, a jury rendered a verdict that the System violated the Stark Law but did not violate the False Claims Act." (***Exhibit G***, Form 990 for 2013, p. 89). After discussing the 2013 jury verdict, the Defendant again makes certain to emphasize the appeal and makes light of the findings, telling the IRS that Tuomey "has included an estimated obligation of $1,790,000" for the Drakeford matter.

On July 2, 2015, the Fourth Circuit Court of Appeals issued its order affirming the District Court's decision and the nearly quarter of a billion dollar judgment against Defendant Tuomey. By its own admission, to date Defendant Tuomey not informed the IRS about the outcome of the Drakeford litigation:

> Q. And we've agreed there have been no filings subsequent to the 2013 Tuomey 990 filing, correct?
>
> A. To my knowledge.
>
> Q. The -- so is it fair to say, then, or is it accurate that the last mention of the Drakeford litigation to the IRS in Tuomey's filings was on page 25 of the financial statement as part of the 2012 Tuomey 990 filing?
>
> A. To my knowledge.
>
> Q. And in that section it indicates the results of the litigation are not finalized as it was on appeal to the Fourth Circuit?
>
> A. Correct.
>
> Q. So as we sit here today, since there's been no more written communications with the IRS regarding the status of the Drakeford litigation, the last update they had was in the 2012 Tuomey 990?
>
> A. To my knowledge.
>
> Q. Is that a: "Yes, to my knowledge"?
>
> A. I'm sorry. Yes, to my knowledge,
>
> [....]

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Q. Has Tuomey informed the IRS that the Fourth Circuit has affirmed the judgment and that the judgment has become final?

A. Tuomey settled the case, so I don't think the judgment is final.

Q. Okay. Was appeal taken from the Fourth Circuit?
A. Appeal -- we settled the case before that. We had an agreement for settlement.

Q. All right. Has Tuomey informed the IRS of the conclusion of the Drakeford litigation?

A. I'm not aware that Tuomey has informed the IRS of the settlement of the Drakeford litigation.

Q. So that's a no?

A I'm just not aware. It's not a "no." It's "I'm not aware."

Q. You're the 30(b)6 designee. You're the person to testify about these topics. To your knowledge, has Tuomey informed the IRS of that resolution of the Drakeford litigation?

A. I am not aware.

Q. You're not aware that it has occurred?

A. Or not occurred.

Q. You don't know?

A. The answer is: Not to my knowledge.

(***Exhibit A***, Tuomey Rule 30(b)(6) Depo., pp. 52-53).

According to its own 30(b)(6) designee, Defendant Tuomey has not informed the IRS of the conclusion of Drakeford litigation. In a system of self-reporting, Tuomey has failed inform the IRS of the Fourth Circuit's final decision on the matter, finding Tuomey guilty of Stark Law and False Claims Act violations and a $237 million judgment. Failure to report the outcome of these violations, offenses which could have resulted in Tuomey having its 501(c)(3) status revoked by the IRS,[10] should result in Tuomey being found not to qualify to receive a limitation of liability

10. Tuomey assets, including the hospital, have recently been purchased by Palmetto Health, and the remaining entity is winding down its affairs. Due to this purchase, surely there is no forthcoming inquiry, by the IRS, as to Tuomey's proper classification as a 501(c)(3) entity. This lack of investigation emphasizes why the Legislature intended the Court to be capable to performing an analysis as to whether an organization should be "exempt from taxation pursuant to Section 501(c)(3)" and why a "determin[ation]by

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under the SCFA.

3. *Unclean Hands and Public Policy*

Because of Tuomey's actions detailed above, Tuomey has unclean hands, and, as such, must not be allowed to avail itself to the protections offered by the SCFA. With regard to other, analogous statutory protections, courts have denied parties the right to avail themselves of such protections where they have "unclean hands." *See* In re Lafferty, 469 B.R. 235, 245 (Bankr. D.S.C. 2012) ("This maxim illustrates the principle that the court will not grant relief to a party who has engaged in wrongful, illegal, or unethical acts."). In Lafferty, the bankruptcy court denied the debtors their statutory homestead exemption protections because the debtors sought to avoid a judicial lien through fraudulent and unethical conduct. 469 B.R. at 246. The court further explained, "The purpose of the unclean hands doctrine is to prevent a court from aiding or abetting a party in the commission of a fraud or other misconduct." Id. at 245-46.

It is a "well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy." Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C.) aff'd sub nom.; Coit v. Green, 404 U.S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 598, 103 S. Ct. 2017, 2031-32, 76 L. Ed. 2d 157 (U.S.S.C. 1983) (refusing to permit a racially discriminatory school from claiming benefit of tax exempt status). "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Muschany v. United States, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945). Federal statutory law is a proper source of declarations of public policy.

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the Internal Revenue Service" is not the language used in S.C. Code Ann. § 15-78-120. Simply put, this Court will be the only adjudicative body to determine whether the Defendant is entitled to the protections of the state statute.

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As a matter of public policy, just as articulated in Green and Bob Jones, *infra*, Defendant Tuomey must not be afforded the protections of tax exempt status conferred by S.C. Code § 33-56-170 & 180, due to the illegal conduct committed by it as established in the Drakeford case. Further, by its Form 990 filings and communications (and lack thereof) with the Internal Revenue Service, Tuomey has failed to properly report its violations to the very body that governs "tax exempt" entities. Its failure to properly report the outcome in Drakeford amounts to unclean hands by the Defendant and should been seen to preclude Tuomey from the protections of the SCFA.

4. *No True "Community Benefit"*

Hospitals seeking § 501(c)(3) status are subject to the "community benefit standard." St. David's Healthcare System v. United States of America, 349 F.3d 232, 235 (5th Cir. 2003); *see also* IHC Health Plans, Inc. v. C.I.R., 325 F.3d 1188, 1198 (10th Cir. 2003) ("Thus, the existence of some incidental community benefit is insufficient. Rather, the magnitude of the community benefit conferred must be sufficient to give rise to a strong inference that the organization operates *primarily for the purpose of benefitting the community.*"). Under the community benefit test, a hospital will be eligible for exempt status if it: (1) provides an emergency room open to all persons, regardless of their ability to pay; (2) is willing to hire any qualified physician; (3) is run by an independent board of trustees composed of representatives of the community; and (4) uses all excess revenues to improve facilities, provide educational services, and/or conduct medical research. St. David's Healthcare System, 349 F.3d at 235. The existence or absence of one factor is not decisive either way, and eligibility must be looked at based on the totality of the circumstances. Id. at 236. If more than an "insubstantial" amount of a hospital's activities are not for exempt purposes, then it is not deemed as being operated exclusively for exempt purposes

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and is not eligible for § 501(c)(3) status. Id. at 237.

Other state courts have denied charitable protections to hospitals classified as § 501(c)(3) organizations when those hospitals did not act in accordance with charitable purposes. In Univ. of Virginia Health Serv. Found. v. Morris ex rel Morris, 275 Va. 319, 657 S.E.2d 512 (2008) the Supreme Court of Virginia denied a health care provider the protections of charitable immunity against medical malpractice suits. Despite the health care provider's status as a § 501(c)(3) corporation based on a 1980 IRS ruling, the court found that the organization did not operate itself with a charitable purpose so as to entitle it to receive charitable immunity. In arriving at this decision, the court considered factors including the manner in which the organization aggressively pursued legal action and collections; ratio of revenue to the cost of charitable work; and physician salaries and incentive payments. Id. at 336-39, 657 S.E.2d at 520-22. After weighing those factors, the court was forced to conclude "it is clear that the manner in which [the defendant] actually conducts its affairs is not in accord with the charitable purpose stated in its Articles of Incorporation. [The defendant] operates like a profitable commercial business with extensive revenue and assets." Id. at 340, 657 S.E.2d at 522.

Prior to the adoption of the SCFA our courts routinely examined the character and manner of operations of "charitable" entities to determine if they were in fact entitled to immunity. *See e.g.* Eiserhardt v. State Agr. & Mech. Soc. of S. C., 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959) ("It is generally held that even if an institution be chartered as a charitable or eleemosynary corporation, this fact is not conclusive of its character, kind or purpose. In a tort action against such corporation its true nature may be shown from the manner in which it conducts its business as well as from its articles of incorporation, and on the trial of the case any competent evidence may be offered with respect to the actualities of its operations."). As has been well established in the

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Drakeford case, and well publicized, Tuomey has not behaved like a charitable or eleemosynary corporation, and is not entitled to those protections.

Moreover, Tuomey paid its CEO in excess of $1.48 million in 2013, as well as his country club dues. ***See Exhibit* A, 5** pp. 40-41, 2013 Form 990. As has been conclusively established by Drakeford, Tuomey has paid its physicians in "excess of the fair market value" for their services.

Further, its filings with the IRS indicate that only after requiring patients to sign a guaranty of financial responsibility when seeking treatment, after billing the patient, seeking to collect with internal collection efforts, thereafter sending accounts to collection for 120 days, does Tuomey write off nonpayment of that bad debt. ***See e.g. Exhibit* A, 4** at p. 33, 2012 Form 990. This is not the behavior of any truly charitable organization, but exactly that of a for-profit corporation in the business of medicine. In the instant case, the burden is on Tuomey to prove the affirmative defense that it qualifies for the protections of the SCFA, and there is no evidence that the organization operates *primarily* for the purpose of benefitting the Sumter community. Further, Tuomey cannot show that, in any way, acts differently than a profitable commercial business with extensive revenue and assets.

C. CONCLUSION AS TO PART I

In the case at hand, the legislative intent behind the South Carolina Charitable Funds Act is clear—to preserve the resources of charitable organizations and the benefits they confer on the community. Protections under the Charitable Funds Act are premised on an organization's eligibility as a § 501(c)(3) under federal law. Thus, if an organization is acting in a manner inconsistent with its stated charitable purposes that would invalidate its § 501(c)(3) status, it must not be permitted to avail itself of the protections of the SCFA. Unless operating exclusively for § 501(c)(3) purposes, there is no longer a charitable purpose entitling that organization to the

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protections of the Charitable Funds Act. In other words, if an organization operates outside of its § 501(c)(3) status, then it is also operating outside the protections of the SCFA.

Furthermore, an organization that has engaged in willful, fraudulent, and illegal conduct cannot be said to be acting in accordance with any claimed charitable purpose. Public policy should operate to prevent an organization from conducting fraudulent and illegal activities, yet still retain its charitable protections which were designed specifically to preserve the resources of those charitable organizations that actually benefit the community. Clearly, an organization that engages in substantial and repeated illegal behavior is not operating for the purpose of benefitting the public. Because illegal and fraudulent behavior is harmful to the public and should always be discouraged by the courts, it necessarily follows that such an organization cannot avail itself of statutory protections reserved for those organizations that serve the public interest. Therefore, due to its practices which are inconsistent with § 501(c)(3) status and its repeated misconduct and fraudulent behavior, Tuomey Healthcare should not be entitled to the protections of the SCFA.

II. TUOMEY'S MOTION FOR A DIRECTED VERDICT AND JNOV

A. *LEGAL STANDARD*

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). If there is more than one reasonable inference that can be drawn from the evidence, a directed verdict should be denied and the case must be submitted to the jury. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993); Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 508 S.E.2d 848 (1998).

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In deciding whether to grant or deny a directed verdict motion and JNOV, the trial court is concerned only with the existence or non-existence of evidence. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). A directed verdict motion should be denied if, liberally construing the facts in the opposing party's favor, any evidence exists by which a verdict for the opposing party would be reasonably possible. Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001).

When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

A directed verdict is appropriate only in rare circumstances. *See* Linnen v. Commercial Cas. Co., 152 S.C. 450, 150 S.E. 127, 128 (1929) (stating that it is only "rare cases in which a directed verdict is proper"). In denying a motion for a directed verdict, the trial court can only be reversed by the appellate court when there is not a scintilla evidence to support the nonmoving party's case. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999). "[U]nder the scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination." Woodle v. Brown, 223 S.C. 204, 209-10, 74 S.E.2d 914, 917 (1953).

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528

S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

B. CIRCUMSTANTIAL EVIDENCE

1. Legal Distinction

In arguing for a directed verdict and JNOV, Defendant has asserted that the Plaintiff has presented only innuendo, conjecture and speculation as to who was the cause of the clear liquid on the floor. Defendant's argument confuses speculation with circumstantial evidence and ignores our state's clear and long-standing policy that a case can be built solely on circumstantial evidence.

Circumstantial evidence, also known as indirect evidence, is every bit as competent and capable of proving a fact at issue as direct evidence, and our law makes no distinction between the efficacy of circumstantial evidence and direct evidence. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320 534 S.E.2s 672 (2000). "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." St. Paul Fire & Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968).

"Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) (*citing* State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). "Circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred, and **is typically characterized by inference or presumption**." State v. Salisbury, 343 S.C. 520, 524, n.1, 541 S.E.2d 247, 248 (2001) (emphasis added). Evidence is said to be indirect or circumstantial when the proof of some other fact or facts from which, taken either singularly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence. 30 S.C. Jur. Evidence § 43 (*citing* United Textile Workers of America, AFL-CIO, Local Union No.

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120 v. Newberry Mills, Inc., 238 F. Supp. 366 (W.D.S.C. 1965). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such a fact does exist. Id.

2. *Evidence Submitted Prior to Trial*

Prior to the start of trial, Defendant Tuomey moved for summary judgment, arguing that there was no evidence: (1) that Tuomey had actual or constructive knowledge of the dangerous condition (i.e. the liquid on the floor) and failed to remedy it; or (2) that the dangerous condition was created by one of Tuomey's employees. In response, Plaintiff stipulated that he would not argue that Tuomey had actual or constructive knowledge of the liquid on the floor and failed to correct the problem, but would proceed to trial solely to prove that the liquid on which Plaintiff slipped was, more likely than not, put on the floor by one of Tuomey's employees.[11] Further, Plaintiff argued that there was ample evidence (let alone a scintilla of evidence) to show that one of Tuomey's nurses spilled the liquid and, therefore, summary judgment would be improper.

In a brief and at oral argument, Plaintiff pointed to numerous pieces of evidence revealed in discovery that, when taken together, created strong circumstantial evidence showing that one of Tuomey's nurses or nurse technicians spilled water on the hospital's floor, thereby creating the dangerous condition that caused Dr. Myat to fall and suffer injury. The seven principle things revealed in discovery were as follows:

1. On July 6, 2011, at around 5:30 A.M., there was a clear liquid on the floor at Tuomey hospital. (*Exhibit C*, Depo. of Kathy Sapp, pp. 11-19)

2. The aforementioned liquid was in a puddle about six to seven inches in diameter and located adjacent to the very same nurses' station where Dr. Myat fell. (*Exhibit C*, Depo. of Kathy Sapp, p. 22)

11. A defendant is liable if its employee creates a dangerous condition on its premises resulting in injuries. Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

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3. Visiting hours at Tuomey Hospital end at 9:00 P.M. and do not resume until 6:00 A.M. Thus, in the early morning when Dr. Myat fell, visitors were not allowed in the area and had not been permitted on the floor for approximately eight and a half hours. (*Exhibit D*, Depo. of William Whitehouse, p. 22)

4. An ice machine and sink are located in a room very near to the nurses' station. Visitors are not permitted to use the ice machine or sink, which are only to be used by Tuomey employees. (*Exhibit D*, Depo. of William Whitehouse, p. 13)

5. Nurses' duties include delivering ice and water to patients in their hospital rooms. It is the custom and practice of Tuomey's nurses to fill cups of ice and water (for delivery to patients) on a cart that is placed in the exact location where Dr. Myat slipped and fell. (*Exhibit D*, Depo. of William Whitehouse, p. 31)

6. It is the nurses' custom and practice to fill the cups of ice and water at around 4:00 A.M., which is just one and half hours prior to Dr. Myat's fall. (*Exhibit D*, Depo. of William Whitehouse, p. 31)

7. On the morning of July 6, 2011, Dr. Myat slipped and fell in a puddle of clear liquid that was located in the exact spot where, just an hour and half prior, nurses had filled cups with ice and water. (*Exhibit C*, Depo. of Kathy Sapp, pp. 11-19 and *Exhibit D*, Depo. of nurse William Whitehouse, p. 31)

The Court denied Tuomey's Motion of Summary Judgment, correctly recognizing that these facts created circumstantial evidence through which a reasonable jury could find that the liquid on the floor was, more likely than not, put there by one of Tuomey's employees.

3. Evidence Presented at Trial

In addition to all seven things cited above, additional evidence was presented at trial that provided further evidence that the clear liquid on the floor was most likely put there by a Tuomey employee. Comprising a combination of direct and indirect evidence, the following testimony, photographs, and other evidence was presented to the jury:

1. Around 5:30 A.M. on the morning of July 6, 2011, Dr. Myat slipped and fell directly beside the nursing station on Unit 3 South of Tuomey Hospital. Kathy Sapp, an officer working for the South Carolina Department of Corrections, testified that she witnessed the fall and, thereafter, rushed to assist Dr. Myat. Dr. Myat also testified

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that he slipped and fell due to a puddle of water directly beside the nursing station on Unit 3 South on the aforementioned date and time.

2. Following Dr. Myat's fall, witnesses observed a puddle of clear liquid, beside the nursing station, in the exact same location where he had slipped. While their testimony as to the size of the puddle differed slightly, both Officer Sapp and Marilyn Wilson (a CNA working for Tuomey) testified that they saw this puddle of clear liquid on the floor at this location.

3. The fall occurred long past the close of the hospital's visitors' hours, which had ended at 9:00 P.M. the prior evening and were not scheduled to resume again until 6:00 A.M. Thus, at the time when Dr. Myat fell, visitors had not been permitted on Unit 3 South for more than eight hours. Mary Yates, former safety director for Tuomey, testified as to the visitor's hours being 6:00 A.M. until 9:00 P.M. and, when shown a written copy of Tuomey's policies and procedures, confirmed that a section found on page 3 establishes the policy for visiting hours.

4. Although patients are sometimes allowed to have visitors stay overnight in their rooms, no witness recalled observing any visitors or other non-Tuomey employees walking in the halls or around the nursing station of Unit 3 South during the early morning hours of July 6, 2011. The only non-employee exceptions were Officer Sapp and her fellow corrections officer, Sergeant James Austin. However, Officer Sapp testified that neither she nor Sergeant Austin spilled any liquids on the floor during the night/morning at issue and, like all the other witnesses, testified that she did not recall seeing any visitors or patients on Unit 3 South that evening/morning. Additionally, Ms. Yates stated that her investigation of the incident did not uncover any evidence of visitors in the area in the hours proceeding Dr. Myat's fall. In short, all of the testimony was that there were no visitors or patients in the area who could have created the spill beside the nursing station.

5. CNA Marilyn Wilson testified that during the night/morning at issue, there were seven Tuomey employees working on Unit 3 South – four RNs, two CNAs (one of which was her) and one student technician.

6. Per Tuomey Hospital's policies and procedures, neither patients nor visitors are permitted to be at or even around the nurses' station. Nurse Whitehouse, CNA Wilson and Ms. Yates all testified as to this. Thus, by Tuomey's own policy and the

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testimony of its employees, patients and visitors are not even allowed to stand, walk or otherwise be in the area where Dr. Myat slipped and fell.

7. A photograph, admitted into evidence, showed two large purple and white signs displayed prominently in the area where Dr. Myat fell. These signs stated: "*NO PATIENTS OR VISITORS ALLOWED AROUND OR THROUGH THE NURSING STATION.*"

8. Ms. Yates testified that, even though Tuomey's policies and procedures do not allow nurses to have drinks at the nursing station, nurses have been known to violate this policy and keep beverages at the hospital's various nursing stations.

9. An ice machine and sink are located in a small room that is very close to the nursing station. The room is locked with a combination code on the door. Visitors are not permitted to use the ice machine or sink, which are only to be used by Tuomey employees. In fact, physicians are not even permitted to enter the small room and are not provided with the combination code to the door. Nurse Whitehouse and CNA Wilson testified as to these facts.

10. A photograph, admitted into evidence, showed a large red and white sign that was prominently displayed on the door to the room with the sink and ice machine. This sign stated: "*Stop! Staff Only.*"

11. This sink and ice machine are the only sources of water that are located close to the location of the clear liquid on the floor. Nurse Whitehouse and CNA Wilson both testified as to this fact.

12. Every morning, between the hours of 4:00 A.M. and 5:00 A.M., Tuomey's nurses and certified nursing assistants use the sink and the ice machine (located in the small room directly beside the nursing station) to fill pitchers of water and ice. These pitchers are then placed on a small cart and wheeled around to the various patients on Unit 3 South. As is the staff's custom and practice, this activity took place during the hour immediately preceding Dr. Myat's fall. Nurse Whitehouse and CNA Wilson testified as to this fact.

13. At the time Dr. Myat slipped, the cart that Tuomey's staff members used to deliver ice and water was located very close to the nursing station. CNA Wilson testified

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that the nurses' water delivery cart was only about an arm's length from where she saw Dr. Myat sitting on the floor immediately following his fall.

14. Tuomey employees admitted that water on the floor at that location constituted a dangerous condition.

15. Nurse Whitehouse, who has worked at Tuomey Hospital since 2009 and is intimately familiar with how Unit 3 South operates and how its staff perform their duties, provided the lay opinion that a Tuomey employee was the most likely source of the clear liquid (the appropriateness of this lay opinion is addressed in a later section).

4. Analysis of Circumstantial Evidence Presented

Taking all of this evidence in the light most favorable to the Plaintiff, more than sufficient evidence was presented by which a reasonable jury could conclude that one of Tuomey's agents created the dangerous condition (*i.e.* that a Tuomey employee was the most likely source of the liquid on the floor). As much as Defendant may wish to classify and categorize the testimony, photographs, documents and other evidence elicited at trial as being "speculation," there was a multitude of indirect/circumstantial evidence to prove that, more likely than not, it was a Tuomey employee who spilled the clear liquid at the nursing station on Unit 3 South. The evidence above is a combination of both direct and indirect evidence on which a jury could reasonably determine that, by a preponderance of the evidence, the clear liquid on which Dr. Myat slipped and fell was spilled on the floor by a Tuomey employee.

The facts above establish that the **time** of Dr. Myat's fall, at around 5:30 AM, creates a presumption that reasonably suggests that Tuomey's nursing staff was the most likely source of the clear liquid: (1) the fall occurred more than eight hours after the area was closed to visitors; (2) numerous witnesses stated that they didn't observe any visitors or patients around the nurses' station in the hours immediately preceding Dr. Myat's fall; and (3) in the hour leading up to Dr.

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Myat's fall, the hospital's RNs and CNAs had filled pitchers of water and ice and placed them on a cart for delivery to the patients throughout the unit.

The facts above, taken collectively, establish that the **location** of Dr. Myat's fall, beside the nursing station, creates a presumption that reasonably suggests that Tuomey's nursing staff was the most likely the source of the clear liquid: (1) only hospital staff is allowed in and around the nursing station; (2) conspicuous signage informs patients and visitors that they are not allowed to stand around the nursing station; (3) the RNs and CNAs filled pitchers of water and ice in this exact location; (4) the cart the staff used to deliver water and ice was only an arm's length from where Dr. Myat fell; (5) there was no nearby sources of water and ice available to patients and visitors; and (6) the closest source for water and ice was in a small locked room that was only accessible to Tuomey's staff.

One does not have to speculate in order to determine who, by a preponderance of the evidence, caused the clear liquid to be on the floor. Given the time of day and location, coupled with the type of nursing work that happens in this location (preparation of water and ice for delivery to patients), a logical inference or presumption is that a nurse or nursing assistant was the cause of the spilled liquid. Taking the facts above collectively, it may be inferred that the clear liquid was the probable consequence of the nurses having spilled a small amount of water or ice in the process of their water delivery rounds, a function that occurs around the same time when Dr. Myat slipped and fell. This is not speculation or conjecture, but a chain of facts and circumstances indicating the existence of another fact, *i.e.* the source of the clear liquid.

Defendant seemingly takes the position that the Plaintiff's case must be built entirely on direct evidence and that unless one has a witness who can testify, "*I watched Nurse Jane Doe turn up her cup and spill water on the floor*," the evidence is all speculation. Rarely do cases have

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such direct evidence and surely such direct evidence is not required:

> The law does not require every fact and circumstance of negligence to be proved by direct and positive evidence or the testimony of eye witnesses. **Proof of negligence may rest entirely on circumstances**, and circumstantial evidence alone may authorize a finding of negligence. Negligence may be inferred from all of the facts and attendant circumstances in the case, and **where the circumstances are such as to take the case out of the realm of conjecture and into the realm of legitimate inferences from established facts**, a *prima facie* case is made.

Childers v. Gas Lines, Inc., 248 S.C. 316, 322, 149 S.E.2d 761, 764 (1966) (emphasis added) (citation omitted). Furthermore,

> It is not necessary that direct and positive evidence of eyewitnesses be introduced in order to show negligence, as this may be done by circumstances surrounding the accident [....] In accord with the rule governing proof of negligence generally, proximate cause need not be established by the testimony of eyewitnesses, nor by direct or positive evidence, but may be proved by circumstantial evidence; it may be determined from the circumstances of the case.

Hopkins v. Derst Baking Co., 221 S.C. 497, 501, 71 S.E.2d 407, 409 (1952) (internal quotation omitted). Much like the witness who testifies, "*I did not see the criminal defendant pull the trigger, but I heard a loud bang, walked into the room, and saw him standing over the victim's dead body and holding a smoking gun in his hand*," the Plaintiff offered ample evidence/facts by which the jury could come to the reasonable conclusion that, as a probable consequence of all the timing and location of the fall, a Tuomey staff member was, more likely than not, the source of the liquid.

In Hopkins v. Derst Baking Co., *supra*, the jury properly took the totality of the circumstantial evidence to determine that a delivery driver, more likely than not, drove over a child and was negligent in having done so. In Hopkins, a two-year-old boy was found dead in a residential suburb of Charleston. There was considerable dispute as to where the truck had been parked and how far it was from the child's body, although there was evidence from which the jury

might infer that the body was discovered 12 to 15 feet from where the truck had been. There was no evidence of the child's body having been dragged. None of the witnesses testified as to having seen the boy run over. No one witnessed the driver run over the child. One witness testified that he was in a position to see the front of the truck and did not see the child there. This latter testimony, together with that of the defendant driver, was relied upon by the driver to support his theory that the child had crawled under the truck and that he was, therefore, not at fault.

In contrast, the child's estate contended that the driver most likely drove off while looking backwards and making his observations as to possible traffic from the rear of the vehicle. The defendant testified that he felt both right wheels pass over something but he thought it to be a water meter. Another witness testified that he heard a "bump."

The jury found the defendant driver to be the most likely cause of the child's death and that he had, more likely than not, acted negligently. On appeal, the driver defendant argued that there was insufficient evidence of negligence. The Supreme Court disagreed, finding that there was sufficient circumstantial evidence on which a reasonable jury could find that the driver ran over the child in a negligent manner.

In the case before this Court, the Plaintiff has significantly more evidence of the nurses having spilled the clear liquid than, in the Hopkins case, the child's estate had of the defendant having negligently driven over the young boy. As described above and listed in the more than one dozen bullet points summarizing some of the key evidence, not only is there a scintilla of evidence on which the jury could find for the Plaintiff, but the Plaintiff presented strong evidence to show that, more likely than not, one of the Defendant's employees was the source of the dangerous condition that caused Dr. Myat's injury.

In fact, the evidence so strongly supports the conclusion that a Tuomey employee caused

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the spill, that it becomes the only reasonable conclusion that can be drawn from the evidence. The evidence provided that patients and visitors were not allowed in the area at issue, no one other than nurses and nursing assistants were seen in the location in the hours immediately preceding Dr. Myat's fall, Tuomey employees had recently filled pitchers with ice and water in this same area, and the cart that the nurses had recently used to deliver the ice and water was only a arm's length from where Dr. Myat fell. The only logical conclusion was that a Tuomey employee spilled the liquid, and Defendant offered no alternative explanation as to how the liquid came to be on the floor.

Not only did the Plaintiff provide a scintilla of evidence on which a reasonable jury could reasonably conclude that a nurse or nurse tech spilled the water, but the evidence was so substantial and overwhelming that it was the only plausible explanation. Accordingly, the Defendant's motion for a directed verdict and JNOV must be denied.

C. *CONCLUSION AS TO PART II*

Defendant Tuomey is not entitled to a directed verdict or JNOV, as there was ample evidence, let alone a scintilla of evidence, to support Plaintiff's claim. Viewing the evidence in the light most favorable to the Plaintiff, as well as all inferences that reasonably can be drawn therefrom, the evidence yields at least one inference that the source of the liquid was a Tuomey employee. As such, the Jury's verdict should stand.

III. NO EVIDENTIARY ERRORS AT TRIAL

A. *LAY OPINION TESTIMONY AS TO THE LIQUID'S MOST LIKELY SOURCE*

Defendant argues that the Court erred in permitting Nurse William Whitehouse offer his opinion regarding how the liquid at issue got on the floor beside the nurses' station. Defendant states that Nurse Whitehouse's testimony was nothing more than a "guess." After requiring an

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extensive foundation to be laid, the Court has performed its proper gate-keeping function and ruled that, Under Rule 701, SCRE, Nurse Whitehouse, due to his years of experience working on Unit 3 South, had a rational basis to state his belief that the clear liquid was more likely from a Tuomey employee than it was from a patient or a visitor.

Nurse Whitehouse's testimony was substantially similar to how he testified at deposition, offering the opinion that, because of his knowledge of the habits and practices of nurses and because visitors are not typically at the nurses station (especially in the early morning hours), the liquid was most likely put on the floor by a Tuomey employee:

> Q: So, you would agree then, because it was only Tuomey staff members that were frequenting the corridors and hallways from roughly 9:00 p.m. the night before until 5:30 a.m. when the fall occurred, that however that water got there, it was likely created or delivered there as a result of some action of a Tuomey staff member?
>
> (Objection as to form by Defense Counsel)
>
> A: It is possible that somehow and some mechanism, somebody did something that created the water to be there at the time.
>
> Q: Is it more likely that someone was a staff member working at Tuomey there from some time after 9:00 p.m. the night before until 5:30 a.m. or is it more likely that it was a visitor prior to 9:00 p.m.?
>
> (Objection as to form by Defense Counsel)
>
> A: **It is more likely that it would have been a staff member.**

(***Exhibit D,*** Depo. of William Whitehouse, pp. 26-27)

Our courts have specifically held that such lay opinions are admissible under South Carolina law. Rule 701 of the South Carolina Rules of Evidence provides that a lay witness is permitted to offer inferences and opinion testimony which: (a) are rationally based on the witness's perception; (b) are helpful to an understanding of the witness's testimony or determining a factual issue; and (c) do not require specialized knowledge or training. Rule 701, SCRE; *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Thus, the opinion of a lay witness who

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has sufficient knowledge of a particular matter or has had ample opportunity to form an opinion of the matter is properly admissible. *See* Roland v. Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992).

Rule 701(b), SCRE, contemplates the admissibility of lay opinion testimony where the testimony cannot be described factually in words other than inferences. Honorable D. Garrison "Gary" Hill, Lay Witness Opinions, 19 S.C. LAW 34, 38 (2007). South Carolina's courts have routinely admitted lay opinions for a wide range of topics including their belief as to the cause of an accident, where no specialized skills or knowledge is needed to make that conclusion. Carter v. Anderson Mem. Hosp., 284 S.C. 229, 325 S.E.2d 78 (Ct. App. 1985). Further, Rule 701 protects against the attempted use of rank opinion testimony by subjecting the lay witness to cross-examination where opposing counsel has the opportunity to expose deficiencies in the witness's knowledge of the matter. *See* Hill, *supra*.

Conclusions or opinions of lay witnesses should not be rejected unless "they are superfluous in the sense that they will be of no value to the jury." Small v. Pioneer Machinery, *Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997).

The facts in Small, *supra*, are rather analogous to the issues at bar. In Small, the operator of a log skidder offered opinion testimony that he believed the design of the skidder allowed debris to get into the throttle linkage and cause the throttle to stick, concluding that "the sticking throttle most likely did ... contribute to or cause this accident." Id. at 456, 494 S.E.2d at 839. The operator was not an engineer or a mechanic, but he had operated skidders for several years and was familiar with problems he experienced with the throttle and operation of this machine. The Court of Appeals held that this lay opinion testimony was properly admitted by the trial judge because it was based on the witness's observations, perceptions, and daily experience in the operation of the

skidder and the environment in which it was used. Id. at 468-69, 494 S.E.2d at 845; *see also* Divine v. Robbins, 385 S.C. 23, 683 S.E.2d 286 (Ct. App. 2009) (finding guardian *ad litem's* opinion testimony regarding a mother's behavior was admissible because it was based on personal observations and did not require special knowledge, skills, or training to form the opinion); Honea v. Prior, 295 S.C. 526, 531, 369 S.E.2d 846, 849 (Ct. App. 1988) (finding that social worker was qualified to offer lay opinion of defendant's mental state based on personal observations).

Similarly, in the present case, after sufficient foundation was laid, Nurse Whitehouse offered his opinion, based on his experience working on this particular unit at Tuomey Hospital and based on his observations that morning, regarding the most likely source of the clear liquid at issue on the hospital's floor. Analogous to the opinion testimony offered by the skidder operator in Small, Whitehouse's opinion testimony is based on him having worked on Unit 3 South on the very night/morning when Dr. Myat fell. It's based on his personal observations and perceptions, including his years of working on this particular unit of the hospital and witnessing when, where and how nurses fill cups of ice and water to deliver to the hospital's patients. It's also based off of his knowledge of how few patients and visitors are walking the halls at 5:30 AM, generally and on the particular morning at issue, and how patients and visitors are not permitted in the area in which Dr. Myat slipped and fell. Thus, his testimony was not an improper "guess," but was a lay opinion rationally based on his experience and perception and on his personal knowledge of the interworking of Unit 3 South. This allowed him to have helpful testimony as to who would be the most likely source of a clear liquid beside the nursing station in the early morning hours.

The Court properly permitted Nurse Whitehouse to offer his opinion, and whatever degree that his testimony is an experienced lay opinion verses an experienced lay guess, this could be and was addressed in the cross-examination of the witness. To this point, in Central R.R. v. Monahan,

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11 F.2d 212, 214 (2d Cir. 1926), Judge Leaned Hand cataloged the flaws inherent in a myopic application of rules so as to preclude opinion evidence from lay witnesses:

> [T]he exclusion of opinion evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness. It is hardly ever reversible error to admit such evidence; **its foundation may generally be as conveniently left to cross-examination**. Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the 'facts' in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

On cross-examination, Defense counsel specifically and clearly brought out the fact that Nurse Whitehouse didn't have personal, first-hard knowledge of the exact source of the water. If his testimony were an improper guess and not an admissible lay opinion, any injury this caused was remedied on cross-examination and is not grounds for a new trial.

As discussed above, Nurse Whitehouse's testimony satisfies the standards set forth in Rule 701, SCRE, because was proper lay opinion testimony that was based on his personal observations and experience, not requiring specialized knowledge, skills, or training. The testimony was not "superfluous," was of value to the jury in determining a factual issue and, as established by the holding in the Small case, was properly admitted by the Court at trial. Lastly, even if it was error to admit this evidence, any error was plainly harmless since a mountain of evidence was presented to the jury for it to reasonably conclude the same as Nurse Whitehouse about the source of the water.

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B. *ALLEGEDLY "FALSIFIED EVIDENCE"*

Defendant Tuomey claims that, during closing argument, Plaintiff's counsel falsified evidence.[12] This serious claim is patently false, and seemingly made flippantly, providing no description of or basis for the accusation. Without any further explanation, Defendant's motion states: "Plaintiff's counsel falsified evidence (floor diagram) during power point presentation [....]" The floor diagram to which Plaintiff's counsel pointed during closing was the very same floor diagram that Defendant provided during discovery, that the parties stipulated would be entered into evidence, and to which both parties used during the examination of witnesses. In fact, Defendant's counsel used this exact same floor diagram during his closing argument.

As an initial matter, no evidence was falsified or altered in any way that was submitted to the jury. In fact, no evidence was presented at closing argument, but only summaries of the evidence and argument as to what should be concluded from the evidence.

Possibly, Defendant is claiming that Plaintiff's counsel mischaracterized the testimony or evidence during the argument. The Undersigned believes it accurately argued the evidence to the jury in closing regarding the location of where the pitchers were filled. Even if counsel misstated the evidence it is for the jury to determine the evidence and if represented incorrectly, the defense is free to argue that point and the jury free to decide the evidence. Importantly, the Defense made no objection during this claimed mischaracterization of the evidence, nor did it respond by pointing out any alleged mischaracterization in its closing argument. Simply put, the Undersigned has not "falsified" any evidence and the first mention of this alleged issue was not contemporaneous to closing arguments, but in a motion filed ten days after the substantial adverse verdict.

12. Defendant's Post-Trial Motions at p. 5, ¶ I(s).

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C. AGREEMENT BETWEEN MYAT AND TUOMEY

Defendant contends that a written agreement between the Plaintiff and the Defendant, relating to Dr. Myat's role as Director of Infectious Disease for the Hospital, controls the application of the Solicitation of Charitable Funds Act.[13] This assertion is without basis and Defendant fails to provide detail or support for the unfounded assertion.

Private contracts do not alter state statutory provisions. *See e.g.* Hogan v. Home Ins. Co., 260 S.C. 157, 160, 194 S.E.2d 890, 891 (1973) (holding that statute on insurance supersedes any agreement between the parties). Further, the contract terms relate only to claims of indemnity, which presume a third party made a claim against Myat or the Hospital. This is not the circumstances involved in this case. Specifically, the Agreement provides:

> This agreement to indemnify and hold harmless the other party shall apply to both third party claims and second-party claims, including but not limited to, claims, actions, damages, losses, expenses or costs . . . incurred by one party to this Agreement as a result of act, or omission to act, on the part of the other party, its agents, or employees pursuant to this Agreement, provided however, Hospital shall not indemnify Contractor for any third party claims that arise as a result of acts or omissions of Contractor and Hospital's indemnification of Contractor is subject to the limitations set forth in the South Carolina Tort Claims Act, S.C. Code Section 33-56-180.

See ***Exhibit* E**, Tuomey/Myat Agreement at p. 10. Indemnification, by definition does not apply to this first party tort claim made by Dr. Myat against the Hospital and the Agreement makes clear it only covers third party claims and second party indemnification claims, neither of which apply here. Thus, the contractual provision is not applicable or controlling as to the Court's construction of the SCFA.

C. *CONCLUSION AS TO PART III*

No evidentiary errors were committed at the trial of this case. Given Nurse Whitehouse's

13. Defendant's Post-Trial Motions at p. 27.

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experience with the interworking of Tuomey's Unit 3 South, it was not error to have allowed him to offer a lay opinion as to the most likely source of the liquid on the floor. Even if this were error, which Plaintiff strongly contends it was not, this did not create prejudice and this issue was addressed and remedied by Defendant's examination of Nurse Whitehouse. Further, no evidence was "falsified" in closing. In summary, there were no errors as to what evidence was admitted or what was otherwise presented to the jury, a new trial is not warranted and the verdict should stand.

CONCLUSION

Based on the foregoing, Plaintiff requests that the Court deny the Defendant's post-trial motions, honor the Jury's verdict, and enter a judgment for Dr. Win Myat, against the Defendant Tuomey Regional Medical Center, in the amount of $2,500,000, plus interest going back to the date of the verdict.

Respectfully submitted,

FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, South Carolina 29202
803-765-2935
803-252-0786 (facsimile)

March 7, 2016
Columbia, South Carolina

By: s/William R. Padget
William R. Padget
Francis M. Hinson, IV
Attorneys for Plaintiff Win Myat, M.D.

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APPENDIX OF EXHIBITS

A. Tuomey Rule 30(b)(6) Deposition Transcript, plus Exhibits 1-10.

1 Notice of Taking 30(b)6 Deposition
2 2010 Tuomey Form 990
3 2011 Tuomey Form 990
4 2012 Tuomey Form 990
5 2013 Tuomey Form 990
6 Wage Chart for Drakeford Physician Pay
7 E-mail with Attachments (IRS Correspondence)
8 Drakeford v. Tuomey Judge Seymour Order 2013
9 Drakeford v. Tuomey Fourth Circuit Opinion 2015
10 Palmetto Health Tuomey Website Home Page

B. United States of America, ex. Rel., Michael Drakeford v. Tuomey Healthcare System, Inc. 2010 Jury Verdict Form and Judge Perry Order and Judgment

C. Kathy Sapp Deposition Transcript Excerpts

D. William Whitehouse Deposition Transcript Excerpts

E. Myat/Tuomey Employment Agreement

F. 2011 Toumey 990 with Financial Statement (as Supplemented)

G. 2013 Toumey 990 with Financial Statement (as Supplemented)

H. Drakeford v. Tuomey Fourth Circuit Opinion 2012 (from 1st appeal)

EXHIBIT A

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF SUMTER

- - -

WIN MYAT,	:	
	:	CIVIL ACTION NO.:
Plaintiff,	:	
	:	2012-CP-43-2030
vs.	:	
	:	
TUOMEY REGIONAL MEDICAL CENTER,	:	
	:	
	:	
Defendant.	:	

30(b)6 DEPOSITION OF TUOMEY REGIONAL MEDICAL CENTER
(Given by Thomas F. Moran)

DATE TAKEN: February 2, 2016

TIME BEGAN: 11:00 a.m.

TIME ENDED: 12:50 p.m.

LOCATION: Nelson Mullins Riley & Scarborough
3751 Robert M. Grissom Parkway
Myrtle Beach, South Carolina

REPORTED BY: Tami I. Watters, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
(803) 212-0012



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ALSO PRESENT:

Sandra K. Axson - PHTS Risk Management Services

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E X H I B I T S

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2	2010 Tuomey Form 990	4
3	2011 Tuomey Form 990	4
4	2012 Tuomey Form 990	4
5	2013 Tuomey Form 990	4
6	Wage Chart	5
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(It is hereby stipulated and agreed by and between counsel for the respective parties that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent does not waive reading and signing of this deposition transcript.)

- - -

(Notice of Taking 30(b)6 Deposition marked Moran Exhibit Number 1, for identification.)

- - -

(2010 Tuomey Form 990 marked Moran Exhibit Number 2, for identification.)

- - -

(2011 Tuomey Form 990 marked Moran Exhibit Number 3 for identification.)

- - -

(2012 Tuomey Form 990 marked Moran Exhibit Number 4 for identification.)

- - -

(2013 Tuomey Form 990 marked Moran Exhibit Number 5 for identification.)

- - -

- - -

(Wage Chart marked Moran Exhibit Number 6 for identification.)

- - - -

EXAMINATION

- - -

BY MR. PADGET:

Q Good morning, Mr. Moran. I'm Bill Padget. We met previously. Is it okay if I call you Tom?

A Sure.

Q I understand you're here today in a representative capacity on behalf of Tuomey Hospital, and we're gonna be asking you some questions pursuant to our 30(b)6 Notice that we previous served.

We've marked that notice as Exhibit 1. Have you received that notice?

A I have.

Q Have you reviewed the notice?

A I've read it.

Q Okay. And so you're familiar with the attachment with the various topics that we intend to discuss today?

A I am familiar with those topics, yes.

MR. HOLLER: Bill, before you get started, can we put our agreement on the record?

MR. PADGET: Sure.

MR. HOLLER: We've agreed that Tom -- Mr. Moran is not waiving any attorney-client privilege with Tuomey as he acts as an attorney for them.

Additionally, we have submitted a confidentiality schedule -- sorry -- confidentiality order. Document 6 has been produced subject to that order, although that piece of paper has not been stamped confidential; and also that the answers -- the question and answers certainly can be used for the purposes of this litigation, but the deposition testimony of Mr. Moran will also be encompassed and protected by the confidentiality order. And obviously if you think certain things shouldn't be confidential, we can address that at a later date.

MR. PADGET: I'm fine with that. My only intention is to use it in connection with the case in court --

MR. HOLLER: Fair enough.

MR. PADGET: -- and any information gleaned therein.

BY MR. PADGET:

Q All right. You have reviewed topics 1 through 9 on Attachment A of Exhibit 1?

A I have.

Q And my understanding is you are the 30(b)6 designee to speak on behalf of Tuomey as to each of those nine topics; is that correct?

A Yes.

Q Is there any topic that you're not prepared to testify about that is listed on this notice?

A There are certain confidentiality agreements under number 9. We didn't talk about that. But I would have to answer related to number 9 that certain confidentiality agreements are in place.

Q Okay. And I understand. And I'll say this: I think -- my understanding is now that the proposed affiliation with Palmetto Health has already taken place and is effective as of January 1, 2016; is that correct?

A Correct.

Q All right. I will likely not ask any questions about the offers or the negotiations. I may ask some questions about the current status of the legal entity.

A Certainly.

Q All right? All right. We've got some housekeeping that we've already done that we need to establish for the record.

We have marked what is Exhibit 2, what was provided to us and represented was the fiscal year 2010 Tuomey Form 990 that was completed, submitted and provided to the Internal Revenue Service.

Is that what is Exhibit 2?

A Yes.

Q Exhibit 3, which was what was provided to us, again, my understanding is that is the fiscal year 2011 Tuomey 990 that was provided to the IRS; is that right?

A Correct.

Q Exhibit 4, I'm handing to you what was provided to us, fiscal year 2012 Tuomey 990 form that was provided to the IRS; is that accurate?

A Correct.

Q And also number 5, the 2013 Tuomey 990

that was provided to the IRS. This one is stamped draft but was represented it is identical to the form that was actually submitted to the IRS; is that correct?

A Correct.

Q All right. And, Tom, feel free to keep those Exhibits 1 through 5 handy. I do have some questions about that.

Let me ask this: Has a 2014 990 been filed with the IRS as of today?

A I don't think so, but I'm not positive.

Q But as you sit here today on behalf of Tuomey, you don't believe --

A I know we got some extension. What I don't know is whether or not we filed the final return. I don't think we have, but I haven't checked with the return preparer to tell you the --

Q So fiscal year 20 --

Starting over, the fiscal year 2013 Tuomey 990 form would have been the last filing that Tuomey has prepared and provided to the Internal Revenue Service?

A That's my current understanding.

Q Other than these 990s which have been provided to the IRS by Tuomey over the past few

years -- and I'm saying roughly four or five years for these documents we have in front of us -- has there been any other written communication between Tuomey and the IRS during that time period?

A Not to my knowledge.

Q Is it accurate that the 2013 Tuomey 990, when that was prepared and filed with the IRS was the last written communication that Tuomey Hospital has had with the IRS?

A To my knowledge.

Q Is that: "Yes, to my knowledge"?

A Sorry. Yes, to my knowledge.

Q Other than these written filings, the 990s over the past few years, since 2010, to your knowledge as the Tuomey 30(b)6 designee, has Tuomey had any oral communications with the Internal Revenue Service regarding any matters outside these 990 filings?

A Not to my knowledge.

Q Over the past five years, going back roughly 2010 to the present, has Tuomey received any communication/correspondence in any method whatsoever from the Internal Revenue Service regarding its tax exempt status?

A Not to my knowledge.

Q By way of example, on the 2012 990 form, which I believe is Exhibit 4, turning to page 4 of that document, which in the top right says page 3, there's an indication there in Section 4 -- there's a question inquiring whether the organization engaged in lobbying activities or have a Section 501(h) election in effect during the tax year, and the answer to that question that Tuomey provided the IRS was yes; is that correct?

A Yes.

Q And that's a yes indicating that Tuomey did participate in some lobbying activities?

A Or had a 501(h) election in place.

Q And there's later disclosures on Schedule C? Page 3.

A How many pages back are we talking?

Q Roughly 12 pages from where we were. 16 pages into the document and Part II-B of Schedule C.

A I don't know. We're close. III-B?

Q II-B.

A Here. You find it.

Q Be glad to. Better idea.

A Sorry.

Q Here you go.

A Thank you.

Q And what we're referencing now is what is on Exhibit 4, Part -- Schedule C, Part II-B. This is a disclosure. It indicates the amount of funds spent on lobbying. Those "other activities" were roughly $14,429. Do you see that?

A Yes.

Q And there's an indication -- an explanation down below in Part IV in Supplemental Information indicating that Tuomey Hospital's a member of the American Hospital Association and the South Carolina Hospital Association and that those organizations engage in lobbying efforts on behalf of the membership bodies each year and a portion of the dues are allocated to those lobbying expenditures.

Do you see that?

A Yes.

Q And is that the lobbying activities that Tuomey engaged in during this calendar year by being a member of these associations that conduct lobbying on behalf of hospitals?

A That's what the return indicates.

Q Schedule J generally on this 990, and on all the 990s that we marked, this schedule is a

disclosure of compensation of officers, directors, trustees, key employees and highest compensated employees in a 990; is that right?

A Correct.

Q And in these various 990s, Exhibits 2 through Exhibits 6, each Schedule J sets forth the compensation amounts by those fiscal years to each of those officers, directors or other key employees?

A Correct.

Q And to your knowledge as a 30(b)6 designee of Tuomey, those amounts listed on Schedule J of this one, the 2012 and of the others, are true and accurate to the best of your knowledge?

A To my knowledge, yes.

Q And each year these 990s are prepared by an accounting firm on behalf of Tuomey?

A Correct.

Q As part of Exhibit 4, the 2012 990, there's a consolidated financial statement attached to the document prepared by Dixon Hughes Goodman; is that correct?

A Correct.

Q And if you'll turn to page 2 of that

attached auditor's report, there's a section on page 2 of that, Emphasis of Matter, indicating that the accountants are placing emphasis -- well: "As discussed in Note 11 to the consolidated financial statements, the System is a defendant in a qui tam lawsuit filed against it by a physician or its medical staff on behalf of the United States Government in the United States District Court for the District of South Carolina. Our opinion is not modified with respect to this matter."

Do you see that?

A Yes.

Q In the notes on page 24 of the auditor's report, there's a disclosure regarding the status of that litigation.

A Correct.

Q This is in 2012 -- of the 2012 fiscal year 990. To your knowledge, is this the first disclosure of that federal lawsuit to the Internal Revenue Service?

A I don't know the answer to that. I'd have to look at the previous return. I don't see the financial statements on the previous return.

Q There's -- the 2011 990 that was provided to me had no financial statement attached to it.

It was just a 990 form completed.

A Right.

Q The 2010 990, Exhibit 2, did have an independent auditor's report, but I did not find any mention of the federal litigation.

A Page 24.

Q Here we go. Yes. Page 24. This -- and back in the 2010 990, this disclosure was the first disclosure to the Internal Revenue Service of the existence of that lawsuit, correct?

A I don't know. I don't have 2009. I'm sorry.

Q Which I don't believe was provided to us.

A Right, so I don't know.

Q 2010 -- we were just looking at page 24 of that consolidated financial statement, and through the middle of the page there's an indication of litigation.

And in the third sentence of that paragraph, beginning: "After a three week trial in federal court" ...

I can point it out.

A Second sentence.

Q Second sentence: "After a three week trial in federal court, the jury rendered a verdict

that the System did not violate the FCA. However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651."

Do you see that?

A Yes.

Q Did that disclosure make any mention that the jury had concluded that Tuomey had violated the Stark Law?

A No.

Q Going back -- we agree in the 2011, which is the Exhibit 3 990, there's no mention of the litigation whatsoever?

A The 2011?

Q That's correct.

A No. I don't know what there was a mention of. The financial statements are not attached to this document.

Q But this is the document that was provided to the IRS?

A I don't know that there may be more. In other words, I don't know that this was the complete document.

Q Well, if this was what was provided to us and provided by Tuomey in response to requests for

production that these are the documents that have been filed with the IRS, I believe which you previously testified have been filed with the IRS, we would agree that the 2011 990 has no mention of the federal litigation?

A This document in front of me does not have the financial statements.

Q Okay. Do you believe that financial statements were filed --

A I don't know.

Q -- with it?

I could be wrong, but it appears to be an every-other-year filing. Is that something that's common?

A I don't know. Not to my knowledge.

Q Fair enough. We'll be looking at Exhibit 4, the 2012 990, page 24 again.

A Right.

Q There's a section for litigation -- disclosure of litigation. At the bottom of the paragraph -- and it says what it says, but at the bottom of the paragraph, it indicates: "In the first trial in this matter in 2010, a jury rendered a verdict that the System did not violate the False Claims Act."

Do you see that?

A You're at the bottom of the next-to-last paragraph?

Q Yes.

A Correct.

Q There's no mention that the jury concluded that Tuomey had violated the Stark Law in this section of the disclosure, is there, regarding the 2010 verdict?

A The provision says: "The Government contends that certain part-time employment agreements, bla bla bla, violated the Stark Law."

Q Sure. And I'm referring to the section about the result of the litigation. In the first -- the jury result: "In the first trial of the matter in 2010, a jury rendered a verdict that the System did not violate the False Claims Act."

Do you see that?

A Correct.

Q There's no mention that the System, Tuomey Hospital -- that the jury had concluded that they had violated the Stark Law in this disclosure, is there?

A No, there is no such mention of that.

Q All right. On the next page going into

page 25, they make mention of the second trial where the jury found violations of the False Claims Act and the Stark Law?

A Correct.

Q All right. And it goes on to indicate that the litigation was on appeal to the Fourth Circuit. We can -- this is just a summary of the disclosure on that page.

A Sure.

Q And it says, the very last paragraph on the bottom, the results of the litigation are not finalized.

Because they were still in appeal at that time, correct?

A Let me read it.

Q Sure. Take your time.

A Repeat your question.

Q Sure. My question is: The last part of this disclosure indicates that the results of the litigation are not yet finalized.

A Correct.

Q And that's because at the time it was on appeal to the Fourth Circuit Court of Appeals.

A Correct.

Q In the 2013 990, which is Exhibit 5, this

one here --

A Sorry.

Q Feel free to take a look. There's no financial statement attached to this 990 filing?

A Does not appear to be, correct.

Q Does not appear to be. And do you agree that there is no mention or disclosure in any way of the status of the federal litigation in the 2013 990 filing?

A I would need to review the entire document.

Q You're welcome to look.

A So repeat the question. Sorry. Thank you for that.

Q Yeah. Absolutely. Is there any mention of the Drakeford litigation in the 2013 Tuomey 990?

A Not in this document in front of me. Assuming it is not filed -- the financial statements were not filed, there's no mention.

Q And we've agreed there have been no filings subsequent to the 2013 Tuomey 990 filing, correct?

A To my knowledge.

Q The -- so is it fair to say, then, or is it accurate that the last mention of the Drakeford

litigation to the IRS in Tuomey's filings was on page 25 of the financial statement as part of the 2012 Tuomey 990 filing?

A To my knowledge.

Q And in that section it indicates the results of the litigation are not finalized as it was on appeal to the Fourth Circuit?

A Correct.

Q So as we sit here today, since there's been no more written communications with the IRS regarding the status of the Drakeford litigation, the last update they had was in the 2012 Tuomey 990?

A To my knowledge.

Q Is that a: "Yes, to my knowledge"?

A I'm sorry. Yes, to my knowledge, assuming there's no 2014 return filed, which I believe to be the case but I'm not sure, and assuming that there were no financial statements that were attached to the 2013 990.

Q But you're Tuomey's 30(b)6 designee, and, to your knowledge, they have not filed a 2014 990 filing as of yet?

A To my knowledge, but I don't know. So to the extent that the answer's no, I can check. They

are in active preparation of the return, if it has not yet been filed.

Q You're not in possession of a 2014 Tuomey 990 filing that has actually been passed on to the IRS?

A I'm not aware of one. I can go look and see.

Q Are you aware of any other correspondence/communication, verbal or otherwise, between the IRS and Tuomey regarding the status of the Drakeford litigation since this 2012 990 was filed with the IRS?

A Subject to the earlier comments that I made, assuming there wasn't 2013 financial statements attached to the 2013 990 and assuming 2014 has not been filed, yes, I'm aware of no such communication.

- - -

(E-mail with Attachments marked Moran Exhibit Number 7 for identification.)

- - -

BY MR. PADGET:

Q Tom, I've handed you a series of documents that were provided to me in an e-mail from Mr. Holler dated January the 6th. One of the

documents, if you turn to page 4 of that exhibit, is the 1991 letter from the district director of the IRS to Tuomey.

Do you see that?

A I do.

Q And this is an indication that at the time in 1991, that Tuomey had been recognized as a Section 501c3 qualified exempt organization under the code; is that accurate?

A Yes.

Q In the second-to-last -- well, the third-to-the-last -- last full paragraph, midway through that letter reads: "Any change in your purposes, characteristic or method of operation must be reported to us so we may consider the effect of the change on your exempt status."

Do you see that?

A I do.

Q Is that a standard directive in any such letter like this from the IRS regarding exempt status?

A It's in the letter, so I don't know whether it's standard or whether it's current, past. But it's in the letter.

Q That was the last communication, I

understand, as far as written correspondence from the IRS regarding Tuomey's tax exempt status; is that correct?

A I don't know that it's the last one. That's --

Q I take that back. There was one in '98 as well.

Does Tuomey -- over the past five or six years, does Tuomey file charitable registration statements with the Secretary of State office?

A Tuomey Hospital? No.

Q Does The Tuomey Foundation?

A Yes.

Q But Tuomey Hospital does not?

A Correct.

Q Does Tuomey Hospital file annual financial reports with the Secretary of State's --

A Not to my knowledge.

Q Has Tuomey been investigated under South Carolina Code 33-56-40 regarding the charitable investigation statutory provision involving any claim since 2006 to the present?

A No.

- - -

- - -

(Drakeford v. Tuomey Decision marked Moran Exhibit Number 8 for identification.)

- - -

BY MR. PADGET:

Q You've been handed what is Exhibit 8 to the deposition, Mr. Moran. And I'll represent to you this is a copy from the reporters of Judge Seymour's trial -- final trial court decision in the Drakeford matter; is that accurate?

A It appears to be.

Q And that order involves the same Tuomey Hospital that is the defendant in this case, the Myat case; is that correct?

A Yes.

- - -

(Drakeford v. Tuomey Fourth Circuit Opinion marked Moran Exhibit Number 9, for identification.)

- - -

BY MR. PADGET:

Q You've been handed what's been marked as Exhibit 9.

A Okay. I'm sorry.

Q I'll represent to you this was the

published order we obtained from the reporters of the final Fourth Circuit opinion regarding the Drakeford matter; is that correct?

A It appears to be.

Q And that decision also involves the same Tuomey Hospital defendant that is a defendant in the Myat case, this case?

A Correct.

Q Would you agree that the gravamen of those claims asserted by the Government under the Stark Law and under the False Claims Act involve the alleged overpayment of certain part-time physicians under contracts that those physicians had with Tuomey? Is that an accurate statement?

A Overpayment?

Q Yes.

A No. I don't -- I wouldn't say that constitutes the gravamen. There's a lot of claims.

Q One of the claims, and the claim that Judge Seymour ultimately entered an order and judgment for and which the Fourth Circuit ultimately affirmed, involved the overpayment -- in excess of the fair market value for salaries -- to 14 part-time physicians; is that correct?

A Point it out to me and I'll --

Q We can --
A -- I'll read it.
Q The order says what it says.
A May I read it?
Q You can read the entire thing if you'd like.
A Well, in order to say what Judge Seymour said, I've got to read it.
Q Sure.
A I'm reading Fourth Circuit. You want me to find --
Q I want you to read hers.
A I'm sorry. You want me to read hers? I'm sorry. I don't see the word "overpayment" nor the argument that -- I'm sorry. Repeat the question.
Q My question was: Was the gravamen of the case the payment in excess of fair market value to certain physicians under part-time contracts between Tuomey and those physicians?
A Does not appear to be.
Q Have you read that opinion before today?
A Yes.
Q Okay. You've been -- we've been provided what is marked as Exhibit 6, which was represented

to me was a list of the part-time employment contracts that were at issue in the Drakeford case and the corresponding amount of those payments from 2006, I believe, to 2011; is that accurate?

A Yes. I'm sorry. That's W-2 compensation, yes.

Q Right. And this was the list of physicians whose compensation was at issue in the Drakeford case?

A Correct.

Q All right. Do you disagree that one of the major issues in the case which Judge Seymour issued an order was whether or not the jury concluded whether or not those part-time physicians were paid in excess of fair market value of their services?

A Whether the Government claimed that to be an issue?

Q That was the allegation made.

A I don't see the allegation in the opinion -- either opinion.

Q Can I hold the opinion?

A Sure.

Q On page 5 of what we've provided -- or this exhibit, Judge Seymour's opinion, there's an

indication that: "According to the Government, the compensation packages paid physicians 31 percent above and beyond their total net collections as independent contractors, and thus is in excess of the fair market value for their services."

You see that was one of the allegations made by the Government --

A Let me look. Let me read this.

Q -- according to Judge Seymour?

A Correct. That appears to be an allegation, yes.

Q And the jury verdict was in favor of the Government.

A Which jury verdict?

Q Sure. The second jury verdict was in favor of the Government on the False Claims Act and on the Stark Law claims?

A Correct.

Q And that jury verdict and the ultimate judgment entered by Judge Seymour by way of this order was affirmed on via the Fourth Circuit?

A Correct.

Q In the Schedule Js of these various 990s, there's the salaries or payments made to a number of officers, directors, quote, key employees of

Tuomey.

How is it that Tuomey evaluated the compensation of those folks to determine whether or not it was in accordance with fair market value in the Schedule J, these physicians involved?

A In the Schedule J list -- let me pull one out. Can we refer to a specific one?

Q Sure. That would be fine. You're in 13?

A So the Schedule J list has various sections to it, so which sections are we talking about?

Q Part II.

A Okay. So for Mark Crabbe, there was an evaluation -- this is 2013. There was an evaluation done by a -- with a formal appraisal for -- and it was approved by the board.

Q They hired an independent consultant in order to evaluate the amount of compensation being paid to those persons?

A To Mark. To Dr. Crabbe they did. To the next -- next to Jay Cox, it would have been standard practice to get the executive compensation plan approved. Traditionally the corporation would do that.

I don't know that it was done in 2013,

but that would have been formally approved by the board, and there would have been comparables looked at by the board to make sure that there were fair market value compensation paid to -- for purposes of 2, 3, 4, 5, 6, 7 and 8.

Number 9, Dr. Li, a physicist, I think is just paid by the hour. I don't believe -- I'm not aware of any evaluation done. And the CRNAs are also paid under a salary, so the next four are just salaried amounts. I don't believe they were -- I'm not aware of any --

There would have been a consideration by TMP for making sure that those payments fell within a certain range; very careful consideration, but there were no third-party valuations done, I don't believe, on the CRNAs.

Q But for the others there were; the other officers?

A That would have been standard practice. I'm not -- I'm not in possession of the document, but it was standard practice for the board to use outside consultants to determine the compensation of its executives.

Q And I believe there was mention that --

A And then Dr. Crabbe, because he was a

physician, had his own separate valuation.

Q It later indicates in the explanation section, it says: "Mr. Cox's compensation for 2013 was based on the separation agreement between himself and Tuomey as well as his employment agreement in place at the time of his termination."

A That's right.

Q And the disclosure compensation for Mr. Cox, the total for that fiscal year 2013 was $1,485,190; is that right, from the Schedule J?

A Yes.

Q Now --

A The total of all columns.

Q The total. And then going back to that explanation --

A Yeah. There it says that.

Q -- "The pay and benefit plan was determined to be fair market value based on executive compensation review performed by Integrated Healthcare Strategies, a consulting firm which specialized in such work;" is that correct?

A Right.

Q So my understanding is Tuomey would retain Integrated Healthcare Strategies to evaluate the compensation packages of its officers and key

employees; is that right -- certain of its key employees?

A Right. Its nonphysician key employees. Its administration, correct.

Q And they would give opinions, up or down, whether or not the compensation packages were within fair market value?

A Correct.

Q Do you know if there was any other steps taken by Tuomey in order to evaluate the fair market value of that compensation?

A Standard practice would be that the board would discuss it outside of Mr. Cox's or whoever's presence; if Mr. Martin was in the board meeting.

And whether or not they have other -- it would be typical for them to take other industry values or comparables into account in looking at the valuation plan; in other words, the valuation would have MGMA standards, it would have examples of other CEOs of hospitals of similar size in the state, that sort of thing. That would be typical.

Q All right. Let's go back to Exhibit 7, the e-mail and the documents that David had provided to us earlier.

There was a series of Articles of

Organization provided as part of this as well -- Articles of Incorporation. Excuse me -- for Tuomey Medical Professionals.

What is Tuomey Medical Professionals?

A Tuomey Medical Professionals is a 501c3 organization that is affiliated with Tuomey Hospital and it employs physicians that practice in or around Sumter.

Q All right. On page 3 under Section 9 of the Articles, Section 9B, there's some language in the Articles of Incorporation indicating that: "No part of the net earnings of the Corporation shall inure to the benefit of, or be distributed to its directors, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above."

Do you see that section?

A I do.

Q Why is that section contained in the Articles of Incorporation?

A That's a statement of law, and oftentimes 501c3 organizations include that in its Articles --

Q Okay. And that's --

A -- who otherwise qualify for 501c3 status. The IRS likes to see it there.

Q Gotcha. At the time of Dr. Myat's fall in 2011 -- July 2011, Tuomey was operating as a legal entity, as a corporation. I believe it was just called Tuomey; is that accurate?

A When you say Tuomey was operating as Tuomey --

Q Yeah. Tuomey Hospital in Sumter was operating as a legal entity, and what was the formal name of that legal entity?

A Tuomey, I believe.

Q Just Tuomey, correct? Just the word "Tuomey"?

A I think so.

Q All right.

A I'd want to look at the Articles to confirm, but I think that's right. Tuomey.

Q As of January 1, it is now being operated in partnership, at least is what the website says, with Palmetto Health.

Can you describe for me the current legal entity or structure of that entity that Tuomey Hospital is currently operating?

A Tuomey Hospital is not, as a corporate entity, affiliated with Palmetto Health. The name "Tuomey" is associated with the organization -- a new organization called Palmetto Health Tuomey, which is a nonprofit corporation controlled by Palmetto Health, and it's my understanding they've applied, and maybe even have received, 501c3 status for that organization.

That is the entity operating as a hospital. That is the entity that owns and operates the hospital.

Q Palmetto Health Tuomey?

A Correct.

Q And that's as of January 1, 2016?

A Correct. Uh-huh.

Q What is the current status of the Tuomey corporation, just Tuomey, that we discussed a moment ago?

A It is unchanged.

Q It is no longer operating a hospital?

A It does not own the hospital. It's winding up its affairs.

Q Okay. So it's currently winding up its affairs?

A Its hospital affairs. Yeah.

Q Were the assets of the -- literally the hospital, the building and so forth, are those -- have they been transferred or are they being transferred to the new entity, Palmetto Health Tuomey?

A Yes, they have been.

Q They have been as of January 1, 2016?

A Correct. Most assets, yes. There were some retained assets, but yeah.

Q So Palmetto Health Tuomey, was that an acquisition of Tuomey's assets that was closed as of January 1?

A The assets were acquired, yes.

Q Were any liabilities acquired under the agreement?

A No. Some were -- well, yes. Some were acquired but not a majority. Most were paid off. The DOJ -- I would say 90 percent were paid off at closing, 80 percent probably.

Q Which primarily involved the Drakeford --

A And the bond debt. Maybe just -- no, primarily the bond debt. Drakeford was less than half the bond debt.

Q What about any contingent liabilities of Tuomey?

A No contingent liabilities were --

Q Were those assumed by Palmetto Health Tuomey?

A No. The only liability they assumed was one particular liability on pension -- on pension fund ongoing -- a closed-down pension plan. There was no other liability assumed that I'm aware of.

Q And then which liabilities were assumed or were not assumed, is that set forth in the purchase and sale agreement?

A Yes.

Q So contingent liabilities like Dr. Myat's, that was not acquired by Palmetto Health Tuomey under the agreement?

A Correct.

Q What about the accounts receivable of Tuomey corporation, the prior entity operating the hospital? Were those acquired by Palmetto Health Tuomey?

A Some were. Not all of them.

Q For example, the accounts receivable of -- for its medical operations?

A Commercial payors were acquired, but Medicare/Medicaid receivables were not.

Q So currently Tuomey corporation is still

operating/collecting on those remaining receivables from certain payors like Medicare/Medicaid?

A Correct.

Q How long -- does Tuomey corporation have any other ongoing operations?

A Winding up its affairs, paying off -- you know, preparing last tax returns, that sort of thing; collecting those accounts, filing reports, pension and profit sharing plan.

Q Is it creating any accounts receivable on -- going forward?

A No. No.

Q How long does it anticipate it will continue to collect on accounts receivable?

A Until they're gone. So I would say less than a year.

Q Are there -- other than accounts receivable that Tuomey corporation has continued to collect from payors like Medicare/Medicaid, are they -- did it retain any other assets?

A It did.

Q What are those?

A It retained rights to any claims against third parties, D&O insurance policies, things of that nature.

I'm trying to think. I'd have to go back and look, but that's what -- it retained those receivables, Medicare/Medicaid receivables. Let me think.

It retained restricted bank accounts or accounts that -- for gifts that had been given to it before the foundation was created. It retained those and transferred those to the foundation.

Seems like I'm missing one thing, but I'd have to go back and look.

Q And in all of those -- what's retained and what's being transferred to Palmetto Health Tuomey, the new entity, all of that was set forth in detail in the purchase and sale agreement?

A Yes.

Q Palmetto Health Tuomey, the new entity, you believe had applied for 501c3 tax exempt status?

A I was told that.

Q Do you know whether or not it has received that tax exempt status?

A I don't know.

Q I know that's a different entity that you're not here today to talk about.

Certain assets were transferred from

Tuomey to Palmetto Health Tuomey, including the right to receive payments on receivables from certain third-party payors like private insurers?

A Correct. Commercial.

Q Commercial payors? Any other assets transferred to Palmetto Health Tuomey --

Let me ask this: The building upon which the hospital campus is situated --

A Transferred.

Q -- transferred to the new entity?

A To Palmetto Health Tuomey.

Q The equipment?

A Transferred to Palmetto Health Tuomey.

Q The employment contracts with staff?

A There were only a couple. The CEO contract, Dr. Logan-Owens, and maybe three of the VPs only had --

Q Those were formerly assigned in the agreement.

A Those agreements were assigned, to my knowledge, if I remember right, to the new organization.

Q What about an average nurse working in the ER?

A There were no employment agreements.

Q There were no written employment agreements?

A Correct, there were no employment agreements that I'm aware of.

Q Those people, say -- let's take an ER nurse working in the ER on December 31st, 2015 at Tuomey and she came to work the next day. Let's say she didn't have the holidays off. Came to work January 1st, 2016 at Tuomey. Is she now employed by a new employer?

A She would -- assuming that she was employed; in other words, she had to apply.

Q So all the employees or --

Any employees that were working before for Tuomey that are now working in Palmetto Health applied for those employment positions?

A And had to otherwise qualify, yes.

Q How many employees who were being paid by Tuomey in December of 2015 who then went on -- then went on with Palmetto Health Tuomey in January of 2016? What -- can you --

A What percentage?

Q Yeah. What percentage?

A I would say the vast majority.

Q 99 percent?

A I don't know it would be that high.
Q Would it be in the nineties?
A I would think so.
Q The board of directors for Palmetto Health -- strike that -- for Tuomey in December of 2015, how does that compare to the board of directors for Palmetto Health Tuomey in January of 2016?
A No commonalty.
Q There's no board members that are the same?
A There are no board members that are the same.
Q How about the officers?
A They do not have the same -- to the extent they were employed, they have different titles.
Q But same people?
A The executive -- all the executive VPs, there were five, were retained and the CEO. But that -- that is not their position within Palmetto Health Tuomey.
Q All right. What is Ms. Logan-Owens' position in Palmetto Health Tuomey?
A It is not CEO. I don't know -- I can't

tell you for sure what it is, but it was not -- I think --

Q Is she chief executive officer of Palmetto Health Tuomey?

A No.

Q Who is?

A I don't know that they have one, so I don't know.

Q Is she operating as the senior executive for Palmetto Health Tuomey --

A I don't know.

Q -- in the operations of the hospital?

A I suspect not, but I don't know.

Q How many people did Tuomey employ in December of 2015, roughly?

A I don't have that total. I'm sorry.

Q Just an estimate.

A It would be a guess. I'm -- so ...

Q The vast majority of employees that were working for Tuomey in December of 2015 are now working for Palmetto Health Tuomey as of January 2016?

A That's my understanding.

Q Who was performing the day-to-day executive management services for Tuomey in

December of 2015?

A The -- repeat the question.

Q What personnel were performing the day-to-day executive management operations of Tuomey in December of 2015?

A There would be a number of them.

Q How many, approximately?

A Executive level?

Q Yes.

A Six.

Q How many are performing that function in January of 2016?

A I don't have that knowledge.

Q To your knowledge, were any of the five or six people performing those services in January -- or December of 2015, were they terminated or let go?

A Repeat the question.

Q Were any of them who were performing those services in December of 2015 -- to your knowledge, are any of them not performing those services in January of 2016?

A I don't have that knowledge.

Q Is Tuomey corporation, the one operating the hospital up until the beginning of this year,

is it in partnership with Palmetto Health Tuomey?

A In what sense?

Q In the sense of by the meaning of partnership. Are they partners in any sense in the operation of Tuomey Hospital going forward or the hospital situated in downtown Sumter going forward?

A There is not a partnership agreement between the two entities.

- - -

(Palmetto Health Tuomey Website Home Page marked Moran Exhibit Number 10, for identification.)

- - -

MR. HOLLER: Can I see it?

MR. PADGET: Sure. Can I proceed, David, or do you need a minute?

MR. HOLLER: Yeah, you can proceed. If he needs an opportunity to discuss this document with me -- I don't think that he would, but if he would, I would think the rules would allow him to have a conversation.

MR. PADGET: I agree with that. I think my question's pretty simple, though.

BY MR. PADGET:

Q Tuomey -- when it was Tuomey corporation

operating the hospital in Sumter up until the --

A Before you ask your question, can I read it?

Q Sure. Sure. It's just the website of Palmetto Health Tuomey, the first page of the home page.

A Got it.

Q Actually, it's an announcement that was on the home page, to be specific.

A Okay.

Q Last year Tuomey corporation operated a website. I believe it was Tuomey.com.

A By Tuomey corporation, I think you're referring to Tuomey, but yeah.

Q Tuomey.

A Right. Right.

Q The corporation known as Tuomey.

A Right.

Q Was that website transferred to Palmetto Health Tuomey as part of that sale?

A Yes.

Q And currently it's being operated -- any content of that website is being put up by Palmetto Health Tuomey; is that right?

A I have no direct knowledge of that. I

don't -- it's not Tuomey putting it up.

Q Tuomey's not operating that website?

A No.

Q It is the entity upon which Tuomey sold many of those assets is operating the website?

A I don't know that, but ...

Q Okay. As part of this sale, Tuomey to Palmetto Health Tuomey, were there any assets or funds put in place to deal with contingent liabilities?

A Yes.

Q Do you know the amount of that?

A I believe the total amount, 2.2 million. I think that's correct.

Q Okay. Interesting number. Do you know how that number was selected?

A It was an amount not solely for contingent liabilities but to allow Tuomey to wind up its affairs and to take care of any potential contingent liabilities.

Q Right on.

A So it was budgeted and negotiated.

Q That was a specific provision in the purchase and sale agreement?

A It was. What I'm not aware of is whether

it was a retained asset or whether it was funded. But I -- I believe that was a retained asset and placed into the trust agreement.

Q Was there a list of contingent claims as part of that agreement or schedule?

A No.

Q Are there currently any other lawsuits pending against Tuomey?

A Yes.

Q How many?

A Several, but I couldn't tell you the exact amount. I can go and look.

Q Are they, generally speaking, medical malpractice cases?

A Or general liability cases.

Q Or general liability cases?

MR. PADGET: Let's take a break.

- - -

(Whereupon there was a recess in the proceedings from 12:32 to 12:43.)

- - -

BY MR. PADGET:

Q Tom, I've just got a couple more questions.

Earlier you mentioned something -- I

thought you mentioned something. I could be wrong -- about when the transfer of assets occurred or when the winding up of Tuomey is ongoing, that one of those assets was a profit sharing plan?

A Pension. And it wasn't an asset. It was a liability.

Q The pension plan.

A So there was a funding obligation for a terminated pension plan. That was the only liability that was assumed by Palmetto from Tuomey.

Q Gotcha. Tuomey had no profit sharing plans in place?

A Tuomey did have profit sharing plans. They were terminated at closing.

Q Okay. Who was eligible to participate in the profit sharing plan?

A Employees of Tuomey.

Q What about officers or directors?

A Sure. They were employees -- no. I'm sorry. Directors, no. You had to be an employee. So officers are employees but directors are not, unless they're also an employee. Sorry.

Really, the -- the designation is employee with -- full time with a certain number of years of service.

Q The short description summary, how did this profit sharing plan work for an employee?

A There were several components of -- technically profit sharing plan is an old term. It's defined contribution plan.

And the defined contribution plan has a 403(b) component, which is similar to a 401(k), and then --

Q I think I can shortcut a lot of this. That plan, what the employee was eligible to receive, did it have anything to do with the revenues of the corporation?

A No.

Q All right. So the term "profit" --

A No.

Q -- had nothing to do with the plan?

A It's not a -- in fact, the term "profit" doesn't appear in the plan. It's a defined contribution plan.

Q It's a matching plan. You put in 3 percent and we'll put in 3 percent?

A Or you put in 3, we'll put in 5 of your salary.

Q But that plan in no way was contingent upon the gross revenues or the net --

A Profit or loss, no, it was not.

Q As you sit here today as representative of Tuomey -- 30(b)6 representative of Tuomey, has Tuomey informed the IRS of the finality of the Drakeford litigation?

A The finality of the Drakeford litigation.

Q The conclusion?

A The settlement?

Q Yes.

A Not to my knowledge.

Q Let me ask that broken into parts.

A Sure.

Q Has Tuomey informed the IRS that the Fourth Circuit has affirmed the judgment and that the judgment has become final?

A Tuomey settled the case, so I don't think the judgment is final.

Q Okay. Was appeal taken from the Fourth Circuit?

A Appeal -- we settled the case before that. We had an agreement for settlement.

Q All right. Has Tuomey informed the IRS of the conclusion of the Drakeford litigation?

A I'm not aware that Tuomey has informed the IRS of the settlement of the Drakeford

litigation.

Q So that's a no?

A I'm just not aware. It's not a "no." It's "I'm not aware."

Q You're the 30(b)6 designee. You're the person to testify about these topics. To your knowledge, has Tuomey informed the IRS of that resolution of the Drakeford litigation?

A I am not aware.

Q You're not aware that it has occurred?

A Or not occurred.

Q You don't know?

A The answer is: Not to my knowledge.

Q Okay.

A I don't know, but I don't have any knowledge of that fact one way or another. Haven't asked the question, nor has it been answered.

Q I understand that the IRS hasn't asked.

A No. I haven't asked the question of -- of anyone or researched whether that could have occurred. I don't know.

Q The last communication that you're aware of as a 30(b)6 representative was contained in the 2012 Tuomey 990 on page 24 of the auditor's report of that filing; is that correct?

A I'm not aware -- again, assuming that there wasn't anything attached to the 2013 filing with financial reports and assuming financial reports weren't otherwise provided, I'm not aware of any other communication.

Q And to the best of your knowledge as Tuomey's representative, the 2013 990 that has been made Exhibit 5 to this deposition, that was the complete document that was provided to the IRS?

A I don't know to that. That is not to the best of my knowledge. I don't know.

Q If Tuomey has not provided a 2014 990 with any disclosures regarding the conclusion of the Drakeford litigation -- if that in fact is true, then the last communication regarding its status was contained in the 2012 Tuomey 990; is that correct?

A I'm not aware of any other communication.

Q Since the 2012 990 disclosure on page 24?

A Assuming there were no disclosures in the 2013 return, I'm not aware of any other information going to the IRS.

Q And we agree there's nothing in the 2013 return that we have reviewed today that was provided to me?

A There's nothing in this document.
Q Regarding the Drakeford litigation?
A Correct.
Q All right. That's all the questions I have. Thank you.
A Thank you, guys.
MR. HOLLER: No questions.
MS. WATTERS: Would you like a copy of the transcript?
MR. PADGET: Yes. E-tran and the original.
MR. HOLLER: Copy.

- - -

(Witness excused.)

- - -

(Deposition concluded at 12:50 p.m.)

- - -

SIGNATURE OF DEPONENT

I, the undersigned, Thomas F. Moran, do hereby certify that I have read the foregoing deposition transcript and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE

Thomas F. Moran

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CERTIFICATE OF REPORTER

I, Tami I. Watters, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 2nd day of February, 2016, at Lexington, Lexington County, South Carolina.

Tami I. Watters,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
February 6, 2019

EXHIBIT 1

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030
Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	)	**THIRD AMENDED NOTICE OF TAKING DEPOSITION OF TUOMEY REGIONAL MEDICAL CENTER PURSUANT TO RULE 30(B)(6)**

TO: DAVID C. HOLLER, ESQ., ATTORNEY FOR THE DEFENDANT

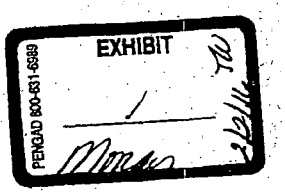
PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, the Plaintiff, through his undersigned attorneys, will take the deposition, upon oral examination, of Defendant Tuomey Regional Medical Center, to be recorded by stenographic means. The deposition is to take place at the offices of Lee, Erter, Wilson, Holler & Smith, LLC, located at **126 North Main Street, Sumter, South Carolina 29151**, commencing at 10:00 A.M. on **Tuesday, January 29, 2016**, and continuing, with adjournment if so required, until completed. Defendant is directed to designate the person or persons most knowledgeable and prepared to testify on behalf of Defendant concerning the subject matter described on **Attachment A** hereto.

Respectfully submitted,

FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, South Carolina 29202
803-765-2935
803-252-0786 (facsimile)

January 19, 2016
Columbia, South Carolina

By: _____
William R. Padget
Francis M. Hinson, IV
Attorneys for Plaintiff Win Myat, M.D.



STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030
Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	)	**NOTICE OF TAKING DEPOSITION PURSUANT TO RULE 30(B)(6)** **ATTACHMENT A**

Topics to be covered at deposition:

1. The salaries, bonuses, and other forms of compensation that Defendant's officers, directors, trustees, physicians, independent contractors and "Key and Highly Compensated Employees" (as defined by the IRS) were paid from 2006 to present.

2. Defendant's IRS Form 1023 Applications for recognition of exemption under Section 501(c)(3) of the Internal Revenue Code, as were submitted from 2006 to the present.

3. Communication, correspondence, and filings (including Form 990's) between the IRS and Tuomey (from 2006 to the present) related to the 501(c)(3) tax-exempt status of Tuomey Regional Medical Center.

4. Defendant's charitable registration statements filed with the South Carolina Secretary of State's Office from 2006 to present.

5. Defendant's annual financial reports filed with the South Carolina Secretary of State's Office from 2006 to present.

6. All investigations, claims, or actions, under S.C. Code 33-56-140, in which Defendant has been involved from 2006 to present.

7. Details and particulars of the litigation in United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 976 F. Supp. 2d 776, 784 (D.S.C. 2013) aff'd, 792 F.3d 364 (4th Cir. 2015) (no attorney-client, attorney work-product or other privileged information regarding the litigation are being sought).

8. Tuomey's organization and structure as a legal entity.

9. Offers to purchase and/or merge Tuomey with other healthcare organizations (from 2006 to present), including, but not limited to, offers and proposals from Palmetto Health.

STATE OF SOUTH CAROLINA COUNTY OF SUMTER Win Myat, Plaintiff, vs. Tuomey Regional Medical Center, Defendant.	)	IN THE COURT OF COMMON PLEAS Docket No.: 2012-CP-43-2030 **CERTIFICATE OF SERVICE**

I, the undersigned, of the law offices of Finkel Law Firm LLC, attorneys for Plaintiff, do hereby certify that I have served all counsel of record on this date, January 19, 2016, in this action with a copy of the pleading(s) herein below specified, by depositing same in the United States mail, first-class postage pre-paid to the following address(es):

PLEADINGS: Third Amended Notice of Taking Deposition of Tuomey Regional Medical Center Pursuant to Rule 30(B)(6)

COUNSEL:
David C. Holler, Esquire
Lee, Erter, Wilson, Holler
& Smith, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151

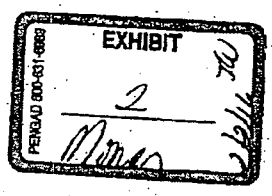
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Margaret M. Rock
Margaret M. Rock
Senior Litigation Paralegal

Columbia, South Carolina
January 19, 2016

EXHIBIT 2

2010 TUOMEY 990



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Form **990**

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements

Department of the Treasury
Internal Revenue Service

OMB No 1545-0047

2010

Open to Public Inspection

A For the 2010 calendar year, or tax year beginning 10-01-2010 and ending 09-30-2011

B Check if applicable
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Terminated
- ☐ Amended return
- ☐ Application pending

C Name of organization
TUOMEY

Doing Business As
TUOMEY HEALTHCARE SYSTEM

Number and street (or P O box if mail is not delivered to street address) | Room/suite
129 NORTH WASHINGTON STREET

City or town, state or country, and ZIP + 4
SUMTER, SC 29150

D Employer identification number
57-0343398

E Telephone number
(803) 774-8616

G Gross receipts $ 202,157,395

F Name and address of principal officer
R JAY COX
129 NORTH WASHINGTON STREET
SUMTER,SC 29150

H(a) Is this a group return for affiliates? ☐ Yes ☑ No

H(b) Are all affiliates included? ☐ Yes ☐ No
If "No," attach a list (see instructions)

H(c) Group exemption number ▶

I Tax-exempt status ☑ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527

J Website: ▶ WWW TUOMEY COM

K Form of organization ☑ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation 1914

M State of legal domicile SC

Part I Summary

1 Briefly describe the organization's mission or most significant activities
OPERATION OF NONPROFIT HEALTHCARE FACILITY IN SUMTER, SC

2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets

3 Number of voting members of the governing body (Part VI, line 1a)	3	14
4 Number of independent voting members of the governing body (Part VI, line 1b)	4	7
5 Total number of individuals employed in calendar year 2010 (Part V, line 2a)	5	1,901
6 Total number of volunteers (estimate if necessary)	6	272
7a Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
b Net unrelated business taxable income from Form 990-T, line 34	7b	0

		Prior Year	Current Year
Revenue	8 Contributions and grants (Part VIII, line 1h)	589,603	1,527,556
	9 Program service revenue (Part VIII, line 2g)	199,784,518	194,996,473
	10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	3,281,523	3,209,230
	11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	2,556,039	2,424,136
	12 Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	206,211,683	202,157,395
Expenses	13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)	73,407	41,134
	14 Benefits paid to or for members (Part IX, column (A), line 4)	0	0
	15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	84,427,408	85,987,062
	16a Professional fundraising fees (Part IX, column (A), line 11e)	0	0
	b Total fundraising expenses (Part IX, column (D), line 25) ▶409,416		
	17 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24f)	114,558,868	102,940,366
	18 Total expenses Add lines 13-17 (must equal Part IX, column (A), line 25)	199,059,683	188,968,562
	19 Revenue less expenses Subtract line 18 from line 12	7,152,000	13,188,833

		Beginning of Current Year	End of Year
Net Assets or Fund Balances	20 Total assets (Part X, line 16)	280,563,026	275,718,221
	21 Total liabilities (Part X, line 26)	159,480,256	152,177,610
	22 Net assets or fund balances Subtract line 21 from line 20	121,082,770	123,540,611

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge

Sign Here

*****
Signature of officer

2012-08-14
Date

MARK LOVELL CFO TUOMEY HEALTHCARE SYSTEM
Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name AMY BIBBY	Preparer's signature AMY BIBBY	Date	Check if self-employed ☐ PTIN
Firm's name ▶ DIXON HUGHES GOODMAN LLP			Firm's EIN ▶
Firm's address ▶ 500 RIDGEFIELD COURT ASHEVILLE, NC 28806			Phone no ▶ (828) 254-2254

May the IRS discuss this return with the preparer shown above? (see instructions) ☑ Yes ☐ No

Part III Statement of Program Service Accomplishments

Check if Schedule O contains a response to any question in this Part III . . . . . ☑

1 Briefly describe the organization's mission

THE MISSION OF TUOMEY HEALTHCARE SYSTEM IS TO PROMOTE GOOD HEALTH AND WELL-BEING AND TO PROVIDE EXCELLENT HEALTHCARE FOR EVERYONE IN SUMTER AND SURROUNDING COUNTIES

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☑ No

If "Yes," describe these new services on Schedule O

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☑ No

If "Yes," describe these changes on Schedule O

4 Describe the exempt purpose achievements for each of the organization's three largest program services by expenses Section 501(c)(3) and 501(c)(4) organizations and section 4947(a)(1) trusts are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported

4a (Code) (Expenses $ 168,473,709 including grants of $ 41,134) (Revenue $ 194,996,473)

TUOMEY HEALTHCARE SYSTEMS IS A 301 BED ACUTE CARE FACILITY LOCATED IN SUMTER, SOUTH CAROLINA TUOMEY WAS ESTABLISHED AS A NON-PROFIT ACUTE CARE HOSPITAL TO ADVANCE OR SUPPORT THE PROVISIONS OF HEALTHCARE SERVICES WITHIN THE SUMTER COMMUNITY TUOMEY'S MAIN OBJECTIVE IS THE PROMOTION OF HEALTH FOR ALL RESIDENTS OF SUMTER AND ITS OUTLYING AREAS THE PROMOTION OF HEALTH HAS BEEN ESTABLISHED AS A CHARITABLE PURPOSE UNDER INTERNAL REVENUE CODE (IRC) SECTION 501 (C) (3) REV RUL 69-545, 1969-2 C B 94, SETS FOR THE FACTORS THE INTERNAL REVENUE SERVICE WILL CONSIDER IN DETERMINING WHETHER A NON-PROFIT HOSPITAL QUALIFIES FOR TAX-EXEMPT STATUS TUOMEY HAS OPERATED ITS FACILITIES IN A MANNER DESCRIBED BY REV RUL 69-545, SUPRA THE BOARD OF TRUSTEES IS COMPRISED OF INDEPENDENT CIVIC LEADERS AN OPEN MEDICAL STAFF IS MAINTAINED BY TUOMEY, WITH PRIVILEGES AVAILABLE TO ALL QUALIFIED PHYSICIANS ALSO, TUOMEY OPERATED A FULL-TIME EMERGENCY ROOM OPEN TO ANYONE WITHOUT THE ABILITY TO PAY AND PROVIDES NON-EMERGENCY MEDICAL SERVICES TO ANYONE WITH THE ABILITY TO PAY, EITHER DIRECTLY OR THROUGH THIRD-PARTY REIMBURSEMENT DURING THE YEAR, TUOMEY PROVIDED 71,291 ADULT PATIENT DAYS, 1,299 BIRTHS, 3,463 NURSERY PATIENT DAYS, 59,359 ER VISITS AND 73,980 OTHER OUTPATIENT VISITS IT ALSO PROVIDED $33 MILLION DOLLARS WORTH OF CHARITY CARE

4b (Code) (Expenses $ including grants of $) (Revenue $)

4c (Code) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O)

(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ $ 168,473,709

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	Yes	
2	Is the organization required to complete Schedule B, Schedule of Contributors (see instruction)?	2	Yes	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		No
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4	Yes	
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		
6	Did the organization maintain any donor advised funds or any similar funds or accounts where donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		No
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas or historic structures? *If "Yes," complete Schedule D, Part II*	7		No
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		No
9	Did the organization report an amount in Part X, line 21, serve as a custodian for amounts not listed in Part X, or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		No
10	Did the organization, directly or through a related organization, hold assets in term, permanent, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10	Yes	
11	If the organization's answer to any of the following questions is 'Yes,' then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a	Yes	
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		No
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		No
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d	Yes	
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e	Yes	
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f	Yes	
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI, XII, and XIII*	12a		No
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered 'No' to line 12a, then completing Schedule D, Parts XI, XII, and XIII is optional*	12b	Yes	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		No
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		No
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, and program service activities outside the United States? *If "Yes," complete Schedule F, Parts I and IV*	14b		No
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or assistance to any organization or entity located outside the U.S.? *If "Yes," complete Schedule F, Parts II and IV*	15		No
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or assistance to individuals located outside the U.S.? *If "Yes," complete Schedule F, Parts III and IV*	16		No
17	Did the organization report a total of more than $15,000, of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I (see instructions)*	17		No
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		No
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		No
20a	Did the organization operate one or more hospitals? *If "Yes," complete Schedule H*	20a	Yes	
b	If "Yes" to line 20a, did the organization attach its audited financial statement to this return? **Note.** Some Form 990 filers that operate one or more hospitals must attach audited financial statements (see instructions)	20b	Yes	

Part IV Checklist of Required Schedules *(continued)*

21	Did the organization report more than $5,000 of grants and other assistance to governments and organizations in the United States on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21	Yes	
22	Did the organization report more than $5,000 of grants and other assistance to individuals in the United States on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		No
23	Did the organization answer "Yes" to Part VII, Section A, questions 3, 4, or 5, about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23	Yes	
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b–24d and complete Schedule K. If "No," go to line 25*	24a	Yes	
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		No
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		No
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		No
25a	**Section 501(c)(3) and 501(c)(4) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		No
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		No
26	Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee, or disqualified person outstanding as of the end of the organization's tax year? *If "Yes," complete Schedule L, Part II*	26		No
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor, or a grant selection committee member, or to a person related to such an individual? *If "Yes," complete Schedule L, Part III*	27		No
28	Was the organization a party to a business transaction with one of the following parties? (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions)			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		No
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b	Yes	
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		No
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		No
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		No
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		No
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		No
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		No
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Parts II, III, IV, and V, line 1*	34	Yes	
35	Is any related organization a controlled entity within the meaning of section 512(b)(13)?	35	Yes	
a	Did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2* ☐ Yes ☑ No			
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		No
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		No
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11 and 19? Note. All Form 990 filers are required to complete Schedule O.	38	Yes	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response to any question in this Part V . . . . . ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096 Enter -0- if not applicable	1a	302		
b	Enter the number of Forms W-2G included in line 1a *Enter -0-* if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?		1c		
2a	Enter the number of employees reported on Form W-3, *Transmittal of Wage and Tax Statements* filed for the calendar year ending with or within the year covered by this return	2a	1,901		
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?		2b	Yes	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to e-file (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?		3a	Yes	
b	If "Yes," has it filed a Form 990-T for this year? *If "No," provide an explanation in Schedule O*		3b	Yes	
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?		4a		No
b	If "Yes," enter the name of the foreign country ▶ See instructions for filing requirements for Form TD F 90-22 1, Report of Foreign Bank and Financial Accounts				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?		5a		No
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?		5b		No
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?		5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible?		6a		No
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?		6b		
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?		7a		No
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?		7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?		7c		No
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?		7e		No
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?		7f		No
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?		7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?		7h		
8	**Sponsoring organizations maintaining donor advised funds and section 509(a)(3) supporting organizations.** Did the supporting organization, or a donor advised fund maintained by a sponsoring organization, have excess business holdings at any time during the year?		8		
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the organization make any taxable distributions under section 4966?		9a		
b	Did the organization make a distribution to a donor, donor advisor, or related person?		9b		
10	**Section 501(c)(7) organizations.** Enter				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	10b			
11	**Section 501(c)(12) organizations.** Enter				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?		12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O		13a		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?		14a		No
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*		14b		

Part VI **Governance, Management, and Disclosure** For each "Yes" response to lines 2 through 7b below, and for a "No" response to lines 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.

Check if Schedule O contains a response to any question in this Part VI . . . . . ☑

Section A. Governing Body and Management

				Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year	1a	14		
b	Enter the number of voting members included in line 1a, above, who are independent	1b	7		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?		2		No
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?		3		No
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?		4		No
5	Did the organization become aware during the year of a significant diversion of the organization's assets?		5		No
6	Does the organization have members or stockholders?		6		No
7a	Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body?		7a		No
b	Are any decisions of the governing body subject to approval by members, stockholders, or other persons?		7b		No
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following				
a	The governing body?		8a	Yes	
b	Each committee with authority to act on behalf of the governing body?		8b	Yes	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? If "Yes," provide the names and addresses in Schedule O		9		No

Section B. Policies (This Section B requests information about policies not required by the Internal Revenue Code.)

			Yes	No
10a	Does the organization have local chapters, branches, or affiliates?	10a		No
b	If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization?	10b		
11a	Has the organization provided a copy of this Form 990 to all members of its governing body before filing the form?	11a	Yes	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990			
12a	Does the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	Yes	
b	Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	Yes	
c	Does the organization regularly and consistently monitor and enforce compliance with the policy? If "Yes," describe in Schedule O how this is done	12c	Yes	
13	Does the organization have a written whistleblower policy?	13	Yes	
14	Does the organization have a written document retention and destruction policy?	14		No
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	Yes	
b	Other officers or key employees of the organization	15b	Yes	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (See instructions.)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		No
b	If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the States with which a copy of this Form 990 is required to be filed ▶ SC

18 Section 6104 requires an organization to make its Form 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you make these available. Check all that apply.

☐ Own website ☑ Another's website ☑ Upon request

19 Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public. See Additional Data Table

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization ▶

MARK LOVELL CFO
129 N WASHINGTON STREET
SUMTER, SC 29150
(803) 774-8604

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response to any question in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed Report compensation for the calendar year ending with or within the organization's tax year

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation, and **current** key employees Enter -0- in columns (D), (E), and (F) if no compensation was paid
- List all of the organization's **current** key employees, if any See instructions for definition of "key employee "
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations

List persons in the following order individual trustees or directors, institutional trustees, officers, key employees, highest compensated employees, and former such persons

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee

(A) Name and Title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional Trustee	Officer	Key employee	Highest compensated employee	Former			
(1) ROBERT BOYKIN BOARD MEMBER	1 00	X						0	0	0
(2) CHAL GLENN CHAIRMAN	1 00	X		X				0	0	0
(3) KIM HARVIN BOARD MEMBER	1 00	X						0	0	0
(4) DR ANDY MCFADDIN BOARD MEMBER	1 00	X						14,483	0	0
(5) REV JAMES BLASSINGAME BOARD MEMBER	1 00	X						0	0	0
(6) NICOLE NORRIS BOARD MEMBER	1 00	X						0	0	0
(7) DR HENRY MOSES BOARD MEMBER (SEE SCH O)	1 00	X						51,800	0	0
(8) PHIL PALMER TREASURER	1 00	X		X				0	0	0
(9) KAY RAFFIELD PHD VICE-CHAIRMAN	1 00	X		X				0	0	0
(10) DR SAM RIDDLE BOARD MEMBER (SEE SCH O)	1 00	X						32,300	0	0
(11) DR MURRELL SMITH CHIEF OF MEDICAL STAFF	1 00	X		X				10,417	0	0
(12) GREG THOMPSON BOARD MEMBER	1 00	X						0	0	0
(13) MITCH WILLIAMS SECRETARY	1 00	X		X				0	0	0
(14) R JAY COX CEO/PRESIDENT	40 00			X				655,102	0	185,520
(15) J GREGG MARTIN COO/VICE-PRESIDENT	40 00			X				409,323	0	122,280
(16) W PAUL JOHNSON THROUGH 411 CFO/VICE-PRESIDENT	40 00			X				504,586	0	50,806

Part VII **Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees** (continued)

(A) Name and Title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional Trustee	Officer	Key employee	Highest compensated employee	Former			
(17) MIKE WINIARSKI FROM 411 TO 811 CFO/VICE-PRESIDENT	40 00			X				0	0	0
(18) DR GENE F DICKERSON MD VP OF MEDICAL AFFAIRS	40 00				X			396,230	0	94,349
(19) WILLIAM RENWICK VP	40 00				X			208,245	0	67,987
(20) MICHELLE LOGAN-OWENS VP	40 00				X			159,812	0	35,432
(21) TERESA M CARLTON CNO/VICE-PRESIDENT	40 00				X			156,588	0	35,626
(22) TEXIN LI PHYSICIST	40 00					X		203,093	0	23,322
(23) MICHAEL SAND CRNA	40 00					X		183,767	0	21,175
(24) JUDY LYNN ROBERTS CRNA	40 00					X		183,794	0	32,775
(25) SANDRA M LAWRENCE CRNA	40 00					X		183,648	0	32,771
(26) ANTHONY W CABALLERO CRNA	40 00					X		238,527	0	31,696
1b Sub-Total										
c Total from continuation sheets to Part VII, Section A										
d Total (add lines 1b and 1c)								3,591,915	0	733,741

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 in reportable compensation from the organization ▶ 48

		Yes	No
3 Did the organization list any former officer, director or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3		No
4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4	Yes	
5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*	5		No

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization

(A) Name and business address	(B) Description of services	(C) Compensation
MIDLANDS EMERGENCY PHYSICIANS PA 129 NORTH WASHINGTON ST SUMTER, SC 29150	MEDICAL SERVICES	6,614,324
REHABCARE GROUP 7733 FORSYTH BLVD SUITE 2300 ST LOUIS, MO 63150	MEDICAL SERVICES	1,728,877
NEKSUNPRUET PO DRAWER 2426 COMLUMBIA, SC 29202	CONSULTING SERVICES	1,018,806
BMA SUMTER DIALYSIS PO BOX 101518 ATLANTA, GA 30392	CONSULTING SERVICES	995,487
PRICE WATERHOUSE COOPERS LLP O BOX 932011 ATLANTA, GA 31193	CONSULTING SERVICES	852,911

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 in compensation from the organization ▶ 31

Part VIII Statement of Revenue

			(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512, 513, or 514
Contributions, gifts, grants and other similar amounts	1a Federated campaigns 1a					
	b Membership dues 1b					
	c Fundraising events 1c					
	d Related organizations 1d	395,363				
	e Government grants (contributions) 1e					
	f All other contributions, gifts, grants, and similar amounts not included above 1f	1,128,193				
	g Noncash contributions included in lines 1a-1f $					
	h Total. Add lines 1a-1f ▶		1,527,556			
Program Service Revenue		Business Code				
	2a NET PROGRAM SERVICE RE	621400	184,933,078	184,933,078		
	b DISPROPORTIONATE SHARE	900099	9,822,617	9,822,617		
	c ANCILLARY SERVICES	900099	240,778	240,778		
	d					
	e					
	f All other program service revenue					
	g Total. Add lines 2a-2f ▶		194,996,473			
	3 Investment income (including dividends, interest and other similar amounts) ▶					
	4 Income from investment of tax-exempt bond proceeds ▶		79,013			79,013
	5 Royalties ▶					
		(i) Real	(ii) Personal			
	6a Gross Rents	1,023,270				
	b Less rental expenses					
	c Rental income or (loss)	1,023,270				
	d Net rental income or (loss) ▶		1,023,270			1,023,270
		(i) Securities	(ii) Other			
	7a Gross amount from sales of assets other than inventory	2,796,715	333,502			
	b Less cost or other basis and sales expenses					
	c Gain or (loss)	2,796,715	333,502			
	d Net gain or (loss) ▶		3,130,217			3,130,217
Other Revenue	8a Gross income from fundraising events (not including $ ____ of contributions reported on line 1c) See Part IV, line 18 a					
	b Less direct expenses b					
	c Net income or (loss) from fundraising events ▶					
	9a Gross income from gaming activities See Part IV, line 19 a					
	b Less direct expenses b					
	c Net income or (loss) from gaming activities ▶					
	10a Gross sales of inventory, less returns and allowances a					
	b Less cost of goods sold b					
	c Net income or (loss) from sales of inventory ▶					
	Miscellaneous Revenue	Business Code				
	11a CAFETERIA & VENDING	722210	1,164,993			1,164,993
	b AFFILIATE MANAGEMENT	561000	209,900			209,900
	c LAUNDRY & HOUSEKEEPING	812300	19,474			19,474
	d All other revenue		6,499			6,499
	e Total. Add lines 11a-11d ▶		1,400,866			
	12 Total revenue. See Instructions ▶		202,157,395	194,996,473	0	5,633,366

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns.
All other organizations must complete column (A) but are not required to complete columns (B), (C), and (D).

Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.		(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to governments and organizations in the U S See Part IV, line 21	41,134	41,134		
2	Grants and other assistance to individuals in the U S See Part IV, line 22				
3	Grants and other assistance to governments, organizations, and individuals outside the U S See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	4,325,656	301,214	4,024,442	
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages	61,605,775	55,535,998	5,860,916	208,861
8	Pension plan contributions (include section 401(k) and section 403(b) employer contributions)	2,634,650	2,213,106	395,198	26,346
9	Other employee benefits	12,765,430	10,722,961	1,914,815	127,654
10	Payroll taxes	4,655,551	3,910,663	698,333	46,555
a	Fees for services (non-employees) Management				
b	Legal	459,875		459,875	
c	Accounting	90,000		90,000	
d	Lobbying				
e	Professional fundraising services *See Part IV, line 17*				
f	Investment management fees	600		600	
g	Other	11,655,215	9,147,810	2,507,405	
12	Advertising and promotion	428,387	4,452	423,935	
13	Office expenses	50,803,885	47,247,671	3,556,214	
14	Information technology	1,199,984	1,054,098	145,886	
15	Royalties				
16	Occupancy	2,632,496	2,632,496		
17	Travel				
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings				
20	Interest	4,580,007	4,580,007		
21	Payments to affiliates				
22	Depreciation, depletion, and amortization	11,962,659	11,962,659		
23	Insurance	784,963	740,595	44,368	
24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24f If line 24f amount exceeds 10% of line 25, column (A) amount, list line 24f expenses on Schedule O)				
a	BAD DEBT EXPENSE	12,578,924	12,578,924		
b	HOSPITAL TAX	5,369,055	5,369,055		
c	MISCELLANEOUS EXPENSES	357,697	430,866	-73,169	
d	RECRUITMENT	36,619		36,619	
e					
f	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24f	188,968,562	168,473,709	20,085,437	409,416
26	**Joint costs.** Check here ▶ ☐ if following SOP 98-2 (ASC 958-720). Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation				

Part X Balance Sheet

				(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing		64,968,298	1	9,342,420
	2	Savings and temporary cash investments			2	
	3	Pledges and grants receivable, net			3	
	4	Accounts receivable, net		34,615,332	4	28,876,650
	5	Receivables from current and former officers, directors, trustees, key employees, and highest compensated employees Complete Part II of Schedule L			5	
	6	Receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers, and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions) Schedule L			6	
	7	Notes and loans receivable, net			7	
	8	Inventories for sale or use		5,031,800	8	4,465,863
	9	Prepaid expenses and deferred charges		6,756,468	9	7,145,114
	10a	Land, buildings, and equipment cost or other basis Complete Part VI of Schedule D	10a 185,564,630			
	b	Less accumulated depreciation	10b 89,405,310	99,395,070	10c	96,159,320
	11	Investments—publicly traded securities		44,902,160	11	100,737,535
	12	Investments—other securities See Part IV, line 11			12	
	13	Investments—program-related See Part IV, line 11			13	
	14	Intangible assets			14	
	15	Other assets See Part IV, line 11		24,893,898	15	28,991,318
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)		280,563,026	16	275,718,221
Liabilities	17	Accounts payable and accrued expenses		51,804,873	17	55,077,581
	18	Grants payable			18	
	19	Deferred revenue			19	
	20	Tax-exempt bond liabilities		105,885,383	20	95,310,029
	21	Escrow or custodial account liability Complete Part IV of Schedule D			21	
	22	Payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons Complete Part II of Schedule L			22	
	23	Secured mortgages and notes payable to unrelated third parties			23	
	24	Unsecured notes and loans payable to unrelated third parties			24	
	25	Other liabilities Complete Part X of Schedule D		1,790,000	25	1,790,000
	26	**Total liabilities.** Add lines 17 through 25		159,480,256	26	152,177,610
Net Assets or Fund Balances		**Organizations that follow SFAS 117, check here ▶ ☑ and complete lines 27 through 29, and lines 33 and 34.**				
	27	Unrestricted net assets		116,041,627	27	118,499,468
	28	Temporarily restricted net assets			28	
	29	Permanently restricted net assets		5,041,143	29	5,041,143
		Organizations that do not follow SFAS 117, check here ▶ ☐ and complete lines 30 through 34.				
	30	Capital stock or trust principal, or current funds			30	
	31	Paid-in or capital surplus, or land, building or equipment fund			31	
	32	Retained earnings, endowment, accumulated income, or other funds			32	
	33	Total net assets or fund balances		121,082,770	33	123,540,611
	34	Total liabilities and net assets/fund balances		280,563,026	34	275,718,221

Part XI Reconcilliation of Net Assets

Check if Schedule O contains a response to any question in this Part XI . . . . . ☑

1	Total revenue (must equal Part VIII, column (A), line 12)	1	202,157,395
2	Total expenses (must equal Part IX, column (A), line 25)	2	188,968,562
3	Revenue less expenses Subtract line 2 from line 1	3	13,188,833
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	121,082,770
5	Other changes in net assets or fund balances (explain in Schedule O)	5	-10,730,992
6	Net assets or fund balances at end of year Combine lines 3, 4, and 5 (must equal Part X, line 33, column (B))	6	123,540,611

Part XII Financial Statements and Reporting

Check if Schedule O contains a response to any question in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990 ☐ Cash ☑ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		No
b	Were the organization's financial statements audited by an independent accountant?	2b	Yes	
c	If "Yes," to 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant? If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O	2c	Yes	
d	If "Yes" to line 2a or 2b, check a box below to indicate whether the financial statements for the year were issued on a separate basis, consolidated basis, or both ☐ Separate basis ☑ Consolidated basis ☐ Both consolidated and separated basis			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a	Yes	
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits	3b	Yes	

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SCHEDULE A (Form 990 or 990EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

▶ Attach to Form 990 or Form 990-EZ. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Reason for Public Charity Status (All organizations must complete this part.) See instructions

The organization is not a private foundation because it is (For lines 1 through 11, check only one box)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E)

3 ☑ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi)** (Complete Part II)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi)** (Complete Part II)

9 ☐ An organization that normally receives (1) more than 331/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 331/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975 See **section 509(a)(2).** (Complete Part III)

10 ☐ An organization organized and operated exclusively to test for public safety See **section 509(a)(4).**

11 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2) See **section 509(a)(3).** Check the box that describes the type of supporting organization and complete lines 11e through 11h

a ☐ Type I b ☐ Type II c ☐ Type III - Functionally integrated d ☐ Type III - Other

e ☐ By checking this box, I certify that the organization is not controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2)

f If the organization received a written determination from the IRS that it is a Type I, Type II or Type III supporting organization, check this box ☐

g Since August 17, 2006, has the organization accepted any gift or contribution from any of the following persons?

	Yes	No
11g(i) (i) a person who directly or indirectly controls, either alone or together with persons described in (ii) and (iii) below, the governing body of the the supported organization?		
11g(ii) (ii) a family member of a person described in (i) above?		
11g(iii) (iii) a 35% controlled entity of a person described in (i) or (ii) above?		

h Provide the following information about the supported organization(s)

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1 - 9 above or IRC section (see instructions))	(iv) Is the organization in col (i) listed in your governing document? Yes	(iv) No	(v) Did you notify the organization in col (i) of your support? Yes	(v) No	(vi) Is the organization in col (i) organized in the U S ? Yes	(vi) No	(vii) Amount of support
Total									

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**

(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
1 Gifts, grants, contributions, and membership fees received (Do not include any "unusual grants ")						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge						
4 Total. Add lines 1 through 3						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public Support.** Subtract line 5 from line 4						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income Do not include gain or loss from the sale of capital assets (Explain in Part IV)						
11 **Total support** (Add lines 7 through 10)						

12 Gross receipts from related activities, etc (See instructions) 12

13 **First Five Years** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a 501(c)(3) organization, check this box and stop here ▶☐

Section C. Computation of Public Support Percentage

14 Public Support Percentage for 2010 (line 6 column (f) divided by line 11 column (f)) 14

15 Public Support Percentage for 2009 Schedule A, Part II, line 14 15

16a **33 1/3% support test—2010.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and stop here. The organization qualifies as a publicly supported organization ▶☐

b **33 1/3% support test—2009.** If the organization did not check the box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and stop here. The organization qualifies as a publicly supported organization ▶☐

17a **10%-facts-and-circumstances test—2010.** If the organization did not check a box on line 13, 16a, or 16b and line 14 is 10% or more, and if the organization meets the "facts and circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts and circumstances" test The organization qualifies as a publicly supported organization ▶☐

b **10%-facts-and-circumstances test—2009.** If the organization did not check a box on line 13, 16a, 16b, or 17a and line 15 is 10% or more, and if the organization meets the "facts and circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts and circumstances" test The organization qualifies as a publicly supported organization ▶☐

18 **Private Foundation** If the organization did not check a box on line 13, 16a, 16b, 17a or 17b, check this box and see instructions ▶☐

Part III **Support Schedule for Organizations Described in Section 509(a)(2)**
(Complete only if you checked the box on line 9 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
1 Gifts, grants, contributions, and membership fees received (Do not include any "unusual grants")						
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose						
3 Gross receipts from activities that are not an unrelated trade or business under section 513						
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5						
7a Amounts included on lines 1, 2, and 3 received from disqualified persons						
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year						
c Add lines 7a and 7b						
8 **Public Support** (Subtract line 7c from line 6)						

Section B. Total Support

Calendar year (or fiscal year beginning in)	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
9 Amounts from line 6						
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975						
c Add lines 10a and 10b						
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income Do not include gain or loss from the sale of capital assets (Explain in Part IV)						
13 **Total support** (Add lines 9, 10c, 11 and 12)						

14 **First Five Years** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶☐

Section C. Computation of Public Support Percentage

15	Public Support Percentage for 2010 (line 8 column (f) divided by line 13 column (f))	15
16	Public support percentage from 2009 Schedule A, Part III, line 15	16

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2010** (line 10c column (f) divided by line 13 column (f))	17
18	Investment income percentage from **2009** Schedule A, Part III, line 17	18

19a **33 1/3% support tests—2010.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3% and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶☐

b **33 1/3% support tests—2009.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3% and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶☐

20 **Private Foundation** If the organization did not check a box on line 14, 19a or 19b, check this box and see instructions ▶☐

Part VI **Supplemental Information.** Supplemental Information. Complete this part to provide the explanations required by Part II, line 10; Part II, line 17a or 17b; and Part III, line 12. Also complete this part for any additional information. (See instructions).

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SCHEDULE C (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Political Campaign and Lobbying Activities

For Organizations Exempt From Income Tax Under section 501(c) and section 527

▶ Complete if the organization is described below.
▶ Attach to Form 990 or Form 990-EZ. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

If the organization answered "Yes," to Form 990, Part IV, Line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then

- Section 501(c)(3) organizations Complete Parts I-A and B Do not complete Part I-C
- Section 501(c) (other than section 501(c)(3)) organizations Complete Parts I-A and C below Do not complete Part I-B
- Section 527 organizations Complete Part I-A only

If the organization answered "Yes," to Form 990, Part IV, Line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then

- Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)) Complete Part II-A Do not complete Part II-B
- Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)) Complete Part II-B Do not complete Part II-A

If the organization answered "Yes," to Form 990, Part IV, Line 5 (Proxy Tax) or Form 990-EZ, Part V, line 35a (Proxy Tax), then

- Section 501(c)(4), (5), or (6) organizations Complete Part III

Name of the organization	Employer identification number
TUOMEY	57-0343398

Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.

1 Provide a description of the organization's direct and indirect political campaign activities in Part IV

2 Political expenditures ▶ $

3 Volunteer hours

Part I-B Complete if the organization is exempt under section 501(c)(3).

1 Enter the amount of any excise tax incurred by the organization under section 4955 ▶ $

2 Enter the amount of any excise tax incurred by organization managers under section 4955 ▶ $

3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? ☐ Yes ☐ No

4a Was a correction made? ☐ Yes ☐ No

b If "Yes," describe in Part IV

Part I-C Complete if the organization is exempt under section 501(c) except section 501(c)(3).

1 Enter the amount directly expended by the filing organization for section 527 exempt function activities ▶ $

2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities ▶ $

3 Total exempt function expenditures Add lines 1 and 2 Enter here and on Form 1120-POL, line 17b ▶ $

4 Did the filing organization file Form 1120-POL for this year? ☐ Yes ☐ No

5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments For each organization listed, enter the amount paid from the filing organization's funds Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC) If additional space is needed, provide information in Part IV

(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds If none, enter -0-	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization If none, enter -0-

Part II-A **Complete if the organization is exempt under section 501(c)(3) and filed Form 5768 (election under section 501(h)).**

A Check ☑ if the filing organization belongs to an affiliated group
B Check ☐ if the filing organization checked box A and "limited control" provisions apply

Limits on Lobbying Expenditures (The term "expenditures" means amounts paid or incurred.)	(a) Filing Organization's Totals	(b) Affiliated Group Totals
1a Total lobbying expenditures to influence public opinion (grass roots lobbying)		
b Total lobbying expenditures to influence a legislative body (direct lobbying)		
c Total lobbying expenditures (add lines 1a and 1b)		
d Other exempt purpose expenditures		
e Total exempt purpose expenditures (add lines 1c and 1d)		
f Lobbying nontaxable amount Enter the amount from the following table in both columns		
g Grassroots nontaxable amount (enter 25% of line 1f)		
h Subtract line 1g from line 1a If zero or less, enter -0-		
i Subtract line 1f from line 1c If zero or less, enter -0-		

If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e
Over $500,000 but not over $1,000,000	$100,000 plus 15% of the excess over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 plus 10% of the excess over $1,000,000
Over $1,500,000 but not over $17,000,000	$225,000 plus 5% of the excess over $1,500,000
Over $17,000,000	$1,000,000

j If there is an amount other than zero on either line 1h or line 1i, did the organization file Form 4720 reporting section 4911 tax for this year? ☐ Yes ☐ No

4-Year Averaging Period Under Section 501(h)
(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 2a through 2f on page 4.)

Lobbying Expenditures During 4-Year Averaging Period

Calendar year (or fiscal year beginning in)	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) Total
2a Lobbying non-taxable amount					
b Lobbying ceiling amount (150% of line 2a, column(e))					
c Total lobbying expenditures					
d Grassroots non-taxable amount					
e Grassroots ceiling amount (150% of line 2d, column (e))					
f Grassroots lobbying expenditures					

0393

Part II-B **Complete if the organization is exempt under section 501(c)(3) and has NOT filed Form 5768 (election under section 501(h)).**

		(a) Yes	(a) No	(b) Amount
1	During the year, did the filing organization attempt to influence foreign, national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of			
a	Volunteers?		No	
b	Paid staff or management (include compensation in expenses reported on lines 1c through 1i)?		No	
c	Media advertisements?		No	
d	Mailings to members, legislators, or the public?		No	
e	Publications, or published or broadcast statements?		No	
f	Grants to other organizations for lobbying purposes?		No	
g	Direct contact with legislators, their staffs, government officials, or a legislative body?		No	
h	Rallies, demonstrations, seminars, conventions, speeches, lectures, or any similar means?		No	
i	Other activities? If "Yes," describe in Part IV	Yes		4,375
j	Total lines 1c through 1i			4,375
2a	Did the activities in line 1 cause the organization to be not described in section 501(c)(3)?		No	
b	If "Yes," enter the amount of any tax incurred under section 4912			
c	If "Yes," enter the amount of any tax incurred by organization managers under section 4912			
d	If the filing organization incurred a section 4912 tax, did it file Form 4720 for this year?			

Part III-A **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6).**

			Yes	No
1	Were substantially all (90% or more) dues received nondeductible by members?	1		
2	Did the organization make only in-house lobbying expenditures of $2,000 or less?	2		
3	Did the organization agree to carryover lobbying and political expenditures from the prior year?	3		

Part III-B **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6) if BOTH Part III-A, lines 1 and 2 are answered "No" OR if Part III-A, line 3 is answered "Yes".**

1	Dues, assessments and similar amounts from members	1	
2	Section 162(e) non-deductible lobbying and political expenditures (do not include amounts of political expenses for which the section 527(f) tax was paid).		
a	Current year	2a	
b	Carryover from last year	2b	
c	Total	2c	
3	Aggregate amount reported in section 6033(e)(1)(A) notices of nondeductible section 162(e) dues	3	
4	If notices were sent and the amount on line 2c exceeds the amount on line 3, what portion of the excess does the organization agree to carryover to the reasonable estimate of nondeductible lobbying and political expenditure next year?	4	
5	Taxable amount of lobbying and political expenditures (see instructions)	5	

Part IV **Supplemental Information**

Complete this part to provide the descriptions required for Part I-A, line 1, Part I-B, line 4, Part I-C, line 5, and Part II-B, line 1i. Also, complete this part for any additional information.

Identifier	Return Reference	Explanation
EXPLANATION OF OTHER LOBBYING ACTIVITIES	PART II-B, LINE 1I	THE HOSPITAL IS A MEMBER OF THE AMERICAN HOSPITAL ASSOCIATION (AHA) AND THE SOUTH CAROLINA HOSPITAL ASSOCIATION (SCHA) THESE ORGANIZATIONS ENGAGE IN LOBBYING EFFORTS ON BEHALF OF THEIR MEMBERSHIP BODIES, AND EACH YEAR A PORTION OF THE DUES PAID ARE ALLOCATED TO LOBBYING EXPENDITURES

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SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes," to Form 990, Part IV, line 6, 7, 8, 9, 10, 11, or 12.
▶ Attach to Form 990. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I **Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.** Complete if the organization answered "Yes" to Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate contributions to (during year)		
3	Aggregate grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds may be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II **Conservation Easements.** Complete if the organization answered "Yes" to Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply)
☐ Preservation of land for public use (e g , recreation or pleasure) ☐ Preservation of an historically importantly land area
☐ Protection of natural habitat ☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a–2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year

		Held at the End of the Year
a	Total number of conservation easements	2a
b	Total acreage restricted by conservation easements	2b
c	Number of conservation easements on a certified historic structure included in (a)	2c
d	Number of conservation easements included in (c) acquired after 8/17/06	2d

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the taxable year ▶ _____

4 Number of states where property subject to conservation easement is located ▶ _____

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting and enforcing conservation easements during the year ▶ _____

7 Amount of expenses incurred in monitoring, inspecting, and enforcing conservation easements during the year ▶ $ _____

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIV, describe how the organization reports conservation easements in its revenue and expense statement, and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements

Part III **Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.** Complete if the organization answered "Yes" to Form 990, Part IV, line 8.

1a If the organization elected, as permitted under SFAS 116, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education or research in furtherance of public service, provide, in Part XIV, the text of the footnote to its financial statements that describes these items

b If the organization elected, as permitted under SFAS 116, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items

(i) Revenues included in Form 990, Part VIII, line 1 ▶ $ _____

(ii) Assets included in Form 990, Part X ▶ $ _____

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under SFAS 116 relating to these items

a Revenues included in Form 990, Part VIII, line 1 ▶ $ _____

b Assets included in Form 990, Part X ▶ $ _____

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3. Using the organization's accession and other records, check any of the following that are a significant use of its collection items (check all that apply.)

a ☐ Public exhibition
b ☐ Scholarly research
c ☐ Preservation for future generations
d ☐ Loan or exchange programs
e ☐ Other

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIV

5 During the year, did the organization solicit or receive donations of art, historical treasures or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements. Complete if the organization answered "Yes" to Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIV and complete the following table

		Amount
c	Beginning balance	1c
d	Additions during the year	1d
e	Distributions during the year	1e
f	Ending balance	1f

2a Did the organization include an amount on Form 990, Part X, line 21? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIV

Part V Endowment Funds. Complete if the organization answered "Yes" to Form 990, Part IV, line 10.

		(a)Current Year	(b)Prior Year	(c)Two Years Back	(d)Three Years Back	(e)Four Years Back
1						
a	Beginning of year balance	5,647,997	5,341,581	5,157,328		
b	Contributions					
c	Investment earnings or losses	-49,302	381,416	259,253		
d	Grants or scholarships					
e	Other expenditures for facilities and programs	75,000	75,000	75,000		
f	Administrative expenses					
g	End of year balance	5,523,695	5,647,997	5,341,581		

2 Provide the estimated percentage of the year end balance held as

a Board designated or quasi-endowment ▶ 8 740 %
b Permanent endowment ▶ 91 260 %
c Term endowment ▶

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by

		Yes	No
(i) unrelated organizations	3a(i)		No
(ii) related organizations	3a(ii)		No
b If "Yes" to 3a(ii), are the related organizations listed as required on Schedule R?	3b		

4 Describe in Part XIV the intended uses of the organization's endowment funds

Part VI Investments—Land, Buildings, and Equipment. See Form 990, Part X, line 10.

Description of investment	(a) Cost or other basis (investment)	(b)Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a Land		9,419,642		9,419,642
b Buildings		44,480,352	65,183,922	-20,703,570
c Leasehold improvements				
d Equipment		40,844,899	24,221,388	16,623,511
e Other		90,819,737		90,819,737
Total. Add lines 1a-1e *(Column (d) should equal Form 990, Part X, column (B), line 10(c).)* ▶				96,159,320

Part VII Investments—Other Securities. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely-held equity interests		
Other		
Total. *(Column (b) should equal Form 990, Part X, col (B) line 12.)* ▶		

Part VIII Investments—Program Related. See Form 990, Part X, line 13.

(a) Description of investment type	(b) Book value	(c) Method of valuation Cost or end-of-year market value
Total. *(Column (b) should equal Form 990, Part X, col (B) line 13.)* ▶		

Part IX Other Assets. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1) ESTIMATED 3RD PARTY PAYOR SETTLEMENTS	4,609
(2) DUE FROM AFFILIATES	28,986,709
Total. *(Column (b) should equal Form 990, Part X, col.(B) line 15.)* ▶	28,991,318

Part X Other Liabilities. See Form 990, Part X, line 25.

1 (a) Description of Liability	(b) Amount
Federal Income Taxes	
OTHER LONG-TERM LIABILITIES	1,790,000
Total. *(Column (b) should equal Form 990, Part X, col (B) line 25.)* ▶	1,790,000

2. Fin 48 (ASC 740) Footnote In Part XIV, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FIN 48 (ASC 740)

Part XI Reconciliation of Change in Net Assets from Form 990 to Financial Statements

1	Total revenue (Form 990, Part VIII, column (A), line 12)	1	202,157,395
2	Total expenses (Form 990, Part IX, column (A), line 25)	2	188,968,562
3	Excess or (deficit) for the year Subtract line 2 from line 1	3	13,188,833
4	Net unrealized gains (losses) on investments	4	-2,663,719
5	Donated services and use of facilities	5	
6	Investment expenses	6	
7	Prior period adjustments	7	
8	Other (Describe in Part XIV)	8	-8,067,273
9	Total adjustments (net) Add lines 4 - 8	9	-10,730,992
10	Excess or (deficit) for the year per financial statements Combine lines 3 and 9	10	2,457,841

Part XII Reconciliation of Revenue per Audited Financial Statements With Revenue per Return

1	Total revenue, gains, and other support per audited financial statements			1	191,595,160
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12				
a	Net unrealized gains on investments	2a	-2,663,719		
b	Donated services and use of facilities	2b			
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIV)	2d	-7,781,360		
e	Add lines 2a through 2d			2e	-10,445,079
3	Subtract line 2e from line 1			3	202,040,239
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIV)	4b	117,156		
c	Add lines 4a and 4b			4c	117,156
5	Total Revenue Add lines 3 and 4c (This should equal Form 990, Part I, line 12)			5	202,157,395

Part XIII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return

1	Total expenses and losses per audited financial statements			1	190,090,450
2	Amounts included on line 1 but not on Form 990, Part IX, line 25				
a	Donated services and use of facilities	2a			
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIV)	2d	1,121,888		
e	Add lines 2a through 2d			2e	1,121,888
3	Subtract line 2e from line 1			3	188,968,562
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIV)	4b			
c	Add lines 4a and 4b			4c	0
5	Total expenses Add lines 3 and 4c (This should equal Form 990, Part I, line 18)			5	188,968,562

Part XIV Supplemental Information

Complete this part to provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b, Part V, line 4, Part X, Part XI, line 8, Part XII, lines 2d and 4b, and Part XIII, lines 2d and 4b Also complete this part to provide any additional information

Identifier	Return Reference	Explanation
DESCRIPTION OF INTENDED USE OF ENDOWMENT FUNDS	PART V, LINE 4	THE EARNINGS OF THE ENDOWMENT FUND ARE DIRECTED TO THE BOARD'S DISCRETION FOR THE PAST FIVE YEARS, THE EARNINGS HAVE BEEN USED TO FUND THE HOSPITAL'S HEALTH REACH PROGRAM
DESCRIPTION OF UNCERTAIN TAX POSITIONS UNDER FIN 48	PART X	THE MEDICAL CENTER (TUOMEY) IS EXEMPT FROM INCOME TAX UNDER SECTION 501(A) AS AN ORGANIZATION DESCRIBED IN SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE,ACCORDINGLY, THE ACCOMPANYING CONSOLIDATED FINANCIAL STATEMENTS DO NOT REFLECT A PROVISION OR LIABILITY FOR FEDERAL AND STATE INCOME TAXES THE SYSTEM HAS DETERMINED THAT IT DOES NOT HAVE ANY MATERIAL UNRECOGNIZED TAX BENEFITS OR OBLIGATIONS AS OF SEPTEMBER 30, 2011 FISCAL YEARS ENDING ON OR AFTER SEPTEMBER 30, 2008 REMAIN SUBJECT TO EXAMINATION BY FEDERAL AND STATE TAX AUTHORITIES
PART XI, LINE 8 - OTHER ADJUSTMENTS		CHANGE IN PENSION OBLIGATION -8,067,273
PART XII, LINE 2D - OTHER ADJUSTMENTS		CHANGE IN NET PENSION OBLIGATION -8,067,273 TUOMEY TRUST REVENUES 285,913
PART XII, LINE 4B - OTHER ADJUSTMENTS		TIMOTHY J TUOMEY TRUST CONTRIBUTION 117,156
PART XIII, LINE 2D - OTHER ADJUSTMENTS		TIMOTHY J TUOMEY TRUST INVESTMENT EXPENSES 1,121,888

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SCHEDULE H (Form 990)

Department of the Treasury
Internal Revenue Service

Hospitals

▶ Complete if the organization answered "Yes" to Form 990, Part IV, question 20.
▶ Attach to Form 990. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Financial Assistance and Certain Other Community Benefits at Cost

			Yes	No
1a	Did the organization have a financial assistance policy during the tax year? If "No," skip to question 6a	1a	Yes	
b	If "Yes," is it a written policy?	1b	Yes	
2	If the organization has multiple hospitals, indicate which of the following best describes application of the financial assistance policy to its various hospital facilities during the tax year ☐ Applied uniformly to all hospitals ☐ Applied uniformly to most hospitals ☐ Generally tailored to individual hospitals			
3	Answer the following based on the the financial assistance eligibility criteria that applied to the largest number of the organization's patients during the tax year			
a	Does the organization use Federal Poverty Guidelines (FPG) to determine eligibility for providing *free* care to low income individuals? If "Yes," indicate which of the following is the FPG family income limit for eligibility for free care ☐ 100% ☐ 150% ☑ 200% ☐ Other ____ %	3a	Yes	
b	Does the organization use FPG to determine eligibility for providing *discounted* care to low income individuals? If "Yes," indicate which of the following is the family income limit for eligibility for discounted care ☐ 200% ☐ 250% ☐ 300% ☐ 350% ☑ 400% ☐ Other ____ %	3b	Yes	
c	If the organization does not use FPG to determine eligibility, describe in Part VI the income based criteria for determining eligibility for free or discounted care Include in the description whether the organization uses an asset test or other threshold, regardless of income, to determine eligibility for free or discounted care			
4	Did the organization's financial assistance policy that applied to the largest number of its patients during the tax year provide for free or discounted care to the "medically indigent"?	4	Yes	
5a	Did the organization budget amounts for free or discounted care provided under its financial assistance policy during the tax year?	5a	Yes	
b	If "Yes," did the organization's financial assistance expenses exceed the budgeted amount?	5b	Yes	
c	If "Yes" to line 5b, as a result of budget considerations, was the organization unable to provide free or discounted care to a patient who was eligible for free or discounted care?	5c		No
6a	Does the organization prepare a community benefit report during the tax year?	6a		No
6b	If "Yes," did the organization make it available to the public?	6b		
	Complete the following table using the worksheets provided in the Schedule H instructions Do not submit these worksheets with the Schedule H			

7 Financial Assistance and Certain Other Community Benefits at Cost

Financial Assistance and Means-Tested Government Programs	(a) Number of activities or programs (optional)	(b) Persons served (optional)	(c) Total community benefit expense	(d) Direct offsetting revenue	(e) Net community benefit expense	(f) Percent of total expense
a Financial Assistance at cost (from Worksheets 1 and 2)			10,002,451	9,822,617	179,834	0 100 %
b Unreimbursed Medicaid (from Worksheet 3, column a)			31,725,182	27,333,652	4,391,530	2 320 %
c Unreimbursed costs—other means-tested government programs (from Worksheet 3, column b)						
d Total Financial Assistance and Means-Tested Government Programs			41,727,633	37,156,269	4,571,364	2 420 %
Other Benefits						
e Community health improvement services and community benefit operations (from Worksheet 4)			452,409		452,409	0 240 %
f Health professions education (from Worksheet 5)						
g Subsidized health services (from Worksheet 6)						
h Research (from Worksheet 7)						
i Cash and in-kind contributions to community groups (from Worksheet 8)			69,351		69,351	0 040 %
j Total Other Benefits			521,760		521,760	0 280 %
k Total. Add lines 7d and 7j			42,249,393	37,156,269	5,093,124	2 700 %

Part II **Community Building Activities** during the tax year, and describe in Part VI how its community building activities during the tax year, and describe in Part VI how its community building activities promoted the health of the communities it serves.

		(a) Number of activities or programs (optional)	(b) Persons served (optional)	(c) Total community building expense	(d) Direct offsetting revenue	(e) Net community building expense	(f) Percent of total expense
1	Physical improvements and housing						
2	Economic development	1		30,000		30,000	0 020 %
3	Community support						
4	Environmental improvements						
5	Leadership development and training for community members						
6	Coalition building						
7	Community health improvement advocacy						
8	Workforce development	1		394,266		394,266	0 210 %
9	Other						
10	Total	2		424,266		424,266	0 230 %

Part III **Bad Debt, Medicare, & Collection Practices**

Section A. Bad Debt Expense

				Yes	No
1	Did the organization report bad debt expense in accordance with Healthcare Financial Management Association Statement No 15?		1	Yes	
2	Enter the amount of the organization's bad debt expense (at cost)	2	3,804,175		
3	Enter the estimated amount of the organization's bad debt expense (at cost) attributable to patients eligible under the organization's financial assistance policy	3			
4	Provide in Part VI the text of the footnote to the organization's financial statements that describes bad debt expense In addition, describe the costing methodology used in determining the amounts reported on lines 2 and 3, and rationale for including a portion of bad debt amounts as community benefit				

Section B. Medicare

5	Enter total revenue received from Medicare (including DSH and IME)	5	63,764,787		
	Enter Medicare allowable costs of care relating to payments on line 5	6	68,979,074		
7	Subtract line 6 from line 5 This is the surplus or (shortfall)	7	-5,214,287		
8	Describe in Part VI the extent to which any shortfall reported in line 7 should be treated as community benefit Also describe in Part VI the costing methodology or source used to determine the amount reported on line 6 Check the box that describes the method used				

☐ Cost accounting system ☑ Cost to charge ratio ☐ Other

Section C. Collection Practices

9a	Does the organization have a written debt collection policy?	9a	Yes	
b	If "Yes," does the organization's collection policy contain provisions on the collection practices to be followed for patients who are known to qualify for charity care or financial assistance? Describe in Part VI	9b	Yes	

Part V **Management Companies and Joint Ventures**

	(a) Name of entity	(b) Description of primary activity of entity	(c) Organization's profit % or stock ownership %	(d) Officers, directors, trustees, or key employees' profit % or stock ownership%	(e) Physicians' profit % or stock ownership %
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					

Part V Facility Information

Section A. Hospital Facilities
(list in order of size, measured by total revenue per facility, from largest to smallest)

How many hospital facilities did the organization operate during the tax year? 1

	Name and address	Licensed hospital	General medical & surgical	Children's hospital	Teaching hospital	Critical access hospital	Research facility	ER-24 hours	ER-other	Other (Describe)
1	TUOMEY 129 NORTH WASHINGTON ST SUMTER, SC 29150	X	X					X		DISPROPORTIONATE SHARE HOSPITAL

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Part V Facility Information *(continued)*

Section C. Other Facilities That Are Not Licensed, Registered, or Similarly Recognized as a Hospital Facility
(list in order of size, measured by total revenue per facility, from largest to smallest)

How many non-hospital facilities did the organization operate during the tax year? _____

	Name and address	Type of Facility (Describe)
1		
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		

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Part VI Supplemental Information

Complete this part to provide the following information

1 **Required descriptions.** Provide the description required for Part I, lines 3c, 6a, and 7, Part II, Part III, lines 4, 8, and 9b, and Part V, Section B, lines 1j, 3, 4, 5c, 6i, 7, 11h, 13g, 15e, 16e, 17e, 18d, 19d, 20, and 21

2 **Needs assessment.** Describe how the organization assesses the health care needs of the communities it serves, in addition to any needs assessments reported in Part V, Section B

3 **Patient education of eligibility for assistance.** Describe how the organization informs and educates patients and persons who may be billed for patient care about their eligibility for assistance under federal, state, or local government programs or under the organization's financial assistance policy

4 **Community information.** Describe the community the organization serves, taking into account the geographic area and demographic constituents it serves

5 **Promotion of community health.** Provide any other information important to describing how the organization's hospital facilities or other health care facilities further its exempt purpose by promoting the health of the community (e g , open medical staff, community board, use of surplus funds, etc)

6 **Affiliated health care system.** If the organization is part of an affiliated health care system, describe the respective roles of the organization and its affiliates in promoting the health of the communities served

7 **State filing of community benefit report.** If applicable, identify all states with which the organization, or a related organization, files a community benefit report

Identifier	ReturnReference	Explanation
		PART I, LINE 7 THE ORGANIZATION UTILIZED THE IRS WORKSHEETS TO DETERMINE THE COST TO CHARGE RATIO

0403

Identifier	ReturnReference	Explanation
		PART II ECONOMIC DEVELOPMENT - SUMTER SMARTER GROWTH INITIATIVE IS A SUMTER ECONOMIC DEVELOPMENT DONATION MADE TO ASSIST IN SUMTER DEVELOPMENT BOARD'S EFFORTS AT RECRUITING INSUDTRY, MARKETING THE SUMNTER COMMUNITY AND DEVELOPING SUMTER COUNTY'S INDUSTRIAL DEVELOPMENT PRODUCTS WORKFORCE DEVELOPMENT - TUOMEY WORKS TO RECRUIT PHYSICIANS THAT WILL MEET THE HEALTHCARE NEEDS OF THE COMMUNITY

Identifier	ReturnReference	Explanation
		PART III, LINE 4 ALTHOUGH NOT DESCRIBED IN THE FOOTNOTES TO THE HOSPITAL'S FINANCIAL STATEMENTS, THE PRACTICE OF THE HOSPITAL IS TO RECORD BAD DEBT EXPENSE AT THE UNPAID BALANCES AFTER CONTRACTUAL DISCOUNTS FOR PATIENTS WITH INSURANCE AND AT THE 70% DISCOUNTED CHARGE LEVEL FOR THOSE WHO DO NOT HAVE INSURANCE THE HOSPITAL NEGOTIATES WITH PAYERS TO COME UP WITH A FAIR DISCOUNTED RATE TO BE PAID FOR SERVICES RENDERED THESE DISCOUNTS ARE NOT RECORDED AS BAD DEBT EXPENSES SIMILARLY FOR PATIENTS WITHOUT ANY INSURANCE, THE HOSPITAL OFFERS SEVERAL DIFFERENT DISCOUNT PROGRAMS, BASED UPON FINANCIAL NEED, TO THESE PATIENTS AND ONCE AGAIN THESE DISCOUNTS ARE NOT RECORDED AS BAD DEBTS FOR PATIENTS WHO DO NOT MEET OR DO NOT FOLLOW-THROUGH TO DEMONSTRATE FINANCIAL HARDSHIP, THE HOSPITAL DOES EXPECT TO BE REIMBURSED AT 70% OF ITS CHARGES ALL OF THE REMAINING BALANCES THAT ARE NOT PAID ARE RECORDED AS BAD DEBTS THE HOSPITAL HAS COSTED THE BAD DEBTS EXPENSE IN LINE 2 OF THIS SECTION AT THE FULL UNPAID CONTRACTED RATE FOR PATIENTS WITH INSURANCE AS THIS REPRESENTS THE "CONTRACTED COST" FOR THE SERVICE AND THUS NOT APPLICABLE TO AN OVERALL COST-TO-CHARGE RATIO FOR PATIENS WITH NO INSURANCE, THE COST ON LINE 2 REPRESENTS THE 70% OF CHARGE FIGURES MULTIPLIED BY THE OVERALL COST-TO-CHARGE RATIO FROM THE AUDITED FINANCIAL STATEMENTS THE CRITERIA THE HOSPITAL USES FOR DISTINGUISHING BETWEEN CHARITY CARE AND BAD DEBT IS THAT IN ORDER FOR A PATIENT TO QUALIFY AS CHARITY CARE, THEY MUST SHARE THEIR FINANCIAL INFORMATION AND SHOW THAT THEY FALL WITHIN THE FEDERAL POVERTY GUIDELINES THUS THE HOSPITAL BELIEVES THAT 50% OF THE FIGURE RECORDED AS BAD DEBT EXPENSE ON LINE 2 WOULD QUALIFY FOR CHARITY CARE IF THE PATIENTS HAD SHARED THEIR FINANCIAL INFORMATION THIS PERCENTAGE WAS DERRIVED FROM DEMOGRAPHIC STUDIES OF THE COMMUNITY FOR FAMILIES FALLING BELOW THE HOSPITALS CHARITY CARE GUIDELINES, WHICH ARE BASED ON THE FEDERAL POVERTY GUIDELINES, IN THE MARKET AREA

Identifier	ReturnReference	Explanation
		PART III, LINE 8 THE ORGANIZATION UTILIZED A COST-TO-CHARGE RATIO IN DETERIMINING THE COSTING FOR THIS SECTION

Identifier	ReturnReference	Explanation
		PART III, LINE 9B ALL SELF PAY PATIENTS ARE INFORMED ABOUT OUR FINANCIAL ASSISTANCE PROGRAM AND ARE GIVEN THE OPPORTUNITY TO COMPLETE THE APPLICATION OTHERWISE PRIOR TO THE PROCEDURE AN ATTEMPT IS MADE TO COLLECT A PORTION OF THE COST OF THE PROCEDURE BASED ON A GOOD FAITH ESTIMATE AFTER THE PROCEDURE THE HOSPITAL WILL SEND OUT ONE STATEMENT WITH THE AMOUNT OWED BY THE PATIENT. AFTER THIS, THE ACCOUNT IS TURNED OVER TO OUR IN-HOUSE COLLECTIONS DEPARTMENT THEY CALL THE PATIENT TO DISCUSS PAYMENT TERMS AND OUR FINANCIAL ASSISTANCE PROGRAMS TO TRY AND FIND OUT IF THE PATIENT HAS A 3RD PARTY PAYER AFTER 120 DAYS THE ACCOUNT IS THEN TURNED OVER TO OUR OUTSIDE 3RD PARTY COLLECTOR THE COLLECTOR WILL CALL AND SEND STATEMENTS IN AN ATTEMPT TO COLLECT THE FUNDS AFTER 120 DAYS FROM THIS PLACEMENT, IF THERE HAS BEEN NO ACTIVITY ON THE ACCOUNT, IT IS RETURNED TO THE HOSPITAL

Identifier	ReturnReference	Explanation
		SCHEDULE H PART VI LINE 8 TUOMEY DOES NOT COMPLETE ITS OWN FORMAL COMMUNITY BENEFIT REPORT THUS WE DO NOT SEND ANY FORMAL REPORT TO ANY STATE BUT WE DO REPORT OUR RAW DATA TO THE SC HOSPITAL ASSOCIATION'S WEBSITE WHICH THEY USE TO FILE A FORMAL REPORT WITH SC AS A COMBINED REPORT COVERING ALL HOSPITALS IN THE STATE

Identifier	ReturnReference	Explanation
		PART VI, LINE 2 TUOMEY PROCURES AN ANNUAL ASSESSMENT IN REGARDS TO DETERMINING THE PHYSICIAN NEEDS OF THE SUMTER COMMUNITY. TUOMEY STRIVES TO MAKE IT UNNECESSARY AND UNREASONABLE FOR ANYONE TO GO OUTSIDE OF THE COMMUNITY TO OBTAIN HEALTHCARE SERVICES THAT WE CAN PROVIDE IN A QUALITY, COST EFFECTIVE MANNER

Identifier	ReturnReference	Explanation
		PART VI, LINE 3 PER TUOMEY POLICY, PUBLIC NOTICE OF THE AVAILABILITY OF ASSISTANCE IS PROVIDED THROUGH THE POSTING OF NOTICES IN LOCATIONS OF HIGH VOLUME SUCH AS INPATIENT/OUTPATIENT ADMITTING/REGISTRATION, ER, BILLING OFFICES, ADMITTING OFFICES AND HOSPITAL OUTPATIENT SERVICE SETTINGS IN ADDITION, NOTICE OF THE AVAILABILITY OF ASSISTANCE AND CONTACT INFORMATION IS LOCATED ON THE HOSPITAL WEBSITE PATIENT LIABILITY STATEMENTS SENT TO PATIENTS ALSO INCLUDE LANGUAGE INDICATING THE PATIENT MAY BE ELIGIBLE FOR ASSISTANCE IF THEY MEET CERTAIN INCOME REQUIREMENTS

Identifier	ReturnReference	Explanation
		PART VI, LINE 4 SUMTER COUNTY IS HOME TO 107,456 RESIDENTS, WITH 38% OF THESE RESIDENTS AT OR BELOW THE POVERTY LEVEL SUMTER'S RACIAL DEMOGRAPHICS ARE COMPRISED OF 48 2% WHITE, 46 9% BLACK, 1 1% ASIAN, AND 3 8% OTHER THE AVERAGE INCOME FOR A SUMTER HOUSE HOLD IS $37,113 CURRENTLY, SUMTER'S UNEMPLOYMENT RATE EQUALS 11 8% SUMTER HAS A MILITARY BASE WHICH HOUSES US AIR FORCE AND US ARMY TROOPS

Identifier	ReturnReference	Explanation
		PART VI, LINE 6 TUOMEY HEALTHCARE SYSTEMS IS A 301 BED ACUTE CARE FACILITY LOCATED IN SUMTER, SOUTH CAROLINA TUOMEY WAS ESTABLISHED AS A NON-PROFIT ACUTE CARE HOSPITAL TO ADVANCE OR SUPPORT THE PROVISIONS OF HEALTHCARE SERVICES WITHIN THE SUMTER COMMUNITY TUOMEY'S MAIN OBJECTIVE IS THE PROMOTION OF HEALTH FOR ALL RESIDENTS OF SUMTER AND ITS OUTLYING AREAS THE ORGANIZATION UTILIZES SURPLUS FUNDS TO MAKE IT NOT ONLY UNNECESSARY, BUT UNREASONABLE FOR ANYONE TO GO ELSEWHERE FOR HEALTHCARE SERVICES THAT WE CAN PROVIDE IN A HIGH-QUALITY, COST - EFFECTIVE MANNER

Identifier	ReturnReference	Explanation
		PART VI, LINE 7 TUOMEY IS THE ANCHOR OF THE TUOMEY HEALTHCARE SYSTEM. TUOMEY SERVES AS THE MEDICAL FACILITY OF THE SYSTEM THAT CONSISTS OF 301 BEDS PROVIDING A WIDE RANGE OF INPATIENT/OUTPATIENT SERVICES, SURGICAL SERVICES, EMERGENCY, DAY SURGERY, INTENSIVE CARE AND WOMEN'S AND INFANTS CARE SERVICES TO THE SUMTER AND SURROUNDING COMMUNITIES

Identifier	ReturnReference	Explanation
REPORTS FILED WITH STATES	PART VI, LINE 7	SC

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Schedule I (Form 990)

Department of the Treasury
Internal Revenue Service

Grants and Other Assistance to Organizations, Governments and Individuals in the United States

Complete if the organization answered "Yes," to Form 990, Part IV, line 21 or 22.
▶ Attach to Form 990

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I General Information on Grants and Assistance

1 Does the organization maintain records to substantiate the amount of the grants or assistance, the grantees' eligibility for the grants or assistance, and the selection criteria used to award the grants or assistance? . . . ☐ Yes ☑ No

2 Describe in Part IV the organization's procedures for monitoring the use of grant funds in the United States

Part II Grants and Other Assistance to Governments and Organizations in the United States.

Complete if the organization answered "Yes" to Form 990, Part IV, line 21 for any recipient that received more than $5,000. Check this box if no one recipient received more than $5,000. Part II can be duplicated if additional space is needed. . . . ▶ ☐

1 (a) Name and address of organization or government	(b) EIN	(c) IRC Code section if applicable	(d) Amount of cash grant	(e) Amount of non-cash assistance	(f) Method of valuation (book, FMV, appraisal, other)	(g) Description of non-cash assistance	(h) Purpose of grant or assistance
(1) SUMTER SMARTER GROWTH INITIATIVE32 EAST CALHOUN SUMTER, SC 29150	26-4385624	501(C)(3)	30,000				TO BRING JOBS AND CAPITAL INVESTMENT TO SUMTER COUNTY

2 Enter total number of section 501(c)(3) and government organizations . . . ▶ 1

3 Enter total number of other organizations . . . ▶

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Part III **Grants and Other Assistance to Individuals in the United States.** Complete if the organization answered "Yes" to Form 990, Part IV, line 22. Use Schedule I-1 (Form 990) if additional space is needed.

(a)Type of grant or assistance	(b)Number of recipients	(c)Amount of cash grant	(d)Amount of non-cash assistance	(e)Method of valuation (book, FMV, appraisal, other)	(f)Description of non-cash assistance

Part IV **Supplemental Information.** Complete this part to provide the information required in Part I, line 2, and any other additional information.

Identifier	Return Reference	Explanation

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Schedule J (Form 990)

Department of the Treasury
Internal Revenue Service

Compensation Information

For certain Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

▶ Complete if the organization answered "Yes" to Form 990, Part IV, question 23.

▶ Attach to Form 990. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Questions Regarding Compensation

			Yes	No
1a	Check the appropriate box(es) if the organization provided any of the following to or for a person listed in Form 990, Part VII, Section A, line 1a Complete Part III to provide any relevant information regarding these items			
	☐ First-class or charter travel	☐ Housing allowance or residence for personal use		
	☐ Travel for companions	☐ Payments for business use of personal residence		
	☐ Tax idemnification and gross-up payments	☐ Health or social club dues or initiation fees		
	☐ Discretionary spending account	☐ Personal services (e g , maid, chauffeur, chef)		
b	If any of the boxes in line 1a are checked, did the organization follow a written policy regarding payment or reimbursement orprovision of all the expenses described above? If "No," complete Part III to explain	1b		
2	Did the organization require substantiation prior to reimbursing or allowing expenses incurred by all officers, directors, trustees, and the CEO/Executive Director, regarding the items checked in line 1a?	2		
3	Indicate which, if any, of the following the organization uses to establish the compensation of the organization's CEO/Executive Director Check all that apply			
	☐ Compensation committee	☐ Written employment contract		
	☑ Independent compensation consultant	☑ Compensation survey or study		
	☐ Form 990 of other organizations	☑ Approval by the board or compensation committee		
4	During the year, did any person listed in Form 990, Part VII, Section A, line 1a with respect to the filing organization or a related organization			
a	Receive a severance payment or change-of-control payment from the organization or a related organization?	4a		No
b	Participate in, or receive payment from, a supplemental nonqualified retirement plan?	4b	Yes	
c	Participate in, or receive payment from, an equity-based compensation arrangement?	4c		No
	If "Yes" to any of lines 4a-c, list the persons and provide the applicable amounts for each item in Part III			
	Only 501(c)(3) and 501(c)(4) organizations only must complete lines 5-9.			
5	For persons listed in form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the revenues of			
a	The organization?	5a		No
b	Any related organization?	5b		No
	If "Yes," to line 5a or 5b, describe in Part III			
6	For persons listed in form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the net earnings of			
a	The organization?	6a		No
b	Any related organization?	6b		No
	If "Yes," to line 6a or 6b, describe in Part III			
7	For persons listed in Form 990, Part VII, Section A, line 1a, did the organization provide any non-fixed payments not described in lines 5 and 6? If "Yes," describe in Part III	7		No
8	Were any amounts reported in Form 990, Part VII, paid or accured pursuant to a contract that was subject to the initial contract exception described in Regs section 53 4958-4(a)(3)? If "Yes," describe in Part III	8		No
9	If "Yes" to line 8, did the organization also follow the rebuttable presumption procedure described in Regulations section 53 4958-6(c)?	9		

Part II **Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees.** Use duplicate copies if additional space is needed.

For each individual whose compensation must be reported in Schedule J, report compensation from the organization on row (i) and from related organizations, described in the instructions on row (ii) Do not list any individuals that are not listed on Form 990, Part VII

Note. The sum of columns (B)(i)-(iii) must equal the applicable column (D) or column (E) amounts on Form 990, Part VII, line 1a

(A) Name		(B) Breakdown of W-2 and/or 1099-MISC compensation			(C) Retirement and other deferred compensation	(D) Nontaxable benefits	(E) Total of columns (B)(i)-(D)	(F) Compensation reported in prior Form 990 or Form 990-EZ
		(i) Base compensation	(ii) Bonus & incentive compensation	(iii) Other reportable compensation				
(1) R JAY COX	(i)	538,720	0	116,382	151,405	34,115	840,622	0
	(ii)	0	0	0	0	0	0	0
(2) J GREGG MARTIN	(i)	331,718	0	77,605	110,561	11,719	531,603	0
	(ii)	0	0	0	0	0	0	0
(3) W PAUL JOHNSON THROUGH 411	(i)	290,014	0	214,572	38,500	12,306	555,392	0
	(ii)	0	0	0	0	0	0	0
(4) DR GENE F DICKERSON MD	(i)	323,731	0	72,499	81,206	13,143	490,579	0
	(ii)	0	0	0	0	0	0	0
(5) WILLIAM RENWICK	(i)	168,419	0	39,826	66,290	1,697	276,232	0
	(ii)	0	0	0	0	0	0	0
(6) MICHELLE LOGAN-OWENS	(i)	147,758	0	12,054	28,577	6,855	195,244	0
	(ii)	0	0	0	0	0	0	0
(7) TERESA M CARLTON	(i)	147,758	0	8,830	19,192	16,434	192,214	0
	(ii)	0	0	0	0	0	0	0
(8) TEXIN LI	(i)	203,093	0	0	8,124	15,198	226,415	0
	(ii)	0	0	0	0	0	0	0
(9) MICHAEL SAND	(i)	146,088	0	37,679	10,400	10,775	204,942	0
	(ii)	0	0	0	0	0	0	0
(10) JUDY LYNN ROBERTS	(i)	171,007	0	12,787	22,000	10,775	216,569	0
	(ii)	0	0	0	0	0	0	0
(11) SANDRA M LAWRENCE	(i)	160,776	0	23,072	21,996	10,775	216,619	0
	(ii)	0	0	0	0	0	0	0
(12) ANTHONY W CABALLERO	(i)	130,070	5,000	103,457	16,500	15,198	270,225	0
	(ii)	0	0	0	0	0	0	0
(13)								
(14)								
(15)								
(16)								

Part III Supplemental Information

Complete this part to provide the information, explanation, or descriptions required for Part I, lines 1a, 1b, 4c, 5a, 5b, 6a, 6b, 7, and 8 Also complete this part for any additional information

Identifier	Return Reference	Explanation
	PART I, LINE 4B	THE FOLLOWING INDIVIDUALS PARTICIPATED IN A SUPPLEMENTAL NON-QUALIFIED RETIREMENT PLAN (457(B)) AND/OR DEFINED BENEFIT PLAN FOR 2010, AS FOLLOWS THE AMOUNTS ARE REPRESENTED IN PART II, COLUMN (C) R JAY COX $ 112,905 J GREGG MARTIN 72,061 WILLIAM RENWICK 35,490 DR GENE DICKERSON 68,198 TERESA M CARLTON 12,798 MICHELLE LOGAN-OWENS 22,118

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Schedule K (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Information on Tax Exempt Bonds

▶ Complete if the organization answered "Yes" to Form 990, Part IV, line 24a. Provide descriptions, explanations, and any additional information in Schedule O (Form 990).
▶ Attach to Form 990. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Bond Issues

	(a) Issuer Name	(b) Issuer EIN	(c) CUSIP #	(d) Date Issued	(e) Issue Price	(f) Description of Purpose	(g) Defeased Yes	(g) Defeased No	(h) On Behalf of Issuer Yes	(h) On Behalf of Issuer No	(i) Pool financing Yes	(i) Pool financing No
A	SOUTH CAROLINA JOBS - ECONOMIC DEVELOPMENT AUTHORITY	57-0960018	83703EKE4	01-12-2006	76,542,284	QUALIFIED HOSPITAL BOND		X		X		X
B	SOUTH CAROLINA JOBS - ECONOMIC DEVELOPMENT AUTHORITY	57-0960018	83703FBT8	12-01-2008	16,440,000	QUALIFIED HOSPITAL BOND		X		X		X

Part II Proceeds

		A	B	C	D
1	Amount of bonds retired	36,255,000	16,200,000		
2	Amount of bonds legally defeased				
3	Total proceeds of issue	76,542,284	16,470,799		
4	Gross proceeds in reserve funds	5,467,276			
5	Capitalized interest from proceeds	2,996,712			
6	Proceeds in refunding escrow	1,164,871			
7	Issuance costs from proceeds	2,068,065	270,799		
8	Credit enhancement from proceeds				
9	Working capital expenditures from proceeds				
10	Capital expenditures from proceeds	21,288,949			
11	Other spent proceeds				
12	Other unspent proceeds	7,301,411			
13	Year of substantial completion	2007			

		A Yes	A No	B Yes	B No	C Yes	C No	D Yes	D No
14	Were the bonds issued as part of a current refunding issue?		X		X				
15	Were the bonds issued as part of an advance refunding issue?	X		X					
16	Has the final allocation of proceeds been made?	X		X					
17	Does the organization maintain adequate books and records to support the final allocation of proceeds?	X		X					

Part III Private Business Use

		A Yes	A No	B Yes	B No	C Yes	C No	D Yes	D No
1	Was the organization a partner in a partnership, or a member of an LLC, which owned property financed by tax-exempt bonds?		X		X				
2	Are there any lease arrangements that may result in private business use of bond-financed property?		X		X				

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Part III Private Business Use *(Continued)*

		A		B		C		D	
		Yes	No	Yes	No	Yes	No	Yes	No
3a	Are there any management or service contracts that may result in private business use?		X		X				
b	Are there any research agreements that may result in private business use of bond-financed property?		X		X				
c	Does the organization routinely engage bond counsel or other outside counsel to review any management or service contracts or research agreements relating to the financed property?								
4	Enter the percentage of financed property used in a private business use by entities other than a section 501(c)(3) organization or a state or local government ▶								
5	Enter the percentage of financed property used in a private business use as a result of unrelated trade or business activity carried on by your organization, another section 501(c)(3) organization, or a state or local government ▶								
6	Total of lines 4 and 5								
7	Has the organization adopted management practices and procedures to ensure the post-issuance compliance of its tax-exempt bond liabilities?	X		X					

Part IV Arbitrage

		A		B		C		D	
		Yes	No	Yes	No	Yes	No	Yes	No
1	Has a Form 8038-T, Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate, been filed with respect to the bond issue?	X		X					
2	Is the bond issue a variable rate issue?		X	X					
3a	Has the organization or the governmental issuer entered into a hedge with respect to the bond issue?		X		X				
b	Name of provider								
c	Term of hedge								
d	Was the hedge superintegrated?								
e	Was a hedge terminated?								
4a	Were gross proceeds invested in a GIC?		X		X				
b	Name of provider								
c	Term of GIC								
d	Was the regulatory safe harbor for establishing the fair market value of the GIC satisfied?								
5	Were any gross proceeds invested beyond an available temporary period?		X		X				
6	Did the bond issue qualify for an exception to rebate?		X		X				

Part V Supplemental Information

Complete this part to provide additional information for responses to questions on Schedule K (see instructions)

Identifier	Return Reference	Explanation

0421

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Schedule L (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Transactions with Interested Persons

▶ Complete if the organization answered "Yes" on Form 990, Part IV, lines 25a, 25b, 26, 27, 28a, 28b, or 28c, or Form 990-EZ, Part V lines 38a or 40b.
▶ Attach to Form 990 or Form 990-EZ. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Excess Benefit Transactions (section 501(c)(3) and section 501 (c)(4) organizations only).
Complete if the organization answered "Yes" on Form 990, Part IV, line 25a or 25b, or Form 990-EZ, Part V, line 40b

1 (a) Name of disqualified person	(b) Description of transaction	(c) Corrected? Yes	(c) Corrected? No

2 Enter the amount of tax imposed on the organization managers or disqualified persons during the year under section 4958 . . . . . ▶ $

3 Enter the amount of tax, if any, on line 2, above, reimbursed by the organization . . . . . ▶ $

Part II Loans to and/or From Interested Persons.
Complete if the organization answered "Yes" on Form 990, Part IV, line 26, or Form 990-EZ, Part V, line 38a

(a) Name of interested person and purpose	(b) Loan to or from the organization? To	(b) From	(c) Original principal amount	(d) Balance due	(e) In default? Yes	(e) No	(f) Approved by board or committee? Yes	(f) No	(g) Written agreement? Yes	(g) No
Total . . . . . ▶ $										

Part III Grants or Assistance Benefitting Interested Persons.
Complete if the organization answered "Yes" on Form 990, Part IV, line 27.

(a) Name of interested person	(b) Relationship between interested person and the organization	(c) Amount of grant or type of assistance

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Part IV Business Transactions Involving Interested Persons.
Complete if the organization answered "Yes" on Form 990, Part IV, line 28a, 28b, or 28c.

(a) Name of interested person	(b) Relationship between interested person and the organization	(c) Amount of transaction	(d) Description of transaction	(e) Sharing of organization's revenues? Yes	(e) Sharing of organization's revenues? No
(1) CHERYL MARTIN	FAMILY RELATIONSHIP WITH OFFICER J GREGG MARTIN	140,244	COMPENSATION AS EMPLOYEE		No
(2) SHANNON BOYKIN	FAMILY RELATIONSHIP WITH BOARD MEMBER ROBERT BOYKIN	67,442	COMPENSATION AS EMPLOYEE		No
(3) JOSEPH DURANT	FAMILY RELATIONSHIP WITH BOARD MEMBER KAY RAFFIELD	47,998	COMPENSATION AS EMPLOYEE		No
(4) MACAULAY SMITH	FAMILY RELATIONSHIP WITH BOARD MEMBER CHARLES WHITE	58,629	COMPENSATION AS EMPLOYEE		No
(5) MARY DEAKIN	FAMILY RELATIONSHIP WITH BOARD MEMBER HENRY MOSES	96,934	COMPENSATION AS EMPLOYEE		No

Part V Supplemental Information

Complete this part to provide additional information for responses to questions on Schedule L (see instructions)

Identifier	Return Reference	Explanation

0423

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SCHEDULE O
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or to provide any additional information.
▶ Attach to Form 990 or 990-EZ.

OMB No 1545-0047

2010

Open to Public Inspection

Name of the organization
TUOMEY

Employer identification number
57-0343398

Identifier	Return Reference	Explanation
FORM 990, PART VI, SECTION B, LINE 11		THE RETURN WAS PREPARED BY AN INDEPENDENT ACCOUNTING FIRM WITH ASSISTANCE AND OVERSIGHT BY MANAGEMENT UPON COMPLETION, THE RETURN WAS REVIEWD BY MANAGEMENT AND DISCUSSED WITH THE BOARD OF DIRECTORS OF THE ORGANIZATION BY THE CFO AND TAX PREPARER BEFORE FILING WITH THE IRS

Identifier	Return Reference	Explanation
	FORM 990, PART VI, SECTION B, LINE 12C	EACH YEAR THE CORPORATE COMPLIANCE OFFICER DISTRIBUTES A CONFLICT OF INTEREST POLICY QUESTIONNAIRE REQUIRING ALL PERSONS MANAGER AND ABOVE TO DISCLOSE ANY POSSIBLE CONFLICT OF INTEREST. OFFICERS, KEY EMPLOYEES, AND TRUSTEES OF THE BOARD COMPLETE THIS QUESTIONNAIRE. BEFORE MAJOR VOTES AND DECISIONS, THE POLICY IS CONSIDERED AND ANY MEMBER WITH A CONFLICT IS EXCUSED FROM THE DISCUSSION OR VOTE. DOCUMENTATION OF THE CONSIDERATION IS KEPT IN THE MINUTES

Identifier	Return Reference	Explanation
	FORM 990, PART VI, SECTION B, LINE 15	THE ORGANIZATION ENGAGES AN INDEPENDENT COMPENSATION CONSULTANT TO DETERMINE THE FAIR MARKET VALUE OF TOP EXECUTIVES FINDINGS OF THE STUDY ARE REVIEWED BY THE BOARD OF TRUSTEES AND USED IN THE SELECTION AND APPROVAL OF COMPENSATION PACKAGES FOR THE CEO AND OTHER OFFICERS AND KEY EMPLOYEES, INCLUDING THE COO, CFO, CNO, CHIEF MEDICAL OFFICER, AND VICE PRESIDENTS

Identifier	Return Reference	Explanation
	FORM 990, PART VI, SECTION C, LINE 18	PHOTOCOPIES OF THE FORM 990 ARE AVAILABLE UPON REQUEST AT THE ORGANIZATIONS ADMINISTRATIVE OFFICE. IN ADDITION, RECENT FILING OF THE FORM 990 ARE AVAILABLE ONLINE AT WWW GUIDESTAR ORG

Identifier	Return Reference	Explanation
	FORM 990, PART VI, SECTION C, LINE 19	PHOTOCOPIES OF THE ORGANIZATION'S GOVERNING DOCUMENTS, CONFLICT OF INTEREST POLICY, AND FINANCIAL STATEMENTS ARE AVAILABLE UPON REQUEST AT THE ORGANIZATION'S ADMINISTRATIVE OFFICE

Identifier	Return Reference	Explanation
CHANGES IN NET ASSETS OR FUND BALANCES	FORM 990, PART XI, LINE 5	NET UNREALIZED LOSSES ON INVESTMENTS -2,663,719 CHANGE IN PENSION OBLIGATION -8,067,273 TOTAL TO FORM 990, PART XI, LINE 5 -10,730,992

File GRAPHIC print - DO NOT PROCESS | As Filed Data - | DLN: 93493227015350430

SCHEDULE R (Form 990)

Related Organizations and Unrelated Partnerships

▶ Complete if the organization answered "Yes" to Form 990, Part IV, line 33, 34, 35, 36, or 37.
▶ Attach to Form 990. ▶ See separate instructions.

OMB No 1545-0047

2010

Open to Public Inspection

Department of the Treasury
Internal Revenue Service

Name of the organization
TUOMEY

Employer identification number
57-0343398

Part I Identification of Disregarded Entities (Complete if the organization answered "Yes" on Form 990, Part IV, line 33.)

(a) Name, address, and EIN of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity

Part II Identification of Related Tax-Exempt Organizations (Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related tax-exempt organizations during the tax year.)

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled organization	
						Yes	No
(1) THE TUOMEY FOUNDATION 115 N SUMTER ST SUITE 120 SUMTER, SC 29150 57-1041691	SUPPORT AND FUNDRAISING	SC	501(C)(3)	11A	N/A		No
(2) TUOMEY MEDICAL PROFESSIONALS INC 129 NORTH WASHINGTON ST SUMTER, SC 29150 57-1012460	HEALTHCARE	SC	501(C)(3)	11A	N/A		No
(3) TIMOTHY J TUOMEY TRUST 129 NORTH WASHINGTON ST SUMTER, SC 29150 23-7127466	SUPPORT AND FUNDRAISING	SC	501(C)(3)	11A	N/A		No

Part III **Identification of Related Organizations Taxable as a Partnership** (Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a partnership during the tax year.)

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512-514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) Disproportionate allocations? No	(i) Code V–UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) General or managing partner? No	(k) Percentage ownership
(1) CORE POSSIBILITIES LLC 129 NORTH WASHINGTON ST SUMTER, SC29150 20-8372814	HEALTHCARE	SC	N/A									

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust** (Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a corporation or trust during the tax year.)

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership
(1) TUOMEY PROFESSIONAL SERVICES LLC 129 NORTH WASHINGTON ST SUMTER, SC29150 20-1691464	HEALTH CARE SERVICES	SC	N/A	C			100 000 %

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Part V Transactions With Related Organizations (Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35, 35A, or 36.)

Note. Complete line 1 if any entity is listed in Parts II, III or IV

		Yes	No
1	During the tax year, did the orgranization engage in any of the following transactions with one or more related organizations listed in Parts II-IV?		
a	Receipt of (i) interest (ii) annuities (iii) royalties (iv) rent from a controlled entity	1a Yes	
b	Gift, grant, or capital contribution to other organization(s)	1b	No
c	Gift, grant, or capital contribution from other organization(s)	1c Yes	
d	Loans or loan guarantees to or for other organization(s)	1d	No
e	Loans or loan guarantees by other organization(s)	1e	No
f	Sale of assets to other organization(s)	1f	No
g	Purchase of assets from other organization(s)	1g	No
h	Exchange of assets	1h Yes	
i	Lease of facilities, equipment, or other assets to other organization(s)	1i Yes	
j	Lease of facilities, equipment, or other assets from other organization(s)	1j	No
k	Performance of services or membership or fundraising solicitations for other organization(s)	1k Yes	
l	Performance of services or membership or fundraising solicitations by other organization(s)	1l	No
m	Sharing of facilities, equipment, mailing lists, or other assets	1m Yes	
n	Sharing of paid employees	1n Yes	
o	Reimbursement paid to other organization for expenses	1o	No
p	Reimbursement paid by other organization for expenses	1p	No
q	Other transfer of cash or property to other organization(s)	1q Yes	
r	Other transfer of cash or property from other organization(s)	1r	No

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds

	(a) Name of other organization	(b) Transaction type(a-r)	(c) Amount involved	(d) Method of determining amount involved
(1)	See Additional Data Table			
(2)				
(3)				
(4)				
(5)				
(6)				

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Part VI **Unrelated Organizations Taxable as a Partnership** (Complete if the organization answered "Yes" on Form 990, Part IV, line 37.)

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization See instructions regarding exclusion for certain investment partnerships

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Are all partners section 501(c)(3) organizations?		(e) Share of end-of-year assets	(f) Disproportionate allocations?		(g) Code V—UBI amount in box 20 of Schedule K-1 (Form 1065)	(h) General or managing partner?	
			Yes	No		Yes	No		Yes	No

0433

Part VII **Supplemental Information**

Complete this part to provide additional information for responses to questions on Schedule R (see instructions)

Identifier	Return Reference	Explanation

Additional Data

Return to Form

Software ID:
Software Version:
EIN: 57-0343398
Name: TUOMEY

Form 990, Schedule R, Part V - Transactions With Related Organizations

	(a) Name of other organization	(b) Transaction type(a-r)	(c) Amount Involved ($)	(d) Method of determining amount involved
(1)	TUOMEY PROFESSIONAL SERVICES LLC	A	353,208	CASH
(2)	THE TUOMEY FOUNDATION	C	223,785	CASH
(3)	TUOMEY MEDICAL PROFESSIONALS	I	317,727	CASH
(4)	TUOMEY MEDICAL PROFESSIONALS	K	190,000	CASH
(5)	TUOMEY MEDICAL PROFESSIONALS	N	66,485	CASH
(6)	TUOMEY MEDICAL PROFESSIONALS	Q	3,432,646	CASH
(7)	TUOMEY PROFESSIONAL SERVICES LLC	Q	1,541,552	CASH

TUOMEY AND AFFILIATES
D/B/A TUOMEY
HEALTHCARE SYSTEM

Consolidated Financial Statements and
Supplemental Schedules

September 30, 2011 and 2010

(with Independent Auditors'
Report thereon)

TUOMEY AND AFFILIATES
d/b/a Tuomey Healthcare System

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September 30, 2011 and 2010

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DIXON HUGHES GOODMAN LLP

Independent Auditors' Report

Board of Trustees
Tuomey and Affiliates d/b/a Tuomey Healthcare System
Sumter, South Carolina

We have audited the accompanying consolidated balance sheets of Tuomey and Affiliates d/b/a Tuomey Healthcare System (the "System") as of September 30, 2011 and 2010 and the related consolidated statements of operations and changes in net assets, and cash flows for the years then ended. These consolidated financial statements are the responsibility of the System's management. Our responsibility is to express an opinion on these consolidated financial statements based on our audits.

We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. An audit includes consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the System's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the consolidated financial statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall consolidated financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the consolidated financial position of Tuomey and Affiliates d/b/a Tuomey Healthcare System as of September 30, 2011 and 2010 and the consolidated results of its operations and cash flows for the years then ended, in conformity with accounting principles generally accepted in the United States of America.

Our audits were conducted for the purpose of forming an opinion on the basic consolidated financial statements taken as a whole. The supplemental schedules consisting of the consolidating balance sheet information as of September 30, 2011 and the consolidating statement of operations information for the year then ended are presented for purposes of additional analysis and are not a required part of the basic consolidated financial statements. These schedules are the responsibility of the System's management. Such schedules have been subjected to the auditing procedures applied in our audits of the basic consolidated financial statements and, in our opinion, are fairly stated in all material respects in relation to the basic consolidated financial statements taken as a whole.

Dixon Hughes Goodman LLP

March 14, 2012

Praxity.

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidated Balance Sheets

	September 30 2011	2010
Assets		
Current assets		
Cash and cash equivalents	$ 9,187,435	$ 5,284,838
Patient accounts receivable, less allowance for uncollectible accounts of approximately $13,882,000 (2011) and $18,431,000 (2010)	27,268,869	31,561,185
Estimated third-party payor settlements	4,609	1,392,253
Inventories of drugs and supplies	4,465,863	5,031,800
Prepaid expenses	5,215,057	4,448,899
Other current assets	4,198,021	4,573,624
Due from Medicaid disproportionate share pool program	–	1,233,988
Assets whose use is limited, required for current liabilities	3,213	151
Total current assets	50,343,067	53,526,738
Assets whose use is limited, excluding amounts required for current liabilities	113,663,682	118,351,842
Property, plant, and equipment, net	97,608,908	100,676,423
Deferred charges and other assets, net	2,777,728	2,572,732
Total assets	$ 264,393,385	$ 275,127,735

(continued)

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidated Balance Sheets (continued)

	September 30 2011	2010
Liabilities and Net Assets		
Current liabilities		
Accounts payable	$ 7,051,196	$ 12,316,378
Accrued salaries, wages, and other current liabilities	9,674,959	8,649,877
Current portion of accrued postretirement benefit obligation	139,300	139,500
Interest payable	1,797,927	1,809,325
Current portion of long-term debt	3,165,000	10,541,210
Total current liabilities	21,828,382	33,456,290
Long-term debt, less current portion	92,145,029	95,344,173
Accrued postretirement benefit obligation, less current portion	36,692,552	29,130,359
Other long-term liabilities	1,790,000	1,790,000
Total liabilities	152,455,963	159,720,822
Net assets		
Unrestricted	106,896,279	110,365,770
Permanently restricted	5,041,143	5,041,143
Total net assets	111,937,422	115,406,913
Total liabilities and net assets	$264,393,385	$275,127,735

The accompanying notes are an integral part of these consolidated financial statements

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidated Statements of Operations and Changes in Net Assets

	Year Ended September 30	
	2011	2010
Unrestricted revenues and other support		
Net patient service revenue	$ 207,008,875	$ 207,800,929
Other operating revenue	2,703,335	2,022,105
Total unrestricted revenues and other support	209,712,210	209,823,034
Expenses		
Salaries and wages	76,335,059	73,683,774
Benefits	21,133,083	19,770,810
Physician fees	8,858,078	9,609,766
Other fees	13,654,076	16,370,267
Supplies	32,647,181	34,195,853
Utilities	3,241,820	3,416,229
Repairs and maintenance	6,557,220	6,011,492
Leases and rentals	3,789,240	3,302,386
Insurance	1,279,371	2,838,628
Interest	4,371,136	4,639,647
Depreciation and amortization	12,267,745	12,576,632
Provision for bad debts	13,211,162	13,036,969
Hospital tax	5,369,055	5,549,777
Other	1,518,528	1,630,042
Total expenses	204,232,754	206,632,272
Income from operations	5,479,456	3,190,762
Nonoperating gains (losses)		
Net investment income	1,713,407	5,599,307
Other nonoperating income	72,271	748,200
Other nonoperating expense	(2,667,352)	(5,885,029)
Total nonoperating gains (losses)	(881,674)	462,478
Excess of revenues and gains over expenses and losses	4,597,782	3,653,240
Change in net postretirement benefit obligation	(8,067,273)	(7,871,604)
Decrease in net assets	(3,469,491)	(4,218,364)
Net assets at beginning of year	115,406,913	119,625,277
Net assets at end of year	$ 111,937,422	$ 115,406,913

The accompanying notes are an integral part of these consolidated financial statements

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidated Statements of Cash Flows

	Year Ended September 30 2011	2010
Operating activities		
Decrease in net assets	$ (3,469,491)	$ (4,218,364)
Adjustments to reconcile decrease in net assets to net cash provided by operating activities		
Depreciation and amortization	12,267,745	12,576,632
Provision for bad debts	13,211,162	13,036,969
Gain on sale and disposal of property, plant, and equipment	(291,901)	–
Change in net postretirement benefit obligation	8,067,273	7,871,604
Changes in operating accounts		
Patient accounts receivable	(8,918,846)	(17,586,162)
Estimated third-party payor settlements	1,387,644	4,931,928
Inventories of drugs and supplies	565,937	221,369
Due from Medicaid disproportionate share pool program	1,233,988	(1,233,988)
Prepaid expenses and other assets	(690,376)	1,034,892
Accounts payable	(5,420,588)	(1,230,859)
Accrued salaries, wages, and other current liabilities	1,025,082	2,771,313
Interest payable	(11,398)	(53,781)
Accrued postretirement benefit obligation	(505,280)	775,089
Net cash provided by operating activities	18,450,951	18,896,642
Investing activities		
Purchase of property, plant, and equipment	(9,220,959)	(6,089,614)
Proceeds received on sale and disposal of property, plant, and equipment	528,717	–
Distribution from joint venture	–	8,715
Net changes in assets whose use is limited	4,685,098	(7,295,671)
Net cash used in investing activities	(4,007,144)	(13,376,570)
Financing activities		
Repayment of long-term debt	(10,541,210)	(2,885,147)
Net cash used in financing activities	(10,541,210)	(2,885,147)
Increase in cash and cash equivalents	3,902,597	2,634,925
Cash and cash equivalents at beginning of year	5,284,838	2,649,913
Cash and cash equivalents at end of year	$ 9,187,435	$ 5,284,838
Supplemental disclosure of noncash capital and financing activity		
Property, plant, and equipment included in accounts payable	$ 155,406	$ –

The accompanying notes are an integral part of these consolidated financial statements

1 **Significant Accounting Policies**

Organization and Principles of Consolidation - The consolidated financial statements of Tuomey and Affiliates d/b/a Tuomey Healthcare System (the "System") include the accounts of Tuomey, formerly known as Tuomey Regional Medical Center (the "Medical Center"), and its affiliates, Tuomey Medical Professionals, Inc ("TMP") and Tuomey Professional Services, LLC ("TPS") The Medical Center is a not-for-profit acute care hospital located in Sumter, South Carolina TMP was established by the Medical Center and consists of a group of physician practices that participate in the integrated health care delivery system TPS is a for profit entity that consists of physician practices

All significant intercompany accounts and transactions have been eliminated in consolidation

Use of Estimates - The preparation of consolidated financial statements in conformity with accounting principles generally accepted in the United States requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the consolidated financial statements Estimates also affect the reported amounts of revenues and expenses during the reporting period Actual results could differ from those estimates

Cash and Cash Equivalents - Cash and cash equivalents include certain investments in highly liquid debt instruments with original maturities of three months or less when purchased, excluding amounts whose use is limited by Board designation or funds held under trust agreements

The System maintains bank accounts at various financial institutions covered by the Federal Deposit Insurance Corporation ("FDIC") At times throughout the year, the System may maintain bank balances in excess of the FDIC insured limits It is management's opinion that the System is not exposed to any significant credit risk related to cash

Patient Accounts Receivable - The System provides services primarily to the residents of Sumter County, South Carolina and surrounding counties without collateral An allowance for uncollectible accounts is provided in an amount equal to the estimated losses to be incurred in collection of the receivables The allowance is based on historical collection experiences and a review of the current status of the existing receivables

Inventories of Drugs and Supplies - Inventories consisting of drugs and supplies are stated at the lower of cost, determined on the first-in, first-out ("FIFO") method, or market value

Investments - Investments in equity securities with readily determinable fair values, all investments in debt securities, and all pooled investments are measured at fair value in the consolidated balance sheets The System adopted the provisions of the *Fair Value Option for Financial Assets and Liabilities* As a result, investment income or loss (including realized and unrealized gains and losses on investments, interest, and dividends) are included in the excess of revenues over expenses unless the income or loss is restricted by donor or law

Assets Whose Use Is Limited - Assets whose use is limited include assets held by trustees under indenture or escrow agreements, designated assets set aside by the Board for future capital improvements, over which the Board retains control and may at its discretion subsequently use for other purposes, and assets restricted by a donor Amounts required to meet current liabilities of the System have been reclassified in the consolidated balance sheets and are included in current assets

Property, Plant, and Equipment - Property, plant, and equipment are recorded at cost or, if contributed, at fair value at date of contribution The cost of the depreciable assets is being amortized on the straight-line method over their estimated useful lives as recommended by the American Hospital Association Interest costs incurred on borrowed funds during the period of construction of capital assets are capitalized as a component of the cost of acquiring those assets

The System periodically assesses the realizability of its long-lived assets and evaluates such assets for impairment whenever events or changes in circumstances indicate the carrying amount of an asset may not be recoverable For assets to be held, impairment is determined to exist if estimated future cash flows, undiscounted and without interest charges, are less than the carrying amount For assets to be disposed of or sold, any resulting gains and losses are reported in income from operations

Deferred Charges and Other Assets - Deferred charges and other assets consist primarily of bond issuance costs and other receivables

Bond issuance costs are amortized over the respective lives of the bond issues Accumulated amortization at September 30, 2011 and 2010 was approximately $703,000 and $611,000, respectively

Bond Issue Discounts and Premiums - Bond issue discounts and premiums are amortized using the effective interest rate method over the respective lives of the bond issues Bond issue discounts and premiums are included in long-term debt on the consolidated balance sheets

Net Assets - A substantial portion of the System's net assets are classified as unrestricted for accounting and reporting purposes These resources have no donor restrictions as to use or purpose These resources include amounts generated from operations, undesignated gifts, and investments in property, plant, and equipment Permanently restricted net assets that have been restricted by donors are to be maintained by the System in perpetuity

Consolidated Statements of Operations and Changes in Net Assets - For purposes of display, transactions deemed by management to be ongoing, major, or central to the provision of healthcare services are reported as revenues and expenses Peripheral or incidental transactions are reported as nonoperating gains and losses Investment income or loss, unrestricted gifts, and bequests are recorded as nonoperating activities

Excess of Revenues Over Expenses - The consolidated statements of operations and changes in net assets includes excess of revenues and gains over expenses and losses which is considered by the System to be its operating indicator Changes in unrestricted net assets which are excluded from excess of revenues over expenses, consistent with industry practice, include permanent transfers of assets to and from affiliates, changes in the pension obligation, and contributions of long-lived assets (including assets acquired using contributions which by donor restriction were to be used for the purposes of acquiring such assets)

Net Patient Service Revenue - The System has agreements with third-party payors that provide for payments to the System at amounts different from its established rates Payment arrangements include prospectively determined rates per discharge, reimbursed costs, discounted charges, and per diem payments Net patient service revenue is recorded at the estimated net realizable amounts from patients, third-party payors, and others for services rendered, including estimated retroactive adjustments under reimbursement agreements with third-party payors Retroactive adjustments are accrued on an estimated basis in the period the related services are rendered and adjusted in future periods as final settlements are determined

Charity Care - The System provides care to patients who meet certain criteria under its charity care policy without charge or at amounts less than its established rates Because the System does not pursue collection of amounts determined to qualify as charity care, they are not reported as net patient service revenue or patient accounts receivable in the accompanying consolidated financial statements Charity care provided during the years ended September 30, 2011 and 2010, measured at established rates, was approximately $32,982,000 and $32,895,000, respectively

Donor-Restricted Gifts - Unconditional promises to give cash and other assets to the System are reported at fair value at the date the promise is received Conditional promises to give and indications of intentions to give are reported at fair value at the date the gift is received The gifts are reported as either temporarily or permanently restricted support if they are received with donor stipulations that limit the use of the donated asset When a donor restriction expires (i-e , when a stipulated time restriction ends or purpose restriction is accomplished), temporarily restricted net assets are reclassified as unrestricted net assets and reported in the consolidated statement of operations and changes in net assets as net assets released from restrictions Donor-restricted contributions whose restrictions are met within the same year as received are reported as unrestricted contributions in the accompanying consolidated financial statements

Pension Costs - The System's funding policy is to contribute amounts sufficient to meet the minimum funding requirements as set forth in the Employee Retirement Income Security Act of 1974 ("ERISA"), plus such additional amounts as the System may determine to be appropriate

Functional Expenses - The System does not present expense information by functional classification because its resources and activities are primarily related to providing health care services Further, since the System receives substantially all of its resources from providing health care services in a manner similar to a business enterprise, other indicators contained in these consolidated financial statements are considered more important in evaluating how well management has discharged its stewardship responsibilities

Income Taxes - The Medical Center and TMP are exempt from income tax under Section 501(a) as organizations described in Section 501(c)(3) of the Internal Revenue Code, accordingly, the accompanying consolidated financial statements do not reflect a provision or liability for federal and state income taxes TPS is a for-profit entity that is not exempt from income taxes The System has determined that it does not have any material unrecognized tax benefits or obligations as of September 30, 2011 Fiscal years ending on or after September 30, 2008 remain subject to examination by federal and state tax authorities

Risk Management - The System is exposed to various risks of loss from torts, theft of, damage to, and destruction of assets, business interruption, errors and omissions, employee injuries and illnesses, and natural disasters Commercial insurance coverage is purchased for claims arising from such matters

Reclassification - Certain amounts in the fiscal year 2010 consolidated financial statements have been reclassified to conform to the fiscal year 2011 presentation

2 **Net Patient Service Revenue**

The System has agreements with third-party payors that provide for payments to the System at amounts different from its established rates A summary of the payment arrangements with major third-party payors follows

Medicare—Inpatient acute care services rendered to Medicare program beneficiaries are paid at prospectively determined rates per discharge These rates vary according to a patient classification system that is based on clinical, diagnostic, and other factors Outpatient services are reimbursed on a prospective payment system, called the Ambulatory Payment Classification System ("APCS") The System's Medicare cost reports have been audited by the Medicare fiscal intermediary through September 30, 2006

Medicaid—Inpatient services rendered to Medicaid program beneficiaries are reimbursed using a payment per discharge system with the case-mix adjustments based on a Diagnosis Related Group ("DRG") system Outpatient Medicaid services are reimbursed at a certain percentage of allowable costs In 2011, Medicaid will be reducing reimbursement to Hospital providers due to decreases in governmental funding and recent healthcare reform The System is reimbursed at a tentative rate with final settlement determined after it submits its annual Medicaid cost report The System's Medicaid cost reports have been audited by the Medicaid program through September 30, 2004

The System has also entered into payment agreements with certain commercial insurance carriers, health maintenance organizations, and preferred provider organizations The bases for payments to the System under these agreements include prospectively determined rates per discharge, discounts from established charges, and prospectively determined daily rates

Revenue from the Medicare and Medicaid programs accounted for approximately 52 percent and 56 percent of the System's net patient service revenue, respectively, for the years ended September 30, 2011 and 2010 Laws and regulations governing the Medicare and Medicaid programs are extremely complex and subject to interpretation As a result, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term The filed cost reports are subject to audits, reviews, and investigations The 2011 net patient service revenue increased approximately $1,340,000

due to changes in the allowances previously estimated for tentative cost report settlements The 2010 net patient service revenue decreased approximately $1,458,000 due to changes in the allowances previously estimated for tentative cost report settlements

Contractual adjustments related to Medicare and Medicaid programs and other deductions were deducted from gross patient service charges to arrive at net patient service revenue as follows

	2011	2010
Gross patient service charges	$ 554,655,888	$ 528,177,189
Deductions from gross patient service charges		
Medicare and Medicaid contractual adjustments	219,778,971	216,544,609
Other deductions	127,868,042	103,831,651
Total deductions from gross patient service charges	347,647,013	320,376,260
Net patient service revenue	$ 207,008,875	$ 207,800,929

During 2011 and 2010, the System received monies under the Medicaid Disproportionate Share Pool Program (the "Program") Under the Program, the System received payments totaling approximately $9,823,000 and $8,194,000 in 2011 and 2010, respectively As of September 30, 2011 and 2010, approximately $- and $1,234,000, respectively, is receivable from the Program The revenue received under the Program is determined by state Medicaid guidelines, which are subject to change, thereby causing volatility in the revenue received under the Program Payments of disproportionate share funds in the future may be impacted by Medicaid reform initiatives

3 **Assets Whose Use Is Limited**

The composition of assets whose use is limited at September 30 is set forth in the following table

	2011	2010
Board designated		
Common trust funds	$ 36,350,226	$ 24,192,974
Cash and cash equivalents	10,801	178,868
Money market funds	-	2,506,453
U S treasury bonds and notes	64,165	6,173,689
U S government agencies	131,342	4,195,548
Mutual funds	7,621	-
Life insurance annuity	91,128	-
Equities	112,678	129,403
Corporate obligations	64,817	13,336,883
	$ 36,832,778	$ 50,713,818

	2011	2010
Funds held by Trustee		
Cash and cash equivalents	$ 236,698	$ 7,529,601
Money market funds	49,551,297	49,462,888
Series 2008 Revenue and Refunding Bonds	16,440,000	-
U S treasury bonds and notes	5,564,979	5,604,543
	71,792,974	62,597,032
Restricted by donor		
Cash and cash equivalents	112,835	242,101
U S treasury bonds and notes	670,322	1,128,411
U S government agencies	1,372,108	1,705,044
Mutual funds	79,615	-
Life insurance annuity	952,001	-
Equities	1,177,133	1,074,948
Corporate obligations	677,129	890,639
	5,041,143	5,041,143
	$ 113,666,895	$ 118,351,993

Net investment income is comprised of the following for the years ended September 30

	2011	2010
Interest and dividend income	$ 586,913	$ 1,807,505
Net realized and unrealized gains (losses) on investments	(2,997,301)	2,071,626
Other investment income	4,123,795	1,720,176
Net investment income	$ 1,713,407	$ 5,599,307

4 Property, Plant, and Equipment

Property, plant, and equipment consist of the following at September 30

	2011	2010
Land	$ 9,419,642	$ 9,656,457
Land improvements	972,581	979,964
Buildings	44,618,694	44,960,680
Building service equipment	85,350,947	86,025,490
Equipment	42,692,254	45,007,744
	183,054,118	186,630,335
Less accumulated depreciation	90,623,687	87,872,823
	92,430,431	98,757,512
Construction in progress	5,178,477	1,918,911
	$ 97,608,908	$ 100,676,423

Depreciation expense for the years ended September 30, 2011 and 2010 was approximately $12,207,000 and $12,498,000, respectively

The System has entered into a contract related to a software upgrade The total contract committed to by the System is approximately $2,628,000 As of September 30, 2011, the System has paid approximately $2,457,000 The software upgrade is estimated to be completed in fiscal year 2012

The System has entered into a contract related to facility renovations The total contract committed to by the System is approximately $613,000 As of September 30, 2011, the System has paid approximately $551,000 The renovations are expected to be completed in fiscal year 2012

5 Capital Contribution Campaign

The Tuomey Foundation Board of Governors voted in December 2005 to embark on a two year capital campaign for the creation of a free standing women's center which would expand and enhance the nurseries and increase the number of beds at the System from 266 to 301 The campaign had raised approximately $2,918,000 as of September 30, 2011 At September 30, 2011 and 2010, approximately $1,074,000 and $1,088,000, respectively, was included in other assets on the consolidated balance sheets

6 Long-Term Debt

A summary of long-term debt at September 30 follows

	2011	2010
Hospital Revenue Bonds		
Series 2008		
Variable rate bonds maturing 2021 to 2025, bearing interest determined weekly, payable semi-annually	$ 16,440,000	$ 16,440,000
Series 2006		
Term bonds maturing 2005 to 2035, bearing interest from 4 00% to 5 00%, payable semi-annually	55,515,000	65,500,000
Series 1998		
Term bonds maturing 2005 to 2026, bearing interest from 4 30% to 5 00%, payable semi-annually	22,135,000	22,675,000
Other long-term debt	-	16,210
Add (less) unamortized original issue premium/discount		
Series 2006 term bonds	1,697,540	1,764,241
Series 1998 term bonds	(477,511)	(510,068)
Total long-term debt	95,310,029	105,885,383
Less current portion	3,165,000	10,541,210
	$ 92,145,029	$ 95,344,173

During 1998, the Hospital Revenue Bonds, Series 1998 ("Series 1998") were issued by the South Carolina Jobs-Economic Development Authority The Series 1998 are limited obligations of the South Carolina Jobs-Economic Development Authority and are payable and secured solely from the receipts and revenues of the System The Series 1998 bonds are insured by Ambac Assurance Corporation The Series 1998 bonds began to mature in 2005 and are subject to redemption rates at 100% of par value after November 1, 2010 The principal and sinking fund payments on the Series 1998 maturing in 2018 and 2026 are due on November 1 of each year as follows $575,000 in 2012, $605,000 in 2013, $645,000 in 2014, $680,000 in 2015, $720,000 in 2016, and $18,910,000 thereafter

On January 6, 2006, the Medical Center issued $74,505,000 of South Carolina Jobs-Economic Development Authority Hospital Revenue and Refunding Bonds, Series 2006 ("Series 2006") The proceeds of the Series 2006 bonds were used to refund in advance of their maturities the Series 1995A bonds, finance the expansion of the patient tower, fund a debt service reserve fund, pay in trust on the Series 2006 bonds through November 1, 2007, and finance certain costs of issuance, including a premium for bond issuance The Series 2006 bonds are secured by a pledge of revenues of the System and a mortgage in the Medical Center property The Series 2006 bonds maturing on November 1, 2030 and November 1, 2035 are subject to a mandatory sinking fund redemption beginning in years

2027 through 2035, ranging in amounts from $2,795,000 to $4,055,000 Included in current maturities at September 30, 2010 is approximately $7,500,000 of unused bond proceeds from the Series 2006 bonds that was paid back by the Medical Center in 2011 The Series 2006 bonds are insured by CIFG Assurance North America

On December 1, 2008, the Medical Center issued $16,440,000 of South Carolina Jobs-Economic Development Authority Hospital Revenue and Refunding Bonds, Series 2008 ("Series 2008") The proceeds of the Series 2008 bonds were used to refund in advance of their maturities the Series 1995B bonds The Series 2008 bonds are secured by a pledge of revenues of the Medical Center and by a letter of credit totaling $16,623,768 at September 30, 2011 Under the terms of the agreement, all drawings under the letter of credit are due to the bank immediately upon withdrawal and accrue interest at the prime rate plus three percent In November 2010, the letter of credit related to the Series 2008 bonds expired At this time, the System repurchased the $16,440,000 Series 2008 bonds The Series 2008 bonds are held in assets whose use is limited on the consolidated balance sheets

Pursuant to its respective bond indentures and loan agreements, the Medical Center is subject to certain restrictive covenants, including maintaining a specific ratio of income available for debt service to maximum annual debt service, limiting the amount of additional indebtedness, and restrictions on the disposal of fixed assets In addition, the financing agreements contain restrictions or limitations with respect to indebtedness, property encumbrance, consolidation, or merger and transfer of assets, and, the Medical Center has agreed that it will not create any lien upon its property, accounts, or revenue now owned or hereafter acquired other than "permitted liens" as described in the loan documents

The maturities of long-term debt are as follows

Maturity Date	2008 Bonds	2006 Bonds	1998 Bonds
2012	$ -	$ 2,590,000	$ 575,000
2013	-	2,720,000	605,000
2014	-	2,845,000	645,000
2015	-	2,985,000	680,000
2016	-	3,130,000	720,000
Thereafter	16,440,000	41,245,000	18,910,000
	$ 16,440,000	$ 55,515,000	$ 22,135,000

Interest paid amounted to approximately $4,383,000 in 2011 and $4,693,000 in 2010

7 Pension Plan

The System follows the provisions of *Employer's Accounting for Defined Benefit Pension and Other Postretirement Plans* and its application is fully reflected in the consolidated financial statements The pronouncement requires the funding deficit or surplus of pension and postretirement benefit plans to be recognized in the sponsoring employer's consolidated balance sheet, with a corresponding adjustment to unrestricted net assets The adjustment to unrestricted net assets at adoption represents the net unrecognized actuarial losses, unrecognized prior service costs and unrecognized transition obligations which were previously netted against the plan's funded status in the consolidated balance sheet These amounts will be subsequently recognized as a net periodic benefit cost pursuant to the Systems' historical accounting policy for amortizing such amounts Further, actuarial gains and losses that arise in subsequent periods and are not recognized as net periodic benefit cost in the same periods will be recognized as a component of unrestricted net assets Those amounts will be subsequently recognized as a component of net periodic benefit cost on the same basis as the amounts recognized in unrestricted net assets upon adoption of the provisions

Effective December 31, 2009, the System froze its Defined Benefit Plan and replaced it with a Defined Contribution Plan No further benefits will accrue to the employees after December 31, 2009

The following table sets forth the plan's funded status and amounts recognized in the accompanying consolidated balance sheets

	2011	2010
Change in projected benefit obligation		
Benefit obligation at beginning of year	$ 65,401,711	$ 57,224,889
Service cost	-	600,688
Interest cost	3,295,008	3,145,302
Actuarial loss	5,071,038	5,901,684
Benefits paid	(1,619,821)	(1,470,852)
Benefit obligation at end of year	72,147,936	65,401,711
Change in plan assets		
Fair value of plan assets at beginning of year	44,390,652	42,152,123
Actual return on plan assets	676,641	3,709,381
Benefits paid	(1,619,821)	(1,470,852)
Employer contributions	1,000,212	-
Fair value of plan assets at end of year	44,447,684	44,390,652
Funded status of the plan	$ (27,700,252)	$ (21,011,059)

	2011	2010
Weighted average assumptions		
Used to determined benefit obligations		
Discount rate	4 63%	5 10%
Rate of annual compensation increases	N/A	N/A
Measurement date	9/30/2011	9/30/2010
Used to determine net periodic benefit cost		
Discount rate	5 10%	5 57%
Rate of increase in compensation levels	N/A	2 00%
Expected long-term rate of return on assets	8 00%	7 50%
Measurement date	9/30/2010	9/30/2009
Net periodic benefit cost		
Service cost	$ -	$ 600.688
Interest cost	3.295.008	3.145.302
Expected return on plan assets	(3.527.811)	(3.104.949)
Amortization of actuarial (gain)/loss	274.335	203.548
Net periodic pension cost	$ 41.532	$ 844.589

Asset Allocation

	Target Allocation	Percentage of Plan Assets as of September 30, 2011	September 30, 2010
Cash and cash equivalents	3%	1%	1%
Fixed income securities	35	53	52
Equity securities	62	46	47
Total	100%	100%	100%

The following table presents the fair value of the plan's investments, along with the level within the fair value hierarchy for the investments as of September 30, 2011

		Fair value measurements at September 30, 2011 using		
	Fair value at September 30, 2011	Quoted prices in active markets for identical assets (Level 1 inputs)	Quoted prices for similar assets (Level 2 inputs)	Significant unobservable inputs (Level 3 inputs)
Assets measured at fair value				
Money market funds	$ 174,123	$ 174,123	$ -	$ -
Fixed income securities				
U S treasury bonds	2,210,146	2,210,146	-	-
U S corporate bonds	21,419,013	21,419,013	-	-
Equities				
U S large cap	14,035,002	14,035,002	-	-
U S mid cap	1,286,063	1,286,063	-	-
U S small cap	2,885,119	2,885,119	-	-
International	2,438,218	2,438,218	-	-
Total assets at fair value	$ 44,447,684	$ 44,447,684	$ -	$ -

The following table presents the fair value of the plan's investments, along with the level within the fair value hierarchy for the investments as of September 30, 2010

		Fair value measurements at September 30, 2010 using		
	Fair value at September 30, 2010	Quoted prices in active markets for identical assets (Level 1 inputs)	Quoted prices for similar assets (Level 2 inputs)	Significant unobservable inputs (Level 3 inputs)
Assets measured at fair value				
Money market funds	$ 534,032	$ 534,032	$ -	$ -
Fixed income securities	23,033,310	-	23,033,310	-
Equities	20,823,310	20,823,310	-	-
Total assets at fair value	$ 44,390,652	$ 21,357,342	$ 23,033,310	$ -

Investment Policy and Strategy - The System's policy, as established by the Pension Committee, is to provide for growth of capital with a moderate level of volatility by investing in a balanced portfolio The actual asset allocation of the overall plan assets, as well as the performance of the individual managers, is reviewed by the Pension Committee on a quarterly basis

Determination of Expected Long-Term Rate of Return - The plan's long-term rate of return assumption of 8 00% is based on expectations regarding each asset category and average long-term rate of returns for a portfolio allocated across these categories

Contributions – Expected contributions for the fiscal year ending September 30, 2012 are approximately $1,532,000

Estimated Future Benefit Payments – The following benefit payments reflecting future services are expected to be paid as follows

2012	$ 1,841,263
2013	2,059,352
2014	2,278,327
2015	2,481,123
2016	2,704,718
2017 – 2021	17,445,207
	$ 28,809,990

8 Postretirement Benefits

In addition to the System's noncontributory defined benefit pension plan, the System sponsors a defined benefit health care plan that provides postretirement medical and dental benefits to eligible employees and/or dependents The availability of group coverage for Medicare eligible retirees varies by employee group with coverage designed either to supplement or coordinate with Medicare Retirees must pay a portion of the cost of the coverage

The following table sets forth the plan's funded status and amounts recognized in the accompanying consolidated balance sheets

	2011	2010
Change in projected benefit obligation		
Benefit obligation at beginning of year	$ 8,258,800	$ 5,410,900
Service cost	388,500	252,800
Interest cost	436,400	297,400
Plan participants' contributions	226,200	201,600
Medicare Part D reimbursements	10,200	36,600
Actuarial loss	355,500	2,573,100
Benefits paid	(544,000)	(513,600)
Benefit obligation at end of year	9,131,600	8,258,800
Change in plan assets		
Fair value of plan assets at beginning of year	-	-
Employer contributions	307,600	275,400
Medicare Part D reimbursements	10,200	36,600
Plan participants' contributions	226,200	201,600
Benefits paid	(544,000)	(513,600)
Fair value of plan assets at end of year	-	-
Funded status of the plan	$ (9,131,600)	$ (8,258,800)

	2011	2010
Weighted average assumptions		
Used to determined benefit obligations		
Discount rate	4 82%	5 33%
Initial medical trend rate	8 50%	9 00%
Ultimate medical trend rate	5 00%	5 00%
Years from initial to ultimate trend	7	8
Dental trend rate	6 00%	6 00%
Measurement date	9/30/2011	9/30/2010
Used to determine net periodic benefit cost		
Discount rate	5 33%	5 55%
Initial medical trend rate	9 00%	7 50%
Ultimate medical trend rate	5 00%	5 00%
Years from initial to ultimate trend	8	5
Dental trend rate	6 00%	6 00%
Measurement date	9/30/2010	9/30/2009

	2011	2010
Net periodic benefit cost		
Service cost	$ 388,500	$ 252,800
Interest cost	436,400	297,400
Amortization of prior service costs	(338,600)	(338,800)
Amortization of actuarial loss	274,700	134,000
Net periodic pension cost	$ 761,000	$ 345,400

The medical trend rate assumption has a significant effect on the amounts reported For example, increasing the assumed medical trend rate by one percentage point in each year would increase the accumulated postretirement benefit obligation as of September 30, 2011 by approximately $2,468,400 and the aggregate of the service and interest cost components of the net periodic postretirement benefit cost for the year ended September 30, 2011 by approximately $260,200

Contributions - Expected contributions for the fiscal year ending September 30, 2012 are approximately $142,600

Estimated Future Benefit Payments – The following benefit payments reflecting future services are expected to be paid net of employee contributions as follows

2012	$ 188,500
2013	206,700
2014	226,200
2015	256,500
2016	288,300
2017 – 2021	2,098,800
	$ 3,265,000

9 Other Employee Benefits

The Medical Center has a retirement savings plan under Section 403(b) of the Internal Revenue Code Employees are eligible to participate on their first date of employment The Medical Center determines its contribution to the 403(b) plan based on employee contribution levels, years of service, and hours worked As of September 30, 2011 and 2010, the Medical Center has accrued approximately $2,250,000 and $2,305,000 respectively, in accrued salaries, wages, and other current liabilities on the consolidated balance sheets for plan contributions

In addition to the Medical Center's noncontributory defined benefit pension plan, 403(b) plan, and medical and dental postretirement benefits, the Medical Center also sponsors a 457(f) plan for executives As of September 30, 2011 and 2010, approximately $1,626,000 and $1,572,000, respectively, is included in the Systems' other current assets on the consolidated balance sheets No liabilities were recorded because certain eligibility requirements have not been met

10 Foundation

The Tuomey Foundation (the "Foundation") was created for the sole benefit of the System and has a calendar year end The summarized unaudited financial information of the Foundation as of the years September 30, 2011 and 2010 are as follows

	2011	2010
Total assets	$ 5,230,262	$ 4,845,330
Total liabilities	1,593,824	1,154,100
Net assets	3,636,438	3,691,230
Revenues	1,176,173	2,998,299
Expenses	1,230,965	3,192,922
Deficit of revenues over expenses	$ (54,792)	$ (194,623)

As of September 30, 2011 and 2010, the Foundation owed $1,594,000 and $1,154,100, respectively, to the System for items purchased on the Foundation's behalf and pledges received by the Foundation for the System These receivables are recorded in other current assets on the System's consolidated balance sheets

11 Concentrations of Credit Risk

Financial instruments that potentially subject the System to a concentration of credit risk consist principally of cash and cash equivalents, investments, and accounts receivable from patients and third-party payors It is management's opinion that the System is not exposed to any significant credit risk related to cash Concentration of credit risk with respect to patient accounts receivable is managed by an in-house credit staff Third-party payors are primarily Medicare and Medicaid which provide reimbursement on patient accounts on a regular basis Managed care receivables are distributed among several primary payors The creditworthiness of managed care payors is considered by the System prior to entering into an agreement with the payor

The System grants credit, without collateral to its patients, most of whom are local residents and insured under third-party payor agreements The mix of receivables from patients and third-party payors at September 30 was as follows

	2011	2010
Medicare	37%	34%
Medicaid	18	19
Blue Cross	16	15
Patient	19	15
Other	10	17
	100%	100%

12 **Commitments and Contingencies**

Operating Leases - The System leases certain equipment and facilities used in its operations under operating leases, which have noncancelable terms in excess of one year Total rent expense in 2011 and 2010 for all operating leases was approximately $4,480,000 and $3,936,000, respectively These leases, which have been accounted for as operating leases, have future minimum annual lease payments as follows

2012	$ 2,268,131
2013	2,060,339
2014	1,795,618
2015	1,422,101
2016	1,111,698
Thereafter	6,330,858
	$ 14,988,745

Medical Malpractice Claims - The System participates in a multiprovider captive for professional and general liability insurance coverage on a claims made basis The System's premiums are accrued based on the experience to date of the participating health care providers The System would be subject to retroactive premium adjustments should the captive's loss experience exceed premiums

The System has an irrevocable letter of credit in favor of the captive at September 30, 2011 of $408,937 The letter of credit expires October 20, 2012 There were no borrowings under the letter of credit at September 30, 2011

Malpractice claims have been asserted against the System by various claimants, and additional claims could be asserted for incidents occurring through September 30, 2011 At September 30, 2011 and 2010, management is aware of no significant claims that are not adequately covered by insurance or that would have a material adverse effect on the consolidated balance sheet of the System An accrual has been established for an estimate of incurred but not reported claims in accrued salaries, wages, and other current liabilities on the consolidated balance sheets

Litigation - The System is involved in litigation and regulatory investigations arising in the normal course of business After consultation with legal counsel, management estimates that these matters will be resolved without material adverse effect on the System's consolidated balance sheet or consolidated statement of operations and changes in net assets

The System is currently a defendant in a civil suit brought by a physician on its medical staff under the qui tam provisions of the federal False Claims Act ("FCA") The suit alleges that the System violated the FCA as a result of part-time employment contracts between the System and certain other physicians on its medical staff The United States Government intervened in the suit After a three week trial in federal court, the jury rendered a verdict that the System did not violate the FCA However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651 The court also granted the Government a new trial on its FCA claims The System has appealed the trial court's equitable judgment to the Fourth Circuit Court of Appeals The trial court stayed its judgment pending appeal but required the System to place $49,384,687 into escrow pending appeal The trial court also stayed its new trial order pending the outcome of the appeal On January 20, 2012 Tuomey presented its oral arguments to support its appeal before a three judge panel of the Fourth Circuit Court of Appeals

The escrow agreement required by the trial court is between the System and an unrelated financial institution During August 2010, the System transferred $49,384,687 to be held by the trustee The escrow agreement funds are held in assets whose use is limited and are reflected in unrestricted net assets on the consolidated balance sheet All investment income earned is restricted and any losses are the responsibility of the System to repay The escrow funds can only be held in U S backed securities with maturities of less than six months

Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2011 and 2010 As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term

Industry Regulation - The health care industry is subject to numerous laws and regulations of federal, state and local governments These laws and regulations include, but are not necessarily limited to, matters such as licensure, accreditation, government health care program participation requirements, reimbursement for patient services, and Medicare and Medicaid fraud and abuse Recently, government activity has increased with respect to investigations and allegations concerning possible violations of fraud and abuse statutes and regulation by health care providers Violations of these laws and regulations could result in expulsion from government health care programs together with the imposition of significant fines and penalties, as well as significant repayments for patient services billed

13 **Related Party Transactions**

The System has a banking relationship with a financial institution that employs the Systems' chairman of the board

The System has physicians that serve on the board that provide medical services totaling approximately $1,008,000 and $1,180,000 for 2011 and 2010, respectively The System also purchased approximately $337,000 and $- in 2011 and 2010, respectively, of assets from physicians that serve on the board

14 **Endowment Funds**

The Medical Center's endowment consists of one donor-restricted endowment fund

Interpretation of Relevant Law -The Board of Trustees of the Medical Center has interpreted the State Prudent Management of Institutional Funds Act ("SPMIFA") as requiring the preservation of the fair value of the original gift as of the gift date of the donor-restricted endowment funds absent explicit donor stipulations to the contrary As a result of this interpretation, the Medical Center classifies as permanently restricted net assets the original value of gifts donated to the permanent endowment

In accordance with SPMIFA, the System considers the following factors in making a determination to appropriate or accumulate donor-restricted endowment funds

- The duration and preservation of the fund
- The purposes of the organization and the donor-restricted endowment fund
- General economic conditions
- The possible effect of inflation and deflation
- The expected total return from income and the appreciation of investments
- Other resources of the organization
- The investment policies of the organization

Changes in Endowment Net Assets – The change in endowment net assets for the year ended September 30, 2011 is as follows

	Unrestricted	Permanently Restricted	Total
Endowment net assets, beginning of year	$ 606,854	$ 5,041,143	$ 5,647,997
Investment loss, net	(49,302)	-	(49,302)
Distribution	(75,000)	-	(75,000)
Endowment net assets, end of year	$ 482,552	$ 5,041,143	$ 5,523,695

The change in endowment net assets for the year ended September 30, 2010 is as follows

	Unrestricted	Permanently Restricted	Total
Endowment net assets, beginning of year	$ 300,438	$ 5,041,143	$ 5,341,581
Investment income, net	381,416	-	381,416
Distribution	(75,000)	-	(75,000)
Endowment net assets, end of year	$ 606,854	$ 5,041,143	$ 5,647,997

Return Objectives and Risk Parameters - The Medical Center has adopted an investment policy that will reduce volatility and prudently maximize total return for the long term The trustees have agreed to place 70% of the funds in a fixed income portfolio and 30% of the funds in an equity portfolio

15 **Fair Value of Financial Instruments**

The *Fair Value Measurements* Standard defines fair value, establishes a framework for measuring fair value, and expands disclosures about fair value measurements The provision does not require any new fair value measurements, but clarifies and standardizes some divergent practices that have emerged since prior guidance was issued The provision creates a three-level hierarchy under which individual fair value estimates are to be ranked based on the relative reliability of the inputs used in the valuation

The provision defines fair value as the price that would be received to sell an asset or transfer a liability in an orderly transaction between market participants at the measurement date When determining the fair value measurements for assets and liabilities, the System considers the principal or most advantageous market in which those assets or liabilities are sold and considers assumptions that market participants would use when pricing those assets or liabilities Fair values determined using level 1 inputs rely on active and observable markets to price identical assets or liabilities In situations where identical assets and liabilities are not traded in active markets, fair values may be determined based on level 2

inputs, which exist when observable data exists for similar assets and liabilities Fair values for assets and liabilities that are not actively traded in observable markets are based on level 3 inputs, which are considered to be unobservable

Among the System's assets were various investments that were reported at their fair values on a recurring basis

For assets carried at fair value, the following tables provide fair value information as of September 30, 2011 and 2010

		Fair value measurements at September 30, 2011 using		
Assets measured at fair value	Fair value at September 30, 2011	Quoted prices in active markets for identical assets (Level 1 inputs)	Quoted prices for similar assets (Level 2 inputs)	Significant unobservable inputs (Level 3 inputs)
Money market funds	$ 49,551,297	$ 49,551,297	$ -	$ -
Common trust funds	36,350,226	-	36,350,226	-
U S equity mutual funds	87,236	87,236	-	-
U S treasury bonds and notes	6,299,466	6,299,466	-	-
U S government agencies	1,503,450	1,503,450	-	-
Series 2008 Revenue and Refunding Bonds	16,440,000	16,440,000	-	-
Equities				
Large cap	1,242,547	1,242,547	-	-
Mid cap	36,212	36,212	-	-
Small cap	11,052	11,052	-	-
Corporate obligations	741,946	741,946	-	-
Total assets at fair value	$ 112,263,432	$ 75,913,206	$ 36,350,226	$ -

Assets whose use is limited, described in Note 3, are held at fair value and included in the table above except cash and cash equivalents totaling $360,334 and life insurance annuities totaling $1,043,129

		Fair value measurements at September 30, 2010 using		
	Fair value at September 30, 2010	Quoted prices in active markets for identical assets (Level 1 inputs)	Quoted prices for similar assets (Level 2 inputs)	Significant unobservable inputs (Level 3 inputs)
Assets measured at fair value				
Money market funds	$ 51,969,341	$ 51,969,341	$ -	$ -
Common trust funds	24,192,974	-	24,192,974	-
U S treasury bonds and notes	12,906,643	12,906,643	-	-
U S government agencies	5,900,592	5,900,592	-	-
Equities	1,204,351	1,204,351	-	-
Corporate obligations	14,227,522	14,227,522	-	-
Total assets at fair value	$ 110,401,423	$ 86,208,449	$ 24,192,974	$ -

Prices for money market funds, mutual funds, U S. treasury bonds and notes, U S government agencies, 2008 Series Revenue and Refunding bonds, equities, and corporate obligations are readily available in the active markets in which those securities are traded, and the resulting fair values are shown in the 'Level 1 input' column The System has determined that small cap equities have market capitalization less than $2 billion, Mid cap equities have market capitalization of between $2 billion and $10 billion, and large cap have market capitalization over $10 billion Common trust funds are not traded on active markets, and therefore the resulting fair values are shown in the 'Level 2 input' column

The following methods and assumptions were used by the System in estimating the fair value of its financial instruments

- *Cash and cash equivalents* The carrying amounts reported in the consolidated balance sheets for cash and cash equivalents approximate their fair value

- *Assets whose use is limited* These assets consist primarily of cash, investments, and interest receivable As discussed in Note 1, the carrying values of investments at September 30, 2011 and 2010 approximate their fair value

- *Accounts payable and accrued expenses* The carrying amounts reported in the consolidated balance sheets for accounts payable and accrued expenses approximate their fair value

- *Estimated third-party payor settlements* The carrying amounts reported in the consolidated balance sheets for these settlements approximate their fair value

- *Long-term debt* Fair values for the 1998, 2006, and 2008 Bonds are based on estimates using present value techniques These techniques involve uncertainties and are significantly affected by the assumptions used and the judgments made regarding risk characteristics of various financial instruments, discount rates, prepayments, and estimates of future cash flows, future expected loss experience, and other factors Changes in assumptions could significantly affect these estimates Derived fair value estimates cannot be substantiated by comparison of independent markets and, in many cases, may or may not be realized in an immediate sale of the instrument The fair value of the 1998, 2006, and 2008 Bonds, described in Note 6, is estimated to be approximately $92,026,000 at September 30, 2011

16 **Subsequent Events**

Subsequent events have been evaluated through March 14, 2012, which is the date the consolidated financial statements were available to be issued

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidating Balance Sheet Information

September 30, 2011

	Medical Center	TMP	TPS	Consolidation/ Eliminations	Total
Assets					
Current assets					
Cash and cash equivalents	$ 8,988,449	$ 109,161	$ 89,825	$ -	$ 9,187,435
Patient accounts receivable, less allowance for uncollectible accounts of approximately $13,882,000	25,820,743	1,097,960	350,166	-	27,268,869
Estimated third-party payor settlements	4,609	-	-	-	4,609
Inventories of drugs and supplies	4,465,863	-	-	-	4,465,863
Prepaid expenses	4,367,386	701,609	146,062	-	5,215,057
Other current assets	32,042,616	424,771	5,615	(28,274,981)	4,198,021
Assets whose use is limited, required for current liabilities	3,213	-	-	-	3,213
Total current assets	75,692,879	2,333,501	591,668	(28,274,981)	50,343,067
Assets whose use is limited, excluding amounts required for current liabilities	113,663,682	-	-	-	113,663,682
Property, plant, and equipment, net	96,159,320	735,744	713,844	-	97,608,908
Deferred charges and other assets, net	2,777,728	-	-	-	2,777,728
Total assets	$ 288,293,609	$ 3,069,245	$ 1,305,512	$ (28,274,981)	$ 264,393,385

(continued)

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

Consolidating Balance Sheet Information (continued)

September 30, 2011

	Medical Center	TMP	TPS	Consolidation/ Eliminations	Total
Liabilities and net assets					
Current liabilities					
Accounts payable	$ 6,921,082	$ 10,860	$ 119,254	$ –	$ 7,051,196
Accrued salaries, wages, and other current liabilities	9,526,720	12,032,291	16,390,929	(28,274,981)	9,674,959
Current portion of accrued postretirement benefit obligation	139,300	–	–	–	139,300
Interest payable	1,797,927	–	–	–	1,797,927
Current portion of long-term debt	3,165,000	–	–	–	3,165,000
Total current liabilities	21,550,029	12,043,151	16,510,183	(28,274,981)	21,828,382
Long-term debt, less current portion	92,145,029	–	–	–	92,145,029
Accrued postretirement benefit obligation, less current portion	36,692,552	–	–	–	36,692,552
Other long-term liabilities	1,790,000	–	–	–	1,790,000
Total liabilities	152,177,610	12,043,151	16,510,183	(28,274,981)	152,455,963
Net assets					
Unrestricted	131,074,856	(8,973,906)	(15,204,671)	–	106,896,279
Permanently restricted	5,041,143	–	–	–	5,041,143
Total net assets	136,115,999	(8,973,906)	(15,204,671)	–	111,937,422
Total liabilities and net assets	$288,293,609	$ 3,069,245	$ 1,305,512	$ (28,274,981)	$264,393,385

See Independent Auditors' Report

Tuomey and Affiliates
(d/b/a Tuomey Healthcare System)

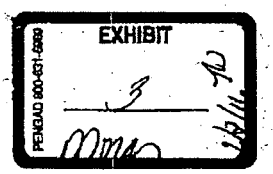
Consolidating Statement of Operations Information
for the year ended
September 30, 2011

	Medical Center	TMP	TPS	Consolidation/ Eliminations	Total
Unrestricted revenues and other support					
Net patient service revenue	$ 195,409,700	$ 7,204,099	$ 4,435,328	$ (40,252)	$ 207,008,875
Other operating revenue	2,467,106	1,008,499	–	(772,270)	2,703,335
Total unrestricted revenues and other support	197,876,806	8,212,598	4,435,328	(812,522)	209,712,210
Expenses					
Salaries and wages	65,931,431	6,561,442	3,842,186	–	76,335,059
Benefits	20,055,631	721,290	365,162	(9,000)	21,133,083
Physician fees	8,858,078	–	–	–	8,858,078
Other fees	11,959,961	2,373,450	324,187	(803,522)	13,654,076
Supplies	31,999,004	407,654	240,523	–	32,647,181
Utilities	3,162,133	39,210	40,477	–	3,241,820
Repairs and maintenance	6,422,387	114,674	20,159	–	6,557,220
Leases and rentals	3,406,411	606,145	467,308	(690,624)	3,789,240
Insurance	784,963	276,866	217,542	–	1,279,371
Interest	4,371,136	–	–	–	4,371,136
Depreciation and amortization	11,962,659	108,378	196,708	–	12,267,745
Provision for bad debts	12,578,924	465,049	167,189	–	13,211,162
Hospital tax	5,369,055	–	–	–	5,369,055
Other	1,294,563	128,528	95,437	–	1,518,528
Total expenses	188,156,336	11,602,686	5,976,878	(1,503,146)	204,232,754
Income (loss) from operations	9,720,470	(3,390,088)	(1,541,550)	690,624	5,479,456
Nonoperating gains (losses)					
Net investment income	1,713,356	51	–	–	1,713,407
Other nonoperating income	72,271	–	–	–	72,271
Other nonoperating expense	(1,934,114)	(42,614)	–	(690,624)	(2,667,352)
Total nonoperating losses	(148,487)	(42,563)	–	(690,624)	(881,674)
Excess (deficit) of revenues and gains over expenses and losses	9,571,983	(3,432,651)	(1,541,550)	–	4,597,782
Change in net postretirement benefit obligation	(8,067,273)	–	–	–	(8,067,273)
Increase (decrease) in net assets	$ 1,504,710	$ (3,432,651)	$ (1,541,550)	$ –	$ (3,469,491)

See Independent Auditors' Report

EXHIBIT 3

2011 TUOMEY 990



Caution: Forms printed from within Adobe Acrobat products may not meet IRS or state taxing agency specifications. When using Acrobat 5.x products, uncheck the "Shrink oversized pages to paper size" and uncheck the "Expand small pages to paper size" options, in the Adobe "Print" dialog. When using Acrobat 6.x and later products versions, select "None" in the "Page Scaling" selection box in the Adobe "Print" dialog.

CLIENT'S COPY

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements.

OMB No. 1545-0047

2011

Open to Public Inspection

A For the 2011 calendar year, or tax year beginning OCT 1, 2011 and ending SEP 30, 2012

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Terminated
- ☐ Amended return
- ☐ Application pending

C Name of organization
TUOMEY
Doing Business As TUOMEY HEALTHCARE SYSTEM

Number and street (or P.O. box if mail is not delivered to street address) 129 NORTH WASHINGTON STREET

Room/suite

City or town, state or country, and ZIP + 4
SUMTER, SC 29150

F Name and address of principal officer: R. JAY COX
SAME AS C ABOVE

D Employer identification number
57-0343398

E Telephone number
803-774-8616

G Gross receipts $ 191,187,040.

H(a) Is this a group return for affiliates? ☐ Yes ☒ No

H(b) Are all affiliates included? ☐ Yes ☐ No
If "No," attach a list. (see instructions)

H(c) Group exemption number ▶

I Tax-exempt status: ☒ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ▶ WWW.TUOMEY.COM

K Form of organization: ☒ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 1914

M State of legal domicile: SC

Part I Summary

Activities & Governance	1	Briefly describe the organization's mission or most significant activities: OPERATION OF NONPROFIT HEALTHCARE FACILITY IN SUMTER, SC		
	2	Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.		
	3	Number of voting members of the governing body (Part VI, line 1a)	3	14
	4	Number of independent voting members of the governing body (Part VI, line 1b)	4	9
	5	Total number of individuals employed in calendar year 2011 (Part V, line 2a)	5	1971
	6	Total number of volunteers (estimate if necessary)	6	251
	7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	0.
	b	Net unrelated business taxable income from Form 990-T, line 34	7b	0.

			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)	1,527,556.	0.
	9	Program service revenue (Part VIII, line 2g)	194,996,473.	187,206,374.
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	3,209,230.	1,321,613.
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	2,424,136.	2,641,431.
	12	Total revenue - add lines 8 through 11 (must equal Part VIII, column (A), line 12)	202,157,395.	191,169,418.
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1-3)	41,134.	45,000.
	14	Benefits paid to or for members (Part IX, column (A), line 4)	0.	0.
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	85,987,062.	88,836,640.
	16a	Professional fundraising fees (Part IX, column (A), line 11e)	0.	0.
	b	Total fundraising expenses (Part IX, column (D), line 25) ▶ 293,293.		
	17	Other expenses (Part IX, column (A), lines 11a-11d, 11f-24e)	102,940,366.	100,689,812.
	18	Total expenses. Add lines 13-17 (must equal Part IX, column (A), line 25)	188,968,562.	189,571,452.
	19	Revenue less expenses. Subtract line 18 from line 12	13,188,833.	1,597,966.

			Beginning of Current Year	End of Year
Net Assets or Fund Balances	20	Total assets (Part X, line 16)	275,718,221.	262,910,417.
	21	Total liabilities (Part X, line 26)	152,177,610.	160,056,368.
	22	Net assets or fund balances. Subtract line 21 from line 20	123,540,611.	102,854,049.

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

▶ Signature of officer — Date

▶ MARK LOVELL, CFO
Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
AMY BIBBY				P00445891

Firm's name ▶ DIXON HUGHES GOODMAN LLP — Firm's EIN ▶ 56-0747981

Firm's address ▶ 500 RIDGEFIELD COURT, ASHEVILLE, NC 28806 — Phone no. (828) 254-2254

May the IRS discuss this return with the preparer shown above? (see instructions) ☒ Yes ☐ No

Part III Statement of Program Service Accomplishments

Check if Schedule O contains a response to any question in this Part III X

1 Briefly describe the organization's mission:
THE MISSION OF TUOMEY HEALTHCARE SYSTEM IS TO PROMOTE GOOD HEALTH AND WELL-BEING AND TO PROVIDE EXCELLENT HEALTHCARE FOR EVERYONE IN SUMTER AND SURROUNDING COUNTIES.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? ..... ☐ Yes ☒ No
If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? ..... ☐ Yes ☒ No
If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations and section 4947(a)(1) trusts are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ 174,584,412. Including grants of $) (Revenue $ 187,206,374.)

TUOMEY HEALTHCARE SYSTEM IS A 301 BED ACUTE CARE FACILITY LOCATED IN SUMTER, SOUTH CAROLINA. TUOMEY WAS ESTABLISHED AS A NON-PROFIT ACUTE CARE HOSPITAL TO ADVANCE OR SUPPORT THE PROVISIONS OF HEALTHCARE SERVICES WITHIN THE SUMTER COMMUNITY. TUOMEY'S MAIN OBJECTIVE IS THE PROMOTION OF HEALTH FOR ALL RESIDENTS OF SUMTER AND ITS OUTLYING AREAS.

TUOMEY HAS OPERATED ITS FACILITIES IN A MANNER DESCRIBED BY REV. RUL. 69-545, SUPRA. THE BOARD OF TRUSTEES IS COMPRISED OF INDEPENDENT CIVIC LEADERS. AN OPEN MEDICAL STAFF IS MAINTAINED BY TUOMEY, WITH PRIVILEGES AVAILABLE TO ALL QUALIFIED PHYSICIANS. ALSO, TUOMEY OPERATES A FULL-TIME EMERGENCY ROOM OPEN TO ANYONE WITHOUT THE ABILITY TO PAY AND

4b (Code:) (Expenses $ Including grants of $) (Revenue $)

4c (Code:) (Expenses $ Including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ Including grants of $) (Revenue $)

4e Total program service expenses ▶ 174,584,412.

SEE SCHEDULE O FOR CONTINUATION(S)

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	X	
2	Is the organization required to complete *Schedule B, Schedule of Contributors*?	2		X
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		X
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4	X	
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		X
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		X
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		X
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		X
9	Did the organization report an amount in Part X, line 21; serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		X
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10	X	
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a	X	
b	Did the organization report an amount for investments - other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		X
c	Did the organization report an amount for investments - program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		X
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d	X	
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e	X	
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f	X	
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI, XII, and XIII*	12a		X
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI, XII, and XIII is optional*	12b	X	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		X
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		X
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		X
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or assistance to any organization or entity located outside the United States? *If "Yes," complete Schedule F, Parts II and IV*	15		X
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or assistance to individuals located outside the United States? *If "Yes," complete Schedule F, Parts III and IV*	16		X
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I*	17		X
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		X
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		X
20a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a	X	
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b	X	

Part IV Checklist of Required Schedules *(continued)*

			Yes	No
21	Did the organization report more than $5,000 of grants and other assistance to any government or organization in the United States on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21	X	
22	Did the organization report more than $5,000 of grants and other assistance to individuals in the United States on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		X
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23	X	
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No", go to line 25*	24a	X	
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		X
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		X
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		X
25a	**Section 501(c)(3) and 501(c)(4) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		X
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		X
26	Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee, or disqualified person outstanding as of the end of the organization's tax year? *If "Yes," complete Schedule L, Part II*	26		X
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		X
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		X
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b	X	
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		X
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		X
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		X
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		X
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		X
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		X
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Parts II, III, IV, and V, line 1*	34	X	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	X	
b	Did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b		X
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		X
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		X
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11 and 19? **Note.** All Form 990 filers are required to complete Schedule O	38	X	

132004
01-23-12

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response to any question in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	265		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		X	
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	2a	1971		
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b		X	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a			X
b	If "Yes," has it filed a Form 990-T for this year? *If "No," provide an explanation in Schedule O*	3b			
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a			X
b	If "Yes," enter the name of the foreign country: ▶				
	See instructions for filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a			X
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b			X
c	If "Yes," to line 5a or 5b, did the organization file Form 8886-T?	5c			
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible?	6a			X
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b			
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a			X
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b			
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c			X
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e			X
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f			X
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g			
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h			
8	**Sponsoring organizations maintaining donor advised funds and section 509(a)(3) supporting organizations.** Did the supporting organization, or a donor advised fund maintained by a sponsoring organization, have excess business holdings at any time during the year?	8			
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the organization make any taxable distributions under section 4966?	9a			
b	Did the organization make a distribution to a donor, donor advisor, or related person?	9b			
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	10b			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a			
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state?	13a			
	Note. See the instructions for additional information the organization must report on Schedule O.				
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a			X
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b			

Part VI Governance, Management, and Disclosure *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response to any question in this Part VI X

Section A. Governing Body and Management

				Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year	1a	14		
	If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.				
b	Enter the number of voting members included in line 1a, above, who are independent	1b	9		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2			X
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person?	3			X
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4			X
5	Did the organization become aware during the year of a significant diversion of the organization's assets?	5			X
6	Did the organization have members or stockholders?	6			X
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a			X
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b			X
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:				
a	The governing body?	8a		X	
b	Each committee with authority to act on behalf of the governing body?	8b		X	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	9			X

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a		X
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	X	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	X	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	X	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	X	
13	Did the organization have a written whistleblower policy?	13	X	
14	Did the organization have a written document retention and destruction policy?	14		X
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	X	
b	Other officers or key employees of the organization	15b	X	
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions).			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		X
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ SC

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

☐ Own website ☒ Another's website ☒ Upon request

19 Describe in Schedule O whether (and if so, how), the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ▶

MARK LOVELL, CFO - (803)774-8604

129 N WASHINGTON STREET, SUMTER, SC 29150

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response to any question in this Part VII ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors; institutional trustees; officers; key employees; highest compensated employees; and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) CHALMERS GLENN CHAIRMAN	1.00	X		X				0.	0.	0.
(2) JOHN BRABHAM VICE-CHAIRMAN	1.00	X		X				0.	0.	0.
(3) PHIL PALMER TREASURER	1.00	X		X				0.	0.	0.
(4) MITCH WILLIAMS SECRETARY	1.00	X		X				0.	0.	0.
(5) CYNTHIA REESE, MD CHIEF OF MEDICAL STAFF	1.00	X						0.	0.	0.
(6) KIM HARVIN BOARD MEMBER	1.00	X						0.	0.	0.
(7) ANSEL MCFADDIN, MD BOARD MEMBER	1.00	X						0.	0.	0.
(8) LEROY CREECH BOARD MEMBER	1.00	X						0.	0.	0.
(9) NICOLE NORRIS BOARD MEMBER	1.00	X						0.	0.	0.
(10) HENRY MOSES, MD BOARD MEMBER	1.00	X						0.	418,800.	34,437.
(11) SAMUEL RIDDLE, MD BOARD MEMBER	1.00	X						0.	275,848.	20,975.
(12) BEN GRIFFITH BOARD MEMBER	1.00	X						0.	0.	0.
(13) KAY RAFFIELD, PHD BOARD MEMBER	1.00	X						0.	0.	0.
(14) R. JAY COX CEO/PRESIDENT	40.00	X		X				838,646.	0.	172,427.
(15) J. GREGG MARTIN COO/VICE-PRESIDENT	40.00			X				508,955.	0.	123,042.
(16) MARK LOVELL (STARTED 4/12) CFO/VICE-PRESIDENT	40.00			X				0.	0.	0.
(17) GENE F. DICKERSON, MD VP OF MEDICAL AFFAIRS	40.00				X			482,424.	0.	79,184.

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(18) WILLIAM RENWICK VP	40.00				X			250,095.	0.	80,534.
(19) MICHELLE LOGAN-OWENS VP	40.00				X			189,281.	0.	32,773.
(20) TERESA M. CARLTON CNO/VICE-PRESIDENT	40.00				X			204,732.	0.	39,027.
(21) TEXIN LI PHYSICIST	40.00					X		205,786.	0.	24,019.
(22) MICHAEL SAND CRNA	40.00					X		168,947.	0.	21,683.
(23) JUDY LYNN ROBERTS CRNA	40.00					X		188,776.	0.	33,283.
(24) JEFF FAW EXECUTIVE DIRECTOR OF FOUNDATION	40.00					X		194,000.	0.	28,728.
(25) ANTHONY W. CABALLERO CRNA	40.00					X		174,856.	0.	26,282.
(26) MIKE WINIARSKI (FROM 4/11 TO 8/ CFO/VICE-PRESIDENT	40.00						X	170,551.	0.	36,517.
1b Sub-total ▶								3,577,049.	694,648.	752,911.
c Total from continuation sheets to Part VII, Section A ▶								179,318.	0.	43,765.
d Total (add lines 1b and 1c) ▶								3,756,367.	694,648.	796,676.

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 39

		Yes	No
3 Did the organization list any former officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3	X	
4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4	X	
5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*	5		X

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
CARDINAL PHARMACY PO BOX 402603, ATLANTA, GA 30384	MEDICAL SERVICES	8,618,855.
MIDLANDS EMERGENCY PHYSICIANS, PA 129 NORTH WASHINGTON ST., SUMTER, SC 29150	MEDICAL SERVICES	6,614,324.
AMERICAN RED CROSS PO BOX 905890, CHARLOTTE, NC 28290	MEDICAL SERVICES	1,761,574.
REHABCARE GROUP PO BOX 502096, ST. LOUIS, MO 63150	MEDICAL SERVICES	1,728,877.
GHA TECHNOLOGIES PO BOX 29661, PHOENIX, AZ 85038	MEDICAL SERVICES	1,376,233.

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 62

SEE PART VII, SECTION A CONTINUATION SHEETS

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(27) PAUL JOHNSON (THROUGH 4/11) CFO/VICE-PRESIDENT	40.00						X	179,318.	0.	43,765.
Total to Part VII, Section A, line 1c								179,318.		43,765.

Part VIII Statement of Revenue

			(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512, 513, or 514
Contributions, Gifts, Grants and Other Similar Amounts	1a Federated campaigns	1a				
	b Membership dues	1b				
	c Fundraising events	1c				
	d Related organizations	1d				
	e Government grants (contributions)	1e				
	f All other contributions, gifts, grants, and similar amounts not included above	1f				
	g Noncash contributions included in lines 1a-1f: $					
	h Total. Add lines 1a-1f					
Program Service Revenue		Business Code				
	2a NET PROGRAM SERVICE RE	621400	175,950,115.	175,950,115.		
	b DISPROPORTIONATE SHARE	900099	8303631.	8303631.		
	c ANCILLARY SERVICES	900099	2952628.	2952628.		
	d					
	e					
	f All other program service revenue					
	g Total. Add lines 2a-2f		187,206,374.			
Other Revenue	3 Investment income (including dividends, interest, and other similar amounts)		689,140.			689,140.
	4 Income from investment of tax-exempt bond proceeds		75,653.			75,653.
	5 Royalties					
		(i) Real	(ii) Personal			
	6a Gross rents	991014.				
	b Less: rental expenses	0.				
	c Rental income or (loss)	991014.				
	d Net rental income or (loss)		991,014.			991,014.
		(i) Securities	(ii) Other			
	7a Gross amount from sales of assets other than inventory	574442.				
	b Less: cost or other basis and sales expenses	0.	17,622.			
	c Gain or (loss)	574442.	-17622.			
	d Net gain or (loss)		556,820.			556,820.
	8a Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18	a				
	b Less: direct expenses	b				
	c Net income or (loss) from fundraising events					
	9a Gross income from gaming activities. See Part IV, line 19	a				
	b Less: direct expenses	b				
	c Net income or (loss) from gaming activities					
	10a Gross sales of inventory, less returns and allowances	a				
	b Less: cost of goods sold	b				
	c Net income or (loss) from sales of inventory					
	Miscellaneous Revenue	Business Code				
	11a CAFETERIA & VENDING	722210	1136830.			1,136,830.
	b MEDICAL RECORD TRANSC	900099	150,241.			150,241.
	c AFFILIATE MANAGEMENT	561000	145,575.			145,575.
	d All other revenue	900099	217,771.			217,771.
	e Total. Add lines 11a-11d		1650417.			
	12 Total revenue. See instructions.		191,169,418.	187,206,374.	0.	3,963,044.

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns. All other organizations must complete column (A) but are not required to complete columns (B), (C), and (D).

Check if Schedule O contains a response to any question in this Part IX ☐

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to governments and organizations in the United States. See Part IV, line 21	45,000.	45,000.		
2	Grants and other assistance to individuals in the United States. See Part IV, line 22				
3	Grants and other assistance to governments, organizations, and individuals outside the United States. See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees	2,956,120.	1,478,062.	1,478,058.	
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)	375,541.	375,541.		
7	Other salaries and wages	65,588,259.	60,364,020.	4,996,704.	227,535.
8	Pension plan accruals and contributions (include section 401(k) and section 403(b) employer contributions)	3,082,696.	2,782,774.	289,745.	10,177.
9	Other employee benefits	11,998,993.	10,833,391.	1,125,983.	39,619.
10	Payroll taxes	4,835,031.	4,364,621.	454,448.	15,962.
11	Fees for services (non-employees):				
a	Management				
b	Legal	491,871.		491,871.	
c	Accounting	90,000.		90,000.	
d	Lobbying	105,545.		105,545.	
e	Professional fundraising services. See Part IV, line 17				
f	Investment management fees	12,884.		12,884.	
g	Other	17,868,452.	16,400,086.	1,468,366.	
12	Advertising and promotion	547,544.	4,352.	543,192.	
13	Office expenses	14,746,436.	13,840,706.	905,730.	
14	Information technology	1,265,346.	1,067,788.	197,558.	
15	Royalties				
16	Occupancy	2,738,601.	2,738,601.		
17	Travel				
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings				
20	Interest	4,071,559.	4,071,559.		
21	Payments to affiliates				
22	Depreciation, depletion, and amortization	11,764,669.	11,764,669.		
23	Insurance	1,233,818.	1,233,818.		
24	Other expenses. Itemize expenses not covered above. (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	MEDICAL SUPPLIES	28,429,000.	28,429,000.		
b	BAD DEBT EXPENSE	9,420,432.	9,420,432.		
c	HOSPITAL TAX	5,369,869.	5,369,869.		
d	LEGAL ISSUES	2,527,983.		2,527,983.	
e	All other expenses	5,803.	123.	5,680.	
25	Total functional expenses. Add lines 1 through 24e	189571452.	174584412.	14,693,747.	293,293.
26	Joint costs. Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☐ if following SOP 98-2 (ASC 958-720)				

Part X Balance Sheet

			(A) Beginning of year		(B) End of year
Assets	1	Cash - non-interest-bearing	9,342,420.	1	3,401,695.
	2	Savings and temporary cash investments		2	
	3	Pledges and grants receivable, net		3	
	4	Accounts receivable, net	28,876,650.	4	30,576,162.
	5	Receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L		5	
	6	Receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions)		6	
	7	Notes and loans receivable, net		7	
	8	Inventories for sale or use	4,465,863.	8	4,708,810.
	9	Prepaid expenses and deferred charges	7,145,114.	9	7,800,811.
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D — 10a: 178,812,791.			
	b	Less: accumulated depreciation — 10b: 86,912,564.	96,159,320.	10c	91,900,227.
	11	Investments - publicly traded securities	100,737,536.	11	102,726,941.
	12	Investments - other securities. See Part IV, line 11		12	
	13	Investments - program-related. See Part IV, line 11		13	
	14	Intangible assets		14	
	15	Other assets. See Part IV, line 11	28,991,318.	15	21,795,771.
	16	Total assets. Add lines 1 through 15 (must equal line 34)	275,718,221.	16	262,910,417.
Liabilities	17	Accounts payable and accrued expenses	55,077,581.	17	66,531,272.
	18	Grants payable		18	
	19	Deferred revenue		19	
	20	Tax-exempt bond liabilities	95,310,029.	20	92,104,822.
	21	Escrow or custodial account liability. Complete Part IV of Schedule D		21	
	22	Payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L		22	
	23	Secured mortgages and notes payable to unrelated third parties		23	
	24	Unsecured notes and loans payable to unrelated third parties		24	
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17-24). Complete Part X of Schedule D	1,790,000.	25	1,420,274.
	26	Total liabilities. Add lines 17 through 25	152,177,610.	26	160,056,368.
Net Assets or Fund Balances		Organizations that follow SFAS 117, check here ▶ [X] and complete lines 27 through 29, and lines 33 and 34.			
	27	Unrestricted net assets	118,499,468.	27	97,812,906.
	28	Temporarily restricted net assets		28	
	29	Permanently restricted net assets	5,041,143.	29	5,041,143.
		Organizations that do not follow SFAS 117, check here ▶ [ ] and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds		30	
	31	Paid-in or capital surplus, or land, building, or equipment fund		31	
	32	Retained earnings, endowment, accumulated income, or other funds		32	
	33	Total net assets or fund balances	123,540,611.	33	102,854,049.
	34	Total liabilities and net assets/fund balances	275,718,221.	34	262,910,417.

Part XI Reconciliation of Net Assets

Check if Schedule O contains a response to any question in this Part XI ..... [X]

1	Total revenue (must equal Part VIII, column (A), line 12)	1	191,169,418.
2	Total expenses (must equal Part IX, column (A), line 25)	2	189,571,452.
3	Revenue less expenses. Subtract line 2 from line 1	3	1,597,966.
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	123,540,611.
5	Other changes in net assets or fund balances (explain in Schedule O)	5	-22,284,528.
6	Net assets or fund balances at end of year. Combine lines 3, 4, and 5 (must equal Part X, line 33, column (B))	6	102,854,049.

Part XII Financial Statements and Reporting

Check if Schedule O contains a response to any question in this Part XII ..... [ ]

			Yes	No
1	Accounting method used to prepare the Form 990: [ ] Cash [X] Accrual [ ] Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		X
b	Were the organization's financial statements audited by an independent accountant?	2b	X	
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant? If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.	2c	X	
d	If "Yes" to line 2a or 2b, check a box below to indicate whether the financial statements for the year were issued on a separate basis, consolidated basis, or both: [ ] Separate basis [X] Consolidated basis [ ] Both consolidated and separate basis			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		X
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

SCHEDULE A
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

▶ Attach to Form 990 or Form 990-EZ. ▶ See separate instructions.

OMB No 1545-0047

2011

Open to Public Inspection

Name of the organization

TUOMEY

Employer identification number

57-0343398

Part I **Reason for Public Charity Status** (All organizations must complete this part.) See instructions.

The organization is not a private foundation because it is: (For lines 1 through 11, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in section 170(b)(1)(A)(i).

2 ☐ A school described in section 170(b)(1)(A)(ii). (Attach Schedule E.)

3 ☒ A hospital or a cooperative hospital service organization described in section 170(b)(1)(A)(iii).

4 ☐ A medical research organization operated in conjunction with a hospital described in section 170(b)(1)(A)(iii). Enter the hospital's name, city, and state: _____

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in section 170(b)(1)(A)(iv). (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in section 170(b)(1)(A)(v).

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in section 170(b)(1)(A)(vi). (Complete Part II.)

8 ☐ A community trust described in section 170(b)(1)(A)(vi). (Complete Part II.)

9 ☐ An organization that normally receives: (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions - subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See section 509(a)(2). (Complete Part III.)

10 ☐ An organization organized and operated exclusively to test for public safety. See section 509(a)(4).

11 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2). See section 509(a)(3). Check the box that describes the type of supporting organization and complete lines 11e through 11h.

a ☐ Type I b ☐ Type II c ☐ Type III - Functionally integrated d ☐ Type III - Other

e ☐ By checking this box, I certify that the organization is not controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2).

f If the organization received a written determination from the IRS that it is a Type I, Type II, or Type III supporting organization, check this box ☐

g Since August 17, 2006, has the organization accepted any gift or contribution from any of the following persons?

		Yes	No
(i)	A person who directly or indirectly controls, either alone or together with persons described in (ii) and (iii) below, the governing body of the supported organization?	11g(i)	
(ii)	A family member of a person described in (i) above?	11g(ii)	
(iii)	A 35% controlled entity of a person described in (i) or (ii) above?	11g(iii)	

h Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1-9 above or IRC section (see instructions))	(iv) Is the organization in col. (i) listed in your governing document? Yes	(iv) No	(v) Did you notify the organization in col. (i) of your support? Yes	(v) No	(vi) Is the organization in col. (i) organized in the U.S.? Yes	(vi) No	(vii) Amount of support
Total									

Part II Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)

(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) 2011	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge						
4 **Total.** Add lines 1 through 3						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4.						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) 2011	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part IV.)						
11 **Total support.** Add lines 7 through 10						

12 Gross receipts from related activities, etc. (see instructions) 12

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and stop here ▶ ☐

Section C. Computation of Public Support Percentage

14 Public support percentage for 2011 (line 6, column (f) divided by line 11, column (f)) 14 %

15 Public support percentage from 2010 Schedule A, Part II, line 14 15 %

16a **33 1/3% support test - 2011.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

b **33 1/3% support test - 2010.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

17a **10% -facts-and-circumstances test - 2011.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

b **10% -facts-and-circumstances test - 2010.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions ▶ ☐

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Part III Support Schedule for Organizations Described in Section 509(a)(2)

(Complete only if you checked the box on line 9 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) 2011	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")						
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose						
3 Gross receipts from activities that are not an unrelated trade or business under section 513						
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 Total. Add lines 1 through 5						
7a Amounts included on lines 1, 2, and 3 received from disqualified persons						
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year						
c Add lines 7a and 7b						
8 Public support (Subtract line 7c from line 6.)						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) 2011	(f) Total
9 Amounts from line 6						
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975						
c Add lines 10a and 10b						
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part IV.)						
13 Total support (Add lines 9, 10c, 11, and 12.)						

14 First five years. If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and stop here ▶ ☐

Section C. Computation of Public Support Percentage

15 Public support percentage for 2011 (line 8, column (f) divided by line 13, column (f))	15	%
16 Public support percentage from 2010 Schedule A, Part III, line 15	16	%

Section D. Computation of Investment Income Percentage

17 Investment income percentage for 2011 (line 10c, column (f) divided by line 13, column (f))	17	%
18 Investment income percentage from 2010 Schedule A, Part III, line 17	18	%

19a **33 1/3% support tests - 2011.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop** here. The organization qualifies as a publicly supported organization ▶ ☐

b **33 1/3% support tests - 2010.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop** here. The organization qualifies as a publicly supported organization ▶ ☐

20 Private foundation. If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

SCHEDULE C
(Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Political Campaign and Lobbying Activities

For Organizations Exempt From Income Tax Under section 501(c) and section 527

▶ Complete if the organization is described below. ▶ Attach to Form 990 or Form 990-EZ.
▶ See separate instructions.

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2011

Open to Public Inspection

If the organization answered "Yes" to Form 990, Part IV, line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then

- Section 501(c)(3) organizations: Complete Parts I-A and B. Do not complete Part I-C.
- Section 501(c) (other than section 501(c)(3)) organizations: Complete Parts I-A and C below. Do not complete Part I-B.
- Section 527 organizations: Complete Part I-A only.

If the organization answered "Yes" to Form 990, Part IV, line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then

- Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)): Complete Part II-A. Do not complete Part II-B.
- Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)): Complete Part II-B. Do not complete Part II-A.

If the organization answered "Yes" to Form 990, Part IV, line 5 (Proxy Tax), or Form 990-EZ, Part V, line 35c (Proxy Tax), then

- Section 501(c)(4), (5), or (6) organizations: Complete Part III.

Name of organization	Employer identification number
TUOMEY	57-0343398

Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.

1 Provide a description of the organization's direct and indirect political campaign activities in Part IV.
2 Political expenditures ▶ $
3 Volunteer hours

Part I-B Complete if the organization is exempt under section 501(c)(3).

1 Enter the amount of any excise tax incurred by the organization under section 4955 ▶ $
2 Enter the amount of any excise tax incurred by organization managers under section 4955 ▶ $
3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? ☐ Yes ☐ No
4a Was a correction made? ☐ Yes ☐ No
b If "Yes," describe in Part IV.

Part I-C Complete if the organization is exempt under section 501(c), except section 501(c)(3).

1 Enter the amount directly expended by the filing organization for section 527 exempt function activities ▶ $
2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities ▶ $
3 Total exempt function expenditures. Add lines 1 and 2. Enter here and on Form 1120-POL, line 17b ▶ $
4 Did the filing organization file Form 1120-POL for this year? ☐ Yes ☐ No
5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments. For each organization listed, enter the amount paid from the filing organization's funds. Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC). If additional space is needed, provide information in Part IV.

(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds. If none, enter -0-.	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization. If none, enter -0-.

Part II-A **Complete if the organization is exempt under section 501(c)(3) and filed Form 5768 (election under section 501(h)).**

A Check ▶ [X] if the filing organization belongs to an affiliated group (and list in Part IV each affiliated group member's name, address, EIN, expenses, and share of excess lobbying expenditures).

B Check ▶ [ ] if the filing organization checked box A and "limited control" provisions apply.

Limits on Lobbying Expenditures (The term "expenditures" means amounts paid or incurred.)	(a) Filing organization's totals	(b) Affiliated group totals
1a Total lobbying expenditures to influence public opinion (grass roots lobbying)		
b Total lobbying expenditures to influence a legislative body (direct lobbying)		
c Total lobbying expenditures (add lines 1a and 1b)		
d Other exempt purpose expenditures		
e Total exempt purpose expenditures (add lines 1c and 1d)		
f Lobbying nontaxable amount. Enter the amount from the following table in both columns.		
g Grassroots nontaxable amount (enter 25% of line 1f)		
h Subtract line 1g from line 1a. If zero or less, enter -0-		
i Subtract line 1f from line 1c. If zero or less, enter -0-		

If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e.
Over $500,000 but not over $1,000,000	$100,000 plus 15% of the excess over $500,000.
Over $1,000,000 but not over $1,500,000	$175,000 plus 10% of the excess over $1,000,000.
Over $1,500,000 but not over $17,000,000	$225,000 plus 5% of the excess over $1,500,000.
Over $17,000,000	$1,000,000.

j If there is an amount other than zero on either line 1h or line 1i, did the organization file Form 4720 reporting section 4911 tax for this year? [ ] Yes [ ] No

4-Year Averaging Period Under Section 501(h)

(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 2a through 2f on page 4.)

Lobbying Expenditures During 4-Year Averaging Period

Calendar year (or fiscal year beginning in)	(a) 2008	(b) 2009	(c) 2010	(d) 2011	(e) Total
2a Lobbying nontaxable amount					
b Lobbying ceiling amount (150% of line 2a, column(e))					
c Total lobbying expenditures					
d Grassroots nontaxable amount					
e Grassroots ceiling amount (150% of line 2d, column (e))					
f Grassroots lobbying expenditures					