THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2016-CP-40-1651
S.C. Ct. App. Appellate Case No. 2017-001726

Sisters of Charity Providence Hospitals, ... Respondents,

v.

Palmetto Health,..... Appellant.

MOTION TO CERTIFY

Pursuant to Rule 204(b), SCACR, Appellant moves to certify this appeal from the Court of Appeals for direct review by this Court. This motion is based upon the grounds set forth below.

INTRODUCTION

This is a FOIA case.[1] Appellant (Defendant) is a private hospital system. The trial court held that Defendant is a "public body" within the meaning of § 30-4-20(a), because it received "public funds" in the form of grant monies in exchange for providing goods and services as required by the governing grant documents. The trial court therefore ordered Defendant to produce documents requested by Respondents (Plaintiff) in its FOIA letter to Defendant. (See Tab A). Defendant appealed to South Carolina Court of Appeals where the appeal is now pending.[2]

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[1] The South Carolina Freedom of Information Act (FOIA) is set forth at S.C. Code Ann. §§ 30-4-10 *et seq.*
[2] The appeal is being held in abeyance pending the trial court's decision on the amount of fees and costs to be awarded to Plaintiff under FOIA. The trial court held a hearing on August 30, 2017, and took the matter under advisement.

On October 19, 2017, this Court held oral argument in the case of *DomainsNewMedia.com v. Hilton Head Island – Bluffton Chamber of Commerce*, Appellate Case No. 2016-000460 ("the *Chamber* case"), another FOIA case involving the receipt of public funds by a private entity. Both cases present the same threshold issue: Did the receipt of "public funds" by the private entity make the private entity a "public body" within the meaning of § 30-4-20(a)?

Both cases also present the same follow-on issue: Assuming the private entity thusly became a "public body" within the meaning of § 30-4-20(a), what is the resulting scope of FOIA's "reach" into the private entity? Does the private entity thereby become subject to all FOIA requirements, *e.g.*, public meetings, notice, etc.? Do the private business documents and activities of the private entity, which have nothing to do with the public funds, become subject to court-compelled production under FOIA? At oral argument in the *Chamber* case, members of this Court referred to this issue as how far do the "tentacles" of FOIA reach into an otherwise private entity?

FACTUAL BACKGROUND

Plaintiff and Defendant are private hospitals that competed with each other in the Columbia-area healthcare market. In 2015, Defendant hired a group of orthopedic physicians that had been employed by Plaintiff. Thereafter, in June 2015, Plaintiff delivered a FOIA letter to Defendant in which Plaintiff sought documents related to Defendant's hiring of the physicians – the request did not seek any information on the receipt or expenditure of any public funds. (Tab B). Defendant denied the request upon the ground that it was not a "public body" within the meaning of FOIA and, therefore, was not required to produce the requested documents. (Tab C).

In March 2016, Plaintiff filed the instant case to compel Defendant to produce the requested documents. In July 2016, Plaintiff filed an "antitrust" action in the United States District Court for the District of South Carolina, Columbia Division, making eleven (11) federal claims and nine

(9) state claims based substantially on Defendant's hiring of the physicians. (See Tab D). Plaintiff has admitted that the documents requested under FOIA are "the heart and core of proof in the Antitrust action." (Tab E, highlighting added). In February 2017, the United States District Court dismissed Plaintiff's federal claims for failure to state a cause of action and declined to exercise jurisdiction over the state law claims. (Tab D). Plaintiff appealed to the United States Court of Appeals for the Fourth Circuit. In September 2017, Plaintiff filed its state law claims in state court.

GROUNDS FOR CERTIFICATION

The grounds for certification include issues of "significant public interest or a legal principle of major importance." Rule 204(b), SCACR. The present case presents such matters.

I. This case presents important issues on the threshold question of whether the receipt of public funds by a private entity subjects the private entity to FOIA.

This case, like the *Chamber* case, presents questions under this Court's rulings that public funds received for a "specific purpose" or received in exchange for "identifiable goods and services" do not subject the receiving private entity to FOIA. *Disabato v. South Carolina Ass'n of Sch. Adm'rs*, 746 S.E.2d 329, 341 (S.C. 2013) (specific purpose); *Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161, 165 (S.C. 1991) (goods and services). Private entities become subject to FOIA only when they receive public funds for "general support." *Disabato*, 746 S.E.2d at 341. Here, Defendant received the grant monies for specific purposes and in exchange for providing identifiable goods and services – it did not receive any public funds for general support. Thus, the receipt of public funds did not make Defendant subject to FOIA under this Court's rulings in *Disabato* and *Weston*.

This case also presents a novel issue not present in the *Chamber* case. The trial court noted that Defendant filed a Form 990 with the IRS listing the "grants," and further noted that the instructions for this federal form required the listing of grants or contracts for which the recipient

delivered direct benefits to the public. The trial court then reviewed the Form 990's filed by Defendant and concluded as follows:

> These [forms] *demonstrate* that these government grants are for the general benefit of the public and not for the benefit of the governmental unit. They are grants, and [Defendant] is an "organization, corporation, or agency supported in whole or part by public funds or expending public funds." *Accordingly*, the Court finds that [Defendant] is supported by public funds.

(Tab A at 3-4) (emphasis added). The trial court's conclusion is in error for numerous reasons, including those noted below.

As is always true, transposing a legal standard created and imposed by a different sovereign for a different purpose is problematic at best. Here, the IRS Form 990 and attending instructions are wholly irrelevant to the issue of whether FOIA applies to Defendant. The "public benefit" test is imposed by a different sovereign (the United States) for a different reason (federal tax law and policy). It has nothing to do with FOIA, nor does it purport to do so. Nothing in FOIA or the case law decided under FOIA mentions the IRS, Form 990, the instructions for Form 990, or any version of the "public benefit" test imposed by the Internal Revenue Code. Moreover, the relevant and controlling questions under FOIA, as explained by this Court in *Weston* and *Disabato,* are whether Defendant received the grant monies for specific purposes or in exchange for identifiable goods and services as opposed to providing "general support" to Defendant. Here, the undisputed evidence demonstrates that Defendant is not a "public body" under *Weston* and *Disabato*. Acceptance of the trial court's "public benefit" test would effectively overrule those decisions because, by definition and as a matter of law, public funds must be expended for the public benefit.

II. This case presents important issues on the scope of FOIA's "reach" into a private entity that has received public funds.

Even if Defendant's receipt of public funds (grant monies) makes it subject to FOIA (and it does not under the undisputed facts of this case and the law established by this Court), there

remains the question of the scope of FOIA's resulting "reach" into a private entity. This issue is present in the *Chamber* case, but it is even more starkly presented in this case, where Plaintiff's FOIA request does not seek any information on the disposition of the public funds, and Plaintiff makes no complaints about the disposition of those public funds.

The scope of FOIA's "reach" into a private entity receiving public funds is a question of statutory interpretation and, like all such questions, it hinges on "a practical, reasonable, and fair interpretation *consonant with the purpose, design, and policy* of the lawmakers." *N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7*, 649 S.E.2d 28, 30 (S.C. 2007) (emphasis added) (interpreting FOIA). Unlike most statutes, FOIA expressly states the lawmakers' purpose:

> The General Assembly finds that it is vital in a democratic society that *public* business be performed in an open and *public* manner so that citizens shall be advised of the performance of *public* officials and of the decisions that are reached in *public* activity and in the formulation of *public* policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their *public* officials at a minimum cost or delay to the persons seeking access to *public* documents or meetings.

S.C. Code Ann. § 30-4-15 (emphasis added). As repeatedly held by this Court, this statement of purpose defines the role of FOIA:

> [FOIA] serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government. An informed electorate is essential to a healthy democracy because members of the *public* cannot meaningfully cast their votes if they are ignorant of what actions the government has taken and the rationale for those actions. Furthermore, secret government activity creates fertile ground for fraud and corruption, especially in the area of *public* expenditures where, without transparency, the *public* can be kept unaware of misappropriations and conflicts of interest.

Disabato, 746 S.E.2d at 348 (emphasis added). With respect to public funds like those received by Defendant here, FOIA "mandates that the *public* be provided with information regarding the *expenditure* of *public* funds." *Weston*, 401 S.E.2d at 164 (emphasis added). Against this backdrop,

the meaning, purpose, and scope of § 30-4-20(a) is clear: if and when the receipt of public funds makes a private entity subject to FOIA under *Weston* and *Disabato*, the public may follow the public money into the private entity to the extent necessary to achieve the purposes and goals of FOIA, *i.e.*, prevent secret government activity, promote an informed electorate, and detect/prevent corruption in the expenditure of those public funds. It does not, however, allow what Plaintiff obtained here – judicial permission to rummage around in Defendant's private business documents to advance Plaintiff's wholly private interests.

Here, Plaintiff does not seek any information on the expenditure of the public funds, does not make any complaints about the disposition of those funds, and makes no complaint about the amount of detail available on the disposition of the public funds. Its sole purpose is to gain access to Defendant's private business documents and activities, none of which have anything to do with the disposition of the public funds. And Plaintiff does this solely for the illicit purpose of furthering its own private business interests in suing Defendant. This plainly is not the purpose of FOIA, and it has nothing to do with FOIA's touchstones of preventing secret government activity, promoting an informed electorate, and detecting/preventing corruption in the expenditure of public funds.

III. Granting certification and deciding this case in conjunction with or soon after the *Chamber* case will enable this Court to explicate more fully the law on FOIA's applicability to private entities receiving public funds.

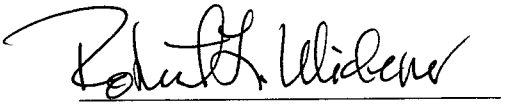
As shown above, the present case shares common issues with the *Chamber* case under similar but different facts. It also presents novel issues like the "public benefit" rule created by the trial court and the propriety of using FOIA for solely private purposes that have nothing to do with the purposes of FOIA. Given these similarities and differences, Defendant submits that certifying this case and deciding it in conjunction with the *Chamber* case or shortly thereafter will

allow this Court to explicate more fully the law on FOIA's applicability to private entities receiving public funds.[3]

CONCLUSION

FOIA's laudable purpose is to prevent secret government activity, promote an informed electorate, and detect/prevent public corruption, including corruption in the disposition of public funds. Plaintiff seeks no such high ground here. Rather, it seeks to pervert FOIA into a private tool for advancing its wholly private interests. The law should not and cannot countenance this perversion of FOIA and its underlying public policy. For this reason and the other reasons set forth above, Defendant moves this Court to certify this appeal for direct review by this Court.

Respectfully Submitted,



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[3] In the *Chamber* case, unlike the present case, the plaintiff's FOIA request included requests for information related to the expenditure of public funds, but it also included requests and assertions that, like all of Plaintiff's FOIA requests in the present case, go beyond the purpose of FOIA. Defendant submits that conflating these two types of requests does not change the analysis. If and when a private entity becomes subject to FOIA under *Weston* and *Disabato*, FOIA's "reach" into the private entity remains the same: it is limited to the information necessary to serve the purposes of FOIA, and it does not "reach" private documents and activities that have nothing to do with the disposition of the public funds.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 16-CP-40-1651
	)	
Sisters of Charity Providence Hospitals,	)	
	)	
Plaintiff,	)	**AMENDED ORDER**
	)	
v.	)	
	)	
Palmetto Health,	)	
	)	
Defendant.	)	

THIS MATTER came before the Court for a bench trial on February 7, 2017. Present at the trial were James G. Carpenter, Esq., for Plaintiff; and Celeste Jones, Esq., for Defendant. The Court heard testimony and received documentary evidence. Based on the evidence presented, the arguments of counsel, and the applicable law, the Court makes the following findings of facts and conclusions of law:

Factual Background

On February 8, 1998, Defendant Palmetto Health was formed as a separate but related entity of the member organizations Richland Memorial Hospital and Baptist Healthcare System of South Carolina.

In 2015, Plaintiff served two requests for "public records" under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 ff. ("FOIA"), one on Charles D. Beaman, Jr., CEO of Palmetto Health (dated June 9, 2015) and one on John J. Singerling III, President of Palmetto Health Richland a/k/a Richland Memorial Hospital (dated July 24, 2015). Both requests were denied. Plaintiff filed this civil action to enforce FOIA.

The central controversy is a mixed question of fact and law: whether Defendant is a "public body" as defined by FOIA.

> (a) "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or **any organization, corporation, or agency supported in whole or in part by public funds or expending public funds**, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

S.C. Code Ann. § 30-4-20(a) (emphasis added).

The central fact in controversy is whether Defendant is an "organization . . . supported in whole or in part by public funds or expending public funds." *Id.* A related factual issue is whether Defendant has a history of complying with FOIA.

Findings of Fact and Conclusions of Law

I. Defendant Is Supported by Public Funds.

Several documents demonstrate that Palmetto Health has been receiving millions of dollars in government grants each year for many years. Each year, Defendant is required to file a federal tax Form 990. The IRS Instructions for Form 990 state the following with regard to line 1.e. of Part VIII. Statement of Revenue:

> Enter the total amount of **contributions** in the form of grants or similar payments from local, state, or federal government sources, as well as foreign governments. Include grant amounts from **U.S. possessions**.
>
> Whether a payment from a **governmental unit** is labeled a "grant" or a "contract" does not determine where the payment should be reported on part VIII. Rather, a grant or other payment from a governmental unit is reported here if its primary purpose is to enable the organization to provide a service to, or maintain a facility for, the direct benefit of the public rather than to serve the direct and immediate needs of the governmental unit. In other words, the payment is recorded on line 1e

if the general public receives the primary and direct benefit from the payment and any benefit to the government unit is indirect and insubstantial as compared to the public benefit.

The following are examples of governmental grants and other payments that are treated as contributions and reported on line 1.e.

- Payments by a governmental unit for the construction or maintenance of a library or museum facilities open to the public.
- Payments by governmental unit to nursing homes to provide care to the residents (but not Medicare/Medicaid or similar payments made on behalf of the residents).
- Payments by governmental unit to child placement or child guidance organizations under government programs to better serve children in the community.

Id., pp. 37-38 (emphasis in original).

Defendant's Form 990, filed from 2008 to 2014, reported the following on Part VIII line 1.e., entitled "government grants (contributions):"

2008: $4,183,656.
2009: $5,910,902.
2010: $5,695,423.
2011: $4,021,062.
2012: $1,861,225.
2013: $1,728,643.
2014: $3,266,825.

In addition, the Palmetto Health Consolidated Statements of Changes in Net Assets show "contributions and grants" as follows:

2009: $7,121,000.
2010: $7,727,000.
2011: $8,648,000.
2012: $8,946,000.
2013: $9,953,000.

Defendant produced two pages of information, SCPH_001750-51, including a detailed chart of the source of government grants for the year ending September 30, 2015. It shows twenty-three separate government grants totaling $2,068,401. These pages demonstrate that these government grants are for the general benefit of the public and not for the benefit of the

governmental unit. They are grants, and Defendant is an "organization, corporation, or agency supported in whole or in part by public funds or expending public funds." S.C. Code Ann. § 30-4-20(a). Accordingly, the Court finds that Defendant is supported by public funds.

II. Defendant Expends Public Funds and Manages Their Expenditure.

David F. Lee, Palmetto Health's director for financial forecasting, testified that his department provides financial record management for the expenditures of monies from governmental grants. Lee testified as follows:

1. That "[o]ne of my responsibilities was reporting -- documentation reporting of grants and other services that we do back to the funding source."[1]

2. That he and his department use a record-keeping system to "report expenditures related to this grant . . . To make sure that the grant obligations are met, . . . and the expenditures have been spent in order for us to release the funds and record them as revenue."[2]

3. That the documentation provided by his department is "a requirement of the funding. When we receive the funding, we're required to keep the documentation of those expenditures and then report them back.[3]

4. That he and his staff "oversee those expenditures to make sure they comply with the purposes of the grant."[4]

5. That "it is fair to say that [he] manage[s] and oversee[s] the financial justifications for the expenditures."[5]

6. That the Sexual Assault Nurse Examiner (or "SANE") program is a grant or program that has been going on since 1999.[6]

7. That his department would have the responsibility for all the financial paperwork, and to make sure that the financial documentation matches up to the budget and the purposes of the grant.[7]

8. That his department oversees the expenditure of the money to make sure it spent as was

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[1] Tr. of R., February 8, 2017, 2016-CP-40-01651 ("Tr."), page 86, lines 2-5.
[2] Tr., p. 91, lines 12-22.
[3] Tr., p. 94, lines 16-18.
[4] Tr., p. 94, lines 19-23.
[5] Tr., p. 97, lines 9-11.
[6] Tr., p. 97, line 22—p. 98, lines 1-3.
[7] Tr., p. 98, line 21—p. 99, lines 1-2.

intended . . . "[a]nd before we request reimbursement for it[.]"[8]

9. That his office would make sure that the expenditures are in keeping with the budget narrative and the purposes.[9]

10. That Palmetto Health has been receiving money under a grant from The Health Resources and Services Administration in the United States Department of Health and Human Services from July 1, 2001 up through May 31, 2019. They receive about $1.2 million a year.[10]

11. That if his office did not "meet obligations," Palmetto Health would, "at some point in time, need to refund the money to the government."[11]

12. That Palmetto Health also receives a grant from the Department of Veterans' Administration, equal to the expenditures they incur, to supply the Veterans' Administration and the Veterans' Hospital with residents, and his office makes sure that the documentation is there to validate those expenditures and those actions being taken.[12]

13. That Palmetto Health also receives funds from the State of South Carolina each year for the expansion of Palmetto Health's family practice residents, and his office overseas financial aspects or the accounting for the distribution of those funds, amounting to "[a]bout $800,000 a year."[13]

The Court finds that Defendant has expended and managed the expenditure of millions of dollars of public grant funds for a variety of public grantors for many years.

III. Defendant Has a History of Complying with FOIA.

Palmetto Health is a combination of Richland Memorial Hospital and Baptist Hospital. Paul Duane, Defendant's CFO of sixteen years, testified that Palmetto Health is an "alliance:" it carries out the function of Richland Memorial Hospital and the function of Baptist Hospital as a unified entity. Defendant has a history of complying with FOIA, both in requests for public records and in the open meetings law sections of FOIA.

[8] Tr., p. 103, lines 8-11.
[9] Tr., p. 103, lines 22-25.
[10] Tr., p. 105, line 16—p. 106, line 16.
[11] Tr., p. 107, lines 1-5.
[12] Tr., p. 107, line 19—p. 108, line 9.
[13] Tr., p. 110, ll. 5 – p. 111, l. 1.

Duane testified that for as long as he had been attending board meetings in his sixteen years as CFO, Palmetto Health has conducted its board meetings as public meetings and gives public notice, which would be in compliance with the open meetings provisions of FOIA, S.C. Code Ann. § 30-4-60.[14] Duane testified that, from time to time, there would be a motion and a vote to go into "executive session" to discuss contracts, strategies, legal matters, and to obtain legal advice from lawyers, in accord with S.C. Code Ann. Section 30-4-70.[15] The most recent executive session was within the last quarter.[16]

Plaintiff's Exhibits 20 and 21 demonstrate that Defendant has responded to requests under FOIA in the past. Exhibits 20 and 21 are letters from March and April of 2002, in which Palmetto Health responds to FOIA requests from Plaintiff, and copies its outside counsel on the letter.[17] The Court finds that Palmetto Health properly believed itself subject to FOIA, and conducted itself accordingly.

IV. Defendant's Defenses Are Unavailing.

Defendant contends it is not a "public body" under FOIA because FOIA does not apply "to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm's-length basis." *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991). The Court finds that the arm's length transaction exception does not exempt Defendant.

a. The Arms' Length Transaction Exception Does Not Apply to Defendant.

The *Weston* court explained:

In that situation, there is an exchange of money for identifiable goods or services

[14] Tr., p. 46, lines 7-19.
[15] Tr., p. 47, lines 1-16.
[16] Tr., p. 48, lines 2-9
[17] Tr., p. 48, line 20—p. 56, line 23.

> and access to the public body's records would show how the money was spent. However, when a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. Defendants contend this exception applies to them.

However, before the *Weston* Court articulated the exception, it also described four separate holdings that it found were sufficient to subject the Defendant Foundation to the application of FOIA. In what the Court called the "second transaction," the Foundation had received $16,300,000 in federal grant money "in connection with" the construction of the Swearingen Engineering Center. The Defendant Foundation had managed the expenditure of these funds in the construction of the engineering center. The Supreme Court found that, in so doing, the Foundation had "received support from public funds and [had] expended public funds." *Id.* 303 S.C. at 402, 401 S.E.2d at 163.

Just as the Foundation in *Weston* received and expended funds for the construction of an engineering center, so has Palmetto Health received and expended funds for various purposes, and is thereby subject to FOIA. In *Weston*, the Supreme Court ruled, "[e]ach of the above transactions alone would bring the Foundation within the FOIA's definition of 'public body.'" *Id.* 303 S.C. at 403, 401 S.E.2d at 164.

In *Weston*, the Defendant Foundation argued "that the grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center." *Id.* 303 S.C. at 402, 401 S.E.2d at 163. The Supreme Court ruled, "[T]he Foundation clearly directed the expenditure of the funds it received." *Id.*

The Defendant Foundation made a similar argument regarding the receipt of two million dollars from the City of Columbia and $3.75 million from Richland County to help develop the

Koger Center. The Foundation argued that those funds were given to it "pursuant to a contractual agreement and that once the City and County transferred the property and performance of their contractual agreement, the expenditure of public funds ended." *Id.* 303 S.C. at 402, 401 S.E.2d at 164. The Supreme Court rejected this argument as well. "This argument is not persuasive. Funds from the public coffer were given to the Foundation which managed the expenditure of the funds and the development of the real estate. By these actions, the Foundation received support from and expended public funds."

The Foundation's argument in *Weston* is the same argument made by Palmetto Health. Defendant has received millions of dollars in public funds over many years and expended the public funds, thereby subjecting itself to the provisions of FOIA.

In the *Weston* case, all the transactions addressed by the Court were in the past, and yet the Supreme Court ruled that these transactions were sufficient to make the Foundation subject to FOIA in the present. Similarly, Palmetto Health has been receiving government grants since 2001, and for at least the last eight years, the evidence demonstrates that Palmetto Health has received millions of dollars each year in government grants from state and federal sources. Although Defendant contends that these grants are for a particular purpose and are not transferred *en masse*, the Court finds that the beneficiaries of these grants are the public at large, and that no benefit is going back to the granting authority. They do not amount to a *quid pro quo*. Accordingly, these are grants and not arm's-length transactions by which a private body sells goods or services to the government. The government does not benefit from these grants; the public does.

b. A Corporate Citizen May Enforce FOIA.

Defendant argues that FOIA does not allow Plaintiff, a corporate citizen, to bring a FOIA enforcement action. Defendant relies on selections from FOIA to support its argument.

The Court finds that the plain language of FOIA authorizes this action by this Plaintiff.

Under FOIA, a "person" is defined as "any individual, **corporation**, partnership, firm, **organization or association**." S.C. Code Ann. § 30-4-20(b) (emphasis added). Under FOIA, "**Any person** has a right to inspect or copy any public record of a public body." S.C. Code Ann. § 30-4-30(a) (emphasis added). If a "public body" refuses to provide a "public record," "**any citizen of the State** may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter." S.C. Code Ann. § 30-4-100(a) (emphasis added).

Defendant argues that although a corporate citizen has a right to *request* a public record, it has no right to *enforce* FOIA in court. Such a result would be absurd, and cannot be the intention of the General Assembly. Furthermore, S.C. Code Ann. Section 30-4-100(b) disposes of such a notion quite firmly: "If **any person or entity** seeking such relief prevails, **he or it** may be awarded reasonable attorney fees and other costs of litigation." The General Assembly clearly intended that corporate citizens, such as Plaintiff, could enforce FOIA.

Corporations and other organizations have used FOIA extensively, and enforced it in the courts of South Carolina. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (journalists' society); *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991) (newspaper company); *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994) (County Administrator); *City of Columbia v. Am. Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E2d 747 (1996) (ACLU); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) (corporation that bid unsuccessfully for a public contract); *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 594 S.E.2d 888 (2004) (newspaper company); *Seago v. Horry Cnty.*, 378 S.C. 414, 663, S.E.2d 38 (2008) (electronic mapping company); *Evening Post Publ'g Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011) (newspaper company); and *Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014)

(newspaper company). The South Carolina Supreme Court has never suggested that corporate citizens or other organizations were precluded from enforcing FOIA.

Both the statutes and the case law of South Carolina authorize corporations to use and enforce FOIA.

c. *Disabato* Did Not Change the Law.

Finally, Defendant quoted from *Disabato v. S.C. Ass'n. of Sch. Admin.*, 404 S.C. 433, 746 S.E.2d 329 (2013), arguing that it represented a "new holding" from the Supreme Court that hospitals are exempt from FOIA, even if they met the definition of a "public body." Defendant's reliance on this case is misplaced. The plain language of FOIA provides no support for Defendant's assertion.

FOIA lists very clearly those "Matters exempt from disclosure." Under S.C. Code Section 30-4-40, the legislature provided the exclusive list of exceptions to the public disclosure requirements found at S.C. Code Section 30-4-30. There is nothing in Section 30-4-40 that says "hospitals" are exempt from FOIA. Defendants have cited no language in FOIA that exempts "hospitals" from FOIA.

Disabato addressed the policies of FOIA competing with the First Amendment rights of school administrators to be a part of a school administrators' advocacy group, supported by public funds. The Supreme Court ruled that FOIA would affect First Amendment rights only in a minor way, because FOIA applies only to "public bodies." At the end of a lengthy opinion, the Court offered a summary of the applicable rule, not a change in the law:

> The FOIA would **not** apply to a private entity that receives public funds for a **specific purpose**. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or healthcare clinic. **However**, the FOIA **does** apply to any private organization that is **generally supported** by public funds.

404 S.C. 433, 456, 746 S.E.2d 329, 341 (2013) (emphasis added)

Again, this "holding" is nothing more than a summary of multiple prior holdings, and may be properly called *dicta*. The remark about a "healthcare clinic" was not a holding of the Court (there was no healthcare clinic involved in the case), and it did not represent any change in policy or interpretation of FOIA. It does not mean that all hospitals are exempt from FOIA. The clause upon which Defendants rely begins with the introductory phrase, "For example." This sentence is an unremarkable articulation of the general rule that FOIA applies to an entity generally supported by public funds, or that receives public funds *en masse*, but FOIA does not apply "to a private entity that receives public funds for a specific purpose." This explanatory statement does not break any new ground, or portend any shift in the interpretation of FOIA.

> "Public body" means . . . any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or **any organization, corporation, or agency supported in whole or in part by public funds or expending public funds**, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions.

S.C. Code Ann. § 30-4-20(a).

To read *Disabato* as Defendant has suggested would mean that the Supreme Court, in *dicta*, intended to create a new common law exemption to FOIA that is not found in the plain language of FOIA. Further, Defendant is a hospital, not a healthcare clinic; accordingly, even if the Supreme Court had intended to create a new common law exemption to FOIA, it did not do so for hospitals.

A hospital can be a "public body" just like any other organization supported by public funds. *See Campbell v. Marion Cnty. Hosp. Dist., d/b/a the Mullins Hosp.*, 354 S.C. 274, 580 S.E.2d 163 (2003). Defendant Palmetto Health is not merely "a private organization that receives public funds to operate a childcare center or healthcare clinic." Instead, it is a combination of public and private organizations, "that is generally supported by public funds." *Id.*

CONCLUSION

Based upon trial testimony, exhibits, and submissions of the parties, the Court finds that Defendant is a "public body." By its denial of its status as a "public body" and its failure to produce the requested "public records," Defendant violated FOIA.

WHEREFORE, the Court:

1. Declares that Defendant is a "public body" under FOIA;
2. Declares that Plaintiff's requests are deemed approved;
3. Enjoins Defendant to provide Plaintiff a copy of all requested "public records;"
4. Grants Plaintiff its attorneys' fees and costs pursuant to S.C. Code Ann. Section 30-4-100(b); and directs Plaintiff to submit an affidavit of attorneys' fees and costs.

SO ORDERED, this 1st day of August, 2017

The Honorable Thomas A. Russo
Circuit Judge, Presiding

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4001651

Sisters Of Charity Providence Hospitals
PLAINTIFF(S)

Palmetto Health
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 14 August 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter
ATTORNEY(S) FOR THE PLAINTIFF(S)

Celeste Tiller Jones
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

CARPENTER
ATTORNEYS AND COUNSELORS AT LAW

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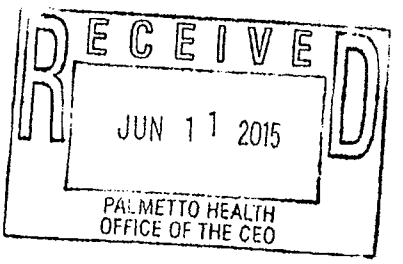
L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net
*LICENSED IN S.C. & N.C.

June 9, 2015

~~Charles D. Beaman, Jr.~~, CEO
~~Palmetto Health~~
Corporate Campus
1301 Taylor Street, 9th Floor
Columbia, SC 29201



VIA CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

CERTIFIED MAIL
RE: FOIA Request
9207 1903 3[illegible] 2977 2220 13

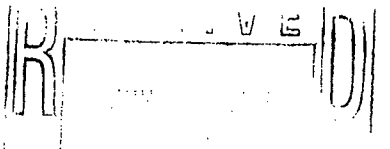
Re: Freedom of Information Act Request

Dear Mr. Beaman:

On behalf of my client, Sisters of Charity Providence Hospitals and pursuant to the South Carolina Freedom of Information Act, SC Code Ann. § 30-4-10 et seq., and 5 U.S.C. § 552 et seq., I respectfully request that you mail me complete copies of the following public records in your possession:

1. Any and all agreements entered into between Palmetto Health, its subsidiaries or affiliated companies (collectively "Palmetto Health") and the following physicians:

Kim J. Chillag, MD
John Clavet, MD
P. Doug DeHoll, MD
William T. Felmly, MD
David B. Fulton, MD
Wendell Holmes, Jr., MD
Jeffrey S. Hopkins, MD
Michael P. Horan, MD, MS
Christopher R. Hydorn, MD
Mark D. Locke, MD
Earl B. McFadden, Jr., MD
Prahitha Nallu, MD



Frank K. Noojin, III, MD	David A. Scott, MD
Michael W. Peelle, MD, MHA	W. Bret Smith, DO, MS
Mickey F. Plymale, MD	Jacquelyn F. Van Dam, MD
Bradley P. Presnal, MD	W. Alaric Van Dam, MD
Ryan M. Putnam, MD	Mae Young, MD

(collectively going forward these individuals are referred to as the "Moore Orthopedic Physicians")

2. Any and all agreements entered into between Palmetto Health and Ryan Hall;

3. Any and all communications, whether electronic (i.e. email or texts) or otherwise, between Palmetto Health and any of the Moore Orthopedic Physicians from January 1, 2013 to the present.

4. Any and all communications, whether electronic (i.e. email or texts) or otherwise, between Palmetto Health and Ryan Hall from January 1, 2013 to the present.

5. Any and all communications, whether electronic (i.e. email or texts) or otherwise, between Palmetto Health and any employee of Providence Hospitals relating to the Moore Orthopedic Physicians from January 1, 2013 to the present.

6. Any and all communications in Palmetto Health's possession relating to any proposed or actual contractual relationships with the Moore Orthopedic Physicians.

7. All documents relating to any proposed or actual contractual relationships with the Moore Orthopedic Physicians.

In the event you determine that a requested document contains material or information within the statutory exemptions to mandatory disclosure, I request you review such material for discretionary disclosure. Similarly, in the event you determine a document contains material or information within the statutory exemptions to mandatory disclosure, I request, in accordance with the provisions of S.C. CODE ANN. § 30-4-40(b), you produce any and all reasonably segregable portions of such document.

If you determine that all documents responsive to any individual requested item (or portion thereof) have been disclosed or specifically identified and withheld under the claim of authority, I request specific written confirmation of such fact. In the event you determine you have no document responsive to an individual request item (or portion thereof), I request specific written confirmation of that fact.

This request constitutes notice of demand for production of all described documents. If, for any reason, you determine that you will not send us any document (or portion thereof), or that this

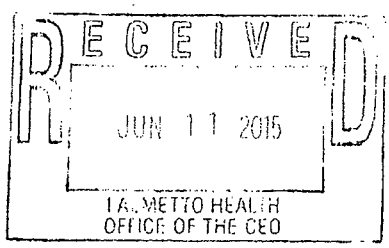
request will not, in whole or in part, be complied with, I request prompt notice of any action taken. In addition, I request such notice include complete identification of the withheld documents (or portions thereof) by title, author, date, nature of such material, and a thorough explanation of all legal and factual bases for your determination to deny disclosure. I request that in responding to this request you adhere to the time limitations set forth in S.C. CODE ANN. § 30-4-30(c).

I will pay the reasonable and direct costs of locating and reproducing the requested documents to the extent required by S.C. CODE ANN. § 30-4-30(b). However, I request prior notice should you determine that such costs will exceed $500.00.

Thank you for your assistance. Should you have any questions, please do not hesitate to call my office at (864) 235-1269.

Sincerely yours,
THE CARPENTER LAW FIRM, P.C.

James G. Carpenter



MCNAIR
ATTORNEYS

June 30, 2015

Celeste T. Jones

cjones@mcnair.net
T 803.799.9800
F 803.753.3278

James G. Carpenter
The Carpenter Law Firm, P.C.
819 East North St
Greenville, SC 29601

Re: Freedom of Information Act Request - Sisters of Charity Providence Hospitals

Dear Mr. Carpenter:

I am writing on behalf of my client, Palmetto Health, in response to the request received on June 11, 2015, made by you under the state and federal Freedom of Information Acts on behalf of your client, Sisters of Charity Providence Hospitals, and relating to, among other things, Moore Orthopedic physicians. For purposes of the South Carolina Freedom of Information Act, Palmetto Health is not a "public body" and, under the federal Freedom of Information Act, Palmetto Health is not an "agency." For those reasons, neither the South Carolina Freedom of Information Act nor the federal Freedom of Information Act applies to Palmetto Health and Palmetto Health will not be providing the requested records.

Even if it was determined that the two acts apply, Palmetto Health would object to the request for several reasons, including, but not limited to, (i) the request is overly broad, (ii) the request is vague or ambiguous in identifying some of the requested materials, and (iii) the request asks for some material which a public body or agency is not required to make publicly available. In addition, the amount proposed to cover the cost of searching for and making copies of the requested records is insufficient. Regardless of any objections Palmetto Health might have, whether or not as stated above, the two acts do not apply to Palmetto Health

Sincerely,

McNAIR LAW FIRM, P.A.

Celeste T. Jones
CTJ:sd

McNAIR LAW FIRM, P.A.
1221 Main Street
Suite 1700
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SCPH Legacy Corporation and POD Legacy, LLC, Plaintiff, vs. Palmetto Health, Practice Partners in Healthcare, Inc., Larry D. Taylor, W. Ryan Hall, Matthew Frick, and David L. Pace, Defendants.	C/A No. 3:16-CV-2863-JFA **ORDER**

This case arises from Defendant Palmetto Health's acquisition of a majority of the Moore Orthopedic Clinic, P.A. ("Moore Clinic") employees. Plaintiffs SCPH Legacy Corporation and POD Legacy, LLC, (collectively "Providence" or "Plaintiffs"), a smaller hospital system that previously owned the orthopedic group, have asserted 20 causes of action, including numerous anti-trust claims and several state law claims. Collectively, the defendants have filed motions to dismiss for failure to state a claim as to all of the claims contained in the complaint.

I. FACTUAL AND PROCEDURAL HISTORY[1]

Plaintiff SCPH Legacy Corporation ("SCPH") was formerly known as Sisters of Charity Providence Hospitals and operated the nonprofit Providence Hospitals in service of citizens residing in the midlands of South Carolina. Plaintiff POD Legacy, LLC, ("POD") was formerly known as Providence Orthopedic Group, LLC, and was a wholly-owned subsidiary of Sisters of Charity Providence Hospitals.

[1] Because this motion is brought pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure, all facts alleged in the complaint are accepted as true.

In 2007, Plaintiffs contracted with the Moore Clinic to acquire services relating to the delivery of orthopedic care, and later became the employer of the physicians and support staff of the Moore Clinic. In 2013, Providence began looking for other hospitals to serve as affiliation partners after changes in the healthcare market made it difficult for Providence to operate as a standalone facility. Providence entered into discussions with Defendant Palmetto Health concerning Palmetto Health's possible acquisition of, or affiliation with, Providence, including the Moore Clinic. During the discussions, Palmetto Health gained access to confidential information concerning Providence's then current financial state and operations. However, in 2014, Providence planned instead to sell all of its assets, including the Moore Clinic, to a separate for-profit hospital system – LifePoint Health ("LifePoint").

During this time, Defendant Practice Partners in Healthcare, Inc. ("PPH"), acting through president and CEO Larry D. Taylor ("Taylor"), contracted with Providence to provide consulting services for Providence's orthopedic service line in exchange for $10,000 per month.

Before Providence finalized negotiations with LifePoint, Moore Clinic physicians and senior executives W. Ryan Hall ("Hall"), Matthew Frick ("Frick"), and David L. Pace ("Pace") (collectively "Individual Defendants"), exercised the 90-day termination right contained in their Employment Agreements and Affiliation Agreements with Providence. By July 27, 2015, all but two of the Moore Clinic employees, more than 330 individuals, resigned *en masse* and became employees of Palmetto Health. Additionally, many physicians exercised their right to purchase Moore Clinic assets. Consequently, Providence's negotiations with LifePoint fell through and discussions of acquisition ceased at that time. Providence operated for another ten months before negotiating a new deal with LifePoint at a reduced purchase price – some $50 million less than LifePoint's original offer.

At the crux of its complaint, Providence alleges that Palmetto Health conspired with the Individual Defendants to orchestrate a mass resignation and redistribution of Moore Clinic physicians, employees, and assets so as to disrupt the negotiations with LifePoint and cause the maximum amount of damage possible to Providence. Additionally, PPH and Taylor violated their contractual obligations by conspiring with the Individual Defendants and facilitating their departure. Providence alleges that these actions were intended to, and did in fact, damage Providence's ability to compete in the healthcare market. Additionally, the acquisition of Moore Clinic physicians and assets contributed to Palmetto Health's monopoly over the health care market, specifically the orthopedic care market, in central South Carolina.

Plaintiffs filed their voluminous complaint on August 17, 2016. (ECF No. 1). Pursuant to Rule 12 of the Federal Rules of Civil Procedure, each defendant chose to assert a motion to dismiss for failure to state a claim in lieu of answering the complaint. (ECF No. 35, 36). The motions have been fully briefed and argued. Therefore, this matter is ripe for review.

II. LEGAL STANDARD

It is well established that a Rule 12(b)(6) motion examines whether a plaintiff has stated a claim upon which relief can be granted. Traditionally, a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The United States Supreme Court has made clear that, under Rule 8 of the Federal Rules of Civil Procedure, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

Expounding on its decision in *Twombly*, the Supreme Court stated in *Iqbal*:

> [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." 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." 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.

Iqbal, 556 U.S. at 677-78 (quoting *Twombly*, 550 U.S. at 555-57, 570) (citations omitted); *see also Bass v. Dupont*, 324 F.3d 761, 765 (4th Cir. 2003).

III. ANALYSIS

In their motion, Defendants Palmetto Health and Individual Defendants have moved for dismissal on all claims asserted against them, 19 of the 20, contained in the Plaintiffs' complaint. Defendants PPH and Taylor have joined in that motion by re-alleging a majority of the arguments set forth by Palmetto Health and have moved to dismiss all of the claims asserted against them, 10 of the 20, in the Plaintiffs' complaint. Plaintiffs' claims can be separated into two major categories. Counts 1-11 allege violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, and the Clayton Act, 15 U.S.C. § 18, and are therefore "anti-trust" claims. The remaining counts allege various violations of South Carolina common law and statutory provisions and are thus "state law" claims.

A. Anti-trust Claims: Counts 1-11

Plaintiffs have alleged several violations of the Sherman Act against all Defendants and a violation of the Clayton act against Palmetto Health. In response to these allegations, Defendants have set forth several arguments as to why these claims should be dismissed. Chief among them is that Plaintiffs lack anti-trust standing and have not suffered an anti-trust injury.

1. Anti-trust Injury

The Supreme Court has stated that those seeking damages under anti-trust laws must prove more than the defendant's violation of those laws. *See Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1984)("Assuming that the defendants have violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, [Plaintiff] has not shown, as it must show under *Brunswick,* that these violations resulted in a compensable antitrust injury."). The plaintiff must show that antitrust violations resulted in anti-trust injuries. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977). Plaintiffs must "prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.* at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)).[2]

Here, Plaintiffs allege that the mass departure of Moore Clinic physicians and assets, orchestrated by Defendants, injured Providence's ability to compete. (ECF No. 41 p. 23). Specifically, Plaintiffs state that Palmetto Health's acquisition of Moore Clinic assets, along with the acquisition of other orthopedic practices, "has substantially lessened competition for orthopedic surgery services for residents of relevant markets, denying them benefits of competition." (ECF No. 1 ¶ 17). Providence alleges that this "loss of competitive strength provided

[2] This holding originally addressed a violation of Section 7 of the Clayton Act, but has been accorded broader application, including violations of Section 2 of the Clayton Act, Section 1 of the Sherman Act, and Section 2 of the Sherman Act. *See Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 303 (5th Cir. 1984).

by the Moore Clinic" damaged its ability to compete by $50 million. (ECF No. 1 ¶¶ 145, 146, 148). These damages were calculated by a reduction in the agreed upon purchase price of Providence to LifePoint. (ECF No. 1 ¶ 147). Although Providence alleges to have suffered damages, it appears that these damages are not necessarily anti-trust damages.

In *Brunswick*, the defendant bowling equipment manufacturer acquired over two hundred bowling centers from defaulting customers. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 479–81 (1977). The plaintiffs were operators of competing bowling centers and sought damages under the Clayton Act for profits they would have made if those defaulting bowling centers had discontinued operations. *Id.* The Supreme Court held that the plaintiffs had not suffered anti-trust injury by stating:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury the loss of income that would have accrued had the acquired centers gone bankrupt bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss" but no compensable injury had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . . . Thus, respondents' injury was not of the type that the statute was intended to forestall.

Id. at 487–88 (internal citations and quotations omitted). The Court went on to say that antitrust laws were enacted for the protection of competition not competitors. *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Court also explained that violation of the anti-trust laws did not necessarily entitle a plaintiff to damages. Compensable damages should be the "type of loss that the claimed violations would be likely to cause." *Id.* at 489 (quotations omitted). Even though the plaintiff in that case was injured, "it was not by reason of anything forbidden in the antitrust laws: while [plaintiff's] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made acquisitions unlawful." *Id.* at 488.

Here, Providence repeatedly alleges that Palmetto Health's acquisition of the Moore Clinic,

along with other orthopedic providers, increased Palmetto Health's market share for orthopedic services in the midlands. (ECF No. 1 ¶¶ 17, 145, 146, 148). Providence then claims this increase in market presence reduced its ability to compete and that ability to compete is valued at $50 million, which is reflected in the reduced purchase price. Taken as true, these allegations support the contention that Providence lost $50 million when Palmetto Health acquired the Moore Clinic. However, this injury is not the type anti-trust statutes were intended to prevent. "Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Brunswick,* at 487.

Just as in *Brunswick*, Providence would have suffered the same injury regardless of who acquired the Moore Clinic. Providence would have lost its ability to compete and $50 million of assets no matter what organization acquired the Moore Clinic, or if the Moore Clinic simply removed itself and operated as an independent orthopedic service provider. Palmetto Health's increased size and market presence did not compound or add to any injury that Providence would have otherwise suffered at the loss of the Moore Clinic. Here, as in *Brunswick*, if the merger of the Moore Clinic and Palmetto Health is unlawful, "it is because they brought a 'deep pocket' parent into a market of 'pygmies.'" *Id.* at 487. Yet this injury "bears no relationship to the size of the acquiring company or its competitors." *Id.* Plaintiffs would have suffered an identical "loss" but no compensable injury had Moore Clinic been purchased by "shallow pocket" parents. *See id.*

Providence attempts to distinguish this situation from *Brunswick* by stating "the claim to damages in *Brunswick* was based on enhanced competition – the very thing the antitrust laws were designed to protect. Again, that is not the situation alleged here. Providence has alleged in detail

that competition has been diminished and that its injuries are the direct result of this diminishment." (ECF No. 41 p. 24). This argument is unpersuasive. Again, Providence may have been injured by the loss of the Moore Clinic, but this injury is not the type contemplated by a monopolization of orthopedic services. Providence may have lost some of its ability to compete in the orthopedic services market when it lost the Moore Clinic. However, this diminished ability to compete did not occur because of the increased size of Palmetto Health. Therefore, Providence's injury was not the type of injury that claimed anti-trust violations would be likely to cause. Without anti-trust injury, Providence lacks anti-trust standing and all anti-trust claims must be dismissed.

2. Anti-trust Standing

Defendants have also asserted that Providence lacks overall "antitrust standing." In *Associated General*, the Supreme Court identified a five factor test for determining antitrust standing. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). "[T]he doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Id.* at 535 n. 31. Additionally, "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013)(quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir.2007)).

When determining whether a plaintiff has antitrust standing, a court must consider (1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; (2) whether the harm was of a type that Congress sought to redress in providing a

private remedy for violations of the antitrust laws; (3) the directness of the alleged injury; (4) the existence of more direct victims of the alleged antitrust injury; and (5) problems of identifying damages and apportioning them among those directly and indirectly harmed. *Kloth v. Microsoft Corp.*, 444 F.3d 312, 324 (4th Cir. 2006) (citing *Associated General*, at 535–45). The first two factors address the concept of anti-trust injury. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007). The last three factors focus on the directness or remoteness of a plaintiff's alleged anti-trust injury. *Id.*; *see also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991) ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws.").

Here, the first two factors addressing anti-trust injury have been discussed in detail above. Accordingly, Plaintiffs have failed to show that the injuries claimed are the type Congress sought to redress in providing a private remedy for violation of anti-trust law. If however, Plaintiff had suffered an anti-trust injury, it would likely still lack anti-trust standing because more direct plaintiffs exist to bring anti-trust claims.

The remaining three factors are intended to restrict the pool of potential plaintiffs asserting an anti-trust claim. *See Novell,* at 317. "If afforded to every person tangentially affected by an antitrust violation or for all injuries that might conceivably be traced to an antitrust violation, the treble-damages remedy would open the door to much mischief, including the filing of claims that are remote from the forbidden anticompetitive activity and the risk of duplicative lawsuits." *Id.* (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n. 6 (1986)). Anti-trust law favors granting standing to the most direct victims of defendants' anticompetitive conduct and denying standing to more remote victims. *Id.* The compensation of only directly injured plaintiffs also prevents the possibility of duplicative recoveries. *Id.*

Here, Plaintiffs seemingly acknowledge the existence of other potential plaintiffs that may be directly harmed by any anti-competitive affects resulting from Defendants' actions.

> As a result of the Acquisition, residents of the relevant market, and their employers will pay directly or indirectly through higher premiums, co-payments, and other out-of-pocket costs when Palmetto Health chooses to exercise its enhanced market power, as commercial health plans will be forced to accede to Palmetto Health's increased rate and preference demands for orthopedic surgery and acute inpatient hospital services in general.

(ECF No. 1 ¶ 160). Defendants assert that this claim, along with other pleadings in the complaint, indicate that health plans, patients, and their employers will be those most directly affected by any antitrust violations. (ECF No. 1 ¶ 158–60). These individuals would be those directly responsible for paying higher prices in the form of increased procedural costs and insurance premiums should Palmetto Health's market presence allow it to unilaterally raise prices (which, as of now, is a speculative injury with no factual support). Additionally, LifePoint would be directly harmed by any anticompetitive affects because it is in direct competition with Palmetto Health regarding health services in central South Carolina. Providence essentially left the market when it sold all of its assets to LifePoint.

The existence of more direct plaintiffs cuts against a finding that Providence has anti-trust standing. Additionally, should Providence be allowed to proceed on its anti-trust claims, Defendants could be subject to later claims from LifePoint, medical patients, and their employers. This creates the possibility of duplicative recoveries along with problems apportioning damages among those directly and indirectly injured. Therefore, it appears that the final three factors also weigh against a finding of anti-trust standing because more direct plaintiffs exist to enforce any anti-trust violations. Consequently, Providence does not have anti-trust standing as defined in *Associated General*. Accordingly, Plaintiffs' anti-trust claims must be dismissed.

B. State Law Claims: Counts 12-20

All remaining claims are brought pursuant to South Carolina statutory and common law and may be heard under the supplemental jurisdiction of the federal courts. 28 U.S.C. § 1367. Therefore, this court does not have original jurisdiction over the remaining claims once separated from the federal antitrust claims. The district court may decline to exercise supplemental jurisdiction over claims if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). Trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been dismissed. *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy. *Id.* (citing *Carnegie–Mellon University v. Cohill,* 484 U.S. 343, 350 n. 7 (1988)).

Here, litigation is still in its earliest stages. Although all parties fully briefed and prepared arguments pertaining to the dismissal of the state law claims, little else has been done to advance this case towards trial. Indeed, all Defendants have yet to prepare an Answer to the Complaint. Moreover, this Court previously issued on Order in this case declining to issue a formal scheduling order or allow discovery to begin until after the instant motions have been adjudicated. (ECF No. 26). This Court specifically based those early determinations on concerns for judicial economy. (ECF No. 26 p. 1)("The Court believes that delaying the discovery start date will promote judicial economy . . . ."). Therefore, the consideration of judicial economy weighs in favor of this Court declining to exercise jurisdiction over the state claims.

Also, dismissing the remaining state claims without prejudice to be refiled in state court would prove to be convenient and fair to all parties. Again, neither party has expended a severe amount of time in relation to this case that would prove to be unfair if dismissed at this early stage. Likewise, no party would be inconvenienced by advancing their respective positions in front of a state judge in a state court. Similarly, notions of comity weigh in favor of declining jurisdiction so that a state judge with a greater familiarity of the remaining state law claims can preside over this matter. Taken as a whole, these factors indicate that the remaining state law claims should be dismissed without prejudice so that they may be refiled in state court and presided over by a state official.

IV. CONCLUSION

For all of the reasons stated above, Defendants' motions to dismiss for failure to state a claim (ECF No. 35, 36) are GRANTED in part. The motions are granted to the extent that Claims 1-11, the antitrust claims, in Plaintiffs' complaint are DISMISSED for failure to state a claim. Additionally, this court declines to exercise jurisdiction over the remaining state law claims and they are dismissed without prejudice to be filed in state court.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

February 23, 2017
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

From: James Carpenter [mailto:james.carpenter@carpenterlawfirm.net]
Sent: Thursday, August 31, 2017 12:35 PM
To: Trinkley, Jane <JTrinkley@MCNAIR.NET>; 'Russo, Thomas A. Law Clerk (Emily Nellermoe)' <TRussoLC@sccourts.org>; 'Russo, Thomas A.' <TRussoJ@sccourts.org>
Cc: Jones, Celeste <CJones@MCNAIR.NET>; Gibson, Lisa <LGibson@MCNAIR.NET>; Oken, Melissa <MOken@mcnair.net>
Subject: RE: Sisters of Charity Providence Hospitals vs. Palmetto Health / C/A No. 2016-CP-40-01651

Dear Judge Russo,

We write to respond to the arguments of opposing counsel regarding the purpose and effect of S.C. Code Ann. § 18-9-150, which requires a surety, pending appeal. We respectfully submit that opposing counsel is wrong, and the Court is right in applying that statute to the current circumstances.

Opposing counsel cited no case law in support of her arguments. We respectfully suggest that a case with very similar facts demonstrates the correctness of the Court's ruling. *Whitman v. National Manufacture & Stores Corporation*, 175 S.C. 464, 179 S.E. 478 (1935). The Plaintiff, Whitman, worked as a manager of a retail store. His annual compensation appear to be $300 plus additional compensation dependent upon the operating results of the store. The Defendant store kept those records. The store refused to share the operating records with the Plaintiff to enable him to calculate the amount he had earned. The Plaintiff filed a Summons (Complaint not served) and moved for discovery of the relevant records. (This was under Code Pleading, prior to the adoption of the South Carolina Rules of Civil Procedure.)

The Defendant made a special appearance contesting the jurisdiction of the Court and demanding a copy of the Complaint. Plaintiff replied that he needed the business records of the store in order to properly draft his Complaint.

The Court granted the motion for discovery, and the Defendant filed Notice of Appeal, still reserving its rights under its special appearance. The Defendant argued that the order to produce the records should be stayed pending appeal. The Circuit Court granted the stay but required a surety of $1,000 pursuant to Section 786 of the 1932 Code.

The Supreme Court stated the following:

> On December 8, 1934, defendant, still reserving the terms of its special appearance as noted, **filed undertaking with surety** in the sum of $1,000, conditioned, **as required by section 786**, to obey the order of the Supreme Court upon this appeal.

The South Carolina Supreme Court affirmed the ruling of the Circuit Judge in its entirety. Accordingly, the Supreme Court viewed section 786 to **require a surety** to ensure that the Defendant would obey the order of the Supreme Court and produce copies of the records.

The significance of this case is twofold: first, factually, it's similar to the case at bar, in that the issue was production of copies of records, not of ownership of records, as suggested by counsel

for Palmetto Health. Second, the required bond was pursuant to Section 786 of the 1932 Code, which is the statutory predecessor to S.C. Code Ann. § 18-9-150.

Plaintiff attaches both *Whitman v. National Manufacture & Stores Corporation*, 175 S.C. 464, 179 S.E. 478 (1935), and S.C. Code Ann. § 18-9-150, with the important portions underlined. *Whitman* clearly demonstrates that this Court was correct in requiring a surety to make sure that the Defendant Palmetto Health will preserve the "public records" and will obey the ruling of the appellate court to produce them.

As to the amount of the bond, the court in *Whitman* required a bond in approximately three times the amount of money in controversy ($1,000 on a claim of just over $300). In the case at bar, as demonstrated by arguments of counsel for Palmetto Health in the hearing yesterday, the documents at issue in the FOIA case are the heart and core of proof in the Antitrust action, pending at the United States Court of Appeals for the Fourth Circuit. The amount in controversy in that case is about $50 million. If this Court were to follow the lead of the *Whitman* court, that would require a bond of $150 million.

Although that may sound like a lot of money, when compared to the worth of Palmetto Health, it is not an overly large amount. In the trial, Mr. Paul Duane, CFO for Palmetto Health, testified that Palmetto Health revenues for 2015 were $1,267,014,000 (Transcript of Trial, p. 73). Accordingly, a $150 million dollar bond would reflect a little over 10% of Defendant's annual revenue. The Court should also consider that Palmetto Health has announced a joinder with Greenville Health System, which is larger than Palmetto Health, meaning annual revenues would more than double, reducing the relative amount of the bond to about 5% of annual revenue. Nevertheless, Plaintiff is satisfied that a $150,000,000 bond would probably be a sufficient amount to assure the continued existence of these public records during the pendency of the appeal and their proper production after the appeal, pursuant to S.C. Code Ann. § 18-9-150.

Respectfully submitted,

Jim Carpenter

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WHEN IT'S WORTH FIGHTING FOR!

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2016-CP-40-1651
S.C. Ct. App. Appellate Case No. 2017-001726

Sisters of Charity Providence Hospitals, ... Respondents,

v.

Palmetto Health,..... Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the *Motion to Certify* by depositing a copy in the United States Mail, postage prepaid, on October 30, 2017, addressed to counsel for the Respondent, as follows:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 E. North Street
Greenville, SC 29601

Ann Shuler

October 30, 2017

Robert L. Widener
SC Bar No. 6089

rwidener@mcnair.net
T 803.799.9800
F 803.753.3278

Via Courier

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Sisters of Charity Providence Hospitals -v- Palmetto Health
Appellate Case No. 2017-001726

Dear Mr. Shearouse:

Enclosed for filing, please find the original and seven copies of Palmetto Health's Motion to Certify regarding the above referenced Appeal, along with our filing fee of $25.00 Please file the motion in your office and return a file stamped copy to me via our courier. By copy of this letter, we are serving counsel for Sister of Charity Providence Hospitals with a copy of the motion.

Please Note: This case is similar to the case of *DomainsNewMedia.com v. Hilton Head Island – Bluffton Chamber of Commerce*, Appellate Case No. 2016-000460, which was recently argued on October 19, 2017. This similarity is one of the reasons for the motion to certify. It may therefore be useful to advise the Court of this motion more quickly than usual.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

RLW/as
Enclosures

cc: Honorable Jenny Abbott Kitchings
James G. Carpenter Esquire

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October 30, 2017

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Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Sisters of Charity Providence Hospitals -v- Palmetto Health
Appellate Case No. 2017-001726

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of Palmetto Health's Motion to Certify regarding the above referenced Appeal, which we are filing with the South Carolina Supreme Court today. Please return the file stamped copy to me via our courier.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

RLW/as
Enclosures

cc: The Honorable Daniel E. Shearouse
James G. Carpenter Esquire

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