THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2020-001323
Case No. 18-ALJ-07-0358-CC
Case No. 18-ALJ-07-0360-CC
Case No. 18-ALJ-07-0366-CC

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CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital. .....Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, .....Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center, ..... Appellants,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

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# MOTION TO DISMISS APPEAL
and
# RETURN TO APPELLANTS' JOINT MOTION FOR RELIEF FROM APPEAL BOND REQUIRED BY S.C. CODE ANN. § 44-7-220(B)

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Pursuant to Rule 240, SCACR, and S.C. Code Ann. § 44-7-220(B) (2017), Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital (MUHA) moves to dismiss the above-captioned appeals and submits this Return to the Appellants' joint motion for relief from the appeal bond required by § 44-7-220(B). For the reasons set forth below, MUHA respectfully submits this Court should deny Appellants' joint motion and dismiss their appeals.

This Return uses "Appellants" to refer to the appeals by Trident and CMC against MUHA. "Trident" is Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center. "CMC" is Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center.[1]

## INTRODUCTION

Appellants Trident and CMC concede that § 44-7-220(B) required them to post a bond within "five calendar days" after filing their notices of appeal. They admit the bond must be five percent of the project's cost or one hundred thousand dollars, whichever is greater, up to a maximum of $1.5 Million Dollars, and secured by cash or surety. Here, the bond is $1.5 Million Dollars, because five percent of the project cost is $16.25 Million Dollars.

Rather than file the conceded bond, Appellants Trident and CMC filed a joint motion for relief from the bond requirement. Appellants concede they will not pursue this appeal if this Court denies their motion. As shown below, this Court should deny Appellants' motion and therefore dismiss their appeals. This Return generally references the Appellants' appeals in the singular.

[1] "Roper" is Respondent CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital. Roper also appealed the ALC's order and moved for relief from the statutory bond. Roper and MUHA settled their differences and this Court dismissed Roper's appeal. Roper remains a party to this appeal as a respondent, because Trident and CMC named Roper as a respondent in their notices of appeal. It is unclear whether Trident and CMC intend to pursue an appeal against Roper. It is unclear what the basis of any such appeal would be, and it is unclear whether Trident and CMC are "aggrieved" by the order vis-à-vis Roper. See S.C. Code Ann. § 18-1-30 (2014) ("Any party aggrieved may appeal in the cases prescribed in this title.") and Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."). If Trident and CMC intend to pursue an appeal against Roper that is independent of their appeals against MUHA, this motion to dismiss would not affect that appeal.

## ARGUMENT

### I. The appeal should be dismissed, because Appellants failed to post the statutory appeal bond required by § 44-7-220(B).

Nothing in § 44-7-220(B) creates any exception to filing the statutory bond for any reason. Section 44-7-220(B) does not allow an appellant to challenge the statutory bond rather than file it. Therefore, under the plain and ordinary meaning of the language used by the General Assembly in § 44-7-220(B), this appeal must be dismissed. *Wheeler v. Hyde*, 91 S.E.2d 265, 265-266 (S.C. 1956) (appellate court has no discretionary power over a bond required by statute and, if the bond is not filed, the appeal is not properly before the court and must be dismissed).[2]

[2] Section 4-7-220 provides in full as follows:

(A) A party who is aggrieved by the Administrative Law Court's final decision may seek judicial review of the final decision in accordance with Section 1-23-380.

(B) If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application or approve the request for exemption under Section 44-7-170 or approve the determination that Section 44-7-160 is not applicable, the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application or of an exemption request under Section 44-7-170 or appeals the determination that Section 44-7-160 is applicable and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

(C)(1) Furthermore, if at the conclusion of the contested case or judicial review the Administrative Law Court or the Court of Appeals finds that the contested case or a subsequent appeal was frivolous, the Administrative Law Court or the Court of Appeals may award damages incurred as a result of the delay, as well as reasonable attorney's fees and costs, to the party whose project is the subject of the contested case or judicial review.

(2) As used in this subsection, "frivolous appeal" means any one of the following:

(a) taken solely for purposes of delay or harassment;
(b) where no question of law is involved;
(c) where the contested case or judicial review is without merit.

## II. The General Assembly created the right to object to a CON application and, therefore, it may impose such conditions on that right that it deems appropriate.

Appellants' right to object to the CON application and appeal the denial of that objection is a right created by the General Assembly in the CON Act. Absent the CON Act, Appellants would have no rights in this matter. When the General Assembly creates a right, it may impose such terms and conditions that it deems appropriate on the exercise of that right and, absent compliance with those terms and conditions, there is no right.[3] Therefore, Appellants must comply with the requirements of the CON Act, including the statutory appeal bond, to assert their statutory rights under the CON Act. This rule is particularly pertinent here for two reasons.

First and foremost, the purpose of the CON Act is to promote and establish healthcare facilities and services that will best serve the needs of the public and ensure high quality healthcare for South Carolina's citizens.[4] This is a matter peculiarly within the province of the General

[3] *See, e.g., National Exchange Bank v. Holman*, 9 S.E. 824, 825 (S.C. 1889) (stating general rule); see also *Boone's Masonry Constr. Co. v. South Carolina Second Injury Fund*, 227 S.E.2d 659, 661 (S.C. 1976) (rights and remedies created by the Second Injury Fund statutes); *Gunnells v.Raybestos-Manhattan, Inc.*, 198 S.E.2d 535, 536 (S.C. 1973) (statutory right of dependents to recover for decedent's death from occupational disease); *Muckenfuss v. Atlanta & C.A.L.R. Co.*, 113 S.E. 367, 369 (S.C. 1922) (rights created by strict liability statute); *Bradley v. Doe*, 649 S.E.2d 153, 157-160 (S.C. App. 2007) (right to recover from UIM carrier when adverse driver unknown).

[4] § 44-7-120 ("The purpose of this article is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State."); *Dema v. Tenet Physician Services – Hilton Head, Inc.*, 678 S.E.2d 430, 433 (S.C. 2009) ("in enacting the CON Act, the Legislature intended to advance the quality of healthcare provided in the State for all people receiving the care"). The significant and growing need for the specialized and critical care services available only at MUHA in Charleston is undisputed, as is the fact that overcrowding at MUHA in Charleston routinely interferes with MUHA's ability to make those critical services available to the sickest patients, including patients that need to be transferred from the Appellants for those services. The MUHA hospital in Berkeley County that DHEC and the ALC approved in this case will allow MUHA to provide "routine" care to patients that do not need the highly specialized care available only at MUHA in Charleston. Again, Appellants do not dispute the need for MUHA to create this "routine" bed capacity elsewhere to optimize its ability to provide specialized and critical care to the sickest patients. They simply claim that MUHA should build additional bed capacity somewhere in Charleston, rather than in Berkeley County. The harm during the pendency of this appeal is to the patients in the Tri-County area. The additional bed need for MUHA was identified in June 2017. (S. C. State Health Plan, p. 28, eff. June 9, 2017). Given the length of time it takes to construct a new hospital and the delay in construction likely caused by this appeal, patients will continue to have restricted options to access MUHA healthcare.

Assembly, because it involves the weighing of competing public policies after studying the issues.[5] Second, the CON Act is a comprehensive and detailed treatment of the entire CON process, including special rules for the DHEC review process, for any ALC contested case hearing, and for appeals from the ALC.[6] This level of detail demonstrates a "legislative intent that [CON] matters *must be decided* only in the manner specified in [the CON Act]."[7]

Appellants complain that other general statutes and rules protect MUHA from delay damages, frivolous appeals, etc. This is a matter for the General Assembly, not this Court, because the question is whether the General Assembly has the power to impose a statutory bond, not whether the General Assembly wisely exercised that power.[8] The General Assembly has that power, because it created Appellants' rights.[9]

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[5] *Holman v. Bulldog Trucking Co.*, 428 S.E.2d 889, 893 (S.C. App. 1993) (public policy is the province of the legislature, not the courts, and the "legislature, not the judiciary, is the proper branch of government to consider and balance competing interests and policies"); *accord Government Employees Ins. Co. v. Poole*, 817 S.E.2d 283, 287 (S.C. 2018) (the General Assembly is better suited to determine public policy, because it has the ability to conduct studies, collect information, and weigh the various alternatives) *and Fullbright v. Spinaker Resorts, Inc.*, 802 S.E.2d 794, 797 (S.C. 2017) (public policy is matter within the sole province of the General Assembly).

[6] See generally S.C. Code Ann. §§ 44-7-110 to -394 (2017 & Supp. 2019).

[7] *Greenville County v. Kenwood Enters., Inc.*, 577 S.E.2d 428, 433 (S.C. App. 2003) (all emphasis added) (considering comprehensive zoning acts), *quoting I'On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 721 (S.C. 2000).

[8] *Horn v. Blackwell*, 48 S.E.2d 322, 323 (S.C. 1948) ("We are not unaware of the fact that [the] requirement [of a bond in appeals from eviction orders] may impose a hardship upon some tenants, but we are here dealing with the power of the General Assembly and not with the question of whether such power was wisely exercised."); *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994) ("the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts."), *aff'd* 475 S.E.2d 762 (S.C. 1996).

[9] Appellants also claim "financial hardship" in being required to post the statutory bond. The statute does not permit any exceptions and, as shown herein, the General Assembly had the power to make the bond mandatory. Moreover, it is questionable whether Appellants are truly unable, as opposed simply to being unwilling, to post the bond. Their supporting affidavits show that they **prefer** to spend the $1.5 Million Dollars elsewhere, ignoring the facts that they **are able to** post a surety rather than cash and that the bond is returned to them if they prevail in this appeal. As shown in the attached affidavit of David Levitt, the Trident appellants have the ability to post the statutory bond, but they simply choose not to do so. Also, HCA is the parent of CMC and the Trident appellants. It is the largest hospital system in the United States according to Becker's Hospital Review (Jan. 15, 2020), and Levitt's affidavit shows that HCA has enormous financial ability to assist Trident and CMC, assuming either of them actually needs assistance as opposed to simply not wanting to post the statutory bond. In any event, financial hardship is not an exception to the bond statute and, if Appellants believe it should be, their recourse is with the General Assembly, not this Court. See *Wheeler, supra* (appellate court has no discretionary power over mandatory statutory bond).

## III. Appellants' "due process" and "equal protection" arguments have no merit.

Appellants bear the heavy burden of proving "clear[ly] and beyond a reasonable doubt" that § 44-7-220(B) is unconstitutional. The courts indulge every presumption in favor of finding statutes constitutional and, if at all possible, will construe a statute so that is constitutional and valid.[10] Appellants fail to bear their heavy burden.

A. The statutory bond requirement in § 44-7-220(B) does not violate due process.

As the Supreme Court stated in *Horn v. Blackwell*: "It is well settled that the right of appeal is not an inherent or vested right, but is a matter of grace." 48 S.E.2d 322, 323 (S.C. 1948). Thus, the General Assembly "in its *discretion* may *abridge* or *regulate* the right of appeal." *Id.* (emphasis added). This discretion includes "the power to require the giving of a bond . . . *as a condition precedent* to the right to appeal . . . unless such power is **clearly excluded** by the constitution." *Id.* (all emphasis added). Here, Appellants spend much of their due process argument attempting to explain why *Horn v. Blackwell* does not control here. (Joint Motion at 8-10). Their analytical gymnastics in attempting to do so belies their argument.

Appellants complain that the appellant in *Horn* received one level of "judicial review" from the magistrate before having to post an appeal bond to seek further judicial review in the appellate court. The magistrate did not provide "judicial review" as contemplated by Article I, § 22, *i.e.*, review after a ruling by the fact finder. In *Horn*, the magistrate was the trial court and fact finder like the ALC in this case, and the first "judicial review" was in the appellate court, as it is here.

Appellants also complain that the constitutional provision on appeals from magistrates provided that appeals would be under "such rules and regulations" as established by the General Assembly, whereas Article I, § 22 does not contain this provision. Article I, § 22 is a limitation

[10] *Bodman v. State*, 742 S.E.2d 363, 365-366 (S.C. 2013).

on executive power, not legislative power, and it is silent on the meaning of "judicial review." That meaning is supplied by Article V, which creates the unified judicial system that is the only constitutional source of any judicial review, including the judicial review envisioned by Article I, § 22. (See Art. V, § 1, creating unified judicial system). In §§ 5 and 9, Article V directs the General Assembly to prescribe the "regulations" for the Supreme Court and the "jurisdiction" of the Court of Appeals. Thus, the General Assembly has the power to impose a bond in CON cases.

Finally, Appellants complain that the bond statute in *Horn* imposed a stay on the eviction of the appellant tenant, but the bond statute here does not impose a stay. Appellants do not request a stay or argue that this Court should interpret § 44-7-220(B) as imposing a stay, so their point here is unclear. In any event, Appellants can only be harmed if MUHA begins accepting patients before this appeal is finished. It will take 45 months to complete the project so, even if MUHA commences the project during this appeal, it is very likely the appeal will be finished before Appellants can possibly suffer any harm.

Appellants' real argument is that Article I, § 22 gives them an "unfettered" right to an appeal. This argument has no merit. Article I, §22 provides in pertinent part that "[n]o person *shall be finally bound* by a judicial or quasi-judicial decision of an administrative agency affecting *private rights* except on due notice and an opportunity to be heard; . . . and he shall have in all such instances the right to judicial review." (Emphasis added). Appellants' rights in this case are not private rights as envisioned by Article I, § 22. The General Assembly created Appellants' rights in the CON Act. Appellants are not "bound" as envisioned by Article I, § 22 – the ALC did not order Appellants to do or not do anything.

In any event, Article I, § 22 does not "clearly exclude" the General Assembly's power to regulate the judicial review afforded by Article I, § 22. Therefore, under long-standing principles

of law that pre-date Article I, § 22 and include *Horn*, *supra*, the General Assembly may require a bond as a condition precedent to the right to appeal. 48 S.E.2d at 323. This is particularly true here, because Appellants' right to object to the CON is a right created by the General Assembly and is therefore subject to such conditions that the General Assembly deems appropriate.[11]

B. The statutory bond required by § 44-7-220(B) does not violate equal protection.

The rational basis test that controls Appellants' equal protection claim has three elements: "(1) whether the law treats similarly situated entities differently; (2) *if so*, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose."[12] The first element of treating similarly situated entities differently is the gateway inquiry. If it is not satisfied, then there is no inquiry into the "rational basis" or "rational relationship" elements.

Courts give "great deference to the General Assembly's decision to create a classification." Challengers like Appellants must "negate every conceivable basis which might support it." The fact that a classification may result in some inequity does not make it unconstitutional, and challengers must show beyond a reasonable doubt that it is "not supported by any rational basis."[13]

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[11] In footnote 2 at page 7 of their joint motion, Appellants cite this Court's unpublished order in *Grand Strand Reg'l Med. Ctr. v. South Carolina Dep't of Health & Envtl. Control*, Appellate Case. No. 2014-000973 (Mar. 19, 2015). Citation of this unpublished order violates Rule 268(d)(2), SCACR. ("[U]npublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). Moreover, Appellants ignore the most salient points in the *Grand Strand* case. First, in affirming the single-judge order denying the motion, the Full Panel of this Court found that a valid purpose of the bond requirement was to provide a reserve fund for the payment of costs, fees, and delay damages. That purpose is particularly important here, if one assumes Appellants are truthful in claiming a financial inability to post the bond. Second, this Court acknowledged the possibility of imperfect results, such as a potential windfall or shortfall, but this imperfection did not make the bond statute unconstitutional. Third, the Supreme Court also denied the motion when Appellants sought review of the Full Panel order.

[12] *Joseph v. South Carolina Dep't of Labor, Licensing & Reg.*, 790 S.E.2d 763, 771 (S.C. 2016) (emphasis added).

[13] *Bodman v. State*, 742 S.E.2d 363, 367-368 (S.C. 2013); *accord Boiter v. South Carolina Dep't of Transp.*, 712 S.E.2d 401, 403 (S.C. 2011).

1. The bond statute does not treat similarly situated persons differently.

Section 44-7-220(B) does not treat similarly situated entities differently. All "objectors" to a CON application are treated the same. Thus, there is no equal protection violation. To avoid this, Appellants argue that the statutory bond applies only to CON cases and not any other appeals from the ALC. To support this mistaken view of the rational basis test, Appellants rely on the decision in *Lindsey v. Normet*, 405 U.S. 56 (1972). Their reliance is misplaced.

In *Lindsey*, the Court considered a tenant's appeal from an eviction order under Oregon law. In Oregon, all civil appellants had to file an appeal bond that covered all damages, costs and disbursements that might be awarded against him in the appeal. 405 U.S. at 74. An evicted tenant, however, unlike any other civil appellant, had to file the same bond **plus** an additional bond for payment of twice the rental value of the rented property. *Id.* at 75-76.

South Carolina does not have a mandatory general bond statute applicable to all civil appeals that Appellants must post in addition to the bond required by the Act that gave them their right to object to the CON. Rather, the General Assembly has enacted numerous appeal bond statutes tailored to specific types of cases. Thus, there is no disparate treatment like that in *Lindsey*.

Moreover, Appellants' argument is a "forum based" theory that makes no sense. They argue that § 44-7-220(B) violates equal protection, because it applies only to CON cases but not any other case that comes before the ALC. Acceptance of this theory would mean that every appeal from the Court of Common Pleas must be subjected to the same bond requirement, and any deviation from that universal requirement in a particular class of cases would violate equal protection. This would invalidate every civil appeal bond statute in South Carolina, because no

statute applies to every case. Manifestly, the General Assembly has the constitutional power and discretion to treat different types of cases differently, and that is what it did in § 44-7-220(B).[14]

2. Assuming some disparate treatment of similarly situated persons, Appellants have failed to prove the bond statute is not rational.

Assuming Appellants have satisfied their heavy burden in challenging the classification of CON appeals (and they have not), they fail to satisfy their burdens under the "rational basis" and "rational relationship" elements of the rational basis test. As shown earlier, the CON Act is an essential part of the General Assembly's implementation of its public policy decisions on promoting and establishing healthcare facilities and services that will best serve the needs of the public interest and ensure high quality healthcare to South Carolina's citizens.[15] This overriding public interest justifies the imposition of the statutory bond, particularly given that Appellants would have no rights in this matter but for the CON Act, which itself imposes the statutory bond. At the very least, the public interest in promoting high quality healthcare throughout South Carolina triggers judicial deference to the General Assembly in this peculiarly legislative matter, and Appellants have failed to prove beyond a reasonable doubt that the classification is not rationally related to the public policy and public interest objectives of the CON Act.

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[14] The following is a non-exhaustive list of appeal bond statutes for specific types of civil appeals:
§ 6-1-1030 (bonds for appeal of assessment of development impact fee against developer)
§ 12-21-2500 (bond in appeal of business license revocation)
§ 12-60-3370 (taxpayer must pay taxes under protest or post bond for those taxes before appealing)
§§ 15-67-620 and -640 (appeal bond when ejected as a trespasser)
§ 15-69-150 (bond in appeal of claim and delivery judgment for purpose of collecting a debt)
§ 18-7-10 and § 14-25-95 (bonds when appeal is to circuit court)
§ 18-9-130(A)(1) & (A)(2) and § 18-9-170 (bonds for money judgments and property sales during appeal)
§ 18-9-150 (bond for appeal of order directing the assignment or delivery of documents or personal property)
§ 22-3-310 (bond in appeals from magistrate's judgment for claim and delivery of personal property)
§ 27-37-130 and § 27-40-800 (bond in ejectment action)
§ 49-17-330 (bond for appeal challenging inclusion of property in a drainage or levee district)
§ 58-1-30 and § 58-11-70 (bonds in appeals involving rates for public utilities and radio common carriers)
§ 59-150-180 (bond in appeals involving lottery retailer contracts)

[15] § 44-7-120 (purpose of CON Act is to establish health facilities and ensure high quality services are provided).

## CONCLUSION

The CON Act is the source of Appellants' rights in this matter. The General Assembly created those rights and, therefore, the General Assembly may impose terms and conditions that it deems appropriate on the exercise of those rights. Appellants concede they have not satisfied and will not satisfy those terms and conditions. Moreover, Appellants fail to carry their heavy burden in challenging § 44-7-220(B) as unconstitutional. For these reasons and the other reasons set forth in this motion and return, MUHA respectfully submits this Court should deny Appellants' motion and dismiss their appeals.

Respectfully Submitted,

/s/Robert L. Widener
S.C. Bar No. 6089
Robert L. Widener
Celeste T. Jones
M. Elizabeth Crum
Pamela A. Baker
BURR & FORMAN, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR RESPONDENT MEDICAL UNIVERSITY HOSPITAL AUTHORITY d/b/a MUHA COMMUNITY HOSPITAL

October 29, 2020
Columbia, SC

# APPELLATE CASE NO. 2020-001323

# AFFIDAVIT OF DAVID S. LEVITT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

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Appellate Case No. 2020-001323

Administrative Law Court Case No. 18-ALJ-07-0358-CC
Administrative Law Court Case No. 18-ALJ-07-0360-CC
Administrative Law Court Case No. 18-ALJ-07-0366-CC

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**AFFIDAVIT OF DAVID S. LEVITT**

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The undersigned, David S. Levitt, being first duly sworn, deposes and states as follows:

1. I am the Managing Partner of Levitt Healthcare Affiliates. I have a Masters in Health Administration ("MHA") from George Washington University and 30 years of experience in health care planning and health care finance.

2. Over the course of my career, I have assisted more than 600 health care clients with strategic planning, business development, product line planning, and marketing. I have assisted in the preparation of more than 1,000 Certificate of Need ("CON") applications, providing, *inter alia*, analyses of relevant markets for services, utilization projections, and financial forecasts. I have served and have been qualified as an expert witness in health planning, healthcare finance, and financial feasibility in five States, including South Carolina, and I have provided testimony on all manner of health care services, including new hospital development. A copy of my CV is included as Attachment 1.

3. On behalf of my clients, Respondent, Medical University Hospital Authority ("MUHA") in the above-captioned matter, I performed an extensive review of both publicly available financial information on HCA as well as internal documents produced during the Administrative Law Court trial on this case.

4. HCA Healthcare, the parent company of Petitioners/Movants Trident Medical Center ("TMC"), Summerville Medical Center ("SMC") and Colleton Medical Center ("CMC") have adequate financial resources to deposit a bond with the Clerk of the Court of Appeals as required under 44-7-220.

5. For the most recent fiscal year (2019), HCA Healthcare had $51,336,000,000 in net revenue, producing $3,505,000,000 in after tax net income. The $1,500,000 bond would represent 0.0029% of net revenue and 0.043% of the company's net income after taxes.

6. Fiscal year 2019 earnings before interest, depreciation, taxes, and amortization (EBIDTA) totaled $7,925,000,000. The $1,500,000 bond would represent 0.019% of the company's EBIDTA.

7. In fiscal year 2019, 4 members alone of senior leadership of HCA Healthcare had compensation that total 47.4 million dollars.

| | | | |
|---|---|---|---|
| Sam Hazen | CEO | $ | 26,800,000 |
| William Rutherford | CFO | $ | 6,300,000 |
| John Foster | Group President | $ | 7,800,000 |
| Charles Hall | Group President | $ | 6,500,000 |
| TOTAL | | $ | 47,400,000 |

The $1,5000,000 bond would represent less than two weeks of compensation for these 4 individuals.

8. In 2020, HCA Healthcare received $1,376,000,000 in Coronavirus Aide, Relief and Economic Security (CARES) Act distributions. These funds are not subject to repayment. However, HCA has recently announced it has the financial resources to repay these grants back to the federal government. HCA Healthcare CEO Sam Hazen recently release a statement:

*"As the initial immediacy of the emergency has passed, and with more information, and more experience managing our operations during the pandemic, we believe returning these taxpayer dollars is appropriate and the socially responsible thing to do. Our focus will remain on supporting our patients, employees and physicians and continuing the vital role we play in the communities we serve."*

As evidenced but HCA's ability to return nearly $1,400,000,000 to the federal government, the company enjoys a strong financial position

9. As of June 30, 2020, HCA Healthcare had $4,638,000,000 in cash on hand. This is an increase from FY 2019 cash on hand of $621,000,000.

10. Since 2015, Trident Medical Center ("TMC") and Summerville Medical Center ("SMC") have applied and been approved to spend $132,176,552 in CON reviewable projects in South Carolina.

11. Trident Medical Center ("TMC") and Summerville Medical Center ("SMC") do not report financial information separately, but rather on a consolidated basis. Recent financial projections (CON project 2541) for the entities indicate the entity budgeted a pretax income of $101,624,484 for 2018 and expected pretax income to be $123,977,457 in 2021.

12. 2018 Internal financial information showed Colleton Medical Center ("CMC") produced $8,427,431 in EBITDA. (CMC-024).

13. Based on the abundantly available financial resources of HCA Healthcare, a $1.5 million bond, as required by statute, is easily accessible to Petitioners/Movants Trident Medical Center ("TMC"), Summerville Medical Center ("SMC") and Colleton Medical Center ("CMC").

FURTHER AFFIANT SAYETH NOT.

David S. Levitt
Levitt Healthcare Affiliates

Sworn to and subscribed before me
this 13th day of October, 2020.

Notary Public for the State of South Carolina
My commission expires: 2-27-2028

FRANK E. GARLINGTON JR.
COMM. EXP.
NOTARY
PUBLIC
02-27-2028
SOUTH CAROLINA

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CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital. .....Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, .....Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center, ..... Appellants,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

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**CERTIFICATE OF SERVICE**

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I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the **Motion to Dismiss Appeal and Return to Appellants' Joint Motion for Relief from Appeal Bond Required by S.C. Code Ann. § 44-7-220(B), with attached Affidavit of David Levitt** was served upon counsel for all parties in the above-captioned matter, via email at the email addresses listed below pursuant to the Supreme Court Order 2020-05-29-02, this 29th day of October, 2020, addressed as follows:

David B. Summer, Jr, Esquire
William R. Thomas, Esquire
Faye A. Flowers, Esquire
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, SC 29202
davidsummer@parkerpoe.com
willthomas@parkerpoe. corn
fayeflowers@parkerpoe.corn

Vito M. Wicevic, Esquire Rupinderjit S. Grewal, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
wicevivm@dhec.sc.gov
grewaIrs@dhec.sc.gov

Jennifer J. Hollingsworth, Esquire
Shannon V. Lipham, Esquire Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201) Post Office Drawer 2426
Columbia, SC 29202
jhollingsworth@nexsenpruet.com
svlipham@nexsenpruet.com

Cheryl D. Shoun, Esquire
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401
cshoun@nexsenpruet.com

Columbia, SC

Ann Shuler