THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Dec 29 2020
SC Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District Inc., d/b/a Lexington Medical Center,.....Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center, ...Respondents,

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the Respondents-Appellants.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS' MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT AND TO EXPEDITE THE PROCEEDING AND MEMORANDA IN SUPPORT OF MOTIONS

The above-captioned appeal is currently pending before the South Carolina Court of Appeals pursuant to S.C. Code Ann. §§ 1-23-380 and 1-23-610(B) (Supp. 2020). Pursuant to S.C. Code Ann. § 14-8-210(b) (Supp. 2020) and Rules 204(b) and 244, SCACR, Respondent Prisma Health-Midlands ("PHM") hereby respectfully moves this Court to certify this appeal from the Court of Appeals to this Court for direct review and an expedited hearing. These motions are based upon the grounds set forth below.

INTRODUCTION

This case arises under the Health Care Cooperation Act, S.C. Code Ann. § 44-7-500, et seq. (2017) ("Act" or "HCCA") and S.C. Code Ann. Reg. 61-31, Health Care Cooperative Agreements ("Regs."). The application of the Act and Regs. to an entity, here PHM, seeking to purchase and operate certain assets pursuant to its existing certificate of public advantage ("COPA") is a case of first impression in this state.[1] As discussed below, in light of the legislative purposes and intent of the Act, its application to PHM is of significant public importance and to the timely, cost effective and efficient delivery of health care services in the Midlands Area of South Carolina.

This appeal is from the Administrative Law Court's ("ALC") orders dated November 2, 2020, Order Denying Cross Motions for Summary Judgment ("Order Denying Cross Motions"), and December 7, 2020,[2] Order on Motion to Clarify and Motions to Reconsider ("Clarification Order") (collectively "Final Orders"), which summarily reversed the Department of Health and Environmental Control's ("Department" or "DHEC") February 28, 2020 decision ("Decision") to approve PHM's purchase of certain assets of LifePoint Health ("LPNT") and operate them subject to its existing COPA-97-01 and DHEC's monitoring and oversight. The LPNT assets include Providence Hospital, LLC d/b/a Providence Health ("Providence Downtown"), Providence Health Northeast ("Providence NE"), Providence Health-Fairfield ("Fairfield FSED")[3], Kershaw Health Medical Center ("Kershaw") and other assets (collectively "LPNT Assets").

[1] This is the first time that the Act has been the subject of a hearing before a South Carolina Article V Court.

[2] The Clarification Order concluded: "this court's Order Denying Cross-Motions for Summary Judgment that was issued on November 2, 2020, effectively ended the contested case before the Court and the parties shall treat it as a final order for the purposes of appeal." Clarification Order, p. 7.

[3] Fairfield FSED is the freestanding emergency department

Copies of the Final Orders are attached hereto as Ex. 1 (November 2) and Ex. 2 (December 7). PHM requests that this Court certify this case from the Court of Appeals and hear it in an expedited manner.

PROCEDURAL BACKGROUND

On December 13, 2019, PHM, the holder of COPA-97-01, filed a request with DHEC for approval of PHM's acquisition of the three (3) Lifepoint Health ("LPNT") hospitals, the freestanding emergency department ("FSED") in Fairfield County and other assets and integration of the assets into PHM to make the assets part of and subject to the COPA-97-01 and its related conditions ("Proposed Transaction"). On February 28, 2020, after considerable review, DHEC approved PHM's request, concluding that 'the ongoing conditions of the COPA shall be amended as follow to provide for the addition of the LPNT assets: … " Ex. 3 (February 28, 2020 decision letter) ("Decision")

On March 13, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") filed a request for review ("RFR") before the Board of the Department of Health and Environmental Control ("Board"), which the Board denied. LMC filed its Petition for Contested Case Review at the ALC on May 14, 2020. On June 22, 2020, PHM filed its Motion to Expedite. LMC opposed the motion and the ALC denied it on July 14, 2020.

On June 22, 2020, the ALC issued its Order for Prehearing Statements, Ex. 4. The Prehearing Statement Order specifically required that the parties state "[t]he issues presented for determination set forth with particularity, including any claims or defenses expected to be raised; …" *Id.*, p. 1, ¶ 3. The parties filed their respective Prehearing Statements on July 13, 2020. On July 14, 2020, Providence Downtown, Providence NE and Kershaw (collectively referred to as "LPNT") moved to intervene in the contested case. LMC opposed the motion, which the ALC

partially granted on September 4, 2020—and allowed LPNT limited participation in the case.

PHM filed its Motion for Summary Judgment ("PHM MSJ") on August 28, 2020. LMC opposed the motion and filed its Cross Motion for Summary Judgment ("LMC MSJ") on September 14, 2020. DHEC filed its response in support of PHM's MSJ on September 15. On September 28, PHM, joined by LPNT, filed their opposition to LMC's MJS. DHEC opposed LMC's MSJ. On October 5, LMC replied both to PHM's and DHEC's opposition to its MSJ.

The ALC heard the motions on October 20, 2020, and issued its Order Denying Cross Motions. PHM filed a Motion to Clarify and Reconsider (Alter or Amend) and LPNT filed a Motion to Clarify, on November 2, 2020. LMC responded to the motions on November 23, 2020. On December 7, 2020, the ALC issued its Clarification Order. This appeal was filed on December 9, 2020.

REGULATORY FRAMEWORK

The General Assembly adopted the COPA Act for the purpose of displacing competition with regulatory oversight, by authorizing transactions that will benefit South Carolina health care consumers, despite potential federal and/or state antitrust concerns. In adopting the Act, our General Assembly joined many other states in establishing a state regulatory scheme to immunize designated health care transactions that benefit the State from federal and state antitrust liability. This immunity exists under the "state action doctrine" articulated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341, 352 (1943).[5] State action antitrust immunity applies, under certain conditions, when a state adopts a "policy to displace competition with regulation", *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978), under the rationale that "[i]f a state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." *Town of Hallie v.*

City of Eau Claire, 700 F.2d 376, 381 (7th Cir. 1983). "[U]nder certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program. When determining whether the anticompetitive acts of private parties are entitled to immunity, [courts] employ a two-part test, requiring first that "the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy," and second that "the policy . . . be actively supervised by the State." *FTC v. Phoebe Putney Health Sys., Inc.,* 568 U.S. 216, 225 (2013).

The Legislature intended to provide state immunity from federal and state antitrust implications for health care providers who participate in discussions or negotiations authorized by this article and *who conduct business pursuant to an approved cooperative agreement*. S.C. Code Ann. § 44-7-520. (Emphasis added.) *See* S.C. Code Regs. 61 – 31 at § 101 ("[t]hese regulations implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or antitrust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition.").

Pursuant to the Act, DHEC is required to receive, review and make the decision whether to approve a cooperative agreement. S. C. Code Ann. § 44-7-540 ("The department shall grant or deny the application … .". In making its decision, the Department must determine whether the likely benefits from the agreement outweigh its likely disadvantages and whether the likely reduction in competition from the agreement is reasonably necessary to obtain the likely benefits. S. C. Code Ann. § 44-7-560. DHEC is authorized to establish conditions for COPA approval that are reasonably necessary to ensure that the activities conducted pursuant to the approved COPA are consistent with the COPA Act. *Id.*

The Act also requires the Department to monitor actively and regulate COPA activities and to revoke a COPA if 1) the operations are not in substantial compliance with the COPA and its conditions; or 2) the benefits of the agreement no longer outweigh the disadvantages; …" S.C. Code Ann. § 44-7-570(A).

As required by the Act, DHEC promulgated S.C. Code Ann. Reg. 61-31. Reg. 61-31, § 508 regulates amendments to a cooperative agreement after receipt of a COPA.[4]

FACTUAL BACKGROUND

COPA 97-01 AND DHEC CONTINUING OVERSIGHT

On October 6, 1996, Baptist Healthcare System of South Carolina, Inc. ("Baptist") and Richland Memorial Hospital ("Richland"), as the Sponsoring Organizations, submitted the application[5] ("Application") to obtain a COPA to enter into a "cooperative agreement" pursuant to the Act to form a single nonprofit entity, PHM, to operate the Baptist and Richland assets. The cooperative agreement submitted with the Application was the joint operating agreement—the Pre-Incorporation and Joint Operating Agreement ("JOA")—formed under the South Carolina Nonprofit Corporation Act of 1996 ("Nonprofit Act"). Pursuant to § 44-7-530, the JOA, PHM Articles of Incorporation ("Articles") and PHM Bylaws ("Bylaws") were included in the Application and were approved by DHEC as part of COPA-97-01. PHM has been operating under the JOA since DHEC issued COPA-97-01.

On May 8, 1997 ("1997 COPA Decision"), DHEC issued its letter advising Baptist and Richland, that subject to the twenty-five (25) conditions contained the letter, it intended to issue a

[4] S.C. Code Ann. Reg. 61-31, § 508 is the regulation under which DHEC made the Decision.

[5] The application was submitted pursuant to S.C. Code Ann. Reg. 61-31 § 201.

COPA "for the incorporation of a nonprofit entity to operate the hospitals of the Sponsoring Organizations as a single unit, where the Sponsoring Organizations will develop, implement, and *find new initiatives to improve public health and community outreach programs*, … ." (COPA Decision) Ex. 5, COPA Decision, p. 1242. (Emphasis added). Among other things, the Department determined:

(1) that the applicant has demonstrated that the likely benefits resulting from the cooperative agreement outweigh the likely disadvantages from the cooperative agreement; and

(2) that the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result."

Id.[6]

On October 6, 1997, DHEC issued COPA-97-01, "subject to each condition described in the approval dated May 8, 1997" ("COPA Conditions). Ex. 6, COPA-97-01. One of the COPA 97-01 Conditions was that DHEC retained the right to amend the COPA-97-01 conditions as circumstances may change during the life of COPA-97-01. *Id*. p. 1246, ¶ 20.

In November 2003, DHEC modified the COPA to remove certain conditions that had been fulfilled. Ex. 7, November 18, 2003 letter from Joel C. Grice to Kester S. Freeman, Jr., p. 1. DHEC retained the right to amend the COPA conditions as circumstances may change during the life of COPA-97-01. *Id.*, ¶ 11.

In 2010, DHEC approved PHM's certificate of need ("CON") application to build a 76-bed hospital at Parkridge. PHM Baptist Parkridge Hospital ("Parkridge") was constructed and opened in 2014, subject to COPA-97-01. PHM also operates PHM Tuomey, which PHM acquired in 2017 as part of the United States Department of Justice's settlement with Tuomey Medical Center in *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (2015).

[6] *See also,* Ex. 6.

In late 2017, Palmetto Health ("PH") and Upstate Affiliate Organization d/b/a Greenville Health System ("GHS") entered into an affiliation agreement to form Prisma Health ("Prisma"), a South Carolina nonprofit corporation operating under the Nonprofit Act. Before that affiliation was completed, PH requested and DHEC confirmed that the affiliation did not implicate COPA-97-01 and that the COPA would remain in effect and binding on PH after that affiliation became effective. Ex. 8, 2017 correspondence between M. Elizabeth Crum and Ashley C. Biggers and Louis W. Eubank. Thereafter, PH and GHS completed the affiliation and formed Prisma. PH changed its name to PHM in acknowledgment of its affiliation with Prisma.

PHM has fully complied with the conditions of COPA-97-01. Among other things, PHM has filed annual report with DHEC pursuant to § 44-7-570(A) and Reg. 61-31 § 504 so that the Department can determine whether the JOA operations continue to comply with the terms of COPA-97-01. In addition, through September 30, 2019, PHM has funded $60,861,210 million in public health initiatives and community outreach programs, including funding these programs in years where it had no excess revenue over expenses.[7]

PENDING TRANSACTION—PHM'S APPROVED CHANGES AFTER RECEIPT OF COPA-97-01

In the summer of 2019, LPNT invited Prisma and other health care systems to submit a proposal to purchase the LPNT Assets. LPNT chose Prisma's proposal and after negotiations, on September 13, 2019, LPNT entered into a letter of intent (as amended, the "LOI") for Prisma or a Prisma affiliate to purchase the LPNT Assets. Ex. 9, Isley Affidavit, ¶ 4, Ex. A, LOI and amendments 1-4. PHM is an affiliate of Prisma. Pursuant to the terms of the LOI, Prisma made

[7] The COPA 97-01 Conditions require that PHM file the Report annually instead of every two years. Part of the Report include the "Tithe" report. COPA-97-01 conditions required that PHM spend ten (10%) percent of its excess revenue over profits on public health initiatives and community outreach programs. The Decision amended the Tithe requirement and raised the percentage to fifteen (15%) percent of excess revenue over profits. Ex. 3, ¶ 2.

an initial good faith deposit of $5,000,000 to LPNT on September 13, 2019 when the LOI was executed. *Id.*, ¶ 5. The LOI also required an additional $5,000,000 deposit upon execution of the Asset Purchase Agreement (the "APA"). *Id.*

On December 13, 2019, PHM notified DHEC that Prisma had entered into the LOI and PHM planned to purchase LPNT Assets and requested that DHEC review the Proposed Transaction and determine that the LPNT Assets would be subject to the COPA Conditions and monitored by DHEC. Ex. 10, pp. 1-2. PHM provided documents and information in support of its request, and, during its review, the Department, requested and obtained additional information from PHM.

After its thorough review, DHEC determined that despite the addition of the LPNT assets, the benefits of the COPA would continue to outweigh any potential competitive disadvantages due to the loss of competition, and, pursuant to its Decision on February 28, 2020, gave its authorization for PHM to purchase the LPNT assets, subject to the ongoing COPA conditions and the additional conditions DHEC added to COPA-97-01.

GROUNDS FOR CERTIFICATION

Rule 204(b), SCACR, provides that "[i]n any case which is pending before the Court of Appeals, the Supreme Court may ... on motion of any party to the case ... certify the case for review by the Supreme Court before it has been determined by the Court of Appeals." Rule 204(b), SCACR, further provides that "[c]ertfication is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." *See*, Rule 204(b), SCACR. Here, there are novel issues of significant public interest and legal principles of major importance, as follows:

- THE ALC *SUA SPONTE* RAISED AND RULED ON DISPOSITIVE ISSUES NOT RAISED BY ANY PARTY TO THE CONTESTED CASE.

- LMC ALLEGED THAT REG. 61-31 § 508 IS UNCONSTITUTIONAL FOR VAGUENESS.
- THE ALC'S FINAL ORDERS MISAPPREHEND THE GENERAL ASSEMBLY'S INTENT TO ESTABLISH A SOUTH CAROLINA REGULATORY PROGRAM THAT ENCOURAGES COOPERATIVE AGREEMENTS BETWEEN HOSPITALS AND THE *CONDUCT OF BUSINESS UNDER THE COOPERATIVE AGREEMENT* WITHOUT BEING SUBJECT TO SCRUTINY UNDER AND IMMUNIZED FROM ANTITRUST LAW.

ARGUMENT

I. *The Ability of the ALC to Raise and Rule on Issues of Law Sua Sponte Is a Question of First Impression and Is of Significant Public Importance and Involves a Legal Principle of Major Importance*. PHM has been unable to find a South Carolina case addressing whether an administrative judge at the ALC has the authority *sua sponte* to raise and rule on issues of law. In this administrative case, the ALC based its Order reversing DHEC's Decision on issues it considered *sua sponte* and did not address, much less give difference to, DHEC's interpretation of the Act it administers.[8]

While we have not found cases addressing an administrative tribunal's statutory authority to raise and rule on issues *sua sponte*, there are many South Carolina cases that have held that it is an error of law for a court under the unified judicial system created pursuant to Article V of the Constitution of South Carolina *sua sponte* to raise and rule on issues not presented to it by the parties. *Henry v. Chambron*, 304 S.C. 351, 404 S.E.2d 518 (Ct. App. 1991).

While no case law addresses whether an ALC can raise and rule on issues *sua sponte*, South Carolina courts have clearly and consistently held that Article V courts have no such power. As a

[8] The Final Orders never addressed deference to DHEC's interpretation of the Act. *See* Exs. 1 and 2.

general rule, a trial court cannot consider issues not raised in the pleadings or set forth by evidence and tried by consent. See *Henry v. Chambron,* 304 S.C. 351, 355, 404 S.E.2d 518, 520 (Ct. App. 1991) ("The circuit court also erred in finding Chambron violated a restriction requiring architectural review of proposed home plans. The alleged violation was not raised by the pleadings, nor was it tried by consent."); *see also* 15 *S.C. Jur. Appeal and Error* § 77 ("A trial court cannot grant judgment or relief on an issue not raised by the pleadings or evidence.").

In *Blackburn and Company, Inc., v. Dudley*, 289 S.C. 416, 338 S.E.2d 151 (1986), this Court held:

> A plaintiff may not base a complaint upon an express contract and recover upon an implied contract or *quantum meruit. Phillips Refrigeration Co. v. Commercial Credit Co.,* 256 S.C. 500, 183 S.E.2d 330 (1971). This is a rule of pleading based upon the principle that a plaintiff who has pled one theory should not be allowed to recover upon another. *Hutson v. Stone,* 119 S.C. 259, 112 S.E. 39 (1922). A defendant is entitled to notice of the type of claim to which he is required to respond. *Birlant v. Cleckley,* 48 S.C. 298, 26 S.E. 600 (1897). A judgment must be in accord with the pleadings of the party in whose favor it is rendered, or it is fatally defective. *Brockington v. Lynch,* 119 S.C. 273, 112 S.E. 94 (1922).

Blackburn, 289 S.C. 415, 417-418, 338 S.E.2d 151, 152-153. As in *Blackburn*, PHM had no notice of the *sua sponte* issues raised by the ALC prior to the filing of the Order Denying Cross Motions.

Certainly, if it is an error of law for an Article V court *sua sponte* to raise and rule on issues, absent express statutory authority from the General Assembly, it is an error of law for the ALC to do so. The General Assembly has granted the ALC no such authority.

The ALC is a creature of statute, and as such "is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). S.C. Code Ann. § 1-23-500 (2005 & Supp. 2012) is

the statutory authority pursuant to which the ALC was created. "The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." *Howard v. S.C. Dep't of Corrections*, 399 S.C. 618, 733 S.E.2d 211 (2012).

The Clarification Order in this case states "all of the issues that PHM asserts the Court raised *sua sponte* were necessary and vital considerations to the Court's analysis of the issues raised by the parties in their summary judgment motions. *Contra Henry v. Chambron,* 304 S.C. 351, 355, 404 S.E.2d 518, 520 (Ct. App. 1991)".[9] Ex. 2, p. 3. The Clarification Order concludes "that all of the issues the Court allegedly raised *sua sponte* were either directly raised by the parties or were necessary derivative legal considerations of the issues raised by the parties." *Id.*, p. 4. At no point in the Clarification Order does the ALC either identify what *sua sponte* issues were directly raised by the parties or cite to where in the pleadings before it the issues were raised. Finally, the ALC's Clarification Order does not cite any authority in support of its contention that the court can raise and rely on "necessary derivative legal considerations of the issues raised by the parties" in reversing an agency decision.

The Final Orders arises from cross motions for summary judgment filed by PHM and LMC. Notably, the ALC *denied* both summary judgement motions, yet instructed the parties to treat the Clarification Order as a final order for purposes of appeal and reversed DHEC's Decision. On its face, the procedural posture of this appeal confirms the fact that the ALC raised and ruled on *sua sponte* issues, without notice to PHM, LPNT and DHEC, the parties defending the Decision. Otherwise, in reversing the Decision, the ALC simply could have granted LMC's MSJ. As the

[9] Notably, while citing *Henry* as a contrary holding, the ALC Clarification Order does not cite to a case supporting its proposition.

ALC states in its Clarification Order: "Neither party had advocated for the legal interpretation the Court ultimately decided was correct, and therefore, the Court denied both parties' motions for summary judgment. … As a result, there are no further facts or legal arguments to develop and the Court's Order is essentially a final order." Ex. 2, p. 2.a.

Of the issues the ALC identified as being before it, the Order Denying Cross Motions only answered the first part of the issues it identified for PHM and agreed with PHM that the "Department has the statutory authority to amend the COPA at issue"[10] but failed to address any of the other issues the ALC identified for either PHM or LMC as being before it. Instead, the ALC identified and ruled on new issues without notice to the respondents. *See* Ex. 1, pp. 5-6.

As is readily apparent from a review of the issues before the ALC and the ALC's summary of those issues, the issues are all procedural nature (DHEC's process and its authority under the Act) and not do not go to the merits of DHEC's decision that the benefits of the transaction outweigh the potential disadvantages of the transaction and any necessary diminution in competition is reasonably necessary to achieve the benefits.

Issues raised sua sponte by the ALC.

A. <u>The Proposed Transaction is not the Kind of Transaction Regulated by the Act</u>. The Order specifically concludes:

> the Court further concludes because the acquisition of the Assets by PHM does not qualify as the kind of transaction that is regulated under the COPA Act, and the Assets are not part of the original cooperative agreement underlying the existing COPA, the Assets cannot be subsumed into the existing COPA.

Ex. 1, p. 7. No party challenged PHM's right to seek an amendment to its existing COPA. Both PHM and DHEC asserted the LPNT Assets could be subsumed into the existing COPA. LMC

[10] The Order found: "Since there appears to be no controversy over the Department's general authority to approve amendments to COPAs, there is no *issue* for the Court to resolve in this regard." *Id*., p. 7, footnote 5.

asserted the LPNT Assets could not be subsumed into the existing COPA because the APA was a cooperative agreement that had not been approved by DHEC under the Act. The Final Order raised *sup sponte* and concluded that since LMC argued the APA required a new COPA, the ALC necessarily had to determine whether the APA was a cooperative agreement. The APA is not a cooperative agreement. The ALC asserted in the Clarification Order that its conclusion that the transaction is not regulated under the Act was not decided *sua sponte* because it "sprang directly from its analysis of LMC's argument on summary judgment."

Firstly, having "sprung" from the ALC's analysis of the LMC argument, the conclusion is clearly not part of the LMC argument.

Secondly, the argument made by LMC is that the APA *is a cooperative agreement*, not that the APA *is not a cooperative agreement*, not covered by the Act. The issue raised and decided by the ALC [that the APA is not the type transaction covered by the Act] is a quantum leap from LMC's argument about which neither PHM nor DHEC had notice. As the Supreme Court stated in *Blackburn*, defendants are "entitled to notice of the type of claim to which he is required to respond." *Blackburn*, 289 S.C. 415, 417-418, 338 S.E.2d 151, 152-153.

B. <u>An Amendment to the Existing COPA is not Appropriate under the Facts of this Case</u>. The Order concluded that there is no controversy regarding the Department's general authority to approve amendments to an existing COPA. However, the Order *sua sponte* raises the issue of whether COPA-97-01 can be amended under the facts of this case—again, not an issue raised or argued to the ALC.

LMC[11] contended that the APA constitutes a cooperative agreement and for PHM to include the assets under its existing COPA, DHEC must review the APA under the process for

[11] Whether one looks at LMC's Prehearing Statement or its "clarified" SJM, the issue is the same.

new cooperative agreements. Nowhere in LMC's Prehearing Statement or SJM does LMC raise the issue that the "facts of this case"[12] deprive DHEC of its acknowledged statutory authority to allow amendment to an existing COPA.

C. The Proposed Transaction Completely Changed the Nature of the JOA. This is not an issue raised by LMC and the Court lacks the authority to raise and rule on it. In discussing whether the LPNT Assets could be subsumed under COPA-97-01 through the APA, the Court found the Proposed Transaction would:

- completely change the nature of the original cooperative agreement;
- profoundly alter the cooperative agreement between Baptist and Richland;
- allow PHM[13] to engage in the pretense of adding "a few new conditions to regulate the inclusion of these distinctly different hospitals into the agreement";
- materially changes the underlying justification for COPA approval and provides antitrust protection to a single buyer not otherwise having access to COPA protection; and
- be outside the purposes of the COPA Act.

Order, p. 10. Also, the Order concluded: "PHM, thus cannot amend the COPA in the way it seeks . . . because extending the existing COPA's coverage over the assets through an amendment is inappropriate." *Id.*, p. 12.

The ALC's findings go to the merits of DHEC's Decision to allow PHM to purchase the LPNT Assets. In other words, whether the benefits of the transaction outweigh the disadvantages of the transaction. As a review of the LMC's discussion of the issues it raised with particularity

[12] The ALC never identifies the "facts" that it contend make the Proposed Transaction not eligible under the statute for approval under PHM's existing COPA.

[13] DHEC, not PHM added the conditions to the COPA as part of its Decision.

in its Prehearing Statement demonstrate, LMC only challenged DHEC's failure to follow the regulatory process required by the Act and Regs. It did not challenge the merits of DHEC's Decision. This issue was not raised to the ALC.

D. COPA 97-01 Only Applies to the Assets Owned by the Sponsoring Organizations when COPA-97-01 Was Issued. The Order found that "because … the Assets are not part of the original cooperative agreement underlying the existing COPA, the Assets cannot be subsumed into the existing COPA." Order, p. 7. This issue was not raised to the ALC.

E A Single Entity Operating Pursuant to the Approved JOA Cannot Acquire New Assets and Have the New Assets Protected under the Existing COPA. The Order found: "But the 'cooperative agreement' cannot be extended to achieve the objective of protecting a single hospital entity's expansion of its operations from antitrust challenges." Order, p. 12. This issue was not raised to the ALC.

F. The Proposed Transaction Does not Comply with the Purposes of the Act. This issue was not raised to the ALC.[14]

As the ALC stated in the Order Denying Cross Motions: "While the parties grounds for summary judgment are somewhat distinct, both PHM's and LMC's motions concern whether the transaction is this case requires a new COPA application or an amendment to the existing COPA, and, if an amendment is sufficient, what kind of review is the Department required to undertake when approving an amendment?" Ex. 1, p. 6. Clearly, the issues are procedural legal issues under the Act and Regs. The issues do not go to the merits of DHEC's Decision.

As a novel legal principle of major importance, this Court should determine, that the ALC

[14] In footnote 11 at p. 22 of its SJM (Ex. 12), LMC did state that in interpreting § 508, DHEC should look to the COPA legislative findings, but never alleged that the Proposed Transaction does not comply with the Purposes of the Act.

cannot consider and rule on dispositive issues not raised by the pleadings.[15]

II. *This Court Should Decide the LMC Allegation that Reg. 61-31 § 508 Is Unconstitutional for Vagueness*.[16] LMC's Prehearing Statement asserts that Reg. 61-31, § 508 "fails for vagueness" and must be struck down as exceeding the Department's powers under the COPA Act. Ex. 11, LMC Prehearing Statement, ¶ 3, p. 4. Because the ALC is an executive branch court, none of LMC's claims with regard to the validity of Reg. 61-31, § 508 can be decided in this forum. *See Drummond v. State*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008). This Court has been clear that only Article V courts of record have jurisdiction to rule on the constitutionality of a state law.

III. *The Application of the Act and Regs. to a COPA Holder's Ability to Acquire Additional Assets and Operate them under an existing COPA Is a Question of First Impression, is of Significant Public Importance and Involves a Legal Principle of Major Importance*. This matter is of significant public interest as it raises a novel question of law—whether an entity operating under an approved cooperative agreement, can purchase health care facilities from another entity, and operate the assets under the approved cooperative agreement subject to DHEC's monitoring and regulation and additional COPA conditions, thereby having antitrust immunity. No court has ruled on DHEC's authority to approve a COPA holder's purchase of health care assets and operate them under the approved cooperative agreement and DHEC's monitoring and regulation. The Legislature intended that the use of "such [cooperative] agreements should be encouraged." Instead of interpreting the Act so as to encourage the use of cooperative agreements, the Final

[15] Obviously, since this matter was decided at summary judgment stage, the question of the issues being tried by consent is not before this Court.

[16] After PHM raised this argument in its SJM, in its Cross Motion for Summary Judgment, LMC contended that it was raising an "as applied" challenge.

Orders interpreted the scope of the Act very restrictively.[17] *See*, S.C. Code Ann. § 44-7-520.

As is discussed below in the Motion to Expedite, not only is the PHM acquisition and operation of the LPNT Assets important for the overall health of the Midlands Area long term, it is of grave public importance for health care services especially during the COVID-19 pandemic to have the ability to manage depleted and exhausted health care resources and personnel and provide patients access to care.

This Court should certify the appeal to construe the General Assembly's stated intent to enable South Carolina health care providers more opportunities to moderate increasing health care costs, foster improvement in the quality of health care, improve access to health care and enhance the likelihood that rural hospitals remain open and rural areas have access to health care.

MOTION TO EXPEDITE

1. *The Opportunity to Close the Proposed Transaction Will Expire Absent Expedited Treatment*. As a condition precedent to closing the Proposed Transaction, PHM, as the buyer, must clear certain regulatory reviews to close the transaction, including the review by the Federal Trade Commission ("FTC"). Ex. 9, Ex. B. APA, p. 73. ¶ 10.1 (g). The effectiveness of DHEC's Decision to amend COPA-97-01 to regulate the operation of the LPNT Assets by PHM impacts that review. Absent regulatory clearance, LPNT, at its sole election can, on March 2, 2021, terminate the APA. *Id.*, p. 79, ¶ 12.2 (g). *See also, Id.*, p. 80 ¶ 12.4(a). If the APA is terminated pursuant to ¶ 10.1(g), the $10,000,000 deposit shall be paid to LPNT. *Id.*, ¶ 12.6(b) PHM should not lose $10,000,000 and the Midlands Area health care benefits that DHEC found would arise from the Proposed Transaction for lack of a timely decision.

[17] The Final Orders' interpretation of COPA-97-01 is that of a cooperative agreement operating frozen in time (1997).

2. *The Health Concerns and Problems Arising from COVID-19 Necessitate Expedited Treatment.* The need for this transaction, and the need for it to happen sooner rather than later, is greatly magnified by the affect the COVID-19 Pandemic has had on the Midlands. Since the Department issued its Decision, South Carolina, the United States and the globe have been gripped by a pandemic — COVID-19. The Court can take judicial notice that the novel Coronavirus is only getting worse in South Carolina and the strain on the Midlands hospitals and patients ability to access treatment is only getting worse.

Patients still have a fear of seeking health care treatment. But now, even when people needing health care overcome their fears of COVID-19, they may not be able to afford care because they have lost their jobs and or their healthcare insurance. PHM's current charity policy includes patients with income levels up to 400% of the federal poverty level ("FPL"). Currently, Providence Health's charity care is limited to families with income levels only up to 180% of the FPL, while Lexington Medical Center's charity care is limited to families with income levels up to 200% of the FPL.[18]

TABLE FOR DETERMINATION OF FINANCIAL ASSISTANCE		
# of Persons in Family	Income Level Cap 0-200%	Income Level Cap >200% - Up to 400%
1	$ 24,980.	$49,960.
2	$ 33,820.	$ 67,640.
3	$ 42,660.	$85,320.
4	$51,500.	$103,000.
5	$ 60,340.	$ 120,680.
6	$ 69,180.	$138,360.
7	$ 78,020.	$156,040.
8	$ 86,860.	$173,720.
For each person over 8 add	$ 8,840.	$17,680.

[18] https://www.lexmed.com/docs/patients/LexingtonMedical_Financial_Assistance.pdf

Allowance to give	100%	76%

As an amended COPA 97-01 Condition, the Decision requires that all of the LPNT acquired facilities be subject to the PHM charity care policy such that patients seeking treatment at Providence, Providence NE, Kershaw and Fairfield FSED will benefit from the much more sustainable charity policy of PHM if the amounts are approved to be included under the existing COPA. Ex. 9, ¶ 7. *See, Id.*, Ex. C, Charity Care Policy.

The longer the delay, the greater the health care related burden on uninsured, under-insured and indigent patients who currently utilize Providence Downtown, Providence NE, Kershaw and the Fairfield FSED. Patients might not seek treatment of non-Covid-19 ailments due to cost/prevalence of Covid-19, which ultimately ends up in expensive emergency room visits or extended, otherwise preventable, costly hospital stays.

South Carolina has been dealing with the novel coronavirus ("COVID-19") since at least March 13 2020, when Governor McMaster declared the first public emergency. While the ALC dismissed the deleterious effects of COVID-19 on PHM and LPNT and Kershaw hospitals in denying the Motion to Expedite below because all hospitals are suffering the effects of COVID-19, not all hospitals and patients suffer equally. COVID-19 burdens are especially heavy on safety net health care systems and hospitals. *See generally*, Affidavit of Michael Bundy, Ex. 13. PHM is the safety net health care provider for the Midlands Area. The Institute of Medicine ("IOM") has defined a safety net health care provider as one that "who by mandate or mission offer access to care regardless of a patient's ability to pay and whose patient population includes a substantial share of uninsured, Medicaid, and other vulnerable patients." (IOM 2000).

PHM, like other safety net providers, also typically serves higher acuity patients and provides specialty services not provided by the other area hospitals. Richland provides the level

one trauma services, the regional perinatal center, the certified stroke center, among other services, that are not provided by other hospitals in the Midlands Area. As the safety net provider, PHM is the health care provider of last resort in the Midlands Area. *Id.*, ¶ 4.

With the advent of the pandemic, PHM implemented an incident command center. *Id.* The incident command center has allowed PHM to respond to the limits of its constraints, beds, staffing and equipment availability. *See, Id.*, ¶ 7, 9, 13-17. In order to keep sufficient staff at Richland, Baptist and Parkridge, PHM currently has a total of 84 traveling[19] nurses on site with an additional 48 travelers arriving between December 28, 2020 and January 25, 2021. These travelers are assigned to the Emergency Departments, Critical Care, Med/Surg/Telemetry, post-anesthesia care unit ("PACU"), and operating room ("OR") units across all three campuses. Travelers are also assigned to the intensive recovery program ("IRP") to float to cover day-to-day shortages across the campuses. Traveling nurse pay rates range from $79.50/hr. to $173/hr. with an average rate of $103/hr. and they are escalating. *Id.*, ¶ 15.

With the integration of the LPNT Assets, PHM will have the immediate ability to make timely decisions, access staffing without having to use travelers (*id.*,¶ 17) and place patients at the time of admission without the need to transfer (*Id.*, ¶ 12). This integration will help prevent Richland at its Level 1 trauma services from having to go on diversion so frequently. *Id.*, ¶¶ 12 and 13.

No one can predict how long the COVID-19 pandemic will last. The one thing that is certain, COVID-19 is not going away soon.

[19] "Travelers" are defined in paragraph 15 of the Bundy Affidavit.

CONCLUSION

For the above stated reasons, PHM respectfully moves this Court to certify this appeal from the Court of Appeals to this Court for direct review and for an expedited hearing.

Respectfully submitted,

M. Elizabeth Crum, S.C. Bar No. 1486
lcrum@burr.com
Celeste T. Jones, S.C. Bar No. 3713
ctjones@burr.com
Pamela A. Baker, S.C. Bar No. 69413
pbaker@burr.com
1221 Main Street, Suite 1800
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Attorneys for Respondent-Appellant
Prisma Health - Midlands

Dated: December 29, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS' MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT AND TO EXPEDITE THE PROCEEDING AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District Inc., d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a KershawHealth Medical Center, Respondents.	)	Docket No. 20-ALJ-07-0108-CC **ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to cross motions for summary judgment filed by Prisma Health Midlands (PHM) and Lexington County Health Services District Inc., d/b/a Lexington Medical Center (LMC). PHM filed its Motion for Summary Judgment on August 28, 2020. On September 14, 2020, LMC filed a Response in Opposition to PHM's motion and its own Motion for Summary Judgment. On September 17, 2020, the South Carolina Department of Health and Environmental Control (Department or DHEC) filed a Response in Support of PHM's Motion for Summary Judgment. Based upon a thorough review of the Motions and the parties' filings, I conclude both parties' motions should be denied.

BACKGROUND

On or about October 23, 1996, Baptist Healthcare System of South Carolina, Inc., (Baptist Hospital) and Richland Memorial Hospital submitted an Application for a Certificate of Public

Advantage (COPA)[1] to serve the Midlands service area[2] of South Carolina. Pursuant to the cooperative agreement for which the COPA was sought, Baptist Hospital and Richland Memorial Hospital would enter into a joint operating agreement to create a locally controlled non-profit health care system. The purpose of the joint operating agreement was to "allow the hospitals to continue their charitable missions during an era of fiscal restraints and to produce significant benefits for the community that could not be achieved by the hospitals if they were to remain separate." The summary of the project in the Application included a number of "assurances" regarding the well-being of the community, including an assurance that "[c]ompetition from Lexington and Columbia/HCA hospitals, as well as from other hospitals in the System's core service area, will help to ensure that the hospitals continue to be efficient, low-cost, high quality hospitals."

Notice of the Application was published in the State Register, and LMC participated in the COPA review process as an affected person. The South Carolina Attorney General (Attorney General) also participated in the review process. On May 8, 1997, the Department notified Baptist Hospital and Richland Memorial Hospital by letter that it had decided to issue a COPA to the BR Health System, Inc. for the incorporation of a nonprofit entity to operate the hospital of the Sponsoring Organizations as a single unit, the Sponsoring Organizations being: (1) Baptist Healthcare System of South Carolina, Inc, Columbia and Easily, South Carolina and (2) Richland Memorial Hospital, Columbia, South Carolina. On October 6, 1997, pursuant to an order of this Court, DHEC issued Certificate of Public Advantage (COPA-97-01) to BR Health System, Inc. (BR Health), the non-profit entity incorporated to operate the hospitals as a single entity. The COPA included twenty-five conditions with which BR Health was required to comply. BR Health later changed its name to Palmetto Health Alliance/Palmetto Health. The original COPA was amended in 2003 to remove some conditions after Palmetto Health had fulfilled some of its obligations under the original conditions of the COPA.

---

[1] A certificate of public advantage is "the formal approval, including any conditions or modifications, by the Department [of Health and Environmental Control] of a contract, business or financial arrangement, or other activities or practices between two or more health providers, health providers networks, or health care purchasers that might be construed to be violations of state of [sic] federal laws." S.C. Code Ann. Regs. 61-31 § 102(2) (2012).

[2] The Midlands service area includes the following counties: Fairfield, Kershaw, Lexington, Newberry, Orangeburg, Richland, and Sumter.

In late 2017, Palmetto Health and Upstate Affiliate Organization d/b/a Greenville Health System (GHS) entered into an affiliation agreement to form Prisma Health (Prisma), a non-profit South Carolina Corporation. Prior to closing the transaction, Palmetto Health and GHS contacted the Department to determine whether the affiliation between the two health systems implicated COPA-97-01. DHEC determined the COPA was not implicated, and it remained in place with Palmetto Health. After Prisma Health was formed, Palmetto Health changed its name to Prisma Health–Midlands (PHM).

In 2019, Prisma and LifePoint Health entered negotiations for Prisma to purchase three of its South Carolina hospitals and a freestanding emergency department (FSED): Providence Downtown, Providence Northeast, Kershaw Health, and Fairfield County FSED (collectively "the Assets"). On September 13, 2019, Prisma and LifePoint Health entered into a Letter of Intent (LOI) for Prisma or one of its affiliates to purchase the Assets. Prisma made an initial good faith deposit of $5 million on September 13, 2019, when the LOI was executed. The LOI also provided for an addition $5 million deposit upon execution of an Asset Purchase Agreement (Agreement). PHM was eventually designated as the Prisma affiliate that would purchase the Assets.

On December 13, 2019, before executing the Agreement, PHM notified the Department that it intended to acquire the Assets and requested the Department to approve the acquisition of the Assets, amend the COPA to include the Assets under the existing COPA, and make such modifications to the COPA as it deemed necessary. The letter included PHM's analysis of how acquiring the Assets would integrate with the COPA and benefit the community. The exact submissions PHM made to the Department are not entirely clear but PHM did not submit an application to the Department for a new COPA. The Department determined PHM's request might materially impact the benefits or disadvantages to the community to be served and, therefore, the Department further determined PHM's request to extend the COPA to the cover the Assets required "another review" under section 508 of Regulation 61-31 (§ 508).

Thereafter, on February 20, 2020, the Department contacted the Attorney General to request an opinion on how "another review" under § 508 should be interpreted. In its request to the Attorney General, the Department put forth its own interpretation—that it is within the Department's "discretion to conduct the review it deems appropriate based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the

cooperative agreement." In a response dated February 25, 2020, the Attorney General opined the Department's interpretation "would likely be given considerable deference by the courts as a reasonable interpretation." Op. S.C. Atty' Gen., 2020 WL 1068931 (Feb. 25, 2020). As a result of the information it received from PHM, the Department determined to conduct its review of the proposed transaction pursuant to § 508 without public notice, public comment, or a hearing. In particular, the Department acknowledges PHM represented to it that LifePoint Health would not consummate the sale if the Department publicly noticed the transaction and thereafter conducted a review. PHM provided the Department with information regarding potential consequences should the transaction not be completed, like staff layoffs and reduced safety net services. The Department found these representations persuasive and determined not to have a public review.

In a letter dated February 28, 2020, the Department stated that "[a]s a result of [our] review, and having given substantial consideration to all information provided by PHM to the Department regarding the proposed transaction, the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the [LifePoint Health] assets." On March 2, 2020, the Agreement was executed. Pursuant to the Agreement, the acquisition is required to close on or before one year from the date the Agreement was executed, or March 2, 2021. PHM will be the sole owner of the Assets once the transaction is closed.

On March 13, 2020, LMC requested a final review conference before the Department's Board (Board).[3] Thereafter, on March 27, 2020, the Department published notice of the amended COPA in the State Register. On April 21, 2020, the Board refused to hold a final review conference and the staff decision became the final agency decision. On May 14, 2020, LMC filed a request for contested case with this Court.

DISCUSSION

The parties moved for summary judgment pursuant to Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules) and Rule 56 of the South Carolina Rules of Civil Procedure (SCRCP). SCALC Rule 68 allows the South Carolina Rules of Civil Procedure to be applied in contested cases at the discretion of the presiding judge. Rule 56(c), SCRCP, provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers

[3] Because there was no public notice of the request for the amended COPA, it is unclear how LMC became aware of the request and the transaction.

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011); *see also Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary.").

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378–79, 534 S.E.2d 688, 692 (2000). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). "Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). Moreover, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).

Here, PHM moves for summary judgment on the following three grounds:

1. The Department has the statutory authority to amend the COPA at issue and to determine if and what type of review is appropriate for an amendment;
2. The ALC does not have the authority to rule on LMC's allegation that Regulation 61-31, section 508, is void for vagueness;[4] and
3. The Department, in exercising its authority to amend the COPA, is not required to follow the provisions of Regulation 61-31 that are applicable to new applications.

[4] This appears to be an anticipated response to LMC's motion for summary judgment rather than a ground for summary judgment for PHM.

PHM asserts these three grounds constitute issues of law for which there are no relevant material facts in dispute.

LMC moves for summary judgment on the following three grounds:

1. The proposed sale/transaction requires a new application under section 44-7-530 of the South Carolina Code and Chapters 2, 3, and 4 of Regulation 61-31, and the Department lacks the authority to circumvent a new application;
2. The Department's Interpretation of the phrase "another review" in Regulation 61-31, section 508, is arbitrary, capricious, and manifestly contrary to the law; and
3. As-applied, Regulation 61-31, section 508, is void for vagueness.

While the parties' grounds for summary judgment are somewhat distinct, both PHM's and LMC's motions concern whether the transaction in this case requires a new COPA application or an amendment to the existing COPA, and, if an amendment is sufficient, what kind of review is the Department required to undertake when approving an amendment?

New Application or Amendment?

LMC submits that, as a matter of law, PHM and LifePoint Health must submit a new COPA application as provided by section 44-7-530 of the South Carolina Code in order to allow for review of the proposed transaction as set forth in sections 44-7-540 to 560 of the COPA Act and Chapters 2, 3 and 4 of Regulation 61-31, and that DHEC lacks the authority to circumvent that process by way of additional conditions to COPA-97-01. LMC argues the transaction at issue, as represented by the Agreement, fits squarely within the definition of a cooperative agreement that must be approved before a COPA can be issued. In the alternative, LMC argues that even if the Assets can be added to the COPA through an amendment, the review process required by § 508 for substantial changes requires the same or substantially similar review to that which is conducted for a new application.

PHM argues that a new application is not necessary in these circumstances because the Agreement underlying the transaction does not qualify as a new cooperative agreement. PHM also argued at the summary judgment hearing that it is not requesting an amendment to the COPA, but, rather, it is requesting the Assets to be approved and subsumed into the COPA once the COPA holder, PHM, becomes the owner of the Assets. Further, PHM argues that the Department, in exercising its authority to amend the COPA pursuant to § 508, is not required to follow sections

540 to 560 of the COPA Act and Chapters 2, 3 and 4 of Regulation 61-31.[5] PHM submits that the Department has broad discretionary authority to determine what kind of review it undertakes for a substantial amendment on a case by case basis.

For the reasons below, the Court concludes the Agreement underlying the transaction does not qualify as a cooperative agreement requiring a new application. However, the Court further concludes because the acquisition of the Assets by PHM does not qualify as the kind of transaction that is regulated under the COPA Act, and the Assets are not part of the original cooperative agreement underlying the existing COPA, the Assets cannot be subsumed into the existing COPA.

Purpose of COPA Act

In resolving these motions and interpreting the COPA Act, it is important to consider the purpose of the COPA Act. The purpose of the COPA Act is to encourage providers to cooperate when it will benefit the public by giving antitrust prosecutorial immunity to the providers.

In enacting the COPA legislation, the General Assembly found:

> (1) that the cost of improved health technology and scientific methods contributes significantly to the increasing cost of health care;
>
> (2) that **cooperative agreements** among hospitals, health care purchasers, and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open;

[5] In its summary judgment motion, PHM argues the Department has the statutory authority to amend COPAs. PHM cites to §309 and § 508 of Regulation 61-31 for the Department's authority to modify a COPA like the one at issue. In response, LMC asserts PHM misapprehended the issue it raised in this case, which is better described as whether the Department "can approve a proposed transaction between Prisma Health/PHM and LifePoint Health by way of 'amendment' to the COPA issued 23 years ago, rather than requiring Prisma Health/PHM and LifePoint Health to engage in the process set forth in the COPA Act and Regulation 61-31 to receive a COPA, starting with the submission of an application." LMC further argues that to the extent PHM's Motion seeks judgment as a matter of law that the Department, generally, has the authority to approve, monitor, and regulate an amendment to the COPA at issue, the Motion should be denied because the function of the court is not to give opinions on abstract matters but to decide actual controversies. In other words, LMC argues the Department's general authority to amend a COPA or amend this COPA is not at issue; rather, the specific issue in this case is whether an amendment is appropriate under the facts of this case.

Since there appears to be no controversy over the Department's general authority to approve amendments to COPAs, there is no issue for the Court to resolve in this regard. *See Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996) ("Before any action can be maintained, there must exist a justiciable controversy."); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract."). Accordingly, it is not necessary to address this issue on summary judgment. *See id.*

> (3) that federal and state antitrust laws may prohibit or discourage **cooperative agreements** that are beneficial to South Carolinians and that such agreements should be encouraged; and
>
> (4) that competition as currently mandated by federal and state antitrust laws should be **supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition**.

S.C. Code Ann. § 44-7-505 (2018) (emphasis added). With these findings in mind, the General Assembly set forth that the intent of the COPA Act is "to require the State to provide . . . regulation, and control over approved cooperative agreements through the department and the Attorney General," and based upon that "regulation, and control of cooperative agreements" healthcare providers are provided immunity "from civil liability and criminal prosecution under federal or state antitrust laws." S.C. Code Ann. § 44-7-520(A) (2018). Section 44-7-560(A) further provides "[t]he department shall issue a certificate of public advantage for a cooperative agreement." Therefore, the underlying document from which the grant of immunity springs is the "cooperative agreement." and thus a COPA cannot be issued without a cooperative agreement to support it.[6]

Accordingly, we must determine whether the transaction at issue represents a "cooperative agreement," an amendment to an existing cooperative agreement, or neither.

Cooperative Agreement

The COPA Act defines "cooperative agreement" as follows:

> an agreement between two health providers, health provider networks, or purchasers or among more than two health care providers, health provider networks, or purchasers for the sharing, allocation, or referral of patients or the sharing or allocation of personnel, instructional programs, support services and facilities, medical, diagnostic or laboratory facilities, procedures, equipment, or other health care services traditionally offered by health care facilities or other health care providers **or the acquisition or merger of assets among or by two or more health providers**, health provider networks, or health care purchasers,

[6] *See also*, § 44-7-520(B) ("A health care provider, health provider network, or health care purchaser may negotiate, enter into, and conduct business pursuant to a cooperative agreement without being subject to damages, liability, or scrutiny under any state antitrust law."); § 44-7-530 ("Parties to a cooperative agreement may apply to the department for a certificate of public advantage."); § 44-7-560(A) ("The department shall issue a certificate of public advantage for a cooperative agreement if it determines that . . . ."); § 44-7-570(A) ("The department shall actively monitor and regulate agreements approved under this article and may request information whenever necessary to ensure that the agreements remain in compliance with the conditions of approval."); § 44-7-580 (The department shall maintain on file all cooperative agreements for which certificates of public advantage remain in effect.").

> provided the agreement does not involve price-fixing or predatory pricing or illegal tying arrangements.

S.C. Code Ann. § 44-7-510 (2018) (emphasis added). Significantly, this case does not involve a merger between hospitals systems but rather an acquisition by PHM. Based upon the plain language of the statute, a cooperative agreement can exist for "the acquisition . . . of assets among or by **two or more** health providers." *Id.* (emphasis added)*; see Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."). Therefore, in order for an acquisition to qualify as a cooperative agreement, two or more healthcare providers must acquire assets; one healthcare provider purchasing assets does not qualify. § 44-7-510. Stated otherwise, a single purchaser does not fall within the unambiguous language defining a "cooperative agreement" as an acquisition of assets by two or more or a group.

Notably, although it conducted another review in this matter, the Department's interpretation is consistent with the statute's clear exclusion of a single-buyer acquisition from qualifying as a cooperative agreement under the COPA Act. Specifically, the Department asserts this is a "simple sale or transfer of assets from one entity, LifePoint, to another entity, PHM" and "[t]his is not an acquisition of assets among or by two or more health care providers." The Department further explains that, unlike the transaction that formed PHM and produced the original COPA (joint operating agreement between Baptist Hospital and Richland Memorial Hospital), the parties to the Agreement will not have a continuing cooperative agreement or relationship after the sale is complete.

Under the undisputed facts before the Court, Richland Memorial Hospital and Baptist Hospital are not themselves acquiring the Assets. If Richland Memorial Hospital and Baptist Hospital, in their individual legal capacities, if they still exist, decided to cooperate in the purchase of the Assets, then the agreement memorializing this transaction may qualify as a cooperative agreement because "two or more" healthcare providers would be purchasing the Assets. *See* § 44-7-510. However, as PHM has repeatedly stated, it is acting in its capacity as a single entity in acquiring the Assets. Therefore, the Court must view this transaction as the acquisition of assets

by a single buyer. Similarly, even though Prisma has been involved during negotiations surrounding the transaction, Prisma is not the party who will actually purchase the Assets.[7]

Since, this is an acquisition involves only one buyer, it does not qualify as a cooperative agreement under the COPA Act. *See* § 44-7-510. And because this transaction cannot qualify as a cooperative agreement, it does not qualify for a COPA. Moreover, it is evident a transaction that does not qualify for a COPA does not require a new application for a COPA. Accordingly, I conclude the parties' Agreement underlying the transaction does require a new application or a new COPA because it does not qualify as a cooperative agreement to begin with. Therefore, I deny LMC's Motion for Summary Judgment to the extent LMC asks this Court to find as a matter of law that the addition of the Assets requires a new COPA application.

Amendment

Additionally, the Court finds PHM cannot use an amendment[8] to subsume the Assets it purchased into the Richland Memorial Hospital and Baptist Hospital COPA. Notably, the COPA sanctioned the cooperative agreement between Richland Memorial Hospital and Baptist Hospital to merge their assets and operate jointly as a single entity. PHM's amendment would add assets which are part of a distinctly different hospital system and therefore completely change the nature of the original cooperative agreement. Yet, PHM seeks to avoid the appearance of profoundly altering the "cooperative agreement" between Baptist Hospital and Richland Memorial Hospital under the pretense it is simply adding a few new conditions to regulate the inclusion of these distinctly different hospitals into the agreement. More importantly, the amendment not only materially changes the underlying justification for the COPA's approval, but it would provide anti-trust protection to a single buyer that would not have access to COPA protections. The addition of the new hospital system into the Richland Memorial Hospital and Baptist Hospital COPA, when Richland Memorial Hospital and Baptist Hospital still maintain a legal existence, is thus outside the scope of the COPA law's purposes.

---

[7] LMC has argued there is a genuine issue of material fact as to who is purchasing the Assets; however, I find it is clear that PHM will be the sole owner of the Assets at the conclusion of the transaction and PHM has further asserted it is a single entity on numerous occasions in this litigation.

[8] At the hearing, PHM argued that it was not amending the COPA but simply requesting that conditions be added to the COPA to accommodate the purchase of the Assets. It is beyond this Court's ability to understand how the changes to the conditions of a COPA as a result of acquiring several hospitals is not an amendment to the COPA.

This conclusion is supported by § 309 of Regulation 61-31. While § 309 is listed under the regulatory provisions providing for "Disposition of Application," its provisions reflect the purpose of the COPA Act. Indeed, as set forth by the South Carolina Supreme Court in *CFRE, LLC v. Greenville County Assessor*, a statute

> must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. We therefore should not concentrate on isolated phrases within the statute. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose.

395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citations and quotation marks omitted); *see also Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) ("Regulations are interpreted using the same rules of construction as statutes.").

Section 309 provides that a COPA "if issued, is only valid for the project described in the application including parties involved, services to be offered, mergers or consolidations approved, or other factors as set forth in the application, except as it may be modified in accordance with these regulations." S.C. Code Ann. Regs. 61-31 § 309. Although § 309 allows modifications, adding the Assets would not merely be a modification to the original terms of the cooperative agreement that was approved, it would completely change the Richland Memorial Hospital and Baptist Hospital "project." Specifically, PHM is not requesting to amend the way Richland Memorial Hospital and Baptist Hospital cooperate together under the COPA; rather, PHM desires to take assets it will acquire independently and make them subject to a COPA by which it was created. This is not a "change" to the agreement as contemplated by § 508 because PHM is not changing the cooperative agreement between Richland Memorial Hospital and Baptist Hospital. Reg. 61-31 § 508 ("If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, the Department will decide whether or not the amendment is substantial and thereby requires another review."). PHM is acquiring the assets of a competitor who is being removed from the market but with whom no cooperative agreement was negotiated or established.

Moreover, not every change in circumstances should be sanctioned by an amendment or modification to a COPA as evidenced by section 308 of Regulation 61-31 (§ 308). Section 308 provides that certain changes to a COPA during the application process "constitute a new application." The application process is the time during which it would be easiest to accommodate an amendment. Yet, section 308 requires a new application under certain circumstances. It is

therefore logical that certain changes requested after the COPA is issued would also rise to the level of requiring a new application or fall outside the scope of the original project. A change that falls outside the scope of an existing COPA is more evident when, as is the case here, the change is not requested by the parties to the cooperative agreement underlying the COPA. PHM, thus cannot amend the COPA in the way it seeks. Indeed, to find otherwise, would allow PHM to claim its acquisition of practically any assets fits within the spirit of the COPA between Richland Memorial Hospital and Baptist Hospital.

In sum, PHM seeks to add assets under the COPA's coverage that are outside the scope of the existing COPA and for which the transaction does not qualify for a new cooperative agreement/COPA. In coming to this conclusion, I disagree with the implication that PHM's "holding" of the COPA elevates its authority, particularly as a party, in seeking a modification of the COPA. Rather, the COPA was simply an approval by the Department of a joint operating agreement of two parties—Richland Memorial Hospital and Baptist Hospital—who still have a technical legal existence. The Department's approval offers protection for hospitals based upon their cooperation with each other. But the "cooperative agreement" cannot be extended to achieve the objective of protecting a single hospital entity's expansion of its operations from antitrust challenges.

Accordingly, I deny PHM's Motion for Summary Judgment to the extent it asks the Court to conclude as a matter of law that the Assets can be covered by the existing COPA through an amendment or additional conditions, or otherwise subsumed under the existing COPA.

Conclusion

I conclude as a matter of law that PHM's acquisition of the Assets does not qualify for a new COPA and the Assets cannot be brought under the existing COPA. Because I find neither parties' interpretation of the law to be correct, neither party is entitled to summary judgment and the motions must be denied. *See* Rule 56(c), SCRCP (providing summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Furthermore, because extending the existing COPA's coverage over the Assets through an amendment is inappropriate, I do not reach whether the Department's interpretation and application of "another review" under §508 is correct

as a matter of law. I also decline to engage in an analysis of "another review" that would merely be an exercise in dicta.

ORDER

IT IS THEREFORE ORDERED that PHM's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that LMC's Motion for Summary Judgment is DENIED.

AND IT IS SO ORDERED.

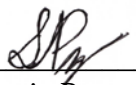
_____

Ralph King Anderson, III
Chief Administrative Law Judge

November 2, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

November 2, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District Inc., d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a KershawHealth Medical Center, Respondents.	Docket No. 20-ALJ-07-0108-CC **ORDER ON MOTION TO CLARIFY AND MOTIONS TO RECONSIDER**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Clarify and a Motion to Reconsider filed by Prisma Health-Midlands (PHM) on November 12, 2020, and a Motion to Reconsider filed by Respondents Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a KershawHealth Medical Center (collectively "Providence") on November 12, 2020. Lexington County Health Services District Inc., d/b/a Lexington Medical Center (LMC) filed a Response to the motions on November 23, 2020. The motions request the Court to clarify or reconsider its Order Denying Cross-Motions for Summary Judgment (Order) issued on November 2, 2020.

DISCUSSION

Motion to Clarify

PHM requests this Court clarify its Order to state whether it is a final decision from which PHM can appeal. PHM notes that the Court's decision effectively ends the case. Similarly, Providence's Motion to Reconsider alleges the Order failed to acknowledge that the Court's conclusions of law had the effect of ending the contested case review by the Court. Providence contends that based on the Court's Order, there are no further facts to be determined, issues to be

decided, or actions to be taken before the ALC and the Court should clarify the effect of its Order is to overturn the Department's decision and to end the case so the parties can move forward with an appeal. LMC has no objection to Providence's request for clarification regarding the impact of the Order on the pending contested case and whether it voids the Department's amendment of the conditions of COPA-97-01.

In response to the parties' requests, the Court now clarifies the effect of its Order. In this matter, PHM seeks to purchase Providence's assets and bring them within the coverage of its existing COPA, COPA-97-01. The Department reviewed the transaction and determined Providence's assets could be included under the COPA by amending it to add additional conditions. LMC contested the Department's decision to amend the COPA to include Providence's assets under its coverage. LMC and PHM both filed motions for summary judgment. As a result of this Court's legal analysis of the parties' summary judgment motions, the Court determined as a matter of law that PHM's acquisition of the Providence assets did not qualify for a new COPA and the assets could not be brought under the existing COPA through an amendment. Neither party had advocated for the legal interpretation the Court ultimately decided was correct, and therefore, the Court denied both parties' motions for summary judgment. Nevertheless, the ultimate effect of the Court's interpretation of the law nullified the Department's decision to amend and/or add additional conditions to the COPA to allow the Providence assets to be covered under it. As a result, there are no further facts or legal arguments to develop and the Court's Order is essentially a final order. *See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.").

PHM Motion to Reconsider

PHM filed its Motion to Reconsider pursuant to Rule 29(D) of the Rules of Procedure for the Administrative Law Court (SCALC Rules) and Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRCP). SCALC Rule 29(D) provides, in part, that a party "may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision." Generally, an order denying summary judgment is an interlocutory order, and not a final order, making a motion for reconsideration procedurally inappropriate. *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511 (Ct. App. 2002) ("Generally,

the denial of a motion for summary judgment is not immediately appealable."). However, because the Court has clarified that the effect of its Order is to end the case, like a final order, the Court will consider the parties' motions to reconsider. *See Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 267, 692 S.E.2d at 895 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined."); S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2019) ("For judicial review of a **final decision** of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge." (emphasis added)).

Sua Sponte Argument

In its Motion to Reconsider, PHM argues the Court improperly raised and ruled upon issues *sua sponte* that PHM had neither notice nor opportunity to address, which is an error of law. Specifically, PHM requests the Court reconsider, alter, and amend its Order by striking the following findings and conclusions from its Order because they were raised *sua sponte* by the Court:

- The Court *sua sponte* raised the issue that the proposed transaction is not the kind of transaction regulated by the COPA Act.
- The Court *sua sponte* raised the issue and concluded that the specific issue in this case is whether an amendment to the existing COPA is appropriate under the facts of this case.
- The Court *sua sponte* raised the issue that the proposed transaction completely changed the nature of the original cooperative agreement.
- The Court *sua sponte* raised the issue that the existing COPA is only applicable to the assets owned by the sponsoring organizations when the COPA was issued.
- The Court *sua sponte* raised the issue that a single hospital operating pursuant to a COPA approved joint operating agreement cannot acquire new assets and have the new assets protected under the existing COPA.
- The Court *sua sponte* raised the issue that the proposed transaction did not comply with the purposes of the COPA Act.

All of these issues that PHM asserts the Court raised *sua sponte* were necessary and vital considerations to the Court's analysis of the issues raised by the parties in their summary judgment motions. *Contra Henry v. Chambron*, 304 S.C. 351, 355, 404 S.E.2d 518, 520 (Ct. App. 1991)

("The circuit court also erred in finding Chambron violated a restriction requiring architectural review of proposed home plans. The alleged violation was not raised by the pleadings, nor was it tried by consent."). For example, in its motion for summary judgment, LMC argued the proposed transaction required a new COPA application. In evaluating this argument, the Court had to consider whether the type of transaction at issue warranted a new COPA application and that legal analysis necessarily included analyzing whether the transaction represented a cooperative agreement, which is the foundational document upon which a COPA is granted. Therefore, the Court's determination that this transaction was not regulated by the COPA Act because it could not qualify as a cooperative agreement under the Act, sprang directly from its analysis of LMC's argument on summary judgment. Similarly, the Court finds it particularly absurd to suggest that "whether an amendment to the existing COPA is appropriate under the facts of this case" was an issue raised *sua sponte* by the Court when, again, one of LMC's primary summary judgment arguments was that a new application rather than an amendment was necessary in this case. LMC thus specifically raised this issue. The Court likewise concludes that all of the issues the Court allegedly raised *sua sponte* were either directly raised by the parties or were necessary derivative legal considerations of the issues raised by the parties.

Further, PHM's Motion to Reconsider suggests this Court was bound to choose one of the parties' legal theories to resolve the case whether or not the theory was correct correct or, in the alternative, the Court was forbidden to engage in statutory construction, such as analyzing and considering the purpose of the COPA Act, when the purpose of the COPA Act was not a specific issue raised by the parties. However, a court is not required to choose one of the legal interpretations advocated by the parties in resolving a legal issue. To hold otherwise could nonsensically force the Court to choose between two legally incorrect interpretations, which would not only create bad precedent but would defile the very purpose of the Court to objectively interpret the law as it is written by the legislature, not as it is interpreted by the parties. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). To the

extent PHM suggests the Court must confine its analysis to the parties' interpretations to the exclusion of analyzing the law for itself, the Court's heartily rejects such an argument.

In sum, the Court did not consider any statute or regulation that was not raised and addressed by the parties. Rather, the Court interpreted the implications of those statutes and regulations differently than the parties when applied to the facts of this case. A court's duty is to properly apply the law and, in exercising that function, a court must be free to make impartial decisions based solely on fact and law.

Interpretation of the COPA Laws

PHM argues the Court committed errors of law when it misapprehended or misinterpreted the COPA Act, the COPA Regulations, and COPA-97-01. First, PHM asserts the Court misapprehended the relationship between the existing cooperative agreement and conditions of the existing COPA. Specifically, PHM asserts that the intention of the existing cooperative agreement is to create a vertically, horizontally, and geographically integrated health care delivery system that allows for new assets to be added. PHM argues the Court's decision in its Order "legislates that a COPA is a stagnant determination based on the original application and cannot later be modified to add additional assets." This is a gross misinterpretation of the Court's holding.

The Court never held that a cooperative agreement and/or COPA could not be amended to include additional assets. The Court's determined that Providence's assets could not be included under the existing COPA based upon applying the law **to the facts of this case**. The Court is aware that PHM previously incorporated a new greenfield hospital under the COPA and the Court's Order neither addressed that addition of assets nor made a blanket determination stating that no assets could ever be added to the COPA's coverage. Moreover, the Order specifically noted that there was no controversy over the Department's general authority to approve amendments to COPAs.

Ultimately, the Court interpreted the meaning of the words of the statutes and regulations and reached a legal conclusion as to what the legislature meant by its use of that wording. The Court did not by any means apply a meaning beyond the words and phrases utilized by the General Assembly. In fact, although PHM asserts the Court's Order was legislating, PHM offered no explanation to support its assertion other than the Court applying its independent reasoning to reach a legal conclusion in this case.

Second, PHM argues the Court misapprehended the Department's authority under section 508 of Regulation 61-31 to evaluate the proposed change to the COPA when the Court determined the addition of the Providence assets would completely change the nature of the original cooperative agreement. The Court finds it thoroughly considered the application of § 508 and there is nothing to alter or amend.

Finally, PHM argues the Court failed to rule on two issues that were raised in summary judgment which it should have addressed. First, PHM asserts the Court failed to rule on LMC's assertion that the Department interpretation of the phrase "another review" in § 508 was arbitrary, capricious, and manifestly contrary to law. Second, PHM asserts the Court failed to rule on LMC's assertion that, as-applied, section 508 is void for vagueness. As the Court explained in its Order, it did not address these issues because, after having concluded that an amendment under § 508 was not appropriate in this case, the Court did not need to make a determination regarding those issues. The Court continues to decline to engage in an analysis of § 508 that would merely be an exercise in dicta.

LMC's Response

LMC agrees the effect of the Court's Order was to overturn the Department's decision that is the subject of this contested case. However, LMC notes in its response that "[t]he denial of a motion for summary judgment does not bar a party from making a later motion for summary judgment based on matters not involved in the decision on the first motion." *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). And, "[i]f the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." *Id.* LMC submits that a second motion for summary judgment may be appropriate on one of the legal arguments it raised in its Petition for Administrative Review, Request for Contested Case Hearing, and its Prehearing Statement, namely: "DHEC does not have the authority to 'update' or 'amend' the ongoing conditions of COPA-97-01, originally issued to [Baptist Health System] and [Richland Memorial Hosptal] on October 6, 1997, in order to include PHM's proposed acquisition of [the Providence] assets."

LMC did not specifically frame any of its issues in its summary judgment motion like it framed the issue above, nor has LMC filed a new motion for summary judgment on this issue or specifically requested the Court give it leave to do so. As stated above, although the Court's legal reasoning in resolving the issue was different than LMC's legal reasoning, the Court's Order

resolves this issue LMC previously raised in its prehearing statement because the Court found an amendment to the COPA was not an appropriate vehicle for covering the Providence assets under the facts of the case. Accordingly, a second motion for summary judgment is unnecessary to resolve this issue LMC previously raised. Moreover, all parties appear to agree that the effect of the Court's Order is to end the controversy and overturn the Department's decision in this case. Therefore, there is simply no reason to hold a contested case hearing or otherwise prolong the case when it is ripe for appeal.

ORDER

IT IS THEREFORE ORDERED that PHM's Motion to Clarify this Court's Order Denying Cross-Motions for Summary Judgment issued on November 2, 2020 is GRANTED.

IT IS FURTHER ORDERED that Providence's Motion to Reconsider is GRANTED to the extent it requested clarification of the effect of this Court's Order Denying Cross-Motions for Summary Judgment issued on November 2, 2020.

IT IS FURTHER ORDERED that this Court's Order Denying Cross-Motions for Summary Judgment that was issued on November 2, 2020, effectively ended the contested case before the Court and the parties shall treat it as a final order for the purposes of appeal.

IT IS FURTHER ORDERED that PHM's Motion to Reconsider is DENIED.

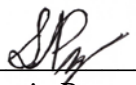
AND IT IS SO ORDERED.

_____
Ralph King Anderson, III
Chief Administrative Law Judge

December 7, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

December 7, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 3

Healthy People. Healthy Communities.

February 28, 2020

VIA CERTIFIED MAIL

Mr. Mark S. O'Halla
President and Chief Executive Officer
Prisma Health
300 East McBee Avenue
Suite 300
Greenville, SC 29601

Re: Review of the Certificate of Public Advantage ("COPA") held by Prisma Health – Midlands (Formerly the Palmetto Health Alliance) and update to the conditions as set forth therein.

Dear Mr. O'Halla:

In December 2019, your organization submitted to the South Carolina Department of Health and Environmental Control ("Department") notice of a proposed transaction wherein Prisma Health – Midlands ("PHM") would acquire certain assets currently owned by LifePoint Health ("LPNT")[1] in the Richland County, Fairfield County, and Kershaw County market area. The Department received additional documentation from PHM in support of this transaction in February 2020. Pursuant to S.C. Code Regs. 61-31,§ 508, the Department determined that the proposed changes resulting from the transaction might materially impact the benefits or disadvantages to the community to be served. The Department therefore undertook another review of the COPA.

As a result of that review, and having given substantial consideration to all information provided by PHM to the Department regarding the proposed transaction, the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets:

1. PHM will provide a full report to the Department every other year which will include, at a minimum, responses to the questions in Regulation 61-31, Health Care Cooperative Agreements, Section 502 (B); the previous fiscal year's independent audited financial

[1] To include Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department in Fairfield County operating under HTL-0929.

statements; and information which will enable the Department to evaluate each of the conditions listed below. In years when a full report is not required, PHM will provide the Department an abbreviated report which will include, at a minimum, an annual audited financial statement plus a description of the programs and services PHM provides through its Community Outreach Programs as described in Condition 2, as well as the required reporting as described in Conditions 17 and 19. All reports, full and abbreviated, may require additional information the Department feels is necessary to adequately evaluate PHM's compliance with the COPA and the COPA conditions. These annual reports are due to the Department no later than 120 days after the end of each fiscal year. In addition, PHM will provide a revised three (3) year forecasted financial statement, which may be based upon its most recently Board approved budget and Board accepted audited financial report, and which projects three (3) years forward from the end of the most recent fiscal year. PHM will also make available to the Department all of its managed care contracts for inspection, if necessary, which will be considered proprietary and not subject to disclosure.

2. PHM will provide fifteen percent (15%) of its "excess revenues over expenses" to fund public health initiatives and community outreach programs. Efforts funded with this money, as a community benefit, will be evaluated each year as a part of the information required in Condition Number 1. The evaluation will be based on the benefits, changes, and/or accomplishments that occur because of the activities and services provided by the programs and for which the program is held accountable. The evaluation will consider whether these programs are reaching populations that might otherwise not receive such services without the Certificate of Public Advantage.

3. For twenty-four (24) months following the date of closing of the transaction, PHM will report major operational savings that can be documented as they relate to the acquisition of the LPNT assets. Costs used to document the above savings must be specific to the acquisition, that is, savings that occurred because of the acquisition and not savings that would have been realized even if the acquisition had not occurred.

4. PHM will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any competing licensed facility that requests such access. For services not offered by competing licensed facilities in the core service area, PHM will give them terms and conditions equal to the average of the amount which would be received from patients insured by any of PHM's commercial payers. That PHM will continue this access for which it is the sole provider until such time as a competing licensed facility offers the service, and will terminate only in the event that South Carolina repeals its Certificate of Need laws or that such laws otherwise cease to be applicable. Additionally, PHM must make available to the Department, upon

request, names of any facilities, to include terms and conditions, to which services have been offered.

5. PHM will continue a relationship substantially similar to the relationship set forth in the affiliation agreement between Prisma Richland Hospital and the University of South Carolina School of Medicine and continue to support medical education. If a clinical service is determined to be located at only one PHM facility, the medical, graduate medical, and allied health education programs will have access to that clinical service at the facility in which the service is to be located, to the extent that is necessary to complete the education and training as required by the program.

6. Should PHM change controlling interest by purchase, lease, assignment, management contract, transfer or comparable arrangement, the new operating entity as a condition of the change will adhere to all the conditions of this approval and all representations put forth in the Certificate of Public Advantage application and subsequent submissions.

7. As part of the information required in Condition Number 1, "generally accepted accounting principles" consistently applied, but excluding extraordinary revenue and expenses, losses on extinguishments of debt and the impact of any mark to market adjustments on derivative instruments, will be used to calculate net of revenues over expenses in the annual report for determining the 15% public health commitment and that such financial statements will be certified by an independent auditor. However, should any of these other items result in cash gains or losses, they may be included in net revenues over expenses.

8. Neither PHM, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations. This does not prevent third party payers from unilaterally choosing not to contract with a hospital that is competitive.

   However, it must be the decision of the payer and not be required as a condition of a contract with PHM or its affiliate. This does not include exclusive contracts with third party payers that may be in effect on this date or their renewals as provided for in the existing contract.

   In addition, PHM will negotiate with managed care payers in good faith and in a fair and equitable manner. This does not require PHM to contract with every payer regardless of terms, or that contracted prices must be the same for all payers. The Department will, as a part of its ongoing monitoring process, investigate consistent complaints from employers and managed care payers to ensure compliance with this condition and will take appropriate regulatory action when necessary.

9. Except to the extent required by vendors, suppliers or Group Purchasing Organizations ("GPOs"), neither PHM, nor its subsidiaries, shall condition any contracts with suppliers, vendors, or GPOs that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the PHM.

10. The Department may amend these conditions to include, but not be limited to, the lowering of prices should unexpected events lead to abnormally high margins from operations.

11. PHM will adhere to the commitments it has outlined in its "Summary of System Commitments and Proposed DHEC Monitoring" in its application and all other representations made in the Certificate of Public Advantage application and all of its subsequent submissions, to the extent that they are consistent with the conditions of this approval, and that may not be specifically described in these conditions.

12. PHM will pay to the Department an annual monitoring fee to cover the actual cost of audits and monitoring. This fee will be used by the Department in whatever manner solely for the purpose of monitoring these conditions.

13. Prior to the final execution of the Asset Purchase Agreement ("APA") by and between PHM and LPNT regarding those assets outlined the December 2019 and February 2020 submissions to the Department by PHM, PHM shall submit to the Department evidence that the Board of PHM is aware of the transaction.

14. PHM will conduct a comprehensive study of access to emergency, urgent, and/or extended primary care services within the northern City of Columbia or other disadvantaged area of Richland County. Based upon this study, PHM will develop a plan to address those issues identified in the study for presentation to, and input from, the Department. Such a study will be completed within eighteen (18) months of the closing date of the transaction.

15. Within twenty-four (24) months of the closing date of the transaction, PHM will begin provision of primary care, and/or extended-hours primary care, and/or urgent care services to the Lower Richland community.

16. Prior to closing or permanently reducing the number of licensed facilities or beds held by PHM, PHM shall submit to the Department a specific plan for the transfer of those services, beds, patients, medical professionals, and/or other staff affected by such a change. This requirement shall be in addition to those requirements set forth in S.C. Code 44-7-110 *et seq.*, and the *South Carolina Health Plan*.

17. All acquired facilities will be subject to the charity care policy of PHM. The current charity care policy in force at the time of submission will be included in PHM's annual COPA report. In the event PHM determines to close a licensed general hospital, PHM will provide the Department with a plan that addresses how indigent care patients will be accommodated.

18. PHM will maintain Level 1 trauma services and serve as a Regional Perinatal Center for at least five (5) years following the date of closing of the transaction, subject to no material change in program requirements, state law or regulations, and federal law or regulations. Further, PHM will commit to operating no less than seven (7) emergency departments, unless otherwise approved to do so by the Department, for at least five (5) years following the date of closing of the transaction.

19. In addition to the requirements set forth in the *Health Care Cooperation Act*, S.C. Code Ann. Sections 44-7-500 through 44-7-590, the *Health Care Cooperative Agreements* Regulation, S.C. Code Ann. Regs. 61-31, and these Conditions, PHM shall notify the Department through its annual COPA report of any acquisitions or dispossessions related to physician practices, surgical centers, imaging centers, radiation therapy facilities, or substance use and treatment facilities.

20. These Conditions will be evaluated for necessity and compliance on an annual basis. Those Conditions that contain specified time periods will be evaluated at the end of that specified time period for compliance, and PHM and the Department may mutually agree to adjust the specified time period.

Your continued cooperation and compliance is greatly appreciated. Please do not hesitate to contact me with any questions you might have.

Very Respectfully,

Louis Eubank, Chief
Bureau of Healthcare Planning & Construction

cc: Malcolm Isley (via email)
Liz Crum, Esquire (via email)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 4

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District, d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Prisma Health-Midlands, Respondent.	)	Docket No. 20-ALJ-07-0108-CC **ORDER FOR PREHEARING STATEMENTS**

IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating the following:

1. The nature of this proceeding;

2. Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;

3. The issues presented for determination set forth with particularity, including any claims or defenses expected to be raised;

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;

5. A brief summary of the facts to be presented at the hearing;

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

7. A list of proposed witnesses and exhibits;

8. A statement regarding the necessity for discovery, if any;

9. The estimated length of the hearing;

10. Any dates in the next one hundred twenty (120) days when you will **not** be available for a hearing; and

11. An email address where you can be reached.

IT IS FURTHERMORE ORDERED that the Prehearing Statement must be filed with the Court and served on all parties within twenty (20) days of the date of this Order. The parties have a continuing obligation to update the information during the course of the proceedings.

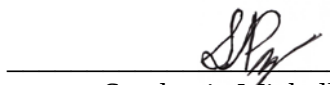
AND IT IS SO ORDERED.

_____
Ralph King Anderson, III
Chief Administrative Law Judge

June 22, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Michelle Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Michelle Perez
Judicial Law Clerk

June 22, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 5

D H E C
PROMOTE PROTECT PROSPER
2600 Bull Street
Columbia, SC 29201-1708

May 8, 1997

CERTIFIED MAIL

Mr. Charles D. Beaman, Jr., President
Baptist Healthcare System of South Carolina, Inc.
Taylor at Marion Street
Columbia, South Carolina 29220

Mr. Kester S. Freeman, Jr., Chief Executive Officer
Richland Memorial Hospital
Five Richland Medical Park
Columbia, South Carolina 29203

Re: Certificate of Public Advantage
BR Health System, Inc.
Columbia, South Carolina

Dear Messrs. Beaman and Freeman:

Pursuant to Section 307 of Regulation No. 61-31, Health Care Cooperative Agreements, this is to advise that it is the decision of this Department that a Certificate of Public Advantage be issued to BR Health System, Inc. (the System) for the incorporation of a nonprofit entity to operate the hospitals of the Sponsoring Organizations as a single unit, where the Sponsoring Organizations will develop, implement, and find new initiatives to improve public health and community outreach programs, and to expand the counseling centers of the Pastoral Institute. The Sponsoring Organizations include (1) Baptist Healthcare System of South Carolina, Inc., Columbia and Easley, South Carolina and (2) Richland Memorial Hospital, Columbia, South Carolina.

The decision to approve the Certificate of Public Advantage is based on the following reasons:

(1) The Department has determined that the applicant has demonstrated that the likely benefits resulting from the cooperative agreement outweigh the likely disadvantages from the cooperative agreement; and

1242

(2) The Department has determined that the reduction in competition likely to result from the cooperative agreement is reasonably necessary to obtain the benefits likely to result.

The Department's decision to approve the Certificate of Public Advantage is made subject to the following conditions pursuant to Section 312 of Regulation 61-31, Health Care Cooperative Agreements:

1. That the System will provide an annual report to the Department, which will include, at a minimum, responses to the questions in Regulation 61-31, Health Care Cooperative Agreements, Section 502 (B); the previous fiscal year's independent audited financial statements; information which will enable the Department to evaluate each of the conditions listed below; and any additional information the Department feels is necessary to adequately evaluate the compliance of the Certificate of Public Advantage. This annual report is due to the Department no later than 120 days after the end of each fiscal year after the System's Joint Operating Agreement is consummated.

2. That the System will provide 10% of its "excess revenues over expenses" to fund public health initiatives and community outreach programs, and the System will provide no less than fifteen million dollars to be allocated over the first five years of the System's existence. This 10% or $15 million, whichever is greater, will be over and above the current annual effort of $3,370,700 for cancer and maternal and child health efforts and any current fiscal year expenditures for other community health benefits. However, in addition to maternal and child health and cancer programs, the fifteen million additional dollars may be used for other approved community benefits. Any efforts funded with this money, as a community benefit, will be evaluated each year as a part of the information required in Condition Number 1. The evaluation will be based on the benefits /changes/ accomplishments that occur because of the activities /services provided by the program and for which the program is held accountable. The evaluation will consider whether these programs are reaching populations that might otherwise not receive these services without the Certificate of Public Advantage.

3. That as a part of the information required in Condition Number 1, the System will report on the nature, source and amount of operational savings and depreciation and interest expense reductions from the capital expenditures avoided during the preceding fiscal year. Costs used to document the above savings must be merger specific, that is, savings that occurred because of the merger and not savings that would have been realized even if the merger had not occurred.

4. That the System, as a part of the information required in Condition Number 1, will provide a revised five year budget projection based on the independently audited financial report.

5. If seventy one million dollars in operational savings and capital cost avoidance is not achieved after five years, that the System will transfer to the public health initiatives budget an amount equal to the difference between the actual amount of operational savings and capital costs avoided during the first five years and 71 million dollars. Should indigent /charity care substantially exceed the average indigent/charity care provided by the parties in FY95 and FY96, the System may request the Department to review this condition to determine the necessity of an adjustment.

6. That the System will provide medically necessary services to individuals regardless of their ability to pay. Because of this commitment, the System will continue to provide one level of care to patients regardless of their ability to pay. This commitment is absolute, predicated on no assumptions, and unconditional. The System will identify the amount of indigent/charity care provided during the fiscal year as part of the information required by Condition Number 1.

7. That the System will adjust its charges to non-governmental payers for the first five years, so that after adjustments for changes to the medical consumer price index (Southeast region or the South Carolina medical consumer price index, whichever is lower), new services, and governmentally imposed requirements, the System will not realize a higher case mix adjusted net inpatient revenue from non-governmental payers per admission than that realized by Baptist Healthcare System of South Carolina, Inc. and Richland Memorial Hospital in combination in 1995.

8. That the System will reduce its gross charges to all payers during each of the first five years of the operation of the System. The System will report, as part of the information required in Condition Number 1, any rate changes (increase or decrease, inpatient or outpatient) to the Department in enough detail to assure the Department that any growth in gross revenue over the five year period is due strictly to changes in patient volume.

9. As part of the information provided in Condition Number 1, the System will report its prospective plans for changes of clinical services between the Sponsoring Organizations' facilities for the upcoming year. That the System, prior to changing, will receive approval from the Department of the change. The changes required to be reported are any consolidations, mergers, deletions, or other change or alteration of clinical services that may significantly affect patients' access to care; or medical, graduate medical, and allied health education program's access to the clinical service.

10. That the System will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any

competing licensed facility that requests such access. For services not offered by competing licensed facilities in the core service area, the System will give them terms and conditions no less favorable than that covering state employees who have selected the standard non-HMO coverage that is in effect at the time the competing licensed facility requests access to a service. That the System will continue this access for which it is the sole provider until such time as a competing licensed facility offers the service, and will terminate only in the event that South Carolina repeals its Certificate of Need laws or that such laws otherwise cease to be applicable.

11. That the System's mission statement will be substantially similar to the existing mission statements of the Baptist Healthcare System of South Carolina, Inc. and Richland Memorial Hospital.

12. That the System will continue a relationship substantially similar to the relationship set forth in the affiliation agreement between Richland Memorial Hospital and the University of South Carolina School of Medicine and continue to support medical education. If a clinical service is determined to be located at only one Sponsoring Organization's facility, (as provided for in Condition Number 9 above) that medical, graduate medical, and allied health education programs will have access to that clinical service at the facility in which the service is to be located, to the extent that is necessary to complete the education and training as required by the program.

13. That should the System change controlling interest by purchase, lease, assignment, management contract, transfer or comparable arrangement, that the new operating entity as a condition of the change will adhere to all the conditions of this approval and all representations put forth in the Certificate of Public Advantage application and subsequent submissions.

14. That as part of the information required in Condition Number 1, "generally accepted accounting principles" consistently applied will be used to calculate net of revenues over expenses in the annual report for determining the 10% public health commitment and that such financial statements will be certified by an independent auditor.

15. That neither the System, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations. This does not prevent third party payers from unilaterally choosing not to contract with a hospital that is not competitive. However, it must be the decision of the payer and not be required as a condition of a contract with the System or its affiliate. This does not include exclusive contracts with third party payers that may be in effect on this date or their renewals as provided for in the existing contract .

16. That the System shall not enter into an exclusive arrangement which will preclude non-employee physicians, payers, or ancillary care providers from entering into contractual arrangements with other facilities and providers. Additionally, the System shall not enter into a new exclusive arrangement with a sole provider of any service in the core service area for the System without prior approval from the Department.

17. That neither the System, nor their affiliates, will enter into contracts with suppliers, vendors, or group purchasing organizations that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the Sponsoring Organizations.

18. That the Department will reevaluate the terms and conditions of this approval in regard to the 10% public health commitment and other community benefits in the aggregate should "[r]evenue and gains in excess of expenses and losses" as a percent of gross revenue escalate or decline (1) to a point where the System's commitment to public health and other community benefits becomes unbalanced as it relates to the System's profitability or (2) to a point where there is little or no commitment to public health or other community benefits.

19. That the Department, as necessary, will compare cost and other indices (such as cost per adjusted patient discharge) for the System to that of similar facilities to measure the efficiency and effectiveness of this alliance.

20. That the Department may amend these conditions to include, but not limited to, lowering prices (1) should the parties not achieve their efficiency goals; (2) should price, as measured in "revenue per stay" (or other measure that may be appropriate), in South Carolina be falling significantly, signaling that to hold prices to pre-Joint Operating Agreement level plus inflation has been too generous compared to what the competitive outcome would have been; or (3) should unexpected events lead to abnormally high margins, such as unexpectedly high disproportionate share payments being received.

21. That the System will provide to the Department copies of all managed care contracts in effect during the last year, within 45 days of the closing of the Joint Operating Agreement. In addition, as a part of the information required in Condition Number 1, the System will provide all existing managed care contracts to the Department. This information will be considered propriety and not subject to disclosure.

22. That at the end of the first full year following the merger, the System will provide a comprehensive and specific plan, acceptable to the Department, for reaching merger specific efficiencies of at least four percent of cost, adjusted for volume.

23. That the System will negotiate with managed care payers in good faith and in a fair and equitable manner. This does not require the System to contract with every payer regardless of terms, or that contracted prices must be the same for all payers. The Department will as a part of its ongoing monitoring process investigate consistent complaints from employers and managed care payers to ensure compliance with this condition and will take appropriate regulatory action when necessary.

24. That the System will adhere to the commitments it has outlined in its "Summary of System Commitments and Proposed DHEC Monitoring" in its application and all other representations made in the Certificate of Public Advantage application and all of its subsequent submissions, to the extent that they are consistent with the conditions of this approval, and that may not be specifically described in these conditions.

25. That the System will pay to the Department an annual monitoring fee to cover the actual cost of audits and monitoring. This fee will be used by the Department in whatever manner solely for the purpose of monitoring this approval.

The proposed decision becomes the final agency decision fifteen (15) days after receipt of this notice by the applicant unless an administrative appeal is commenced pursuant to Section 311 of Regulation No. 61-31, Health Care Cooperative Agreements, and the Administrative Procedures Act. An appeal may be submitted by any affected person or the applicant, within this fifteen (15) day period, which gives notice in writing that the person is desirous of an administrative appeal. Should this be the case, the affected person/applicant should submit the original request to the following:

The Board of Health and Environmental Control
Attention: Clerk of the Board
Office of the Commissioner
2600 Bull Street
Columbia, South Carolina 29201

A copy of the correspondence must be forwarded to the Director of the Bureau of Health Facilities and Services Development. Should there be no request for appeal within the fifteen (15) day period, this decision will be final.

If you have any questions, please feel free to contact us at (803) 737-7200.

Sincerely,

Leon B. Frishman

Leon B. Frishman, Director
Bureau of Health Facilities and
Services Development

LBF:JCG:mwf

cc: The Honorable Charles M. Condon
Mr. Robert Armistead
Mr. Mark Ballew
Mr. Marty Bridges
Dr. Stuart A. Hamilton
Mr. Henry T. Hopkins
Mr. Julius Murray
Colonel Morris B. Rubenstein
Mr. Scott W. Trent, Jr.

D H E C
PROMOTE PROTECT PROSPER
2600 Bull Street
Columbia, SC 29201-1708

May 15, 1997

Mr. Charles D. Beaman, Jr., President
Baptist Healthcare System of South Carolina, Inc.
Taylor at Marion Street
Columbia, South Carolina 29220

Mr. Kester S. Freeman, Chief Executive Officer
Richland Memorial Hospital
Five Richland Medical Park
Columbia, South Carolina 29203

Re: Certificate of Public Advantage
BR Health System, Inc.
Columbia, South Carolina

Dear Messrs. Beaman and Freeman:

In reviewing the Department's decision granting the Certificate of Public Advantage ("COPA") to BR Health System, Inc., we have discovered that there is a clerical error contained in the first sentence of the last paragraph on page six (6). The sentence containing the clerical error reads, in pertinent part: "The proposed decision . . . unless an administrative appeal is commenced pursuant to Section 311 of Regulation No. 61-31, Health Care Cooperative Agreements, ..." Reg. 61-31 §311 reads, in pertinent part: " . . .the Department shall issue a staff decision approving or denying the application for a Certificate of Public Advantage. The Department's staff decision . . . ."

The referenced sentence in the COPA letter inadvertently used the word "proposed" instead of "staff" as the adjective modifying "decision" when referring to the §311 Administrative Procedures Act appeal provision. The first sentence of the last paragraph of page six is corrected to read: "The staff decision becomes the final agency decision fifteen (15) days after receipt of this notice by the applicant unless an administrative appeal is commenced pursuant to Section 311 of Regulation No. 61-31, Health Care Cooperative Agreements, and the Administrative Procedures Act."

Please be advised that the aforementioned 15 day period commenced from the day that the Sponsoring Organizations reviewed the Department's May 8, 1997, decision letter regarding the COPA.

1303

If you have any questions, please feel free to contact us at (803) 737-7200.

Sincerely,

Leon B. Frishman

Leon B. Frishman, Director
Bureau of Health Facilities and
Services Development

LBF/JCG/vmm

cc: The Honorable Charles M. Condon
Mr. Robert Armistead
Mr. Mark Ballew
Mr. Marty Bridges
Dr. Stuart A. Hamilton
Mr. Henry T. Hopkins
Mr. Julius Murray
Colonel Morris B. Rubenstein
Mr. Scott W. Trent, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 6

D H E C
PROMOTE PROTECT PROSPER
2600 Bull Street
Columbia, SC 29201-1708

Of Joel file

October 6, 1997

Mr. Charles D. Beaman, Jr., President
Baptist Healthcare System of South Carolina, Inc.
Taylor at Marion Street
Columbia, South Carolina 29220

Mr. Kester S. Freeman, Chief Executive Officer
Richland Memorial Hospital
Five Richland Medical Park
Columbia, South Carolina 29203

c/o Ms. M. Elizabeth Crum
McNair Law Firm, P.A.
P. O. Box 11390
Columbia, S. C. 29211

Re: COPA-97-01
Certificate of Public Advantage
BR Health System, Inc.
Columbia, South Carolina

Dear Messrs. Beaman and Freeman:

Enclosed is the Certificate of Public Advantage issued to BR Health System, Inc. pursuant to the Order of The Honorable John D. Geathers, Administrative Law Judge, dated August 28, 1997.

Should there be any questions regarding this action, please feel free to contact me.

Sincerely,

Douglas E. Bryant
Commissioner

DEB/vmm

Enclosure
cc: The Honorable Charles M. Condon

South Carolina Department of Health and Environmental Control

CERTIFICATE OF PUBLIC ADVANTAGE

This Certificate of Public Advantage, No. COPA-97-01, is issued to BR Health System, Inc.,(the System) for the incorporation of a nonprofit entity to operate the hospitals of the Sponsoring Organizations as a single unit. The Sponsoring Organizations include (1) Baptist Healthcare System of South Carolina, Inc., Columbia and Easley, South Carolina and (2) Richland Memorial Hospital, Columbia, South Carolina.

In reaching this decision, the Department has determined that the applicants have demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement. The Department has also determined that the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result.

This represents the Department's final decision regarding this agreement. This decision is subject to each condition described in the approval dated May 8, 1997.

In Witness Whereof I have hereunto set my hand and the seal of the Department of Health and Environmental Control this the 6th day of October, 1997.

Douglas E. Bryant
Commissioner

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 7

November 18, 2003

Mr. Kester S. Freeman, Jr., Chief Executive Officer
Palmetto Health Alliance
P. O. Box 2266
Columbia, South Carolina 29202-2266

Re: Update of the original conditions as set forth in Palmetto Health Alliance's Certificate of Public Advantage (COPA)

Dear Mr. Freeman:

Palmetto Health Alliance (The System) celebrated its fifth anniversary on February 8, 2003. Throughout this time, Palmetto Health Alliance has operated in accordance with the Certificate of Public Advantage (COPA) granted by the South Carolina Department of Health and Environmental Control (Department) on or around May 8, 1997. Many of the conditions set forth in the COPA were targeted for the first five (5) years of operations and have either been satisfied or are no longer applicable. Accordingly, we have reviewed the original twenty-five (25) conditions and have made modifications in which many conditions have been eliminated, while others were combined, amended, or restated.

The proposed modifications to the COPA are as follows:

1. That the Palmetto Health Alliance (the System) will provide a full report to the Department every other year beginning FY 2003, which will include, at a minimum, responses to the questions in Regulation 61-31, Health Care Cooperative Agreements, Section 502 (B); the previous fiscal year's independent audited financial statements; and information which will enable the Department to evaluate each of the conditions listed below. In years when a full report is not required, the System will provide the Department an abbreviated report which will include, at a minimum, an annual audited financial statement plus a description of the programs and services the System provides through its Community Outreach Programs as described in Condition 2. All reports, full and abbreviated, may require additional information the Department feels is necessary to adequately evaluate the compliance of the Certificate of Public Advantage. These annual reports are due to the Department no later than 120 days after the end of each fiscal year after the System's Joint Operating Agreement is consummated.

   In addition, the System will provide a revised three (3) year forecasted financial statement, which may be based upon its most recently Board approved budget and Board accepted audited financial report. The System will also make available to the Department all of its managed care contracts for inspection, if necessary, which will be considered proprietary and not subject to disclosure.

2. That the System will provide 10% of its "excess revenues over expenses" to fund public health initiatives and community outreach programs, and the System will provide no less than seventeen million dollars to be allocated over the first seven years of the System's existence. As of September 30, 2002, the end of the fifth fiscal year of the COPA, the System provided $12,143,200 to fund public health initiatives and community outreach programs. In year six the System will provide $2,428,000 or ten percent of year six's excess revenues over expenses, whichever is greater to fund public health initiatives and community outreach programs. In year seven the System will provide $2,429,000 of ten percent of year seven's excess of revenue over expenses, whichever is greater, to fund public health initiatives and community outreach programs. After year seven, the System will continue to provide ten percent of it excess revenue over expenses to fund such programming. Efforts funded with this money, as a community benefit, will be evaluated each year as a part of the information required in Condition Number 1. The evaluation will be based on the benefits/changes/accomplishments that occur because of the activities/services provided by the programs and for which the program is held accountable. The evaluation will consider whether these programs are reaching populations that might otherwise not receive these services without the Certificate of Public Advantage.

   In addition the Department will re-evaluate the terms and conditions of the 10% public health commitment and other community benefits in the aggregate should "revenue and gains in excess of expenses and losses" as a percent of gross revenue escalate or decline (1) to a point where the System's commitment to public health and other community benefits becomes unbalanced as it relates to the System's profitability or (2) to a point where there is little or no commitment to public health or other community benefits.

3. That as a part of the information required in Condition Number 1, the System will report on the nature, source and amount of capital expenditures avoided during the preceding fiscal year. In addition, the System will report major operational savings that can be documented. Costs used to document the above savings must be merger specific, that is, savings that occurred because of the merger and not savings that would have been realized even if the merger had not occurred.

4. The System will report its prospective plans for changes of clinical services between the Sponsoring Organizations' facilities prior to making such changes. That the System, prior to changing, will receive approval from the Department of the change. The changes required to be reported are any consolidations, mergers, deletions, or other change or alteration of clinical services that may significantly affect patients' access to care; or medical, graduate medical, and allied health education program's access to the clinical service.

5. That the System will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any competing licensed facility that requests such access. For services not offered by competing licensed facilities in the core service area, the System will give them terms and conditions equal to the lowest of the amount which would be received from patients insured by either Premier PPO, Cigna or Aetna. That the System will continue this access for which it is the sole provider until such time as a competing licensed facility offers the service, and will terminate only in the event that South Carolina repeals its Certificate of Need laws or that such laws otherwise cease to be applicable. Additionally, the System must make available to the Department, upon request, names of any facilities, to include terms and conditions, to which services have been offered.

6. That the System will continue a relationship substantially similar to the relationship set forth in the affiliation agreement between Richland Memorial Hospital and the University of South Carolina School of Medicine and continue to support medical education. If a clinical service is determined to be located at only one Sponsoring Organization's facility, (as provided for in Condition Number 4 above) that medical, graduate medical, and allied health education programs will have access to that clinical service at the facility in which the service is to be located, to the extent that is necessary to complete the education and training as required by the program.

7. That should the System change controlling interest by purchase, lease, assignment, management contract, transfer or comparable arrangement, that the new operating entity as a condition of the change will adhere to all the conditions of this approval and all representations put forth in the Certificate of Public Advantage application and subsequent submissions.

8. That as part of the information required in Condition Number 1, "generally accepted accounting principles" consistently applied, but excluding extraordinary revenue and expenses, losses on extinguishments of debt and the impact of any mark to market adjustments on derivative instruments, will be used to calculate net of revenues over expenses in the annual report for determining the 10% public health commitment and that such financial statements will be certified by an independent auditor. However, should any of these other items result in cash gains or losses, they may be included in net revenues over expenses.

9. That neither the System, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations. This does not prevent third party payers from unilaterally choosing not to contract with a hospital that is competitive.

However, it must be the decision of the payer and not be required as a condition of a contract with the System or its affiliate. This does not include exclusive contracts with third party payers that may be in effect on this date or their renewals as provided for in the existing contract.

In addition, the System will negotiate with managed care payers in good faith and in a fair and equitable manner. This does not require the System to contract with every payer regardless of terms, or that contracted prices must be the same for all payers. The Department will as a part of its ongoing monitoring process investigate consistent complaints from employers and managed care payers to ensure compliance with this condition and will take appropriate regulatory action when necessary.

10. Except to the extent required by vendors, suppliers or GPOs, that neither the System, nor their affiliates, shall condition any contracts with suppliers, vendors, or group purchasing organizations that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the Sponsoring Organizations.

11. That the Department may amend these conditions to include, but not limited to, lowering prices should unexpected events lead to abnormally high margins from operations.

12. That the System will adhere to the commitments it has outlined in its "Summary of System Commitments and Proposed DHEC Monitoring" in its application and all other representations made in the Certificate of Public Advantage application and all of its subsequent submissions, to the extent that they are consistent with the conditions of this approval, and that may not be specially described in these conditions.

13. That the System will pay to the Department an annual monitoring fee to cover the actual cost of audits and monitoring. This fee will be used by the Department in whatever manner solely for the purpose of monitoring this approval.

We appreciate the continued cooperation from the Alliance. If you have any questions regarding this letter, do not hesitate to contact me.

Sincerely,

Joel C. Grice

Joel C. Grice, Director
Bureau of Health Facilities and Services Development

cc: Mr. Charles D. Beaman, Jr.
Mr. Howard West

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 8

MEMORANDUM

M. Elizabeth Crum

lcrum@mcnair.net
T 803.753.3240
F 803.933.1464

Via Email

TO: Louis W. Eubank
Margaret (Maggie) P. Murdock
MaryJo Roue
Eva Johnson
Ashely C. Biggers, Esquire

CC: Howard P. West, Esquire, Joseph J. Blake, Jr., Esquire

FROM: M. Elizabeth Crum, Esquire

DATE: October 11, 2017

RE: Newco and Affiliation between UAO/GHS and PH

As we discussed in our respective meetings, below is a description of our understanding of the ownership of hospitals and other health care facilities and providers both before the Newco transaction and after the Newco transaction. Attached please see charts showing the ownership of Palmetto Health hospitals before the transaction and the Upstate Affiliate Organization d/b/a Greenville Health System ("UAO/GHS") hospitals before the transaction and the ownership for both PH and UAO/GHS after the transaction.

The Parties

The Affiliation Agreement ("Agreement") between Palmetto Health and SCO (as defined below) contemplates a new company, now incorporated as SC Health Company ("Newco"), would be established and become effective at closing.

Strategic Coordinating Organization ("SCO") is a South Carolina nonprofit corporation and the parent organization of a comprehensive integrated health care system that includes hospitals and other licensed health care facilities and services[1] serving the Upstate region of South Carolina. Those hospitals and

McNAIR LAW FIRM, P.A.
1221 Main Street
Suite 1600
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

[1] Health care facilities and services are used as specified in the State Certificate of Need and Health Facility Licensure Act (CON Act) and are licensed as required under the CON Act and applicable Department of Health and Environmental Control (DHEC) regulations (DHEC regulations).

other health care facilities and services are currently owned and operated by and post transaction closing, will continue to be operated/owned by UAO/GHS. The licenses, permits, and certificates for these hospitals, other health care facilities and services are currently issued to UAO/GHS as the owner/operator of the hospital and other health care facilities and services. Post transaction, UAO/GHS will still hold the licenses, permits and certifications for these hospitals, other health care facilities and services

The Agreement contemplates at the closing of the transaction, Newco will become the member and parent organization of UAO/GHS. This will be accomplished by merging the SCO with and into UAO/GHS with UAO/GHS being the surviving entity of that merger and the Newco becoming the sole member of the UAO/GHS.

Palmetto Health is and will continue to be a comprehensive, integrated health care system that includes hospitals and other licensed health care facilities and services serving the Midlands region of South Carolina. Palmetto Health is the sole member of Palmetto Health Tuomey, a South Carolina nonprofit corporation which owns and holds the license, permits, and certificates for Palmetto Health Toumey Hospital and its other health care facilities and services. The remaining hospitals, health care facilities and services are currently owned by and the licenses, permits, and certificates are currently issued in the name of Palmetto Health as the owner of the health care facilities and services. At closing, the organizational documents of Palmetto Health will be amended to add the Newco as a member of Palmetto Health with certain rights and powers reserved to it.

UAO/GHS and Palmetto Health are also the only two members of Baptist Easley Hospital ("BEH"), a South Carolina nonprofit corporation. UAO/GHS and Palmetto Health are equal members in BEH. BEH owns Baptist Easley Hospital and holds the license, permits, and certificates for the hospital. The Agreement does not contemplate impacting or changing BEH.

The Transaction

SCO and Palmetto Health entered into the Agreement to create Newco. Newco is intended to support UAO/GHS, Palmetto Health, and any future members provide health care and related educational activities more efficiently and effectively. It intends to accomplish this by providing overall strategic direction, coordination, other elements of corporate support, and other services to UAO/GHS and Palmetto Health. Newco will also coordinate academic relations and affiliations of UAO/GHS and Palmetto Health.

Newco will be a non-profit corporation, without members, with a tax-exemption based on its status as a supporting organization of UAO/GHS and Palmetto Health. The Newco Board will initially be 16 persons – 6 elected by SCO, 6 elected by Palmetto Health, the current CEOs of SCO and Palmetto Health (who will serve jointly as Newco's co-CEOs until December 31, 2019 and will leave the Newco board when they cease being co-CEOs), and two at large members elected by those 14 persons. However, once the initial terms of those initial directors expire, the Newco Board will become self-perpetuating with requirements to assure involvement by persons within the geographic areas served by UAO/GHS and Palmetto Health.

Upon completion of the change in corporate structures described below and the closing of this transaction, UAO/GHS and Palmetto Health will remain in existence and responsible for the operations of their respective hospitals and other health care facilities and services, and will retain title to their real property and the medical and non-medical equipment and other personal property involved in their delivery of health care services. No state (DHEC, LLR, etc.) or federal license, permit, or certificate (whether administered by DHEC or not) required for the operation of the hospitals, other health care facilities and services and physicians and physician practice groups will change. The Medicare provider numbers for all UAO/GHS and Palmetto Health existing hospitals, other health care facilities and services and employed physicians and physician practice groups will stay the same. Newco will not have legal title to or operate any hospital, other health care facility or service and is not required to obtain or have any license, permit, or certificate for a hospital or other health care facility or service as a condition of the transaction closing.

After the transaction closes, UAO/GHS and Palmetto Health will remain in existence with their own boards. These corporations will continue to deliver health care through their respective hospitals, other health care facilities and services and physicians and physician practice groups, and will continue participating directly in healthcare education. The boards of both entities will be active and will retain, among other things, primary oversight of the delivery and quality of services through their respective hospitals, other health care facilities and services, physicians and physician practice groups and other employees, compliance with capital and operating budgets and operating plans established by Newco, medical staff credentialing, and community health initiatives relating to community health status assessment and improvement. Additionally, both UAO/GHS and Palmetto Health will remain obligated to perform their respective contractual obligations in existence as of the closing, which include real property leases, personal property leases, and license agreements. Palmetto Health will continue to meet its obligations under its Certificate of Public Advantage (COPA). No change to the COPA is being sought, is required, or

will be made as a result of this transaction since there will be no change in the services provided or service area served.

Corporate Structure After the Transaction

At the consummation of the transaction, Newco will become the sole member of UAO/GHS.

At the consummation of the transaction, Newco will become an additional member of Palmetto Health, along with Baptist Healthcare System of South Carolina, Richland Memorial Hospital, and Tuomey Foundation.

Attached are three organizational charts: 1) Palmetto Health ownership/facility structure prior to the transaction closing; 2) UAO/GHS ownership/facility structure at the closing of the transaction closing; and 3) the Palmetto Health and UAO/GHS ownership/facility structures after the transaction closing. As you can see, no hospital, other healthcare facility or service will change as a result of the transaction.

Conclusion

The transaction contemplated by the Agreement does not change Palmetto Health's provision of services or the service area as described by the COPA that Palmetto Health and the Department entered into pursuant to S.C. Code Ann. § 44-7-330. S.C. Code Ann. §§ 44-7-510, et seq. is not implicated by the transaction.

As described above, there will not be change of ownership, health care facility location or health care facility name[2] as a result of the transaction contemplated by the Agreement. Therefore, the transaction does not implicate either licensure or certification requirements. Please do not hesitate to call me if you have any questions or concerns about the above. My direct line number is 803-753-3240. Thank you for your attention to this matter.

MEC:vjh

[2] The hospitals and other health care facilities have to get new licenses if there is: 1) a change of ownership either by purchase or lease, 2) change of name, or 3) change in bed complement. See: S.C. Regs. 61-16 § 201(G) (hospitals); 61-91 § 103(K) (ambulatory surgery facility); 61-77 § 102(I) (home health); et seq.

Crum, Liz

From: Eubank, Louis W. <EUBANKLW@dhec.sc.gov>
Sent: Wednesday, November 1, 2017 4:31 PM
To: Crum, Liz; Biggers, Ashley; Murdock, Margaret P.
Subject: Re: Any word on a response to my letter regarding

Hi Liz,

Ashley is planning to come to my office in the morning to review your letter and the original COPA file. If there is any need for additional follow-up after, we'll definitely reach out. I would expect we can let you know something either way by the end of the week.

- Louis

Louis Eubank, Chief
Bureau of Healthcare Planning and Construction
S.C. Dept. of Health & Environmental Control
Office: (803) 545-3652
Mobile: (803) 730-0523
Connect: www.scdhec.gov Facebook Twitter

From: Crum, Liz <LCrum@MCNAIR.NET>
Sent: Wednesday, November 1, 2017 3:44:56 PM
To: Biggers, Ashley; Eubank, Louis W.; Murdock, Margaret P.
Subject: Any word on a response to my letter regarding

No CHOW and COPA not implicated in the GHS/PH transaction? Sorry to bug you but .... ☺ thx, Liz

M. Elizabeth Crum
Shareholder
lcrum@mcnair.net | 803 753 3240 Direct

McNair Law Firm, P.A.
Columbia Office 1221 Main Street | Suite 1800 | Columbia, SC 29201
803 799 9800 Main | 803 753 3278 Fax
Mailing Post Office Box 11390 | Columbia, SC 29211
VCard | Bio URL | Website

Crum, Liz

From: Crum, Liz <lcrum@burr.com>
Sent: Tuesday, November 21, 2017 1:20 PM
To: 'Ashley C. Biggers (biggerac@dhec.sc.gov)'
Subject: Sorry to bother you again. Any luck in getting me

Importance: High

An email or something in writing saying that the Department agrees with my letter of October 11 re COPA and CHOW. This is the last thing that PH and GHS are waiting on. Thx, Liz

Crum, Liz

From: Biggers, Ashley <biggerac@dhec.sc.gov>
Sent: Tuesday, November 21, 2017 5:41 PM
To: Crum, Liz
Subject: Your letter of October 11, 2017

Liz,

We are in agreement with your letter of October 11, 2017.

Thanks,
Ashley

Ashley C. Biggers
Chief Counsel for Health Regulation
S.C. Dept. of Health & Environmental Control
Office: (803) 898-3362
Mobile: (803) 354-2928
Connect: www.scdhec.gov Facebook Twitter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 9

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2020-001610

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

Case No.: 20-ALJ-0108-CC

Lexington County Health Services District, Inc.,
d/b/a Lexington Medical Center, ...Petitioner/Respondent,

v.

South Carolina Department of Health and
Environmental Control, Prisma Health – Midlands,
Providence Hospital, LLC d/b/a Providence Health,
Providence Health Northeast, Providence Health
Fairfield, and Kershaw Hospital, LLC
d/b/a KershawHealth Medical Center, ...Respondents,

Of WHICH
Prisma Health – Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC, d/b/a Kershaw Health Medical Center are the Respondents-Appellants.

AFFIDAVIT OF MALCOLM W. ISLEY

I, Malcolm Isley, hereby state as follows:

1. I am a resident of Greenville County, South Carolina, over twenty-one years of age and am competent to make this affidavit.

2. I am employed by Prisma Health ('Prisma") and serve as the Chief Strategy Officer for Prisma.

3. I am providing this affidavit based on my personal knowledge and on information obtained in the course of my employment with Prisma Health (Prisma). If called as a witness, I could competently testify to the facts set forth herein. Prisma Health-Midlands (PHM) is a South Carolina nonprofit corporation and a subsidiary of Prisma.

4. On September 13, 2019, Lifepoint Holdings 2, LLC, a Delaware limited liability company, Providence Holding Company, LLC, a Delaware limited liability company ("Providence Holding"), Kershaw Health Holdings, LLC ("Kershaw Holding"), a South Carolina limited liability company (collectively "LPNT"), and Prisma, a South Carolina nonprofit corporation, entered into a letter of intent (as amended, the "LOI") for Prisma or an affiliate of Prisma to purchase substantially all of the assets of LPNT used in connection with the operations of Providence Hospitals (as defined in the LOI) and KershawHealth Medical Center (as defined in the LOI) (collectively, the "LPNT Assets"). A true and accurate copy of the LOI and amendments 1-4 is attached hereto as Exhibit A.

5. Pursuant to the terms of the LOI, Prisma made an initial good faith deposit of $5,000,000 to LPNT on September 13, 2019. The LOI further required that, upon execution of the Definitive Agreement (as defined in the LOI), Prisma pay an additional $5,000,000 good-faith deposit to LPNT. The Asset Purchase Agreement ("APA"), which is the "Definitive Agreement" referenced in the LOI, was executed by the parties thereto on March 2, 2020 and Prisma paid an additional deposit of $5,000,000 to LPNT on March 2, 2020. Prisma has, to date, paid LPNT a total of $10,000,000 to LPNT as a good faith deposit in connection with the purchase the LPNT Assets, which deposit is non-refundable to Prisma except under limited circumstances.

6. PHM is the buyer of the LPNT Assets. A true and accurate copy of portions (cover page, pp. 1-4, 56-57, 72-74, 78-81 and all signature pages) of the APA is attached hereto as Exhibit B. The APA

requires that the closing of PHM's acquisition of the LPNT Assets take place on or before one (1) year from the date the APA was executed, that is on or before March 2, 2021. *Id.*, pp. 78-81).

7. On February 28, 2020, SC Department of Health and Environmental Control ("DHEC") issued its decision ("Decision") and determined that the "ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets: ... All acquired facilities will be subject to the charity care policy of PHM. The current charity care policy in force at the time of submission will be included in PHM's annual COPA report. ...". Exhibit C, ¶ 17. A true and accurate copy of the Decision is attached hereto as Exhibit C. A true and accurate copy of the Prisma Health Midlands Charity Care Policy is attached hereto as Exhibit D.

FURTHER, the affiant saith not.

Malcolm Isley, Chief Strategy Officer

SWORN TO AND SUBSCRIBED BEFORE ME
This 22nd day of December, 2020

Notary Republic for the State of South Carolina
My Commission expires Aug. 28, 2022

EXHIBIT A

CONFIDENTIAL

Prisma Health
300 E. McBee Avenue
Greenville, SC 29601

September 13, 2019

D. Andrew Slusser
Executive Vice President, Chief Development Officer
LifePoint Holdings 2, LLC
330 Seven Springs Way
Brentwood, Tennessee 37027

Re: Proposed Acquisition of Certain Facilities

Dear Mr. Slusser:

This letter of intent (the "Letter of Intent") sets forth an agreement in principle among LifePoint Holdings 2, LLC, a Delaware limited liability company ("LPNT"), Providence Holding Company, LLC, a Delaware limited liability company ("Providence"), Kershaw Health Holdings, LLC, a South Carolina limited liability company ("Kershaw", and together with Providence, "Seller") and Prisma Health, a South Carolina nonprofit corporation, with respect to the proposed purchase (the "Transaction") by Prisma Health or one or more affiliates of Prisma Health (collectively, "Buyer" and, alone or with LPNT and Seller, a "Party" or the "Parties") of substantially all of the assets of Seller used primarily in connection with the operations of Providence Hospitals and KershawHealth Medical Center (collectively, the "Hospitals"), including, without limitation, the assets listed on Exhibit A-1 attached hereto and incorporated by reference (the "Acquired Assets"), but specifically excluding the assets listed on Exhibit A-2 attached hereto and incorporated by reference (the "Excluded Assets").

1. Type of Transaction. Pursuant to a definitive agreement(s) to be mutually acceptable to Seller and Buyer (collectively in the singular, the "Definitive Agreement"), the Transaction shall be structured as a sale of the Acquired Assets by Seller to Buyer. Subject to Buyer's due diligence, the Definitive Agreement will contain terms requiring Buyer to assume all of Seller's operating contracts and agreements, including physician employment and recruitment contracts, to the extent such agreements embody commercially reasonable terms and comply with applicable law.

2. Purchase Price. In consideration for the purchase of the Assets, Buyer will pay Seller a purchase price of $[redacted] in cash (the "Purchase Price") plus the dollar value of the actual amount of inventory and prepaid expenses at closing less the dollar value of the actual amount of employee-related liabilities (accrued payroll and PTO, as applicable) less the dollar value of the accounts payable of Seller assumed by Buyer at closing. Such adjustments

to the Purchase Price will be estimated at closing and will be subject to reconciliation after closing based on actual amounts. For clarity purposes, the Purchase Price will be reduced by the amount of any long-term liabilities assumed by Buyer in its discretion (subject to Buyer's due diligence). Except as described in this Letter of Intent, Seller will retain all accounts receivable, other current assets and any other current liabilities.

3. Non-Refundable Deposit. At the time the Transaction becomes publicly known as a consequence of: (a) Buyer's participation in any meeting regarding the Transaction or the COPA (as defined below) where the discussion of the Transaction is disclosed pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. 30-40 (2017) (the "SC FOIA"); (b) Buyer's submission to any governmental, regulatory, or administrative agency or authority of any written filing or application regarding the Transaction or the COPA that is disclosed under the SC FOIA; or (c) any other state or federal regulatory filing or a public announcement made by a person authorized by Buyer[1], Buyer shall pay a good-faith deposit of $5,000,000 (the "Initial Deposit"), which shall be held by a mutually-agreeable escrow agent (the "Escrow Agent") pursuant to a mutually agreed upon escrow agreement (the "Escrow Agreement"). Prior to the time the Transaction becomes publicly known and in the process of negotiating the Escrow Agreement, the Parties will agree upon a limited number of contingencies which would result in the Initial Deposit being returned to Buyer. Upon execution of the Definitive Agreement, Buyer shall make an additional $5,000,000 good-faith deposit (the "Additional Deposit" and, together with the Initial Deposit, the "Deposit") which shall also be held by the Escrow Agent. In the event the Definitive Agreement is executed prior to the time the Initial Deposit is made, the amount of the Additional Deposit shall be increased to $10,000,000. At the closing of the Transaction, the Deposit shall be credited toward the Purchase Price and paid over to Seller by the Escrow Agent. In the event the Definitive Agreement is executed, but the Transaction fails to close by a mutually agreed upon date (other than due to a limited number of contingencies to be set forth in the Definitive Agreement), the Deposit shall be paid over to Seller by the Escrow Agent.

4. Kershaw Prime Lease and MPT Lease. As a condition to the Transaction, Seller shall have: (a) obtained consent to assign the Kershaw Prime Lease to Buyer; and (b) delivered to Buyer title to the real estate and related assets associated with the MPT Lease free and clear of encumbrances under the MPT Lease and any other liens and encumbrances; provided, however, that such assets have certain obligations and restrictions related to the Kershaw Prime Lease that would be assumed by Buyer, subject to Buyer's due diligence.

[1] The escrow agreement will schedule those authorized persons to include all employees of Buyer who have executed a non-disclosure agreement in connection with Buyer's evaluation of the Transaction, which the parties will use commercially reasonable efforts to execute within ten (10) calendar days after the date of this Letter of Intent

5. Providence Hospitals. Subject to Buyer's due diligence, the Definitive Agreement will contain terms requiring that Buyer honor Seller's existing continuation of service and similar obligations pertaining to the Providence Hospitals as of the closing. Buyer acknowledges that Seller is obligated to use commercially reasonable efforts to cause the Ethical and Religious Directive obligations with respect to the Providence Hospitals to continue following the closing of any acquisition of Providence Hospitals. As such, Buyer agrees that it will review and discuss with Seller the nature and scope of such obligations as part of Buyer's due diligence.

6. Fairfield FSED. At the closing of the Transaction, Seller will assign to Buyer its rights under the existing Hospital Transformation Agreement related to the Fairfield FSED and Buyer will assume Seller's obligations thereunder, subject to Buyer's due diligence.

7. No Financing Contingency. Buyer will not include a financing contingency for the Purchase Price in the Definitive Agreement.

8. Payment of Purchase Price. Buyer shall pay the Purchase Price to Seller at closing by wire transfer of immediately available funds to a bank account of Seller's designation.

9. Encumbrances. Except as otherwise expressly provided in this Letter of Intent or as may otherwise be agreed by Buyer in its discretion, Seller will convey title to the Acquired Assets to Buyer free and clear of all liens, liabilities, encumbrances and defects in title, except for such customary and reasonable encumbrances and defects in title that do not represent secured debt, and will not interfere with Buyer's use of the Acquired Assets in the operation of the Hospitals in a manner similar to Seller's historical use of the Acquired Assets.

10. Liabilities. Except to the extent set forth in the Definitive Agreement, Buyer will not assume, and Seller and LPNT shall remain responsible for and shall indemnify and defend Buyer and its affiliates against, any and all liabilities, indebtedness, commitments or obligations of any kind whatsoever which relate to the sale of the Acquired Assets or the operation of the Assets or the Hospitals by Seller prior to the closing, including, without limitation, environmental claims, claims associated with alleged violations of environmental laws for acts prior to closing, claims relating to tax matters, and government or private payor claims of any kind, including, without limitation, Medicare, Medicaid and medical malpractice and general liability claims.

11. Additional Terms and Conditions.

(a) Employees. Buyer shall offer employment to substantially all of the Hospitals' active employees in good standing as of the closing, for positions and at compensation levels substantially consistent with those then being provided by Seller. Buyer shall establish terms and conditions of employment. Subject to Buyer's due diligence, Buyer

intends to honor prior service credit with Seller for purposes of satisfying pre-existing condition limitations and eligibility in Buyer's welfare benefit plans. Subject to Buyer's due diligence and its related policies, Buyer intends to assume Seller's obligations for vacation and holiday pay benefits, for Seller employees that become Buyer employees, in the amounts accrued as of closing.

(b) Covenant Not to Compete. Seller and LifePoint Health, LLC ("LifePoint Health") and its subsidiaries will agree at the closing to a covenant not to compete with the business of owning or operating one or more general acute care hospitals or other facilities including free-standing emergency rooms, free standing ambulatory or other types of surgery centers, imaging centers, rehabilitation, skilled nursing or primary care or specialty clinics (the "Restricted Business") within a 75-mile radius of the Hospitals for a period of five (5) years after the closing; provided, however, that the covenant not to compete would not apply to: (i) any Restricted Business owned or operated by a company at the time it acquires an equity interest in LifePoint Health and/or one or more of its subsidiaries (a "Change of Control"); (ii) any Restricted Business comprised of multiple facilities acquired by LifePoint Health and/or one or more of its subsidiaries; or (iii) the continued operation of Carolina Pines Regional Medical Center in Hartsville, its current Restricted Business and new Restricted Business outside of Richland, Lexington and Kershaw counties following the closing. The Parties acknowledge that the specific terms of such restrictive covenants and exceptions will be on terms to be mutually agreed by the Parties in good faith set out in the Definitive Agreement.

(c) Allocation of Purchase Price. The Purchase Price will be allocated among the Acquired Assets pursuant to procedures to be specified in the Definitive Agreement. Seller will be responsible for preparing the initial suggested allocation.

(d) Medical Staff. Subject to Buyer's due diligence, Buyer anticipates that the current Hospitals' medical staff by-laws and clinical privileges for physicians and other practitioners at the Hospitals will remain in place as of the closing.

(e) Transition Services. As of the closing, Seller or one or more of its subsidiaries would enter into a transition services agreement (the "TSA") with Buyer to provide information services to the Hospitals and such other services as may be agreed upon by the Parties for a period of up to twenty-four (24) months as determined and mutually agreed by the Parties. The TSA or another written agreement between the Parties will also provide for Buyer to agree, for a period of no more than twelve (12) months after closing, to use commercially reasonable efforts to collect Seller's accounts receivable for services rendered prior to closing, in consideration for payment of a commercially reasonable fee.

12. Access to Information. Seller will permit Buyer and its representatives, including its transaction advisors, accountants, and legal counsel, reasonable access to inspect and appraise the Acquired Assets, the Hospitals and their business prospects, and will disclose and make available to Buyer and its representatives additional books, agreements, papers and

records relating to the ownership and operation of the Hospitals in order that the Buyer can determine the financial and operational details of the Hospitals and their affiliated business operations. For convenience, promptly following execution of this Letter of Intent by the Parties, Buyer will provide Seller with a "due diligence" list of required items to effectuate the intent of this paragraph, provided, however, that the scope of Buyer's diligence review will not be limited by such list. The Parties acknowledge that due diligence information will be uploaded to a virtual data room maintained by a third party selected by Seller. Buyer agrees that its due diligence shall not unduly interfere with the operations of the Hospitals and, given the need for confidentiality of the Transaction to be maintained, that no such inspection shall take place and no employees or physicians associated with the Hospitals shall be contacted by Buyer without Buyer first coordinating such inspection with D. Andrew Slusser, Executive Vice President and Chief Development Officer of LPNT.

13. No Violation. Each Party hereby represents to the other Parties that neither this Letter of Intent nor the Transaction contemplated hereby (subject to obtaining the consents and approvals to be set forth in the Definitive Agreements) will violate any contract, agreement or commitment currently binding on such Party.

14. Confidentiality; Disclosure; Expenses.

(a) Except as otherwise required by law, Buyer and Seller agree to keep this Letter of Intent and its contents and all information provided by or on behalf of either Party pursuant to this Letter of Intent confidential and not disclose the same to any third party (except attorneys, consultants, or accountants hired by them and except to applicable governmental agencies in connection with any required notification or application for approval or exemption therefrom in connection with the Transaction) without the written consent of the other Party. The Agreement for Use and Non-Disclosure of Confidential Information dated as of May 1, 2019 among the Parties shall remain in effect and the terms thereof are hereby incorporated into this Letter of Intent by this reference.

(b) Except as required by law, any release to the public of information with respect to the matters set forth herein will be made only in the form and manner approved by the Parties and their respective counsel.

(c) Except to the extent set forth below, each Party shall bear its own expenses in connection with the implementation of this Letter of Intent and the Transaction, regardless of whether the Definitive Agreement is executed. Notwithstanding the foregoing: (i) Buyer shall be responsible for all expenses relative to the cost of title policies, surveys, environmental engineering reports, licensure application fees, recording fees, and mechanical, structural, electrical and roofing engineering costs, and any costs associated with pursuit of a modification of the existing Certificate of Public Advantage or a new Certificate of Public Advantage ("COPA"), except the fees and costs of legal counsel and advisers engaged by

Seller in connection with the COPA, which shall be borne exclusively by Seller; and (ii) real estate transfer taxes shall be split evenly between Seller and Buyer.

15. Definitive Agreement. Except for the provisions of Sections 3, 12, 13, 14, 15, 16, and 17 hereof (collectively, the "Binding Provisions"), this Letter of Intent is not intended to be a binding agreement and shall not give rise to any obligations between the Parties or their affiliates. It is the express intention of the Parties that, except for the Binding Provisions, no binding contractual agreement shall exist between them or their affiliates unless and until the Definitive Agreement shall have been fully executed. The Parties intend that the Definitive Agreement shall contain terms consistent with the provisions outlined above as well as representations, warranties, interim covenants, and other terms and conditions customary in this type of transaction, all of which must be acceptable to the Parties in their sole discretion (including, without limitation, conditions requiring receipt of all necessary regulatory approvals). Either Party may, for whatever reason or no reason, terminate this Letter of Intent and further negotiations by written notice to the other Party(ies). In such event, there shall be no liability among the Parties as a result of the execution of this Letter of Intent, any action taken in reliance on this Letter of Intent, or such termination, except with respect to claims arising from alleged breaches of obligations imposed by the Binding Provisions. Buyer shall prepare the initial draft of the Definitive Agreement.

16. Controlling Law. This Letter of Intent will be governed by and construed in accordance with the laws of the State of Delaware.

17. No-Shop Provision. For one-hundred-five (105) days after the date of execution of this Letter of Intent by the Parties, Seller and LifePoint Health will not, directly or indirectly, without the prior written approval of Buyer: (a) offer for sale all or any material portion of the Acquired Assets or all or any material portion of any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (b) solicit offers to buy all or any material portion of the Acquired Assets or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (c) hold discussions with any party (other than Buyer) looking toward such an offer or solicitation or looking toward a merger or consolidation of any entity owning any of the Acquired Assets; or (d) enter into any agreement with any party (other than Buyer) with respect to the sale or other disposition of the Acquired Assets (or any material portion thereof) or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets or with respect to any merger, consolidation, or similar transaction involving any entity owning any of the Acquired Assets or any transaction that is or would be the same or have substantially similar effect as the Transaction; provided, however, the obligations of this Section 17 will not apply to a transaction resulting in: (i) a Change of Control; or (ii) a transaction, or series of related transactions, in which LifePoint Health or one or more of its subsidiaries (including a sale of assets or equity interests, a merger, a consolidation or other similar transaction), sells, leases, or transfers more than one (1) acute care hospital owned by LifePoint Health or one or more of its subsidiaries that includes one (1) or more of the Hospitals and: (x) such Hospital(s) does not represent more

than ten percent (10%) of the combined net revenues of all of the hospitals being sold, leased, or otherwise transferred in such transaction; and (y) the principal place of business of the buyer in such transaction is not located in either North Carolina or South Carolina. Seller represents to Buyer that none of Seller or LifePoint Health or their respective subsidiaries is currently in discussions with any third party regarding a transaction described in (ii) above that would include the Hospitals or the Acquired Assets.

18. Agreement to Cooperate/Regulatory Approvals. Buyer and Seller (and, to the extent required, LPNT) shall coordinate and provide their full cooperation to obtain any regulatory, agency or governmental approvals that might be required for the Transaction, including any pertaining to Palmetto Health's COPA and, to the extent necessary, defend the Transaction from any public or private challenges. The Definitive Agreement will obligate the Parties to continue to pursue all such approvals until the parties in their reasonable discretion determine that such approvals cannot be obtained.

19. Closing. Subject to the last sentence of Section 18, the Definitive Agreement will contain a "target" closing date no later than ninety (90) days from the signing of the Definitive Agreement.

Please indicate your approval of the terms and conditions of this proposal and your intention to enter into these negotiations by executing two copies of this Letter of Intent in the space provided below and returning one executed copy to me. Please be advised that this proposal shall expire unless Buyer receives a fully executed copy of this Letter of Intent no later than 5:00 p.m., Eastern Daylight time, on September 20, 2019.

[Signature page follows]

CONFIDENTIAL

We look forward to a successful and mutually rewarding relationship in respect of the transactions set forth herein.

Sincerely,

PRISMA HEALTH

By: _____
Mark O'Halla
Chief Executive Officer

THE FOREGOING IS APPROVED
THIS 13th DAY OF September 2019:

LIFEPOINT HOLDINGS 2, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

PROVIDENCE HOLDING COMPANY, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

CONFIDENTIAL

EXHIBIT A-1

ACQUIRED ASSETS

- All of the assets of Seller or LifePoint Health and its subsidiaries utilized in the operation of the Hospitals, including, without limitation, any associated medical office buildings, physician clinics, ancillary services, land and buildings.
- All real property used in connection with the operation of the Hospitals or acquired for the benefit of the Hospitals, including, without limitation, any and all buildings, leaseholds, improvements or fixtures used in connection therewith.
- All equipment, inventory and supplies.
- All patient, medical, personnel and other records of the Hospitals.
- All licenses, permits and trade names, to the extent transferable by law.
- Any and all prepaid expenses and deposits.
- All contracts and agreements relating to the Assets and the Hospitals, other than contracts (if any) which are exclusively available to Seller or LifePoint Health and its subsidiaries.
- Any and all other property, whether tangible or intangible, of every kind, character or description, owned by Seller and used in the operation of the Hospitals.
- Any interests of Seller or LifePoint Health and its subsidiaries in any joint ventures associated with the Hospitals.

EXHIBIT A-2

EXCLUDED ASSETS

- Cash and cash equivalents.
- Patient accounts receivables and other receivables.
- Any and all bank accounts of Seller and LifePoint Health and its subsidiaries.
- All of Seller's insurance proceeds arising in connection with the operation of the Assets or the Hospitals.
- All amounts due or to become due to Seller from the Medicare, Medicaid or other payor programs in respect of cost report periods ended on or prior to closing; provided that DSH and similar payments will be allocated among the Parties based on their respective periods of ownership.
- Computer software and programs which are proprietary to Seller or LifePoint Health and its subsidiaries.
- All documents, records, operating manuals and film pertaining to the Hospitals proprietary to Seller or which Seller is required by law to retain.
- Any contracts, commitments or agreements, which are available only to Seller and LifePoint Health and its subsidiaries.
- Intercompany obligations.
- Provider Numbers.
- Any and all organizational documents and other corporate records of Seller and its LifePoint Health and its subsidiaries.

AMENDMENT NO. 1 TO LETTER OF INTENT

THIS AMENDMENT NO. 1 TO LETTER OF INTENT ("Amendment No. 1") is made and entered into as of November 22, 2019, by and among LifePoint Holdings 2, LLC, a Delaware limited liability company ("LPNT"), Providence Holding Company, LLC, a Delaware limited liability company ("Providence"), Kershaw Health Holdings, LLC, a South Carolina limited liability company ("Kershaw", and together with Providence, "Seller") and Prisma Health, a South Carolina nonprofit corporation ("Buyer").

WHEREAS, the Parties previously executed and delivered a letter of intent, dated September 13, 2019 (the "Letter of Intent"), with respect to the proposed Transaction described in the Letter of Intent;

WHEREAS, the Letter of Intent identifies certain provisions as binding and enforceable agreements of the Parties;

WHEREAS, the Parties desire to set forth in this Amendment No. 1 certain additional binding and enforceable agreements with respect to the Transaction and amend the Letter of Intent as expressly set forth in this Amendment No. 1;

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the Parties, intending to be legally bound, agree as follows:

1. Definitions. Capitalized terms used but not defined herein shall have the meanings given to them in the Letter of Intent.

2. Amendments to the Letter of Intent. The Letter of Intent is hereby amended as follows:

(a) The reference to "$[redacted] in Section 2 of the Letter of Intent is hereby deleted and replaced with "$[redacted]

(b) Footnote 1 is hereby deleted in its entirety and Section 3 of the Letter of Intent is hereby deleted in its entirety and replaced with the following, with all deletions shown in ~~strikethrough text~~ and all additions shown in double-underlined text:

> 3. Non-Refundable Deposit. Within one (1) business day of the date of the last signature to this Amendment No. 1, pursuant to that certain Escrow Agreement, dated as of October 10, 2019, as amended (the "Escrow Agreement"), by and among Prisma Health, LPNT, Providence, Kershaw and U.S. Bank National Association (the "Escrow Agent"), ~~at the time the Transaction becomes publicly known as a consequence of: (a) Buyer's participation in any meeting regarding the Transaction or the COPA (as defined below) where the discussion of the Transaction is disclosed pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. 30-40 (2017) (the "SC FOIA"); (b) Buyer's submission to any governmental, regulatory, or administrative agency or authority of any written filing or application regarding the Transaction or the COPA that is disclosed under the SC FOIA; or (c) any other state or federal regulatory filing or a public announcement made by Buyer,~~ Buyer shall pay a good-faith deposit of $5,000,000 (the "Initial Deposit"), which shall be held by the "Escrow Agent pursuant to the Escrow Agreement. ~~Prior to the time the Transaction becomes publicly known and in the process of negotiating the Escrow Agreement, the Parties will agree upon a limited number of contingencies which would result in the Initial Deposit being returned to Buyer.~~ Upon execution of the Definitive Agreement, Buyer shall make an additional $5,000,000 good-faith deposit (the "Additional Deposit" and, together with the Initial Deposit, the "Deposit") which shall also be

held by the Escrow Agent pursuant to the Escrow Agreement. ~~In the event the Definitive Agreement is executed prior to the time the Initial Deposit is made, the amount of the Additional Deposit shall be increased to $10,000,000.~~ At the closing of the Transaction, the Deposit shall be credited toward the Purchase Price and paid over to Seller by the Escrow Agent. In the event the Definitive Agreement is executed, but the Transaction fails to close by a mutually agreed upon date (other than due to a limited number of contingencies to be set forth in the Definitive Agreement), the Deposit shall be paid over to Seller by the Escrow Agent.

(c) Section 4 of the Letter of Intent is hereby deleted in its entirety and replaced with the following:

4. Kershaw Prime Lease and MPT Lease. (a) As a condition to the Transaction, Kershaw shall have terminated its and its' affiliates obligations relating to the Fee Agreement, dated October 27, 2015, by and among Kershaw County, South Carolina, a body politic and corporate and a political subdivision of the State of South Carolina, acting by and through its County Council as governing body of the County, Kershaw Hospital, LLC, a South Carolina limited liability company ("Kershaw Hospital"), Kershaw Clinics, LLC, a South Carolina limited liability company, and KershawHealth, a South Carolina political subdivision (the "District").

(b) The Parties acknowledge that the interest of Kershaw Hospital in the real property relating to the Kershaw facilities is currently that of a sublessee of an affiliate of Medical Properties Trust, Inc. ("MPT"), which is a lessee of that real property from the District. In connection with the closing of the Transaction: (i) the leasehold interest in the Kershaw facilities held by MPT shall be assigned by either MPT or Kershaw Hospital to and assumed by Buyer; and (ii) the sublease between MPT and Kershaw Hospital shall be terminated. For avoidance of doubt, any and all liabilities or obligations to MPT in connection with the termination of the sublease between MPT and Kershaw Hospital and/or the assignment of MPT's leasehold obligations in the Kershaw facilities to Buyer or its Affiliates (as defined in the Definitive Agreement) will be Excluded Liabilities under and as defined in the Definitive Agreement.

(c) As a condition to the Transaction, Buyer shall assume or agree to honor any and all existing obligations of Kershaw Hospital set forth in the following sections of the Asset Purchase Agreement dated September 25, 2015 by and between the District and Kershaw Hospital: (i) Section 6.7. Governance., (ii) Section 6.11. Capital Expenditures., (iii) Section 6.13. Hospital Services., (iv) Section 6.14. Strategic Plan., (v) Section 6.15. Office Space., (vi) Section 6.17. Selection of CEO., (vii) Section 6.20. Long Term Care Excluded Assets. and (viii) Section 6.21. Non-Competition Agreement.

(d) The introductory phrase in Section 5 "Subject to Buyer's due diligence" is hereby deleted in its entirety. The reference in Section 5 to "continuation of service and similar obligations" is hereby deleted and replaced with "continuation of service obligations".

(e) The reference in Section 11(e) to "commercially reasonable fee"" is hereby deleted and replaced with "commercially reasonable fair market value fee."

3. No Other Changes. Upon execution and delivery of this Amendment No. 1 by the Parties, the Letter of Intent shall be amended in accordance herewith and this Amendment No. 1 shall form part of the Letter of Intent for all purposes. Except as expressly set forth or contemplated in this Amendment No. 1, the terms and conditions of the Letter of Intent shall remain in place and shall not be altered, amended or changed in any manner whatsoever, except by any further amendment to the Letter of Intent made in accordance with the terms of the Letter of Intent, as hereby amended.

4. Counterparts. This Amendment No. 1 may be executed in any number of counterparts and by the different Parties on separate counterparts, each of which when executed and delivered shall be deemed an original binding the Party executing the same, but all of which shall together constitute one and the same instrument.

5. Definitions. Capitalized terms used herein without definition shall have the same meanings ascribed to such terms in the Letter of Intent.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Amendment No. 1 to Letter of Intent to be executed as of the date first written above.

PRISMA HEALTH

PRISMA HEALTH

By: _____

Mark O'Halla
Chief Executive Officer

LIFEPOINT HOLDINGS 2, LLC

LIFEPOINT HOLDINGS 2, LLC

By: _____

D. Andrew Slusser
Its Authorized Representative

PROVIDENCE HOLDING COMPANY, LLC

PROVIDENCE HOLDING COMPANY, LLC

By: _____

D. Andrew Slusser
Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

KERSHAW HEALTH HOLDINGS, LLC

By: _____

D. Andrew Slusser
Its Authorized Representative

AMENDMENT NO. 2 TO LETTER OF INTENT

THIS AMENDMENT NO. 2 TO LETTER OF INTENT (this "Amendment No. 2") is made and entered into as of December 27, 2019 by and among LifePoint Holdings 2, LLC, a Delaware limited liability company ("LPNT"), Providence Holding Company, LLC, a Delaware limited liability company ("Providence"), Kershaw Health Holdings, LLC, a South Carolina limited liability company ("Kershaw" and, together with Providence, "Seller") and Prisma Health, a South Carolina nonprofit corporation ("Buyer").

WHEREAS, the Parties previously executed and delivered a Letter of Intent dated as of September 13, 2019, as previously amended by that certain Amendment No. 1 to Letter of Intent dated as of November 22, 2019 (the "Letter of Intent"), with respect to the proposed Transaction described in the Letter of Intent;

WHEREAS, the Letter of Intent identifies certain provisions as binding and enforceable agreements of the Parties; and

WHEREAS, the Parties desire to amend the Letter of Intent as expressly set forth in this Amendment No. 2.

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the Parties, intending to be legally bound, agree as follows:

1. Definitions. Capitalized terms used but not defined in this Amendment No. 2 shall have the meanings given to them in the Letter of Intent.

2. Amendment to the Letter of Intent. Section 17 of the Letter of Intent is hereby deleted in its entirety and replaced with the following, with all deletions shown in ~~strikethrough text~~ and all additions shown in double-underlined text:

> 17. No-Shop Provision. For ~~one hundred five (105)~~ one hundred twenty (120) days after the date of execution of this Letter of Intent by the Parties, Seller and LifePoint Health will not, directly or indirectly, without the prior written approval of Buyer: (a) offer for sale all or any material portion of the Acquired Assets or all or any material portion of any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (b) solicit offers to buy all or any material portion of the Acquired Assets or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (c) hold discussions with any party (other than Buyer) looking toward such an offer or solicitation or looking toward a merger or consolidation of any entity owning any of the Acquired Assets; or (d) enter into any agreement with any party (other than Buyer) with respect to the sale or other disposition of the Acquired Assets (or any material portion thereof) or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets or with respect to any merger, consolidation, or similar transaction involving any entity owning any of the Acquired Assets or any transaction that is or would be the same or have substantially similar effect as the Transaction; provided, however, the obligations of this Section 17 will not apply to a transaction resulting in: (i) a Change of Control; or (ii) a transaction, or series of related transactions, in which LifePoint Health or one or more of its subsidiaries (including a sale of assets or equity interests, a merger, a consolidation or other similar transaction), sells, leases, or transfers more than one (1) acute care hospital owned by LifePoint Health or one or more of its subsidiaries that includes one (1) or more of the Hospitals and: (x) such Hospital(s) does not represent more than ten percent (10%) of the combined net revenues of all of the hospitals being sold, leased, or otherwise transferred in

such transaction; and (y) the principal place of business of the buyer in such transaction is not located in either North Carolina or South Carolina. Seller represents to Buyer that none of Seller or LifePoint Health or their respective subsidiaries is currently in discussions with any third party regarding a transaction described in (ii) above that would include the Hospitals or the Acquired Assets.

3. No Other Changes. Upon execution and delivery of this Amendment No. 2 by the Parties, the Letter of Intent shall be amended in accordance herewith and this Amendment No. 2 shall form part of the Letter of Intent for all purposes. Except as expressly set forth or contemplated in this Amendment No. 2, the terms and conditions of the Letter of Intent shall remain in place and shall not be altered, amended or changed in any manner whatsoever, except by any further amendment to the Letter of Intent made in accordance with the terms of the Letter of Intent, as hereby amended.

4. Counterparts. This Amendment No. 2 may be executed in any number of counterparts and by the different Parties on separate counterparts, each of which when executed and delivered shall be deemed an original binding the Party executing the same, but all of which shall together constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Amendment No. 2 to Letter of Intent to be executed as of the date first written above.

PRISMA HEALTH

PRISMA HEALTH

By: _____
Mark O'Halla
Chief Executive Officer

LIFEPOINT HOLDINGS 2, LLC

LIFEPOINT HOLDINGS 2, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

PROVIDENCE HOLDING COMPANY, LLC

PROVIDENCE HOLDING COMPANY, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

KERSHAW HEALTH HOLDINGS, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

AMENDMENT NO. 3 TO LETTER OF INTENT

THIS AMENDMENT NO. 3 TO LETTER OF INTENT (this "Amendment No. 3") is made and entered into as of January __, 2020 by and among LifePoint Holdings 2, LLC, a Delaware limited liability company ("LPNT"), Providence Holding Company, LLC, a Delaware limited liability company ("Providence"), Kershaw Health Holdings, LLC, a South Carolina limited liability company ("Kershaw" and, together with Providence, "Seller") and Prisma Health, a South Carolina nonprofit corporation ("Buyer").

WHEREAS, the Parties previously executed and delivered a Letter of Intent dated as of September 13, 2019, as previously amended by that certain Amendment No. 1 to Letter of Intent dated as of November 22, 2019 and by that certain Amendment No. 2 to Letter of Intent dated as of December 27, 2019 (the "Letter of Intent"), with respect to the proposed Transaction described in the Letter of Intent;

WHEREAS, the Letter of Intent identifies certain provisions as binding and enforceable agreements of the Parties; and

WHEREAS, the Parties desire to amend the Letter of Intent as expressly set forth in this Amendment No. 3.

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the Parties, intending to be legally bound, agree as follows:

1. Definitions. Capitalized terms used but not defined in this Amendment No. 3 shall have the meanings given to them in the Letter of Intent.

2. Amendment to the Letter of Intent. Section 17 of the Letter of Intent is hereby deleted in its entirety and replaced with the following, with all deletions shown in ~~strikethrough text~~ and all additions shown in double-underlined text:

> 17. No-Shop Provision. For ~~one hundred twenty (120) days after the date of~~ the period from the execution of this Letter of Intent by the Parties until January 31, 2020, Seller and LifePoint Health will not, directly or indirectly, without the prior written approval of Buyer: (a) offer for sale all or any material portion of the Acquired Assets or all or any material portion of any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (b) solicit offers to buy all or any material portion of the Acquired Assets or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (c) hold discussions with any party (other than Buyer) looking toward such an offer or solicitation or looking toward a merger or consolidation of any entity owning any of the Acquired Assets; or (d) enter into any agreement with any party (other than Buyer) with respect to the sale or other disposition of the Acquired Assets (or any material portion thereof) or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets or with respect to any merger, consolidation, or similar transaction involving any entity owning any of the Acquired Assets or any transaction that is or would be the same or have substantially similar effect as the Transaction; provided, however, the obligations of this Section 17 will not apply to a transaction resulting in: (i) a Change of Control; or (ii) a transaction, or series of related transactions, in which LifePoint Health or one or more of its subsidiaries (including a sale of assets or equity interests, a merger, a consolidation or other similar transaction), sells, leases, or transfers more than one (1) acute care hospital owned by LifePoint Health or one or more of its subsidiaries that includes one (1) or more of the Hospitals and: (x) such Hospital(s) does not represent more than ten percent (10%) of the combined net revenues of all of the hospitals being sold, leased, or

otherwise transferred in such transaction; and (y) the principal place of business of the buyer in such transaction is not located in either North Carolina or South Carolina. Seller represents to Buyer that none of Seller or LifePoint Health or their respective subsidiaries is currently in discussions with any third party regarding a transaction described in (ii) above that would include the Hospitals or the Acquired Assets.

3. No Other Changes. Upon execution and delivery of this Amendment No. 3 by the Parties, the Letter of Intent shall be amended in accordance herewith and this Amendment No. 3 shall form part of the Letter of Intent for all purposes. Except as expressly set forth or contemplated in this Amendment No. 3, the terms and conditions of the Letter of Intent shall remain in place and shall not be altered, amended or changed in any manner whatsoever, except by any further amendment to the Letter of Intent made in accordance with the terms of the Letter of Intent, as hereby amended.

4. Counterparts. This Amendment No. 3 may be executed in any number of counterparts and by the different Parties on separate counterparts, each of which when executed and delivered shall be deemed an original binding the Party executing the same, but all of which shall together constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Amendment No. 3 to Letter of Intent to be executed as of the date first written above.

PRISMA HEALTH

PRISMA HEALTH

By: _____
Mark O'Halla
Chief Executive Officer

LIFEPOINT HOLDINGS 2, LLC

LIFEPOINT HOLDINGS 2, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

PROVIDENCE HOLDING COMPANY, LLC

PROVIDENCE HOLDING COMPANY, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

KERSHAW HEALTH HOLDINGS, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

AMENDMENT NO. 4 TO LETTER OF INTENT

THIS AMENDMENT NO. 4 TO LETTER OF INTENT (this "Amendment No. 4") is made and entered into as of January 31, 2020 by and among LifePoint Holdings 2, LLC, a Delaware limited liability company ("LPNT"), Providence Holding Company, LLC, a Delaware limited liability company ("Providence"), Kershaw Health Holdings, LLC, a South Carolina limited liability company ("Kershaw" and, together with Providence, "Seller") and Prisma Health, a South Carolina nonprofit corporation ("Buyer").

WHEREAS, the Parties previously executed and delivered a Letter of Intent dated as of September 13, 2019, as previously amended by that certain Amendment No. 1 to Letter of Intent dated as of November 22, 2019, by that certain Amendment No. 2 to Letter of Intent dated as of December 27, 2019, and by that certain Amendment No. 3 to Letter of Intent dated as of January 10, 2020 (the "Letter of Intent"), with respect to the proposed Transaction described in the Letter of Intent;

WHEREAS, the Letter of Intent identifies certain provisions as binding and enforceable agreements of the Parties; and

WHEREAS, the Parties desire to amend the Letter of Intent as expressly set forth in this Amendment No. 4.

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the Parties, intending to be legally bound, agree as follows:

1. Definitions. Capitalized terms used but not defined in this Amendment No. 4 shall have the meanings given to them in the Letter of Intent.

2. Amendment to the Letter of Intent. Section 17 of the Letter of Intent is hereby deleted in its entirety and replaced with the following, with all deletions shown in ~~strikethrough text~~ and all additions shown in double-underlined text:

> 17. No-Shop Provision. For the period from the execution of this Letter of Intent by the Parties until ~~January~~ February 10, 2020, Seller and LifePoint Health will not, directly or indirectly, without the prior written approval of Buyer: (a) offer for sale all or any material portion of the Acquired Assets or all or any material portion of any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (b) solicit offers to buy all or any material portion of the Acquired Assets or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets; (c) hold discussions with any party (other than Buyer) looking toward such an offer or solicitation or looking toward a merger or consolidation of any entity owning any of the Acquired Assets; or (d) enter into any agreement with any party (other than Buyer) with respect to the sale or other disposition of the Acquired Assets (or any material portion thereof) or any ownership interest in any entity owning, directly or indirectly, any of the Acquired Assets or with respect to any merger, consolidation, or similar transaction involving any entity owning any of the Acquired Assets or any transaction that is or would be the same or have substantially similar effect as the Transaction; provided, however, the obligations of this Section 17 will not apply to a transaction resulting in: (i) a Change of Control; or (ii) a transaction, or series of related transactions, in which LifePoint Health or one or more of its subsidiaries (including a sale of assets or equity interests, a merger, a consolidation or other similar transaction), sells, leases, or transfers more than one (1) acute care hospital owned by LifePoint Health or one or more of its subsidiaries that includes one (1) or more of the Hospitals and: (x) such Hospital(s) does not represent more than ten percent (10%) of the combined net

revenues of all of the hospitals being sold, leased, or otherwise transferred in such transaction; and (y) the principal place of business of the buyer in such transaction is not located in either North Carolina or South Carolina. Seller represents to Buyer that none of Seller or LifePoint Health or their respective subsidiaries is currently in discussions with any third party regarding a transaction described in (ii) above that would include the Hospitals or the Acquired Assets.

3. No Other Changes. Upon execution and delivery of this Amendment No. 4 by the Parties, the Letter of Intent shall be amended in accordance herewith and this Amendment No. 4 shall form part of the Letter of Intent for all purposes. Except as expressly set forth or contemplated in this Amendment No. 4, the terms and conditions of the Letter of Intent shall remain in place and shall not be altered, amended or changed in any manner whatsoever, except by any further amendment to the Letter of Intent made in accordance with the terms of the Letter of Intent, as hereby amended.

4. Counterparts. This Amendment No. 4 may be executed in any number of counterparts and by the different Parties on separate counterparts, each of which when executed and delivered shall be deemed an original binding the Party executing the same, but all of which shall together constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Amendment No. 4 to Letter of Intent to be executed as of the date first written above.

PRISMA HEALTH

PRISMA HEALTH

By: _____
Mark O'Halla
Chief Executive Officer

LIFEPOINT HOLDINGS 2, LLC

LIFEPOINT HOLDINGS 2, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

PROVIDENCE HOLDING COMPANY, LLC

PROVIDENCE HOLDING COMPANY, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

KERSHAW HEALTH HOLDINGS, LLC

By: _____
D. Andrew Slusser
Its Authorized Representative

ATTACHMENT B

Execution Copy

ASSET PURCHASE AGREEMENT

BY AND AMONG

PROVIDENCE HOLDING COMPANY, LLC,

PROVIDENCE HOSPITAL, LLC,

PROVIDENCE GROUP PRACTICES, LLC,

PROVIDENCE GROUP PRACTICES, II, LLC,

PROVIDENCE PHYSICIAN PRACTICES, LLC,

PROVIDENCE PROFESSIONAL SERVICES, LLC,

PROVIDENCE IMAGING CENTER, LLC,

PERS LEGACY, LLC,

KERSHAW HEALTH HOLDINGS, LLC,

KERSHAW HOSPITAL, LLC,

KERSHAW ANESTHESIA, LLC,

KERSHAW CLINICS, LLC,

KERSHAWHEALTH CANCER CENTER, LLC,

KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC,

LIFEPOINT HOLDINGS 2, LLC,

LIFEPOINT HEALTH, INC.,

PRISMA HEALTH-MIDLANDS,

AND

PRISMA HEALTH

DATED AS OF MARCH 2, 2020

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT, effective as of March 2, 2020 (the "Execution Date"), is made and entered into by and among PROVIDENCE HOLDING COMPANY, LLC, a Delaware limited liability company ("Providence HoldCo"), PROVIDENCE HOSPITAL, LLC, a Delaware limited liability company ("Providence"), PROVIDENCE GROUP PRACTICES, LLC, a Delaware limited liability company, PROVIDENCE GROUP PRACTICES, II, LLC, a Delaware limited liability company, PROVIDENCE PHYSICIAN PRACTICES, LLC, a Delaware limited liability company, PROVIDENCE PROFESSIONAL SERVICES, LLC, a Delaware limited liability company, PROVIDENCE IMAGING CENTER, LLC, a Delaware limited liability company, PERS LEGACY, LLC, a South Carolina limited liability company, KERSHAW HEALTH HOLDINGS, LLC, a South Carolina limited liability company ("Kershaw HoldCo"), KERSHAW HOSPITAL, LLC, a South Carolina limited liability company ("Kershaw"), KERSHAW ANESTHESIA, LLC, a South Carolina limited liability company, KERSHAW CLINICS, LLC, a South Carolina limited liability company, KERSHAWHEALTH CANCER CENTER, LLC, a Delaware limited liability company, KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC, a Delaware limited liability company, and PRISMA HEALTH-MIDLANDS d/b/a Prisma Midlands, a South Carolina nonprofit corporation ("Buyer"). In addition: (a) LIFEPOINT HOLDINGS 2, LLC, a Delaware limited liability company ("LPNT"), is executing and is a party to this Agreement for the limited purposes set forth herein; (b) LIFEPOINT HEALTH, INC., a Delaware corporation ("LifePoint Health"), is executing and is a party to this Agreement for the limited purposes set forth herein; and (c) PRISMA HEALTH, a South Carolina nonprofit corporation ("Prisma Health"), is executing and is a party to this Agreement for the limited purposes set forth herein.

RECITALS

WHEREAS, Providence HoldCo, Providence, and those Sellers (as defined below) that are their subsidiaries provide a range of medical and surgical services, including cardiac care, cardiopulmonary rehabilitation and fitness, emergency services, imaging, orthopedics, outpatient physical therapy, pulmonary care, primary care, sleep disorders, surgery, wound care, vein care, and urology, to individual patients through a network of facilities including the Providence Hospitals (as defined below) and Providence Health-Fairfield (as defined below);

WHEREAS, Kershaw HoldCo, Kershaw, and those Sellers that are their subsidiaries provide a range of medical and surgical services, including adult and pediatric medicine, geriatric behavioral health, cardiovascular services, cardiac rehabilitation, emergency services, gastroenterology, home health and hospice, imaging, medical oncology, orthopedics, primary care, rehabilitation, physical therapy, sleep diagnostics, surgical services, urology and women's health services, to individual patients at, among other locations, KershawHealth Medical Center and KershawHealth Urgent Care;

WHEREAS, LPNT is an indirect subsidiary of LifePoint Health and is the sole member of Providence HoldCo;

WHEREAS, Buyer is a subsidiary of Prisma Health and operates a network comprised of four acute care hospitals and associated assets, supported by a network of physicians and advanced

practice providers, providing healthcare services and ancillary services to individuals living in the South Carolina Midlands and surrounding regions;

WHEREAS, each of the Sellers has determined that it is in its best interest and in their collective best interests to sell the Acquired Assets at fair market value to a qualified operator;

WHEREAS, Buyer, in the furtherance of its overall charitable purposes, has determined that it is advisable and in its best interest to purchase the Acquired Assets in order to, among other things, enable Buyer to enhance and expand the provision of healthcare services to patients, including indigent patients, living in the greater Columbia, South Carolina area; and

WHEREAS, the Sellers agree to sell to the Buyer, and the Buyer agrees to purchase and acquire all of the Acquired Assets and to assume the Assumed Liabilities from the Sellers, in each case upon the terms and conditions set forth in this Agreement.

AGREEMENTS

NOW, THEREFORE, for and in consideration of the foregoing Recitals, the mutual promises, covenants, conditions, representations, and warranties set forth below, and for other good and valuable consideration, the receipt and adequacy of which are acknowledged, the Parties hereby agree as follows:

1. DEFINITIONS AND REFERENCES

1.1 Definitions. Unless otherwise specifically defined herein, the following capitalized terms used in this Agreement shall be defined in the following manner:

"Accounts Receivable" shall mean accounts receivable, notes receivable, and other rights to payment, including any notes, instruments, chattel paper, or general intangibles related thereto.

"Acquired Assets" has the meaning set forth in Section 2.1 below.

"Acquired NWC Assets" has the meaning set forth in Section 2.1(d) below.

"Action" means any lawsuit, action, arbitration, cause of action, complaint, prosecution or proceeding, whether civil, criminal, or administrative, at law or at equity, before or brought by any Governmental Authority or arbitrator, as applicable.

"Affiliate" means, as to the Person in question, any Person that directly or indirectly Controls, is Controlled by, or is under common Control with, the Person in question and any successors or assigns of such Person; provided, however, that, the term "Affiliate" shall not include: (a) individuals serving as officers, directors or managers of any Parties or officers, directors or managers of affiliates thereof; or (b) any Person that directly or indirectly owns equity securities of LifePoint Health (including any successor in interest to LifePoint Health), or any portfolio company, portfolio investment or affiliate of any such Person (including affiliated investment funds and their portfolio companies and portfolio investments) other than LifePoint Health and its subsidiaries. For purposes of the definition of "Affiliate", the terms "Control",

(i) Certificate of incumbency for the officers of Buyer executing this Agreement and the other Transaction Documents, dated as of the Closing Date;

(j) A Certificate of Existence (Good Standing) for Buyer issued by the South Carolina Secretary of State dated not more than thirty (30) days prior to the Closing Date;

(k) The IT Transition Services Agreement, duly executed by an authorized officer of Buyer;

(l) The CoreCore Transition Services Agreement, duly executed by an authorized officer of Buyer and the other parties thereto;

(m) The Employee Services Agreement, duly executed by an authorized officer of Buyer;

(n) The insight Master Services Agreement, duly executed by an authorized officer of Buyer and the other parties thereto;

(o) The Closing Statement, executed by Buyer; and

(p) Such other agreements, instruments and documents as reasonably requested by the Sellers to effect the Transaction.

12. TERM; TERMINATION

12.1 **Term**. The term of this Agreement shall commence as of the Execution Date and shall continue until the earlier to occur of: (a) the Closing; and (b) the earlier termination of this Agreement pursuant to this Article 12.

12.2 **Termination Prior to Closing**. Notwithstanding anything to the contrary in this Agreement, this Agreement may be terminated as follows:

(a) By Buyer, on the one hand, or the Sellers, on the other hand, upon written notice provided to the other, if the Closing shall not have taken place on or before 11:59:59 p.m. on the second anniversary of the Execution Date (the "Outside Date") for any reason not described in Sections 12.2(b)-(g) below, inclusive;

(b) Prior to the Outside Date, upon the mutual, written consent of Buyer, on the one hand, and the Sellers, on the other hand;

(c) By Buyer in the event the Sellers have breached any representation, warranty, or covenant of the Sellers contained in this Agreement, Buyer has notified the Sellers of the same, and such breach: (i) would give rise to the failure of a condition set forth in Section 10.1(a) or Section 10.1(c) above; and (ii) (A) cannot be cured by the Outside Date; or (B) if capable of being cured, shall not have been cured by the earlier of: (1) one hundred eighty (180) days after receipt of written notice from Buyer of such breach; or (2) the Outside Date;

IN WITNESS WHEREOF, the Parties have caused this Asset Purchase Agreement to be executed by their duly authorized officers as of the Execution Date.

SELLERS:

PROVIDENCE HOLDING COMPANY, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE HOSPITAL, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE GROUP PRACTICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE GROUP PRACTICES, II, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE PHYSICIAN PRACTICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE PROFESSIONAL SERVICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE IMAGING CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PERS LEGACY, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW HOSPITAL, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW ANESTHESIA, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW CLINICS, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAWHEALTH CANCER CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

[Signatures continue on next page]

BUYER:

PRISMA HEALTH-MIDLANDS

By: Mark S. O'Halla
Name: Mark S. O'Halla
Title: CEO

LPNT (solely for purposes of Section 17.1):

LIFEPOINT HOLDINGS 2, LLC

By: _____
Name: _____
Title: _____

LIFEPOINT HEALTH (solely for purposes of Section 7.11 and Section 7.12):

LIFEPOINT HEALTH, INC.

By: _____
Name: _____
Title: _____

PRISMA HEALTH (solely for purposes of Section 17.2):

PRISMA HEALTH

By: Mark S. O'Halla
Name: Mark S. O'Halla
Title: President and CEO

BUYER:

PRISMA HEALTH-MIDLANDS

By: _____
Name: _____
Title: _____

LPNT (solely for purposes of Section 17.1):

LIFEPOINT HOLDINGS 2, LLC

By: _____
Name: Kathy Teague
Title: AVP Secretary

LIFEPOINT HEALTH (solely for purposes of Section 7.11 and Section 7.12):

LIFEPOINT HEALTH, INC.

By: _____
Name: Kathy Teague
Title: AVP, Assistant Secretary

PRISMA HEALTH (solely for purposes of Section 17.2):

PRISMA HEALTH

By: _____
Name: _____
Title: _____

(d) By the Sellers in the event Buyer has breached any representation, warranty, or covenant of Buyer contained in this Agreement, Sellers have notified Buyer of the same, and such breach: (i) would give rise to the failure of a condition set forth in Section 10.2(a) or Section 10.2(f) above; and (ii) (A) cannot be cured by the Outside Date; or (B) if capable of being cured, shall not have been cured by the earlier of: (1) one hundred eighty (180) days after receipt of written notice from Buyer of such breach; or (2) the Outside Date;

(e) By Buyer pursuant to Section 9.4 above;

(f) By Buyer in the event of a closure of one (1) or more of the Hospitals as a result of casualty, Force Majeure, or revocation or termination of license to operate as an acute hospital, which closure is reasonably expected to extend for a period of at least one (1) year and such closure is not due to any of the following events: (i) changes in general local, domestic, foreign, or international economic, business, regulatory, political, or market conditions or in national or international financial markets, or (ii) changes affecting generally the healthcare industry, which changes, in the case of either (i) or (ii) above do not disproportionately affect the Hospitals relative to the impact of such conditions on hospitals and healthcare facilities in South Carolina; and

(g) By Sellers at any time on or after the first anniversary of the Execution Date provided, however, that, solely in the event that the HSR Filing Date occurs on or before the first anniversary of the Execution Date, Sellers shall not be entitled to terminate this Agreement pursuant to this subsection (g) until the later of (A) the first anniversary of the Execution Date or (B) the 120th day following the HSR Filing Date; provided, further, however, that, Sellers shall not be entitled to terminate this Agreement pursuant to this subsection (g) if Sellers' breach of this Agreement has prevented or would prevent satisfaction of the condition in Section 10.2(g) to be satisfied.

12.3 **Casualty; Condemnation**.

(a) From the Execution Date and until the Closing Date, the Sellers shall give written notice to Buyer as soon as reasonably possible if all or any part of the Real Property is materially damaged (whether by fire, theft, vandalism, or other casualty). Promptly following the occurrence of such event, the Parties shall negotiate in good faith to agree: (i) to reduce the Purchase Price by the value of damaged, lost, or destroyed Real Property, such value to be the greater of: (A) the value of such damaged, lost, or destroyed Real Property; or (B) the estimated cost to restore the damaged, lost, or destroyed Real Property to its prior condition; (ii) that Sellers shall, within one hundred and twenty (120) days after such event but prior to Closing, repair, replace, or restore such damaged, lost, or destroyed Real Property prior to Closing pursuant to the provisions set forth herein; or (iii) that Sellers will, at Closing, transfer, assign, and convey all rights, title, and interests in and to proceeds (or the right to the proceeds) of applicable insurance or loss recovery funds available with respect to such damage, loss, or destruction to Buyer, in which case Buyer shall consummate the Transactions without regard to such damage, loss, or destruction without any reduction in the Purchase Price, except that the Purchase Price shall be reduced by the amount of any deductible paid by Buyer; provided, however, if, within sixty (60) days after Sellers' written notice of such damage as required above, the Parties have not reached agreement, the Sellers will, at Closing, transfer, assign, and convey all rights, title, and interests in

EXHIBIT B

ASSET PURCHASE AGREEMENT

BY AND AMONG

PROVIDENCE HOLDING COMPANY, LLC,

PROVIDENCE HOSPITAL, LLC,

PROVIDENCE GROUP PRACTICES, LLC,

PROVIDENCE GROUP PRACTICES, II, LLC,

PROVIDENCE PHYSICIAN PRACTICES, LLC,

PROVIDENCE PROFESSIONAL SERVICES, LLC,

PROVIDENCE IMAGING CENTER, LLC,

PERS LEGACY, LLC,

KERSHAW HEALTH HOLDINGS, LLC,

KERSHAW HOSPITAL, LLC,

KERSHAW ANESTHESIA, LLC,

KERSHAW CLINICS, LLC,

KERSHAWHEALTH CANCER CENTER, LLC,

KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC,

LIFEPOINT HOLDINGS 2, LLC,

LIFEPOINT HEALTH, INC.,

PRISMA HEALTH-MIDLANDS,

AND

PRISMA HEALTH

DATED AS OF MARCH 2, 2020

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT, effective as of March 2, 2020 (the "Execution Date"), is made and entered into by and among PROVIDENCE HOLDING COMPANY, LLC, a Delaware limited liability company ("Providence HoldCo"), PROVIDENCE HOSPITAL, LLC, a Delaware limited liability company ("Providence"), PROVIDENCE GROUP PRACTICES, LLC, a Delaware limited liability company, PROVIDENCE GROUP PRACTICES, II, LLC, a Delaware limited liability company, PROVIDENCE PHYSICIAN PRACTICES, LLC, a Delaware limited liability company, PROVIDENCE PROFESSIONAL SERVICES, LLC, a Delaware limited liability company, PROVIDENCE IMAGING CENTER, LLC, a Delaware limited liability company, PERS LEGACY, LLC, a South Carolina limited liability company, KERSHAW HEALTH HOLDINGS, LLC, a South Carolina limited liability company ("Kershaw HoldCo"), KERSHAW HOSPITAL, LLC, a South Carolina limited liability company ("Kershaw"), KERSHAW ANESTHESIA, LLC, a South Carolina limited liability company, KERSHAW CLINICS, LLC, a South Carolina limited liability company, KERSHAWHEALTH CANCER CENTER, LLC, a Delaware limited liability company, KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC, a Delaware limited liability company, and PRISMA HEALTH-MIDLANDS d/b/a Prisma Midlands, a South Carolina nonprofit corporation ("Buyer"). In addition: (a) LIFEPOINT HOLDINGS 2, LLC, a Delaware limited liability company ("LPNT"), is executing and is a party to this Agreement for the limited purposes set forth herein; (b) LIFEPOINT HEALTH, INC., a Delaware corporation ("LifePoint Health"), is executing and is a party to this Agreement for the limited purposes set forth herein; and (c) PRISMA HEALTH, a South Carolina nonprofit corporation ("Prisma Health"), is executing and is a party to this Agreement for the limited purposes set forth herein.

RECITALS

WHEREAS, Providence HoldCo, Providence, and those Sellers (as defined below) that are their subsidiaries provide a range of medical and surgical services, including cardiac care, cardiopulmonary rehabilitation and fitness, emergency services, imaging, orthopedics, outpatient physical therapy, pulmonary care, primary care, sleep disorders, surgery, wound care, vein care, and urology, to individual patients through a network of facilities including the Providence Hospitals (as defined below) and Providence Health-Fairfield (as defined below);

WHEREAS, Kershaw HoldCo, Kershaw, and those Sellers that are their subsidiaries provide a range of medical and surgical services, including adult and pediatric medicine, geriatric behavioral health, cardiovascular services, cardiac rehabilitation, emergency services, gastroenterology, home health and hospice, imaging, medical oncology, orthopedics, primary care, rehabilitation, physical therapy, sleep diagnostics, surgical services, urology and women's health services, to individual patients at, among other locations, KershawHealth Medical Center and KershawHealth Urgent Care;

WHEREAS, LPNT is an indirect subsidiary of LifePoint Health and is the sole member of Providence HoldCo;

WHEREAS, Buyer is a subsidiary of Prisma Health and operates a network comprised of four acute care hospitals and associated assets, supported by a network of physicians and advanced

practice providers, providing healthcare services and ancillary services to individuals living in the South Carolina Midlands and surrounding regions;

WHEREAS, each of the Sellers has determined that it is in its best interest and in their collective best interests to sell the Acquired Assets at fair market value to a qualified operator;

WHEREAS, Buyer, in the furtherance of its overall charitable purposes, has determined that it is advisable and in its best interest to purchase the Acquired Assets in order to, among other things, enable Buyer to enhance and expand the provision of healthcare services to patients, including indigent patients, living in the greater Columbia, South Carolina area; and

WHEREAS, the Sellers agree to sell to the Buyer, and the Buyer agrees to purchase and acquire all of the Acquired Assets and to assume the Assumed Liabilities from the Sellers, in each case upon the terms and conditions set forth in this Agreement.

AGREEMENTS

NOW, THEREFORE, for and in consideration of the foregoing Recitals, the mutual promises, covenants, conditions, representations, and warranties set forth below, and for other good and valuable consideration, the receipt and adequacy of which are acknowledged, the Parties hereby agree as follows:

1. DEFINITIONS AND REFERENCES

1.1 Definitions. Unless otherwise specifically defined herein, the following capitalized terms used in this Agreement shall be defined in the following manner:

"Accounts Receivable" shall mean accounts receivable, notes receivable, and other rights to payment, including any notes, instruments, chattel paper, or general intangibles related thereto.

"Acquired Assets" has the meaning set forth in Section 2.1 below.

"Acquired NWC Assets" has the meaning set forth in Section 2.1(d) below.

"Action" means any lawsuit, action, arbitration, cause of action, complaint, prosecution or proceeding, whether civil, criminal, or administrative, at law or at equity, before or brought by any Governmental Authority or arbitrator, as applicable.

"Affiliate" means, as to the Person in question, any Person that directly or indirectly Controls, is Controlled by, or is under common Control with, the Person in question and any successors or assigns of such Person; provided, however, that, the term "Affiliate" shall not include: (a) individuals serving as officers, directors or managers of any Parties or officers, directors or managers of affiliates thereof; or (b) any Person that directly or indirectly owns equity securities of LifePoint Health (including any successor in interest to LifePoint Health), or any portfolio company, portfolio investment or affiliate of any such Person (including affiliated investment funds and their portfolio companies and portfolio investments) other than LifePoint Health and its subsidiaries. For purposes of the definition of "Affiliate", the terms "Control",

"Controlled", and "Controlling" mean, as applicable, the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of memberships, securities, election, or appointment of directors, by contract or otherwise.

"Agency Settlements" has the meaning set forth in Section 2.2(c) below.

"Agreement" means this Asset Purchase Agreement.

"Allocation" has the meaning set forth in Section 3.7 below.

"Amended Schedules" has the meaning set forth in Section 7.16 below.

"Antitrust Laws" means the Sherman Antitrust Act of 1890, as amended, the Clayton Antitrust Act of 1914, as amended, the HSR Act, the Federal Trade Commission Act of 1914, as amended, and all other applicable Laws that are designed or intended to prohibit, restrict, or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through merger or acquisition.

"Approval Date" has the meaning set forth in Section 9.2 below.

"Assignment and Assumption Agreement" has the meaning set forth in Section 11.2(c) below.

"Assumed Contracts" has the meaning set forth in Section 2.1(e) below.

"Assumed Leases" has the meaning set forth in Section 2.1(i) below.

"Assumed Liabilities" has the meaning set forth in Section 2.3 below.

"Assumed NWC Liabilities" has the meaning set forth in Section 2.3(b) below.

"Balance Sheet Date" has the meaning set forth in Section 4.12 below.

"Basket" has the meaning set forth in Section 13.3(a)(i) below.

"Benefit Plan" means any "employee benefit plan" as defined in Section 3(3) of ERISA, including any Pension Plan and any plan as defined in Section 3(37) and 3(40) of ERISA and any employee stock ownership, bonus, stock purchase, restricted stock, stock option or other security purchase, medical, hospitalization, vision, dental, life, disability, training or apprentice plan, or other welfare benefit plan, policy or agreement, deferred compensation, change in control, or severance pay plan, policy or agreement, or any other performance, bonus, incentive or benefit plan, policy or agreement, or any similar or related trust, fund, arrangement, policy, agreement, or understanding and any current or former employment or executive compensation or severance agreements or any other plan or arrangement to provide compensation or benefits to any individual, written or otherwise, which has ever been sponsored or maintained or entered into for the benefit of or, relating to, any present or former employee or director of any Seller.

"Bill of Sale" has the meaning set forth in Section 11.2(b) below.

"BPCI Agreements" means that certain Participation Agreement between LifePoint Corporate Services, General Partnership and CMS, including any agreements relating to downstream episode initiators or financial arrangements.

"Business Day" means any day other than a Saturday, Sunday, or day on which banks are permitted or required to be closed for business in the State of South Carolina.

"Businesses" means all businesses owned, leased, managed, or otherwise operated or conducted by Sellers at the Facilities taken as a whole as of the Execution Date.

"Buyer" has the meaning set forth in the introductory paragraph of this Agreement.

"Buyer's Indemnified Persons" means Buyer and its Affiliates, and their respective successors, permitted assigns, shareholders, and Representatives.

"CereCore Transition Services Agreement" has the meaning set forth in Section 10.1(e) below.

"Closing" has the meaning set forth in Section 11.1 below.

"Closing Date" means the calendar day on which the Closing occurs.

"Closing Statement" has the meaning set forth in Section 7.23 below.

"CMS" means the Centers for Medicare & Medicaid Services.

"CMS Regional Office" means the regional office of CMS, and any successor office thereto, with geographic jurisdiction over the region in which the Facilities are located which serves as the initial point of contact between CMS and entities within the region on Medicare, Medicaid, or state Children's Health Insurance Program issues.

"COBRA" means the group health plan continuation coverage requirements of Section 4980B of the Code, Sections 601 through 608 of ERISA, and any similar or comparable state Law promulgated by any state Governmental Authority.

"Code" means the Internal Revenue Code of 1986.

"Competing Business" has the meaning set forth in Section 7.12(a) below.

"Confidential Information" has the meaning set forth in Section 7.13(a) below.

"Confidentiality Agreement" means the Confidentiality Agreement dated May 1, 2019, by and among Providence HoldCo, Kershaw HoldCo, and Prisma Health.

"Contingency Event" means the occurrence of any one or more of the following: (a) the mutual agreement of the Parties to terminate this Agreement; (b) termination of this Agreement by Buyer pursuant to Section 12.2(c) or Section 12.2(f) below; or (c) an Action that is a Third Party Claim (including a Governmental Authority, including KershawHealth) is pending

Authority; and (f) any other material development affecting the Sellers, the Facilities, the Acquired Assets, or the Assumed Liabilities, or the financial condition, operations, or prospects of the Sellers. Prior to the Closing Date, the Sellers shall provide copies of all Assumed Contracts that have been entered into since the Execution Date.

7.5 Permits. From the Execution Date until the Closing Date: (a) the Sellers shall promptly apply for and use their commercially reasonable efforts to obtain, prior to Closing, all Permits required to be obtained by Sellers to transfer the Acquired Assets to Buyer; and (b) the Buyer shall promptly apply for and use its commercially reasonable efforts to obtain, prior to Closing, all Permits necessary for Buyer's operation of the Businesses following the Effective Time. The Parties shall reasonably assist and cooperate with each other to obtain such Permits and shall promptly provide such information and communications to Governmental Authorities as may be required in connection therewith.

7.6 HSR Act Filings.

(a) To the extent required by law, Buyer and the Sellers shall use commercially reasonable efforts to: (i) make the filings required of the Parties, as applicable, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the rules and regulations promulgated thereunder (the "HSR Act") on a date mutually agreed upon by the Parties (the actual date such filing occurs, the "HSR Filing Date"), after the date upon which SCDHEC's proposed modification of the existing Certificate of Public Advantage ("COPA") becomes final and binding; (ii) coordinate on their responses to any request for additional information received by the Parties or an Affiliate of any of the Parties from the Federal Trade Commission (the "FTC") or Antitrust Division of the U.S. Department of Justice (the "DOJ") pursuant to the HSR Act; (iii) cooperate with each other in connection with the other's filings under the HSR Act and in connection with resolving any investigation or other regulatory inquiry concerning the Transactions commenced by either the FTC, the DOJ or other Governmental Authority; and (iv) thereafter, as promptly as practicable, respond to any government requests for information in a manner agreed upon by the Parties and make any other required submission under the HSR Act.

(b) Sellers and Buyer shall cooperate with each other and shall furnish to the other Party: (i) copies of any notices or written communications, and a written summary of any material or substantive oral communications, in each case received by the other Party or its Affiliates from any Government Antitrust Entity with respect to the Transactions; and (ii) all other information necessary or desirable in connection with making any filing under the HSR Act and in connection with resolving any investigation or other inquiry by any Government Antitrust Entity under any Antitrust Laws with respect to the Transactions; provided, however, that: (A) Seller shall not be required to furnish to Buyer (including Buyer's outside antitrust counsel) any documents prepared by its private equity sponsor (as such term is understood in the private equity industry); and (B) Buyer and Sellers shall not be required to provide to the other any confidential information or business secrets, which information shall instead be designated as restricted to the other Party's outside counsel only and provided only by one Party's counsel to the other Party's counsel and shall not be shared with employees, officers, managers or directors or their equivalents of the other Party without approval of the Party providing such information: (x) any documents or information which reveal such Party's negotiating objectives or strategies regarding the Transactions; (y) information relating to businesses and investments of Sellers and their Affiliates

(other than the Business); or (z) any Item 4(c) or Item 4(d) documents. Each of the Parties shall promptly inform the other Party of any communication with, and any proposed understanding, undertaking or agreement with, any Government Antitrust Entity regarding any such filings or any such transaction. None of the Sellers nor Buyer shall participate in any meeting or substantive conversation with any Government Antitrust Entity in respect of any such filings, investigation or other inquiry without giving the other Party prior notice of and reasonable opportunity to participate in the meeting or substantive conversation. The Parties will consult and cooperate with one another in connection with any analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of any Party in connection with all meetings and Actions under or relating to the HSR Act (including, with respect to making a particular filing, by providing copies of all such documents to the non-filing party and their advisors prior to filing and, if requested, giving due consideration to all reasonable additions, deletions or changes suggested in connection therewith). Notwithstanding the foregoing, but without limitation thereof, the Parties shall, in all cases act in good faith and in consultation with one another and after good faith consideration of the other's views: (1) determine timing and strategy and control the final content of any substantive oral or written communications with any applicable Government Antitrust Entity in connection with the filings under the HSR Act or other Antitrust Laws; and (2) lead all proceedings and coordinate all activities with respect to seeking any Actions or Permits from any Government Antitrust Entity in connection with the filings under the HSR Act or other Antitrust Laws. If the Parties initially disagree upon any such proposed timing, strategy, communication or activities, the Parties agree to work together in good faith to resolve the disagreement and endeavor to implement such timing, strategy, communication or activities in a mutually acceptable manner.

(c) Without limiting the generality of the foregoing, Buyer shall, and shall cause its Affiliates to take commercially reasonable measures to avoid or eliminate any impediment under any antitrust, competition or trade regulation Law that may be asserted so as to enable the Parties to close the Transactions as promptly as possible but, in any event, by no later than the Outside Date, which may include proposing, negotiating, committing to and effecting, by consent decree, separate orders, or otherwise, the sale, divesture or disposition of such of the Acquired Assets (the "Divestitures"), and the entrance into such other arrangements, as necessary or advisable in order to avoid the entry of and the commencement of litigation seeking the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order or decision in any suit or proceeding, which would otherwise have the effect of materially delaying or preventing the consummation of the Transactions; provided, however, that nothing in this Section 7.6(c) shall, or is intended or shall be deemed or construed so as to, require Buyer to take or agree to take any Divestiture of: (i) its or its Affiliates' own assets, including without limitation any hospitals owned by Buyer or its Affiliates; or (ii) any of the Facilities. Subject to the preceding proviso, in connection with any Divestitures of any Acquired Assets, Sellers and their Affiliates shall use their commercially reasonable efforts to assist Buyer in obtaining approval by the Government Antitrust Entity of such Divestitures, including: (A) entering into necessary arrangements with third party divestiture buyers; and (B) obtaining any necessary third party consents. In addition, Buyer shall use commercially reasonable efforts to defend through litigation on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing from occurring as promptly as practicable. Buyer shall be solely

9.4 Termination. If Buyer elects to terminate this Agreement pursuant to and in accordance with this Article 9, this Agreement shall terminate immediately upon the Sellers' receipt of Buyer's termination notice and the effect of such termination shall be governed by Article 12. Regardless of whether Buyer shall have furnished to the Sellers any Objection Notice, Buyer may, at or before the Closing Date, further notify the Sellers in writing of any defects in title arising after the effective date of Buyer's title examination referenced above, and for any defects in title set forth in such further notice, the Sellers shall have the same obligations and Buyer shall have the same rights as those set forth in Section 9.3 that apply to any notice of defects in title resulting from a title examination made by Buyer.

9.5 Survival of Encumbrances. Notwithstanding any other provision of this Agreement and the recording of the Deeds, the Parties acknowledge and agree that the Real Property being transferred pursuant to this Agreement is being transferred subject to: (a) zoning and similar municipal restrictions that do not materially impair the value of the Real Property or the continued conduct of business on the Real Property in the manner conducted by Sellers as of the date of transfer of the Real Property to the Buyer; and (b) rights or claims of tenants or licensees under those certain unrecorded leases and licenses identified in Section 4.27(a) of the Sellers' Disclosure Schedule.

10. CONDITIONS PRECEDENT TO OBLIGATIONS OF THE PARTIES

10.1 Conditions Precedent to Obligations of Buyer. The obligations of Buyer to consummate the Transactions are subject in all respects to the satisfaction on or prior to the Closing Date of all of the following conditions, unless waived in writing by Buyer in its sole discretion:

(a) Representations and Warranties; Performance of Covenants. The representations and warranties of the Sellers contained in this Agreement that are qualified as to materiality shall be true and correct in all respects, and the representations and warranties of the Sellers contained in this Agreement that are not qualified as to materiality shall be true and correct in all material respects, in each case, when made and as of the Closing Date as though such representations and warranties had been made on and as of such Closing Date, in each case taking into account all supplements to the Sellers' Disclosure Schedule delivered to Buyer pursuant to this Agreement. Each and all of the terms, covenants, and agreements to be complied with or performed by the Sellers on or before the Closing Date shall have been complied with and performed in all material respects.

(b) Pre-Closing Confirmations. Buyer shall have received documentation or other evidence reasonably satisfactory to Buyer that the Permits and Buyer's Regulatory Approvals identified on Attachment K have been obtained or will be transferred to, or issued or reissued, in the name of Buyer.

(c) Required Contract Consents. Buyer shall have received documentation or other evidence reasonably satisfactory to Buyer that all required consents to assignment of the Assumed Contracts and the Assumed Leases identified on Attachment L (collectively, the "Required Contract Consents") have been obtained by Sellers.

(d) No Material Adverse Effect. From and after the Execution Date, there shall not have occurred any result, occurrence, fact, change, event, or effect that has resulted or could reasonably be expected to result in a Material Adverse Effect.

(e) Deliveries at Closing. Each item required to be delivered by the Sellers pursuant to Section 11.2 shall have been delivered by the Sellers and received by Buyer as required therein. Buyer shall have received (i) a Prisma Health - Midlands Transition Services Agreement in substantially the form attached hereto as **Exhibit G** by and among HCA-Information Technology & Services, Inc. d/b/a CereCore and Buyer (the "CereCore Transition Services Agreement") executed by HCA-Information Technology & Services, Inc. d/b/a CereCore and (ii) an inSight Master Services Agreement in substantially the form attached hereto as **Exhibit I** by and among HealthTrust Purchasing Group, L.P. and Buyer (the "inSight Master Services Agreement") executed by HealthTrust Purchasing Group, L.P.

(f) Title and Survey Matters. The Title Report shall be brought current to the Closing and shall be unchanged except for the deletion of defects, exceptions, liens, encroachments, and Encumbrances and the satisfaction of conditions.

(g) HSR Act Filings. The applicable waiting period under the HSR Act shall have expired or terminated without challenge by the FTC or the DOJ to the consummation of the transactions contemplated by this Agreement, or, if either the FTC or the DOJ shall have initiated any such challenge, the matter shall have been resolved to the mutual satisfaction of the Parties.

(h) No Actions. There shall be no pending Action that is a Third Party Claim (including a Governmental Authority, including KershawHealth) to enjoin, prevent, or prohibit the Transactions or any one or more of the following, regardless of the form or manner thereof: (i)(A) the assignment of the tenant's interest in the Kershaw Lease or the sale of the fee interest in the MPT Owned Real Property to Buyer or its Affiliate, as the case may be; or (B) the release of the MPT Real Property from the MPT Lease; or (ii) Kershaw's performance (or actual or alleged nonperformance) of the Kershaw Asset Purchase Agreement or Buyer's agreement to comply with the Kershaw Hospital Covenants in lieu of Kershaw's performance thereof or, solely if requested by Sellers, the discharge of, any and all obligations of Kershaw under the Kershaw Hospital Covenants.

10.2 Conditions Precedent to Obligations of the Sellers. The obligations of the Sellers to consummate the Transactions are subject in all respects to the satisfaction on or prior to the Closing Date of all of the following conditions, unless waived in writing by Sellers in their sole discretion:

(a) Representations and Warranties; Performance of Covenants. The representations and warranties of Buyer contained in this Agreement that are qualified as to materiality shall be true and correct in all respects, and the representations and warranties of Buyer contained in this Agreement that are not qualified as to materiality shall be true and correct in all material respects, in each case, when made and as of the Closing Date as though such representations and warranties had been made on and as of such Closing Date. Each and all of the terms, covenants, and agreements to be complied with or performed by Buyer on or before the Closing Date shall have been complied with and performed in all material respects.

(b) Pre-Closing Confirmations. The Sellers shall have received documentation or other evidence reasonably satisfactory to the Sellers that the Permits and Sellers' Regulatory Approvals identified on Attachment M have been obtained or will be transferred to, or issued or reissued, in the name of Buyer.

(c) Required Contract Consents. Sellers shall have received documentation or other evidence reasonably satisfactory to Sellers that all required consents to assignment of the Assumed Contracts and the Assumed Leases identified on Attachment L as Sellers' Required Contract Consents have been obtained by Sellers.

(d) Termination Agreement. Kershaw shall have terminated its and its Affiliates' obligations relating to the Fee Agreement, dated October 27, 2015, by and among Kershaw County, South Carolina, a body politic and corporate and a political subdivision of the State of South Carolina, acting by and through its County Council as governing body of the County, Kershaw, Kershaw Clinics, LLC, a South Carolina limited liability company, and KershawHealth, a South Carolina special purpose district ("KershawHealth").

(e) Kershaw Lease and MPT. The Parties acknowledge that the interest of Kershaw in the MPT Leased Real Property is currently that of a sublessee under the MPT Lease of an affiliate of MPT, which is a lessee under the Kershaw Lease of that real property from KershawHealth. Accordingly, it is a condition to the closing of the Transaction that: (i) the tenant's interest under the Kershaw Lease be assigned by MPT or its Affiliates and assumed by Buyer or its Affiliates; (ii) the MPT Owned Real Property be transferred by MPT or its Affiliates to Buyer or its Affiliates; and (iii) the MPT Real Property be released from the MPT Lease.

(f) Deliveries at Closing. Each item required to be delivered by Buyer pursuant to Section 11.3 shall have been delivered by Buyer and received by the Sellers as required therein.

(g) HSR Act Filings. The applicable waiting period under the HSR Act shall have expired or terminated without challenge by the FTC or the DOJ to the consummation of the transactions contemplated by this Agreement, or, if either the FTC or the DOJ shall have initiated any such challenge, the matter shall have been resolved to the mutual satisfaction of the Parties.

(h) No Actions. There shall be no pending Action that is a Third Party Claim (including a Governmental Authority, including KershawHealth) to enjoin, prevent, or prohibit the Transactions or any one or more of the following, regardless of the form or manner thereof: (i)(A) the assignment of the tenant's interest in the Kershaw Lease or the sale of the fee interest in the MPT Owned Real Property to Buyer or its Affiliate, as the case may be; or (B) the release of the MPT Real Property from the MPT Lease; or (ii) Kershaw's performance (or actual or alleged nonperformance) of the Kershaw Asset Purchase Agreement or Buyer's agreement to comply with the Kershaw Hospital Covenants in lieu of Kershaw's performance thereof or, solely if requested by Sellers, the discharge of, any and all obligations of Kershaw under the Kershaw Hospital Covenants.

(i) Certificate of incumbency for the officers of Buyer executing this Agreement and the other Transaction Documents, dated as of the Closing Date;

(j) A Certificate of Existence (Good Standing) for Buyer issued by the South Carolina Secretary of State dated not more than thirty (30) days prior to the Closing Date;

(k) The IT Transition Services Agreement, duly executed by an authorized officer of Buyer;

(l) The CereCore Transition Services Agreement, duly executed by an authorized officer of Buyer and the other parties thereto;

(m) The Employee Services Agreement, duly executed by an authorized officer of Buyer;

(n) The insight Master Services Agreement, duly executed by an authorized officer of Buyer and the other parties thereto;

(o) The Closing Statement, executed by Buyer; and

(p) Such other agreements, instruments and documents as reasonably requested by the Sellers to effect the Transaction.

12. TERM; TERMINATION

12.1 Term. The term of this Agreement shall commence as of the Execution Date and shall continue until the earlier to occur of: (a) the Closing; and (b) the earlier termination of this Agreement pursuant to this Article 12.

12.2 Termination Prior to Closing. Notwithstanding anything to the contrary in this Agreement, this Agreement may be terminated as follows:

(a) By Buyer, on the one hand, or the Sellers, on the other hand, upon written notice provided to the other, if the Closing shall not have taken place on or before 11:59:59 p.m. on the second anniversary of the Execution Date (the "Outside Date") for any reason not described in Sections 12.2(b)-(g) below, inclusive;

(b) Prior to the Outside Date, upon the mutual, written consent of Buyer, on the one hand, and the Sellers, on the other hand;

(c) By Buyer in the event the Sellers have breached any representation, warranty, or covenant of the Sellers contained in this Agreement, Buyer has notified the Sellers of the same, and such breach: (i) would give rise to the failure of a condition set forth in Section 10.1(a) or Section 10.1(e) above; and (ii) (A) cannot be cured by the Outside Date; or (B) if capable of being cured, shall not have been cured by the earlier of: (1) one hundred eighty (180) days after receipt of written notice from Buyer of such breach; or (2) the Outside Date;

(d) By the Sellers in the event Buyer has breached any representation, warranty, or covenant of Buyer contained in this Agreement, Sellers have notified Buyer of the same, and such breach: (i) would give rise to the failure of a condition set forth in Section 10.2(a) or Section 10.2(f) above; and (ii) (A) cannot be cured by the Outside Date; or (B) if capable of being cured, shall not have been cured by the earlier of: (1) one hundred eighty (180) days after receipt of written notice from Buyer of such breach; or (2) the Outside Date;

(e) By Buyer pursuant to Section 9.4 above;

(f) By Buyer in the event of a closure of one (1) or more of the Hospitals as a result of casualty, Force Majeure, or revocation or termination of license to operate as an acute hospital, which closure is reasonably expected to extend for a period of at least one (1) year and such closure is not due to any of the following events: (i) changes in general local, domestic, foreign, or international economic, business, regulatory, political, or market conditions or in national or international financial markets, or (ii) changes affecting generally the healthcare industry, which changes, in the case of either (i) or (ii) above do not disproportionately affect the Hospitals relative to the impact of such conditions on hospitals and healthcare facilities in South Carolina; and

(g) By Sellers at any time on or after the first anniversary of the Execution Date provided, however, that, solely in the event that the HSR Filing Date occurs on or before the first anniversary of the Execution Date, Sellers shall not be entitled to terminate this Agreement pursuant to this subsection (g) until the later of (A) the first anniversary of the Execution Date or (B) the 120th day following the HSR Filing Date; provided, further, however, that, Sellers shall not be entitled to terminate this Agreement pursuant to this subsection (g) if Sellers' breach of this Agreement has prevented or would prevent satisfaction of the condition in Section 10.2(g) to be satisfied.

12.3 Casualty; Condemnation.

(a) From the Execution Date and until the Closing Date, the Sellers shall give written notice to Buyer as soon as reasonably possible if all or any part of the Real Property is materially damaged (whether by fire, theft, vandalism, or other casualty). Promptly following the occurrence of such event, the Parties shall negotiate in good faith to agree: (i) to reduce the Purchase Price by the value of damaged, lost, or destroyed Real Property, such value to be the greater of: (A) the value of such damaged, lost, or destroyed Real Property; or (B) the estimated cost to restore the damaged, lost, or destroyed Real Property to its prior condition; (ii) that Sellers shall, within one hundred and twenty (120) days after such event but prior to Closing, repair, replace, or restore such damaged, lost, or destroyed Real Property prior to Closing pursuant to the provisions set forth herein; or (iii) that Sellers will, at Closing, transfer, assign, and convey all rights, title, and interests in and to proceeds (or the right to the proceeds) of applicable insurance or loss recovery funds available with respect to such damage, loss, or destruction to Buyer, in which case Buyer shall consummate the Transactions without regard to such damage, loss, or destruction without any reduction in the Purchase Price, except that the Purchase Price shall be reduced by the amount of any deductible paid by Buyer; provided, however, if, within sixty (60) days after Sellers' written notice of such damage as required above, the Parties have not reached agreement, the Sellers will, at Closing, transfer, assign, and convey all rights, title, and interests in

and to proceeds (or the right to the proceeds) of applicable insurance or loss recovery funds available with respect to such damage, loss, or destruction to Buyer, in which case Buyer shall consummate the Transactions without regard to such damage, loss, or destruction without any reduction in the Purchase Price, except that the Purchase Price shall be reduced by the amount of any deductible paid by Buyer.

(b) From the Execution Date and until the Closing Date, the Sellers shall give written notice to Buyer as soon as reasonably possible if all or any part of the Real Property is taken, reduced, or restricted by any pending, threatened, or contemplated condemnation or eminent domain proceeding or similar action ("Taking"). In such event, the Parties shall reduce the Purchase Price by the value of such portion of Real Property, such value to be the value of such portion of the Real Property as of the day immediately prior to such Taking as reasonably determined by the Sellers, after consulting with Buyer in good faith. The Sellers shall retain all rights, title, and interests in and to the proceeds of all applicable insurance or loss recovery funds available with respect to such damage, loss, or destruction.

12.4 Effect of Termination.

(a) In the event this Agreement is terminated pursuant to Section 12.2(a), Section 12.2(b) or Section 12.2(g) above, subject to Section 12.4(c) below, this Agreement will terminate and thereafter be of no further force or effect, and there will be no Liability on the part of any Party hereto to any other and all rights and obligations of any Party hereto will cease, except that nothing herein will relieve any Party from any Losses arising out of, resulting from or relating to any intentional breach, prior to such termination, of any representation, warranty, covenant or agreement contained in this Agreement.

(b) In the event this Agreement is terminated pursuant to Section 12.2(c), Section 12.2(d), Section 12.2(e), or Section 12.2(f) above, subject to Section 12.4(c) below, the obligations of the Parties under this Agreement shall terminate; provided, however, that the terminating Party's right to pursue all legal remedies will survive such termination unimpaired and nothing herein will relieve any Party from any Losses arising out of, resulting from or relating to such breach.

Notwithstanding anything in this Agreement to the contrary: (i) those provisions of this Agreement that are expressly intended to survive the termination of this Agreement for any reason shall, by their terms, survive such termination; and (ii) without limiting the generality of the foregoing, the provisions of this Section 12.4 and of Section 7.11, Section 12.5, Section 12.6, Article 15, and Article 16 shall survive the termination of this Agreement for any reason

12.5 Costs and Expenses.

(a) Generally. Whether or not the Transactions are consummated, except as otherwise expressly set forth in this Agreement, all expenses of the preparation of this Agreement and of the purchase of the Acquired Assets set forth in this Agreement, including counsel, accounting, and brokerage and investment advisor fees and disbursements, shall be borne by the respective Party incurring such expense. Notwithstanding the foregoing, in the event that a Party institutes an Action to enforce its rights under this Agreement or any Transaction Document, the

prevailing Party in such Action shall be entitled to recover its reasonable costs and expenses (including reasonable attorneys' fees) incurred in connection with such Action from the losing Party. Notwithstanding anything in this Agreement to the contrary, Buyer shall bear all expenses relative to cost of the Title Policy, surveys, environmental engineering reports, licensure application fees, and mechanical, structural, electrical and roofing engineering costs, and any costs associated with pursuit of a modification of the existing COPA or a new COPA, except the fees and costs of legal counsel and advisers engaged by Sellers in connection with the COPA and any licensure application, which shall be borne exclusively by Sellers.

(b) Title Fees and Transfer Taxes. All recording costs (which, for the sake of clarity, shall not include any Transfer Taxes) as well as transfer and filing costs related to the Real Property shall be borne by Buyer. Buyer shall pay the premium for issuance of the Title Policy, if any. Buyer shall have the option, in its sole discretion, to require an ALTA Extended Coverage Owner's policy for the Owned Real Property, and the cost of such ALTA Extended Coverage Owner's Title Policy (if any), to the extent it exceeds the cost of the Title Policy and the cost of any title endorsements requested by Buyer, together with any survey of the Real Property required by Buyer or the Title Company, shall be borne by Buyer; provided, however, that neither obtaining an ALTA extended coverage policy nor any endorsements shall delay or impede the Closing, unless such ALTA extended coverage policy or endorsements are required to address the title defects objected to by Buyer in accordance with Sections 9.3. Buyer, on the one hand, and the Sellers, on the other hand, shall each bear fifty percent (50%) of all Transfer Taxes (which, for sake of clarity, shall not include any recording costs) related to the transfer of the Acquired Assets not otherwise provided for in this Agreement; provided, however, that each Party shall be responsible for the fees and expenses of its attorneys and Representatives.

(c) HSR Filing Fees. Notwithstanding anything in this Agreement to the contrary, Buyer shall bear all fees and expenses of the Parties payable to the FTC in connection with the filings under the HSR Act.

(d) State Filings; Notices. Buyer shall pay, and be fully liable and responsible for, any and all fees, costs, and expenses associated with any filings with or notices to any state or local Governmental Authorities in connection with the Transaction, except the fees and costs of legal counsel and advisers engaged by Sellers in connection with any such filings or notices to any state or local Governmental Authorities, which shall be borne exclusively by Sellers.

12.6 Deposit. Notwithstanding any provision in this Agreement or the Escrow Agreement, the Parties agree that: (a) if the Closing occurs, the Deposit shall be paid pursuant to the instructions set forth on the Closing Statement; and (b) if the Closing does not occur, the Deposit shall be paid upon the expiration or termination of this Agreement as follows:

(a) if a Contingency Event shall have occurred, the Deposit shall be paid to Buyer; or

(b) if a Contingency Event shall not have occurred, the Deposit shall be paid to the Sellers c/o LPNT.

IN WITNESS WHEREOF, the Parties have caused this Asset Purchase Agreement to be executed by their duly authorized officers as of the Execution Date.

SELLERS:

PROVIDENCE HOLDING COMPANY, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE HOSPITAL, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE GROUP PRACTICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE GROUP PRACTICES, II, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE PHYSICIAN PRACTICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE PROFESSIONAL SERVICES, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PROVIDENCE IMAGING CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

PERS LEGACY, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW HEALTH HOLDINGS, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW HOSPITAL, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW ANESTHESIA, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAW CLINICS, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAWHEALTH CANCER CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

KERSHAWHEALTH AMBULATORY SURGERY CENTER, LLC

By: _____
Name: D. Andrew Slusser
Title: Its Authorized Representative

[*Signatures continue on next page*]

BUYER:

PRISMA HEALTH-MIDLANDS

By: _____
Name: Mark S. O'Halla
Title: CEO

LPNT (solely for purposes of Section 17.1):

LIFEPOINT HOLDINGS 2, LLC

By: _____
Name: _____
Title: _____

LIFEPOINT HEALTH (solely for purposes of Section 7.11 and Section 7.12):

LIFEPOINT HEALTH, INC.

By: _____
Name: _____
Title: _____

PRISMA HEALTH (solely for purposes of Section 17.2):

PRISMA HEALTH

By: _____
Name: Mark S. O'Halla
Title: President and CEO

BUYER:

PRISMA HEALTH-MIDLANDS

By: _____
Name: _____
Title: _____

LPNT (solely for purposes of Section 17.1):

LIFEPOINT HOLDINGS 2, LLC

By: _____
Name: Kathy Teague
Title: AVP, Secretary

LIFEPOINT HEALTH (solely for purposes of Section 7.11 and Section 7.12):

LIFEPOINT HEALTH, INC.

By: _____
Name: Kathy Teague
Title: AVP, Assistant Secretary

PRISMA HEALTH (solely for purposes of Section 17.2):

PRISMA HEALTH

By: _____
Name: _____
Title: _____

EXHIBIT C

dhec
Healthy People. Healthy Communities

February 28, 2020

VIA CERTIFIED MAIL
Mr. Mark S. O'Halla
President and Chief Executive Officer
Prisma Health
300 East McBee Avenue
Suite 300
Greenville, SC 29601

Re: Review of the Certificate of Public Advantage ("COPA") held by Prisma Health – Midlands (Formerly the Palmetto Health Alliance) and update to the conditions as set forth therein.

Dear Mr. O'Halla:

In December 2019, your organization submitted to the South Carolina Department of Health and Environmental Control ("Department") notice of a proposed transaction wherein Prisma Health – Midlands ("PHM") would acquire certain assets currently owned by LifePoint Health ("LPNT")[1] in the Richland County, Fairfield County, and Kershaw County market area. The Department received additional documentation from PHM in support of this transaction in February 2020. Pursuant to S.C. Code Regs. 61-31,§ 508, the Department determined that the proposed changes resulting from the transaction might materially impact the benefits or disadvantages to the community to be served. The Department therefore undertook another review of the COPA.

As a result of that review, and having given substantial consideration to all information provided by PHM to the Department regarding the proposed transaction, the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets:

1. PHM will provide a full report to the Department every other year which will include, at a minimum, responses to the questions in Regulation 61-31, Health Care Cooperative Agreements, Section 502 (B); the previous fiscal year's independent audited financial

[1] To include Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department in Fairfield County operating under HTL-0929.

statements; and information which will enable the Department to evaluate each of the conditions listed below. In years when a full report is not required, PHM will provide the Department an abbreviated report which will include, at a minimum, an annual audited financial statement plus a description of the programs and services PHM provides through its Community Outreach Programs as described in Condition 2, as well as the required reporting as described in Conditions 17 and 19. All reports, full and abbreviated, may require additional information the Department feels is necessary to adequately evaluate PHM's compliance with the COPA and the COPA conditions. These annual reports are due to the Department no later than 120 days after the end of each fiscal year. In addition, PHM will provide a revised three (3) year forecasted financial statement, which may be based upon its most recently Board approved budget and Board accepted audited financial report, and which projects three (3) years forward from the end of the most recent fiscal year. PHM will also make available to the Department all of its managed care contracts for inspection, if necessary, which will be considered proprietary and not subject to disclosure.

2. PHM will provide fifteen percent (15%) of its "excess revenues over expenses" to fund public health initiatives and community outreach programs. Efforts funded with this money, as a community benefit, will be evaluated each year as a part of the information required in Condition Number 1. The evaluation will be based on the benefits, changes, and/or accomplishments that occur because of the activities and services provided by the programs and for which the program is held accountable. The evaluation will consider whether these programs are reaching populations that might otherwise not receive such services without the Certificate of Public Advantage.

3. For twenty-four (24) months following the date of closing of the transaction, PHM will report major operational savings that can be documented as they relate to the acquisition of the LPNT assets. Costs used to document the above savings must be specific to the acquisition, that is, savings that occurred because of the acquisition and not savings that would have been realized even if the acquisition had not occurred.

4. PHM will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any competing licensed facility that requests such access. For services not offered by competing licensed facilities in the core service area, PHM will give them terms and conditions equal to the average of the amount which would be received from patients insured by any of PHM's commercial payers. That PHM will continue this access for which it is the sole provider until such time as a competing licensed facility offers the service, and will terminate only in the event that South Carolina repeals its Certificate of Need laws or that such laws otherwise cease to be applicable. Additionally, PHM must make available to the Department, upon

request, names of any facilities, to include terms and conditions, to which services have been offered.

5. PHM will continue a relationship substantially similar to the relationship set forth in the affiliation agreement between Prisma Richland Hospital and the University of South Carolina School of Medicine and continue to support medical education. If a clinical service is determined to be located at only one PHM facility, the medical, graduate medical, and allied health education programs will have access to that clinical service at the facility in which the service is to be located, to the extent that is necessary to complete the education and training as required by the program.

6. Should PHM change controlling interest by purchase, lease, assignment, management contract, transfer or comparable arrangement, the new operating entity as a condition of the change will adhere to all the conditions of this approval and all representations put forth in the Certificate of Public Advantage application and subsequent submissions.

7. As part of the information required in Condition Number 1, "generally accepted accounting principles" consistently applied, but excluding extraordinary revenue and expenses, losses on extinguishments of debt and the impact of any mark to market adjustments on derivative instruments, will be used to calculate net of revenues over expenses in the annual report for determining the 15% public health commitment and that such financial statements will be certified by an independent auditor. However, should any of these other items result in cash gains or losses, they may be included in net revenues over expenses.

8. Neither PHM, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations. This does not prevent third party payers from unilaterally choosing not to contract with a hospital that is competitive.

   However, it must be the decision of the payer and not be required as a condition of a contract with PHM or its affiliate. This does not include exclusive contracts with third party payers that may be in effect on this date or their renewals as provided for in the existing contract.

   In addition, PHM will negotiate with managed care payers in good faith and in a fair and equitable manner. This does not require PHM to contract with every payer regardless of terms, or that contracted prices must be the same for all payers. The Department will, as a part of its ongoing monitoring process, investigate consistent complaints from employers and managed care payers to ensure compliance with this condition and will take appropriate regulatory action when necessary.

9. Except to the extent required by vendors, suppliers or Group Purchasing Organizations ("GPOs"), neither PHM, nor its subsidiaries, shall condition any contracts with suppliers, vendors, or GPOs that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the PHM.

10. The Department may amend these conditions to include, but not be limited to, the lowering of prices should unexpected events lead to abnormally high margins from operations.

11. PHM will adhere to the commitments it has outlined in its "Summary of System Commitments and Proposed DHEC Monitoring" in its application and all other representations made in the Certificate of Public Advantage application and all of its subsequent submissions, to the extent that they are consistent with the conditions of this approval, and that may not be specifically described in these conditions.

12. PHM will pay to the Department an annual monitoring fee to cover the actual cost of audits and monitoring. This fee will be used by the Department in whatever manner solely for the purpose of monitoring these conditions.

13. Prior to the final execution of the Asset Purchase Agreement ("APA") by and between PHM and LPNT regarding those assets outlined the December 2019 and February 2020 submissions to the Department by PHM, PHM shall submit to the Department evidence that the Board of PHM is aware of the transaction.

14. PHM will conduct a comprehensive study of access to emergency, urgent, and/or extended primary care services within the northern City of Columbia or other disadvantaged area of Richland County. Based upon this study, PHM will develop a plan to address those issues identified in the study for presentation to, and input from, the Department. Such a study will be completed within eighteen (18) months of the closing date of the transaction.

15. Within twenty-four (24) months of the closing date of the transaction, PHM will begin provision of primary care, and/or extended-hours primary care, and/or urgent care services to the Lower Richland community.

16. Prior to closing or permanently reducing the number of licensed facilities or beds held by PHM, PHM shall submit to the Department a specific plan for the transfer of those services, beds, patients, medical professionals, and/or other staff affected by such a change. This requirement shall be in addition to those requirements set forth in S.C. Code 44-7-110 *et seq.*, and the *South Carolina Health Plan*.

17. All acquired facilities will be subject to the charity care policy of PHM. The current charity care policy in force at the time of submission will be included in PHM's annual COPA report. In the event PHM determines to close a licensed general hospital, PHM will provide the Department with a plan that addresses how indigent care patients will be accommodated.

18. PHM will maintain Level 1 trauma services and serve as a Regional Perinatal Center for at least five (5) years following the date of closing of the transaction, subject to no material change in program requirements, state law or regulations, and federal law or regulations. Further, PHM will commit to operating no less than seven (7) emergency departments, unless otherwise approved to do so by the Department, for at least five (5) years following the date of closing of the transaction.

19. In addition to the requirements set forth in the *Health Care Cooperation Act*, S.C. Code Ann. Sections 44-7-500 through 44-7-590, the *Health Care Cooperative Agreements* Regulation, S.C. Code Ann. Regs. 61-31, and these Conditions, PHM shall notify the Department through its annual COPA report of any acquisitions or dispossessions related to physician practices, surgical centers, imaging centers, radiation therapy facilities, or substance use and treatment facilities.

20. These Conditions will be evaluated for necessity and compliance on an annual basis. Those Conditions that contain specified time periods will be evaluated at the end of that specified time period for compliance, and PHM and the Department may mutually agree to adjust the specified time period.

Your continued cooperation and compliance is greatly appreciated. Please do not hesitate to contact me with any questions you might have.

Very Respectfully,

Louis Eubank, Chief
Bureau of Healthcare Planning & Construction

cc: Malcolm Isley (via email)
Liz Crum, Esquire (via email)

EXHIBIT D

Prisma Health

Manual of Policy Directives

POLICY NAME: Financial Arrangements and Assistance **POLICY NUMBER: S-020-08**

EFFECTIVE DATE: 2020

POLICY STATEMENT: In keeping with our purpose to inspire health, serve with compassion and be the difference, Prisma Health is committed to providing financial assistance to patients who cannot pay for all or a part of their bill.

A further responsibility of Prisma Health requires it to generate sufficient revenues in order to provide high quality patient care and to maintain a sound financial position. Because the primary source of operating revenue for Prisma Health consists of collections for services rendered to patients, it is imperative that reimbursement from patients or other responsible parties be optimized. In order to provide financial assistance responsive to the population served and keep hospitalization costs at a minimum, Prisma Health has adopted this policy.

All facilities of Prisma Health are available to patients without regard to race, color, religion, age, sex or national origin or any other discriminatory differentiating factor. Emergency services will not be denied because of an inability to pay. Satisfactory financial arrangements are required before elective services are rendered. Elective cases without satisfactory financial arrangements may be deferred with physician consent.

This policy applies to the following Prisma Health hospitals and related clinics:

Prisma Health Baptist Hospital
Prisma Health Baptist Easley Hospital
Prisma Health Baptist Parkridge Hospital
Prisma Health Greenville Memorial Hospital
Prisma Health Greer Memorial Hospital
Prisma Health Hillcrest Memorial Hospital
Prisma Health Laurens County Memorial Hospital
Prisma Health North Greenville Long Term Acute Care Hospital
Prisma Health Oconee Memorial Hospital
Prisma Health Patewood Memorial Hospital
Prisma Health Richland Hospital
Prisma Health Tuomey Hospital

All employed physicians of the University Medical Group and Palmetto Health – University of South Carolina Medical Group providing medically necessary and/or emergent services at hospital facilities and off-campus hospital departments of Prisma Health participate in this Financial Assistance Policy (FAP). See Attachment B for a complete listing of providers. Independent providers of the Prisma Health

Medical Staff do not participate in the FAP. A complete list of physicians providing emergency and/or medically necessary care covered by this Policy can be found at https://www.Prisma Health.org/patients-visitors/patient-info/payment/financial-assistance/ or by writing Prisma Health, Attn: Financial Assistance, 255 Enterprise Blvd., Ste. 250, Greenville, SC, 29615.

DEFINITIONS:

1. AGB- Amounts generally billed for emergency or other medically necessary care to individuals who have insurance coverage. Prisma Health has elected to determine AGB using the Look-back Method as defined below. The AGB percentage can be located on Attachment A of this policy.
2. Extraordinary Collection Actions (ECAs) - Actions taken to collect a debt, include but are not limited to reporting debts to credit bureaus, selling debt to a third party and pursuing liens, garnishments and other legal actions.
3. FPG- Federal Poverty Guideline (published by the U.S. Department of Health and Human Services).
4. Medicare Look-Back Methodology- calculation based on actual past claims paid to the hospital facility by either Medicare fee-for-service alone or Medicare fee-for-service together with all private health insurers paying claims to the hospital facility (including, in each case, any associated portions of these claims paid by Medicare beneficiaries or insured individuals).
5. Service Catchment Area- A geographic region served by the hospital.
6. Tertiary Care Facility- A hospital that provides specialized care by specialists in a large hospital after a referral from primary care and secondary care. Tertiary centers usually include the following:

    - A major hospital that usually has a full complement of services including pediatrics, obstetrics, general medicine, gynecology, various branches of surgery and psychiatry or;
    - A specialty hospital dedicated to specific sub-specialty care (pediatric centers, oncology centers, psychiatric hospitals). Patients will often be referred from smaller hospitals to a tertiary hospital for major operations, consultations with sub-specialists and when sophisticated intensive care facilities are required.

PROCEDURE:

Satisfactory Financial Arrangements: All financial arrangements will be made using the following guidelines after the patient's status is determined by the physician:

a. **Emergency Services- Immediate** Inpatient, outpatient or emergency hospital services where the patient is at risk of life or limb that are necessary to prevent death or other serious health risks. *Financial arrangements should be made as soon as practical after stabilizing care is rendered.*
b. **Routine/Medically Necessary Services-** Health care services or supplies needed to diagnose or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of medicine; no imminent danger. *Financial arrangements should be made prior to rendering service.*

c. **Elective Services-** Chosen (elected) by the patient or physician and is advantageous to the patient but is not urgent and may or may not be considered medically necessary (e.g. cosmetic surgery). *Financial arrangements must be made prior to rendering service.*

Satisfactory financial arrangements may consist of any one or a combination of the following:

1. Payment in full of the patient's obligation made in advance of services being rendered.
2. Adequate hospitalization insurance benefits exist which the patient assigned to Prisma Health for the payment of services. Automobile liability coverage alone is not considered adequate hospitalization insurance.
3. Sponsorship by a third party, such as Medicare, Medicaid, or other agencies contracting with Prisma Health for payment of care rendered to patients upon verification of eligibility.
4. If Prisma Health determines that the patient has no available means to pay for services, a patient will then be declared eligible for financial assistance.

The specific percentage discount for income greater than 200% up to 400% of FPG is updated annually and the sliding scale adjustment is based on Medicare look-back methodology. This is determined from actual past claims paid to the hospital facility by Medicare fee-for-service together with all private health insurers paying claims to the hospital facility (including, in each case, any associated portions of these claims paid by Medicare beneficiaries or insured individuals).

No person eligible for financial assistance under this policy will be charged more for emergency or other medically necessary care than Amounts Generally Billed (AGB) to individuals with insurance covering such care. This applies to all patients if the care is emergency or medically necessary, regardless of county of residency. Financial Assistance is not available for elective care unless approved by Chief Financial Officer (CFO), Vice-President, Revenue Management or Executive Director of revenue Cycle.

Prisma Health does not extend financial assistance to patients residing in a foreign country. Accept by exceptions which may be granted on a case by case basis in advance of services being rendered and are at the discretion of the Chief Administrative Officer, Chief Financial Officer or Vice-President of Revenue Management.

Patients who have a network benefit with an in-network provider other than Prisma Health may choose to receive services as out of network. The out of network benefit may pay a small sum, or nothing at all, toward the billed charges. Financial Assistance is not available for charges not covered due to the patient choosing to receive services out of network. Exceptions for extenuating circumstances may be approved by the Chief Financial Officer (CFO), Vice-President, Revenue Management or Executive Director of Revenue Cycle.

METHOD FOR APPLYING FOR FINANCIAL ASSISTANCE:

All patients who believe they may qualify for financial assistance are urged to complete, sign and submit a Financial Assistance Application. The Financial Assistance Application, Billing and Collections Policy, as well as information about the financial assistance application processes are widely publicized. Information can be obtained by:

1. Visiting Prisma Health website at https://www.Prisma Health.org/patients-visitors/patient-info/payment/financial-assistance/.
2. Contacting Prisma Health Patient Financial Services at one of the numbers listed below:
    a. Greenville- (864) 454-9604 or 1-844-302-8298 (toll free)
    b. Columbia- (803) 434-3834
    c. Sumter- (803) 774-8838
3. Mailing a request to one of the addresses below based on your location:
    a. Greenville- Prisma Health, Attn: Financial Counseling/Patient Access, 255 Enterprise Blvd., Ste. 250, Greenville, SC 29615 Attn: Financial Counseling/Patient Access
    b. Columbia- Prisma Health, Attn: Financial Navigation/Patient Access, Five Medical Park Columbia, SC 29203
    c. Sumter- Prisma Health, Attn: Financial Counselors/Patient Access, 129 N. Washington St., Sumter, SC 29150
4. Visiting a Prisma Health facility. Representatives are available to provide a copy of the Financial Assistance Application or assist the patient/guarantor in completing and submitting the application.

Documentation to be submitted with the financial assistance application is two most recent pay stubs and statements for investments or other sources of income. Individuals who are self-employed are required to submit the most recent years' business and personal tax return. The business is considered a resource. Failure to submit required documentation may result in denial of the financial assistance application.

EXTRAORDINARY COLLECTION ACTIONS (ECAs):

Prisma Health will not engage in ECAs against an individual to obtain payment for care before making reasonable efforts to determine whether the individual is eligible for financial assistance under this Financial Arrangements and Assistance Policy.

Prisma Health offers hospital patients two options for payment when insurance or financial assistance is not available:

1. In-house interest free payments for up to twelve (12) months in duration.
2. If payments are needed beyond twelve (12) months, reasonable payment arrangements with interest are available with an outside agency for patients who have no other resources or means to pay and do not qualify for financial assistance.

Patient balances that do not qualify for financial assistance and are unpaid may be placed with a collection agency or attorney, or filed as a lien against real estate or personal property. These actions are further described in the Billing and Collections Policy. Members of the public may obtain a free copy of this separate policy from Prisma Health as indicated in the contact list in this policy.

Financial Assistance Eligibility Criteria:

Applicants must complete and sign the Financial Assistance Application. This requirement may be waived in the event that the totality of the circumstances indicates that the patient would qualify for charity but is deceased, homeless, transient or as a result of physical or mental incapacity is unable to provide the required information. These circumstances must be documented and

reviewed by the VP Revenue Management, Executive Director or Director, Patient Access before the patient's account may be considered for financial assistance.

Criteria for eligibility is outlined in section one (1) through five (5) below. If a person does not meet criteria based on requirements outlined in section one (1) through five (5), the person may qualify under section six (6); which is an alternative means of qualifying based a significant financial hardship.

1. Applicants must meet the following criteria:
    a. U.S. resident or legally admitted alien for permanent residence);
    b. Individuals meeting all criteria for financial assistance with an income level at or below 200% of the Federal Poverty Guideline (FPG) receive free care. Individuals with an income level of > 200% FPG up to 400% FPG receive discounted care based on a sliding scale as set forth in this policy. Reference Attachment A of this policy.
2. Resource Limits:
    a. Primary residence includes one primary place of residence with a tax assessed value of two hundred thousand dollars ($200,000) or less.
    b. Other Resources include real estate, in addition to the primary residence, or liquid assets convertible to cash and unnecessary for the patient's daily living; not to exceed a combined total value of ten thousand dollars ($10,000). Recreational vehicles are included in the total value of liquid assets. Vehicles necessary for day to day living are excluded from other resources.
3. Household composition is used to calculate the level of financial assistance and is based on income and the number of dependents in the family that the guarantor is financially responsible for. These are person(s) claimed on an individual's tax return. Household composition is defined as follows:
    a. Adult- a person at least eighteen (18) years of age or a younger person who is or has been married or has had the disabilities of minority removed for general purposes, i.e. emancipated minor.
    b. Unmarried couples- adults who live together and file taxes jointly and/or own property together.
    c. Managing conservator- a person designated by a court to have legal responsibility for a minor.
    d. Minor child- a person up to and including the month of the nineteenth (19^{th}) birthday and is claimed as a dependent on an adult's Federal tax return. A person over the age of eighteen (18) years old is considered his/her own guarantor and the parents income is not considered when determining financial assistance for that individual. If an application is submitted and a person over the age of eighteen (18) years old is claimed on a person's tax return as a dependent, this person counts in the household composition but not in the income.
4. Filing timeline for financial assistance is 240 days from the date of the first post discharge billing statement. Duration of eligibility will be twelve (12) months from date of application. Exceptions are as follows:
    a. Accounts pending Medicaid, SSI, and Social Security Disability for more than eight (8) months and have been denied benefits and qualify for financial assistance. Duration of the application in this instance to cover any outstanding balances at the time of determination for Medicaid, Supplemental Social Security Income (SSI) or Social Security Disability.

b. Accounts which have liability coverage and have been in litigation for more than eight(8) months and have been denied a medical settlement, or received a limited medical settlement and qualify for hospital charity.
c. Accounts that have had an estate in probate more than eight (8) months with no assets and qualify for hospital charity.
d. Accounts where insurance was filed and there was a delay in payment from the insurance of more than eight (8) months.
e. Recent loss of income/employment will be considered for outstanding accounts. If approved, financial assistance will only apply to outstanding accounts meeting all other criteria at the time of approval. Financial Assistance will not be added to the patient's record for dates beyond the 12 month eligibility. The patient may reapply when additional services are received

5. Duration of Eligibility:
    a. An approved application for financial assistance will cover applicable services that fall within the range of two hundred and forty (240) days or less from the first post discharge billing statement for a duration of one year from the application date.

6. Catastrophic Event:
    a. When the patient's out of pocket liability for Prisma Health hospital bills exceed 25% of the patient's annual gross household income the following criteria will be considered when determining financial assistance eligibility:
        i. The tax appraised value of the primary place of residence may exceed two hundred thousand dollars ($200,000).
        ii. Liquid assets may exceed a combined total value of $10,000.
        iii. Financial Assistance for a catastrophic event may be approved within the range of two hundred and forty (240) days or less from the first post discharge billing statement. Financial Assistance will not be extended to future dates of service. A financial assistance application may but may resubmitted if additional services are received.

7. Patients may also be eligible for other forms of financial assistance such as drug replacement, discount or other programs as available.

Income, asset, residency information, etc. provided by the patient will be verified through an electronic vendor inquiry. Income discrepancies between information provided by the patient/patient representative and the electronic inquiry, may require additional information/documentation from the patient/patient representative. In the event additional information/documentation is requested but not received (examples include but are not limited to: real estate equity letter, bank statements, most recent years' tax return or other financial documents) the account will be dispositioned fourteen days after the request and may be denied for failure to submit requested information/documentation.

Presumptive Eligibility:

There are certain scenarios, outlined below, where a patient may be considered as having met criteria for Financial Assistance on a presumptive basis. A financial assistance application will not be required in these instances since the patient would have already submitted an application that was processed through the Department of Health and Human Services.

a) Patients who are who are dual eligible for Medicare and Medicaid, or eligible for Medicaid. In the event that the co-payment has not been satisfied after the mailing of one billing statement.
b) Patients who applied and were determined to be non-covered by Medicaid may be deemed eligible for financial assistance.
c) Patients who are covered by Family Planning Only Medicaid.
d) Patients who are covered by Emergency Services Medicaid may be deemed eligible for financial assistance for services not covered by Emergency Services Medicaid.
e) Patients who are eligible for retro Medicaid and the claim is not paid by Medicaid
f) Patients who are eligible for Out of State Medicaid and the claim is not paid by the State Medicaid Plan.
g) Patients who are affiliated with the Access Health program or referred by the Community Free Clinics who support the regions served by Prisma Health Hospitals (named on page 1 of this document).
h) Patients who are homeless.

Prisma Health Vice President of Financial Services will determine the percentage guidelines utilized for sponsorship on an annual basis. Prisma Health reserves the right to define maximum charitable expenditures, service catchment areas, prevailing charges, excluded services, fee reduction schedules, patient responsibilities, and other business practice parameters consistent with the prudent management of Prisma Health.

Prisma Health accommodates all significant populations served who have limited proficiency in English by translating copies of our Financial Arrangements and Assistance Policy, Financial Assistance Application Form, and this summary in the primary languages spoken by those populations.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 10

PROPRIETARY AND CONFIDENTIAL

Friday, December 13, 2019

Margaret P. Murdock, Esquire
Director, Division of Certificate of Need
301 Gervais Street
Columbia, SC 29201

Re: PRISMA HEALTH–MIDLANDS ACQUISITION OF LIFEPOINT ASSETS AND THEIR INCLUSION UNDER THE CONDITIONS OF THE 1997 CERTIFICATE OF PUBLIC ADVANTAGE.

Dear Ms. Murdock:

We are submitting this request to you in your capacity as Director of the Certificate of Need Program, which includes overseeing the State Certificate of Need and Health Facilities Licensure Act, S.C. Code Ann. §§ 44-7-110 (2010) and the Health Care Cooperative Act, S.C. Code Ann. §§ 44-7-500 (2010) .

HISTORICAL BACKGROUND.

Palmetto Health (PH) is the company that was formed by Baptist Healthcare System of South Carolina, Inc. and Richland Memorial Hospital and is the legal entity to whom the Department of Health and Environmental Control (DHEC or Department) issued the Certificate of Public Advantage (COPA). On May 8, 1997, DHEC issued the decision letter, with twenty-five (25) conditions approving the COPA (COPA Conditions). Exhibit 1, Certificate of Public Advantage BR Health System, Inc., Columbia, South Carolina. Disaffected parties sought an administrative review by the S. C. Administrative Law Court (ALC). The ALC dismissed the case and the actual COPA was issued October 6, 1997. *Id.*

PH has complied with all of the COPA Conditions, including its tithe.[1] Over the years, DHEC has monitored PH's actions under the COPA Conditions. In 2003, DHEC and PH agreed to modify and update the COPA Conditions. Exhibit 2, Modified COPA Conditions dated November 8, 2003.

In late 2017, PH and Upstate Affiliate Organization d/b/a Greenville Health System (GHS) entered into an affiliation agreement to form Prisma Health (Prisma Health). Prior to closing the transaction, PH and GHS sought a determination from DHEC as to whether the affiliation between the two health systems implicated the COPA Conditions. This transaction is further described in Exhibit 3, attached hereto. DHEC determined that the affiliation between PH and GHS to form Prisma Health did not implicate the COPA Conditions, which remained in place with PH. *Id.* After Prisma Health was formed, PH changed its name to Prisma Health–Midlands. Exhibit 4, page from the S. C. Secretary of State website.

THE REQUEST AND SUPPORTING RATIONALE

Prisma Health entered into a Letter of Intent on September 13, 2019 to acquire three South Carolina hospitals, and other related assets and operations, (the "LPNT Assets") from LifePoint Health ("LPNT"), an investor-owned hospital management company based in Brentwood, Tennessee (the "Transaction"). Prisma Health–Midlands intends to purchase Providence Downtown ("PD") and Providence Northeast

[1] https://www.palmettohealth.org/classes-events/community-outreach/community-health-initiatives/annual-reports

("PNE"), both located in Richland County, and Kershaw Health ("KH"), located in Kershaw County. Prisma Health will acquire these LPNT Assets through the execution of an Asset Purchase Agreement ("APA"). Prior to the execution of the APA, we are notifying DHEC that it is our belief that the LPNT Assets being acquired by Prisma Health–Midlands are subject to the COPA Conditions and are asking DHEC after evaluating the benefits and competitive consequences of the asset acquisition: 1) to acknowledge that the LPNT Assets are subject to and will be monitored under the COPA Conditions, and 2) to make such updates and modifications to the COPA Conditions as the Department deems necessary. We believe that acquiring and integrating these health care facilities into Prisma Health, specifically Prisma Health–Midlands, will benefit healthcare consumers in the Midlands region, and advance our ability to create a better state of health for South Carolina.

We intend to integrate these facilities into Prisma Health–Midlands, a 501(c)3 entity that provides health care to the communities within the Midlands region of South Carolina. To facilitate this integration, we are requesting that the Department approve Prisma Health–Midlands' proposed modifications to the conditions of the COPA Conditions between Prisma Health–Midlands and the Department, to make the LPNT Assets a part of and subject to the COPA Conditions. It is our position that our acquisition and integration of the LPNT Assets, specifically including the three hospitals, falls squarely within the purpose and scope of the South Carolina Health Care Cooperation Act and regulation[2] and requires only that the COPA Conditions be modified and updated to make the LPNT Assets subject to the COPA Conditions when the Transaction closes. For the reasons set forth below, Prisma Health–Midlands believes the LPNT Asset acquisition fits perfectly within the active COPA Conditions that has been in place between DHEC and Prisma Health–Midlands for over 22 years and has provided over $60 million in direct support through the Tithe (Exhibit 5 attached hereto), in addition to providing a myriad of healthcare benefits to the community including health screenings and health educational programs.

As we will describe in further detail, the community benefits of the Transaction fall into three primary categories:

- Increased Quality
- Improved Access to Care
- Lower Costs

In addition to the community benefits, we believe the Transaction will have little to no effect on the competitive landscape in the COPA Service Area. If you believe that you need any further information in order to evaluate our proposed transaction, please let us know immediately and we will respond.

---

[2] SC Code Ann. Regs 61-31 (1995) Section 101 Purpose:

> These Regulations implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers, which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition.
>
> This is encouraged because the cost of improved technology and scientific methods contribute significantly to the increasing cost of health care; and cooperative agreements among hospitals, health care purchasers, and other health care providers will foster improvements in the quality of health care for South Carolinians.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS

EXHIBIT 11

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District, d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Prisma Health-Midlands, Respondents.	Docket No. 20-ALJ-07-0108-CC **PETITIONER'S PREHEARING STATEMENT**

Petitioner Lexington County Health Services District, d/b/a Lexington Medical Center (LMC), submits the following Prehearing Statement pursuant to the June 22, 2020 Order of the Court.

1. **The nature of this proceeding.**

This contested case proceeding arises from the Respondent South Carolina Department of Health and Environmental Control's (DHEC or the Department) decision dated February 28, 2020, directed to Respondent Prisma Health – Midlands (PHM) and purporting to amend the ongoing conditions of an existing Certificate of Public Advantage (COPA) originally issued to Baptist Healthcare System of South Carolina, Inc. (BHS), and Richland Memorial Hospital (RMH), on October 6, 1997 ("COPA-97-01"), in order to include PHM's proposed acquisition of acute care facilities owned and operated by LifePoint Health (LPNT), a separate healthcare provider operating in the same service area as LMC and PHM. According to DHEC's decision, the assets PHM seeks to acquire from LPNT include Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department (FED) in Fairfield County operating under HTL-0929. On May 20, 2020, contested case

challenges to DHEC's decision were also filed by Fairfield County and Fairfield County Memorial Hospital (Fairfield County), assigned Docket No. 20-ALJ-07-0120-CC, Kershaw County (Kershaw County), assigned Docket No. 20-ALJ-07-0120-CC, and the City of Columbia, assigned Docket No. 20-ALJ-07-0122-CC. On June 4, 2020, PHM moved with the consent of all parties to consolidate this proceeding with the contested cases filed by Fairfield County, Kershaw County and the City of Columbia. Shortly thereafter, PHM withdrew its motion to consolidate as the contested cases filed by Fairfield County, Kershaw County and the City of Columbia were each separately dismissed. On June 19, 2020, PHM filed a Motion to Expedite, which is now pending before the Court.

2. **The statutory provision (s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.**

The Administrative Law Court has jurisdiction over this contested case pursuant to S.C. Const. Art. I, § 22; the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.* and 1-23-505, *et seq.*; the Health Care Cooperation Act (HCCA or the Act), S.C. Code Ann. §§ 44-7-500, *et seq.*; S.C. Code Ann. Regs. 61-31 § 311; and Rule 11 of the Rules of Procedure for the Administrative Law Court, as well as other applicable laws, such as S.C. Code Ann. §§ 44-1-60 and 1-23-600.

3. **The issues to be presented for determination set forth with particularity, including any claims or defenses expected to be raised.**

Reserving the right to supplement or amend this Prehearing Statement as the facts are developed through discovery, LMC anticipates the following issues will be presented for determination by the Court, described herein with particularity:

LMC submits that DHEC does not have the authority to "update" or "amend" the ongoing conditions of COPA-97-01, originally issued to BSH and RMH on October 6, 1997, in order to

include PHM's proposed acquisition[1] of LPNT's assets. By the plain language of the HCCA, PHM and LPNT are each "health care providers" under Section 44-7-510(5) and the proposed transaction identified in DHEC's decision represents a "cooperative agreement" under Section 44-7-510(3), such that if PHM (and/or Prisma Health) desires the benefits of a COPA to apply to the "acquisition . . . of assets," DHEC is required to review the proposed transaction in accordance with the requirements of the HCCA prior to any COPA benefits being afforded, to include the submission of an application by the applicants in accordance with Section 44-7-530 and participation in the review process set forth in Sections 44-7-540, -550 and -560, as well as Chapters 2, 3 and 4 of Regulation 61-31. DHEC also has an obligation to affirmatively "determine[] that the applicant has demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement; and the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result." S.C. Code Ann. Regs. 61-15 § 401. As there is no evidence of an application received by DHEC, a review conducted by DHEC, or a determination that the likely benefits outweigh the likely disadvantages in accordance with these legal requirements, DHEC lacked the authority to approve the proposed transaction by way of additional conditions to COPA-97-01.

Furthermore, even if DHEC has the authority to update or amend the ongoing conditions as represented in DHEC's decision letter without the necessary finding as to benefits and disadvantages, DHEC's interpretation of Regulation 61-31 § 508 that "another review" of the COPA does not require the review process set forth in the HCCA or Regulation 61-31 is contrary to the plain language of the regulation and manifestly at odds with the legislative intent. DHEC's interpretation of Section 508 in

[1] By attachment to its Reply to LMC's Opposition to PHM's Motion to Expedite, for the first time on July 6, 2020, PHM provided a copy of the letter of intent ("LOI") underlying the proposed acquisition. According to the LOI dated September 13, 2019 and the amendments through Amendment No. 4 dated January 31, 2020, the "Buyer" of the LPNT facilities is "Prisma Health," principally located in Greenville, SC, not PHM. To the extent that PHM is not the entity acquiring the assets within the meaning of the HCCA, but instead the transaction is explicitly or for all practical purposes between Prisma Health and LPNT, DHEC cannot address the proposed transaction through amendment or update to COPA-97-01 issued to BSH and RMH in 1997.

this matter of first impression in fact necessitates a finding that the regulation fails for vagueness and must be struck down as exceeding DHEC's powers under the HCCA. *See S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). While DHEC is empowered to promulgate regulations "to implement the provisions" of the HCCA, nothing within the HCCA contemplates DHEC's authority to review or approve cooperative agreements in a manner contrary to the law (such as without a public review, input from affected persons, or consultation with the Attorney General, and without submission of an application with an executed written copy of the cooperative agreement). *See* S.C. Code Ann. §§ 44-7-530 to -570. For these reasons, as will be further developed during discovery, DHEC's decision must be reversed or, in the alternative, the matter remanded to DHEC for "another review" in accordance with the HCCA and Regulation 61-31.

4. **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations.**

LMC respectfully requests that this Court reverse the decision of DHEC and deny PHM's request, or remand this matter back to DHEC with instructions to engage in the review process established by the HCCA. "As a creature of statute, [DHEC] has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control*, 363 S.C. at 74, 610 S.E.2d at 485 (internal quotations omitted). DHEC's authority to issue a COPA is limited to those cooperative agreements for which DHEC has reviewed an application with the substantive supporting documentation necessary to demonstrate that the potential benefits of the proposed cooperative agreement outweigh any potential disadvantages caused by the reduction in competition. *See* S.C. Code Ann. §§ 44-7-510, -530, -540, -550; -560; *see also*, S.C. Code Ann. Regs. 61-31 §§ 201, 202, 301, 302, 305, 306, 307, 401, 402, 403, 404. DHEC may only issue a

COPA after it determines, with notice to affected persons and in consultation with the Attorney General, that the applicants have demonstrated the likely benefits such as enhanced quality, improved access, preservation of providers, utilization, or cost-efficiency of health care from the cooperative agreement outweighs any likely disadvantages associated with the agreement such as reduced competition and impact on quality and availability of services. *See* S.C. Code Ann. § 44-7-560; *see also* S.C. Code Ann. Regs. 61-31 § 401. The Act expressly requires that DHEC "shall consider . . . support of the agreement by purchasers and payers in the health service area." *See* S.C. Code Ann. § 44-7-560(A)(1)(vii); *see also* S.C Code Ann. Regs. 61-31 § 402.1(g).

Conversely, DHEC does not have the authority to issue a COPA for a proposed transaction where the applicant has not "demonstrated that the likely benefits resulting from the [transaction] outweigh the likely disadvantages from the [transaction]; and the reduction in competition likely to result from the [transaction] is reasonably necessary to obtain the benefits likely to result." S.C. Code Ann. Regs. 61-31 § 401. While there are no administrative or judicial opinions addressing the merits of a Department decision to approve or deny a COPA application, there have been issued a plethora of analogous decisions evaluating DHEC's approval or denial of applications for certificates of need, which demonstrate the obvious conclusion that a Department decision approving a non-compliant application must be reversed. *See e.g., Roper Hosp. Inc. et al. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 01-ALJ-07-0378-CC, 2002 WL 31423787 (S.C. Admin. Law J. Div. Sept. 5, 2002).

When interpreting regulations, the South Carolina Supreme Court has observed that regulations are construed using the same canons of construction as statutes. *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012); *see also Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). As

such, "[t]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation operation." *Blue Moon of Newberry, supra.* "Furthermore, the regulation must be construed as a whole rather than read in its component parts in isolation." *Id.* A court "will not construe a [regulation] in a way which leads to an absurd result or renders it meaningless." *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). While courts generally defer to an agency's interpretation of a statute or regulation with which the agency is charged with administering, where the agency's interpretation is "manifestly at odds with legislative intent," the court should conclude that "the deference [it may] normally accord an agency's policy determinations is not warranted." *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 392 S.C. 314, 322, 709 S.E.2d 626, 620 (2011). Similarly, an interpretation that is contrary to the plain language should be rejected. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

Again in the analogous context of certificates of need, the South Carolina Supreme Court has observed that DHEC has formulated "exacting procedural requirements" governing the submission, review, and appeal procedures for CON applications. *See Amisub of South Carolina, Inc. v. S.C. Dept. of Health and Envtl. Control*, 403 S.C. 576, 590, 743 S.E.2d 786, 794 (2013); *see also* S.C. Code Ann. § 44-7-120(2) *and* S.C. Code Ann. Regs. 61-15 § 307(1). Exacting procedural requirements in the law are not to be ignored, even if the end objectives of the regulation are believed to be satisfied. *See Sierra Club v. S.C. Dept. of Health and Envtl. Control*, 426 S.C. 236, 256, 826 S.E.2d 595, 606 (2019). The "exacting procedural requirements" governing the submission, review, and appeal procedures for CON applications are quite similar to those set forth for COPA applications. For example, both regulations promulgated by DHEC include explicit

format requirements for the written application submission for a CON and a COPA, with four separate sections for the Part A, Part B, Part C and Part D information. *See* S.C. Code Ann. Regs. 61-15 § 202 and 61-31 §§ 201-202. Also similar are the "Disposition of Application" provisions in both the CON Regulation 61-15 and the COPA Regulation 61-31, both of which include procedural requirements for additional information, public notice and opportunity for public hearing, and the following nearly identical obligation as to the "Department Decision":

In CON Regulation 61-15 § 308:

> On the basis of staff review of the record established by the Department, including but not limited to, the application, comments from affected persons and other persons concerning the application, data, studies, literature and other information available to the Department, the staff of the Department shall make a proposed decision to grant or deny the Certificate of Need.

In COPA Regulation 61-31 § 307:

> On the basis of staff review of the record established by the Department, including but not limited to comments from the Attorney General's office, the application, written and verbal comments by affected persons and other persons concerning the application, data studies, literature and other information available to the Department, the staff of the Department shall make a proposed decision to grant or deny the Certificate of Public Advantage. . . .

Despite similar (in fact, more extensive) "exacting procedural requirements" that must be followed in order to receive the benefits of a COPA, in this instance, DHEC did not require PHM to comply with the "exacting procedural requirements" of Regulation 61-31. Instead, DHEC was "persuaded" to evaluate the proposed transaction as if a change to the originally issued COPA-97-01, and interpreted "another review" under Regulation 61-31 § 508 to mean something entirely contrary to the legal requirements addressed above.

The Department's apparent approval of the proposed transaction without receipt and review of the required documentation or participation in the applicable public review process, coupled with its finding "that the proposed changes resulting [from PHM's acquisition of three

hospitals and a FED] might materially impact the benefits or disadvantages to the community to be served" but without determining the likely benefits outweigh the likely disadvantages, constituted a reckless disregard of the duties placed on the Department by the General Assembly. As in performance of its duties in implementing the CON program, DHEC should "use common practice and common sense" in applying the COPA Regulations in review of proposed transactions. *See e.g. MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 292 S.C. 314, 319, 709 S.E.2d 626, 629 (2011) (quotations omitted). In *MRI at Belfair*, the Supreme Court held "DHEC must not allow a potential CON applicant to avoid the CON process based on an arbitrary factor." *Id.* In that proceeding, the Department's method for allocating project costs for an imaging center for purposes of a non-applicability determination "was affected by an arbitrary factor that strayed substantially from legislative intent and worked substantial prejudice to [the applicant's] competitors." *Id.* at 321, 709 S.E.2d at 630. LMC submits that similarly here, DHEC has allowed PHM to avoid the COPA process based on an arbitrary factor – the one-sided, self-interested allegations of the applicant – which resulted in a process and outcome that "strayed substantially from legislative intent and worked substantial prejudice to [affected persons]." *See id.* Because there is no evidence PHM followed the "exacting procedural requirements" of Regulation 61-31, to include submission of the necessary application with responses to the questionnaire, submission of programmatic documents, or even written assurance as required by Section 202(d) of Regulation 61-31, DHEC could not have (and LMC and this Court cannot now) evaluate <u>any</u> potential benefits to the proposed transaction as necessary to outweigh the apparent disadvantages and the Department's decision must be reversed.[2]

[2] In significant contrast, just the narrative portion of the application submitted by RMH and BHS in 1996 in accordance with Regulation 61-31, which culminated in the issuance of COPA-97-01, spanned 79 pages. Attached as **Exhibit A** is the cover page, table of contents and application summary for COPA-97-01.

Alternatively, should the Court believe the existing COPA issued to RMH and BHS can be amended to address the LPNT transaction, the matter must at a minimum be remanded to DHEC with the instruction that DHEC engage in the review process necessary to evaluate the "amendment" sought by PHM of the existing COPA, which review cannot solely consist of the self-interested opinions of the applicant that stands to benefit from the approval. Once issued, a COPA "is only valid for the project described in the application including parties involved, services to be offered, mergers or consolidations approved, or other factors as set forth in the application, except as may be modified in accordance with these regulations." S.C. Code Ann. Regs. 61-31 § 309. As further proscribed by regulation, "[i]f an applicant amends, alters, or otherwise changes the agreement after receipt of a [COPA], the Department will decide whether or not the amendment is substantial and thereby requires another review." *Id.* at § 508. It is undisputed that DHEC determined the transaction proposed by PHM, to the extent disclosed to DHEC by PHM,[3] was a "substantial" change to the COPA issued to RMH and BHS. *See* DHEC decision, p. 1 ("[T]he Department determined that the proposed changes resulting from the transaction might materially impact the benefit or disadvantages to the community to be served. The Department therefore undertook another review of the COPA.") DHEC's interpretation of Regulation 61-15 § 508 to allow for the inadequate and incomplete review that occurred here is manifestly erroneous and contrary to the plain meaning of Section 508. Where parties desire the benefit of a COPA, such request to DHEC must be in an application, and the General Assembly has instructed that DHEC "**shall review** the application in accordance with the standards set forth

[3] It does not appear from the documents produced to LMC in response to a FOIA request that DHEC was provided all of the documentation necessary under the HCCA for review and approval of a cooperative agreement. At a minimum, and by statute, PHM is required to provide "an executed written copy of the cooperative agreement and describe the nature and scope of the cooperation in the agreement and any monetary or other consideration passing to a party under the agreement . . . ." S.C. Code Ann. § 44-7-530. The significance of this required disclosure is evidenced by the Department's separate statutory obligation to "maintain on file all cooperative agreements for which certificates of public advantage remain in effect." S.C. Code Ann. § 44-7-580.

in Section 44-7-560 and if requested by an affected person within thirty days of the department's receipt of a completed application, may hold a public hearing in accordance with regulations promulgated by the department." S.C. Code Ann. § 44-7-540 (emphasis added). By interpreting Section 508 to allow for something other than the review process set forth in the HCCA and Regulation 61-31, DHEC "denied contemporaneous notice and participation opportunities that DHEC's own regulations required be provided to both the public and [affected persons]." *Pickens Cty. v. S.C. Dept. of Health and Envtl. Control*, 429 S.C. 92, 105, 837 S.E.2d 743, 750 (Ct. App. Jan. 8, 2020), *reh'g denied.* Based on the foregoing, LMC submits that reversal of the DHEC decision is appropriate, or that the matter must be remanded to DHEC for an appropriate review in accordance with the law.

5. **A brief summary of the facts to be presented at the hearing.**

LMC will present fact and expert testimony and documentary evidence demonstrating that the Department's decision violates the HCCA and Regulation 61-31 in the particulars described in Sections (3) and (4) above. In acquiescing to PHM's demands for a limited and one-sided review without the submission of an application and the substantive documentation required by Regulation 61-31, DHEC did not develop the record necessary to reasonably evaluate the benefits and disadvantages that will result from combining the only providers of acute and emergency care services in Richland, Kershaw, Fairfield and Sumter Counties.[4] *See* S.C. Code Ann. Regs. 61-31 §§ 307, 401, 402, 403. In fact, Regulation 61-31 specifically requires DHEC to consider "written and verbal comments by affected persons and other persons concerning the application." S.C. Code Ann. Regs. 61-31 § 307. Rather than a robust, detailed, and transparent review process, the

[4] Notably, the COPA application and subsequent submissions in support of BHS and RMH's request for a COPA in 1996 were *replete* with references to both LMC and "Columbia/HCA hospitals" as existing competitors in the core service area that militated against any disadvantage from the combination of BHS and RMH. *See e.g.* Ex. A at 0008; *see also* **Exhibit B**, Section II (Evaluation of Disadvantages) portion of the application for COPA-97-01.

Department inexplicably "conducted a review without public notice or hearing" based only on the "persuasive" writings of PHM and its representations as to the benefits of the transactions and dire consequences should the Department's conduct not comport with the demands made by PHM. *See* Staff Response to RFR at p. 5 ("PHM represented to the Department that the seller of the assets would not proceed with the proposed transaction if the review included public notice and review and provided information to the Department regarding the potential consequences if the transaction were not consummated.") By acquiescing to PHM's demands, DHEC has impermissibly made "the [COPA] process vulnerable to manipulation." *See MRI at Belfair, LLC*, 392 S.C. at 322, 709 S.E.2d at 630 (reversing DHEC decision based on a cost allocation methodology with "no basis in the facts of the proposal and arbitrarily allows a potential applicant to avoid the CON review process, is contrary to the purposes of the CON Act and therefore an error of law.")

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.**

LMC believes the parties should confer on a Consent Scheduling Order and enter an appropriate Confidentiality Order for the protection of sensitive information without need for motion practice. LMC reserves the right to file a dispositive motion in the event it is determined to be appropriate under the facts and law applicable to the case.

7. **A list of proposed witnesses and exhibits.**

As to proposed witnesses, and in addition to those witnesses identified by any other party to this proceeding, LMC intends to present factual and/or expert testimony from the following individuals:

- Tod Augsburger
  President and Chief Executive Officer
  Lexington Medical Center

- Armand Balsano
  Balsano Consulting, LLC

- Louis Eubank
  Chief, Bureau of Healthcare Planning & Construction
  SC DHEC

- Margaret Murdock, Esq.
  Director, Division of CON
  SC DHEC

- Mark O'Halla
  President and Chief Executive Officer
  Prisma Health

- Malcolm Isley
  Vice President of Strategic Services
  Prisma Health

LMC specifically and expressly reserves the right to identify additional witnesses, fact and/or expert, as discovery in this proceeding progresses and in response to disclosures made by other parties.

As to proposed exhibits, and in addition to the right to refer to and introduce as evidence any documents identified by any party to this proceeding, and to introduce documents gathered during the discovery period, LMC identifies the following documents as potential exhibits at the final hearing:

- The Department's Record underlying the February 28, 2020 decision;

- The Department's Record for COPA-97-01;

- The DHEC Staff Response to Request for Review; and

- Any other evidence produced and/or obtained during discovery that may be relevant to the subject matter of this proceeding.

8. **A statement regarding the necessity for discovery, if any.**

LMC believes discovery as allowed by SCALC Rule 21(A) is necessary and, given the novelty and significance of the issues before this Court, good cause exists for the expansion of discovery as provided by the Rules of the Court.

9. **The estimated length of the hearing.**

LMC estimates the hearing will require 4-5 days.

10. **Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.**

LMC will confer with counsel of record in an effort to reach an agreeable Scheduling Order to allow for an orderly progression of this case. In the next 120 days, counsel for LMC is unavailable for a hearing on July 23, 24 and August 10, and is currently under a Scheduling Order for a contested case hearing set for October 12-21, 2020.

11. **An e-mail address where you can be reached:**

Kelly M. Jolley: kjolley@jolleylawgroup.com

Ariail B. Kirk: akirk@jolleylawgroup.com

Jennifer J. Hollingsworth: jhollingsworth@nexsenpruet.com

Shannon V. Lipham svlipham@nexsenpruet.com

With courtesy copy to: visherwood@nexsenpruet.com

lsmith@nexsenpruet.com

[Signature page follows]

Respectfully submitted,

Jennifer J. Hollingsworth
jhollingsworth@nexsenpruet.com
Shannon V. Lipham
svlipham@nexsenpruet.com
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803)540-2112
(803)727-1446 (fax)

Kelly M. Jolley
kjolley@jolleylawgroup.com
Ariail B. Kirk
akirk@jolleylawgroup.com
JOLLEY LAW GROUP, LLC
Post Office Box 50529
Columbia, SC 29250
(803) 830-6500
(877) 668-1766 (fax)

Counsel for Petitioner Lexington County Health Services District, d/b/a Lexington Medical Center

July 13, 2020
Columbia, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District, d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Prisma Health-Midlands, Respondents.	Docket No. 20-ALJ-07-0108-CC **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Petitioner's Prehearing Statement** has been served upon all counsel of record by electronic mail and U.S. Mail, addressed as shown below, this 13 day of July, 2020:

M. Elizabeth Crum, Esquire
Celeste T. Jones, Esquire
Pamela A. Baker, Esquire
Burr & Forman, LLP
1221 Main Street, Suite 1800
P.O. Box 11390
Columbia, South Carolina 29201
Email: LCrum@burr.com
Email: CTJones@burr.com
Email: PBaker@burr.com

Attorneys for Respondent, Prisma Health-Midlands

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
Email: Biggerac@dhec.sc.gov
Email: Wicevivm@dhec.sc.gov

Attorneys for Respondent, South Carolina Department of Health & Environmental Control

Debbie Warford

NEXSEN PRUET, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 12

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District, d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Prisma Health-Midlands, Respondents.	Docket No. 20-ALJ-07-0108-CC **PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT**

TO: ATTORNEYS FOR RESPONDENTS, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND PRISMA HEALTH-MIDLANDS:

Pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, Petitioner, Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC), hereby submits this Response in Opposition to the Motion for Summary Judgment filed by Respondent Prisma Health-Midlands (PHM), and further moves this Court to grant summary judgment in favor of Petitioner on the issues raised herein because no genuine issue exists as to any material fact, and Petitioner is entitled to judgment as a matter of law on those issues. In opposition to PHM's Motion and in support of this Motion for Summary Judgment, Petitioner submits the following:

BACKGROUND

On or about October 23, 1996, Baptist Healthcare System of South Carolina, Inc. (BHS) and Richland Memorial Hospital (RMH) submitted an application for a Certificate of Public Advantage (COPA) to Respondent South Carolina Department of Health and Environmental Control (DHEC or Department) for approval of a cooperative agreement whereby BHS and RMH would be jointly operated as a single unit by a newly formed nonprofit entity: BR Health System,

Inc. (BR Health). (DHEC FOIA 0016)[1]. According to the COPA application, the competitive landscape within which BHS and RMH proposed to merge included "LMC and Columbia/HCA hospitals, as well as other hospitals, in the [] core service area." (DHEC FOIA 0008, 0062-65). Following a public review process that included participation by affected persons and the Attorney General, as well as a public hearing, DHEC issued a decision on May 8, 1997 to approve the application for the COPA (DHEC FOIA 1253-1259), and COPA-97-01 was ultimately issued to BR Health on October 6, 1997 (DHEC FOIA 1408). As provided in the May 8, 1997 decision, COPA-97-01 is subject to 25 enumerated conditions, which are preceded by two explicit findings of the Department, *to wit*:

> The decision to approve the Certificate of Public Advantage is based on the following reasons:
>
> (1) The Department has determined that the applicant has demonstrated that the likely benefits resulting from the cooperative agreement outweigh the likely disadvantages from the cooperative agreement; and
>
> (2) The Department has determined the reduction in competition likely to result from the cooperative agreement is reasonably necessary to obtain the benefits likely to result.

(DHEC FOIA 1253-59).

This contested case proceeding arises from DHEC's decision dated February 28, 2020, purporting to amend COPA-97-01 with additional conditions in order to include PHM's proposed acquisition of acute care facilities owned by LifePoint Health (LPNT), a separate healthcare provider operating in the same service area as LMC and PHM (the "DHEC Decision"). According to the DHEC Decision, which is attached as *Exhibit A* to LMC's Request for Contested Case Hearing, the assets PHM seeks to acquire from LPNT include Providence Health (HTL-0928),

[1] The documents produced by DHEC pursuant to LMC's FOIA request prior to commencement of this contested case proceeding are identified by the Bates label "DHEC FOIA ____" and referenced excerpts are provided in numerical order at **Exhibit A**.

Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department (FED) in Fairfield County operating under HTL-0929. As will be further discussed herein, and unlike DHEC's review of the BSH and RMH COPA application, there was no public notice of the Department's receipt and review of the proposed "amendment" and no opportunity for affected person participation or public hearing prior to the DHEC Decision.

By decision dated April 21, 2020, the DHEC Board declined Requests for Final Review Conference filed by LMC, the City of Columbia, Fairfield County and Fairfield Memorial Hospital, and Kershaw County. LMC thereafter commenced this proceeding by Request for Contested Case Hearing filed May 14, 2020.[2] On June 14, 2020, PHM filed a Motion to Expedite, which was denied by Order dated July 14, 2020. Also on July 14, 2020, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, and Providence Health Fairfield (Providence Hospitals) and Kershaw Hospital, LLC d/b/a KershawHealth Medical Center (Kershaw Hospital) submitted a Motion for Leave to Intervene as Respondents, which the Court granted subject to certain limitations on September 4, 2020.

The parties are engaged in written discovery and LMC is currently awaiting DHEC's written responses and production of documents pursuant to LMC's First Requests to Produce Documents served on June 25, 2020, as well as documents that are still outstanding and due from PHM in response to discovery served that same date. PHM served written discovery to LMC on August 14 and 18, 2020, and LMC is timely in its responses. The contested case is currently set to be heard January 11-14, 2021.

On August 28, 2020, PHM served a Notice of Motion and Motion for Summary Judgment asserting that there are "three issues that are strictly matters of statutory interpretation, no

[2] The three remaining entities that were denied final review by the DHEC Board also filed requests for contested case hearings in this Court, but those matters were subsequently withdrawn with consent of DHEC and PHM.

additional discovery is necessary to address them, and there are no disputed issues of material fact relevant to them." PHM Mot. Summ. J., p. 1. For the reasons described in detail below, PHM's Motion must be denied, and LMC is entitled to judgment in its favor as a matter of law on those issues identified herein.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011). "[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP. "'[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.'" *Bell v. Progressive Direct, Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (quoting *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross Blue Shield of S.C., Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002) (reversing summary judgment that operated to deprive plaintiff of full and fair discovery and trial of disputed factual issues). Instead, "[s]ummary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). As to the issues on which LMC seeks summary judgment, there are no genuine issues of material fact in dispute to the knowledge of LMC from

the documents made available to date. *See Matsell*, 393 S.C. at 70, 710 S.E. 2d at 93; *see also Town of Hollywood v. Floyd*, 403 S.C. 466, 478, 744 S.E.2d 161, 167 (2013) (upholding summary judgment where zoning administrator had no lawful authority to approve subdivision plats); *Palmetto Princess, LLC v. Georgetown County*, 369 S.C. 34, 38, 631 S.E.2d 68, 70 (2006) (upholding summary judgment where county lacked legal authority to enact ordinances prohibiting gambling cruises).

ARGUMENTS

I. DISPUTED AND INCOMPLETE FACTUAL BACKGROUND

A. History of COPA-97-01

Before addressing the legal grounds as identified by PHM's Motion, there are several representations in the Motion's Background that are disputed as facts or lack support in the record. With regard to the public review process required by the Health Care Cooperation Act, S.C. Code Ann. §§ 44-7-500, *et seq.* (the COPA Act), LMC participated as an "affected person" during DHEC's review of the COPA application, as did dozens of citizens, businesses and other providers interested in and affected by the proposed combination of BHS and RMH. (DHEC FOIA 1012-1014, 1016-1027, 1038, 1136, 1140, 1150). This participation was made possible by DHEC's notification to the public in the November 22, 1996 State Register of its receipt of a COPA application.[3] (DHEC FOIA 0963-965). As explained at that time by DHEC to an interested person inquiring about the public hearing, "[t]he overriding issue is whether the benefits of the proposed merger outweigh the disadvantages caused by their potential adverse effects on competition." (DHEC FOIA 1061). LMC also attended the public hearing held on March 10, 1997 (DHEC FOIA

[3] The public was also notified that the COPA application was deemed complete for review by notices published December 25, 26, and 27, 1996, in The State Newspaper, and notified in advance of the public hearing. (DHEC FOIA 1010, 1068).

1204-1215), and submitted the letter provided as *Ex. 2* to PHM's Motion outlining concerns with the proposed combination. Contrary to PHM's allegation, DHEC did not "impose[] each condition requested by LMC as part of the conditions of the COPA-97-01" (PHM Mot. Summ. J., p. 3), although the issues raised by LMC bear similarity to the conditions numbered 10, 15, 16 and 17. (DHEC FOIA 1247-1249). As demonstrated by the documents in DHEC's file, there was significant public participation and input, and the conditions ultimately imposed by DHEC were understandably meant to touch on a myriad of concerns received from a variety of affected persons.

In addition to the breadth of public participation, PHM's Background fails to address the participation of the South Carolina Attorney General (AG) during DHEC's review of the COPA application. On receipt of the COPA application, DHEC notified the AG of the submission in accordance with Section 44-7-550(A) of the COPA Act and "request[ed] that [he] conduct a thorough review of the application so that any issues [he] may have can be addressed by the department." (DHEC FOIA 0961). DHEC followed up by letter of November 12, 1996, reminding the AG of the timing by which DHEC must notify the applicants of additional information requested pursuant to the COPA Act and Regulation 61-31. (DHEC FOIA 0962). Additional communications between DHEC and the AG's Office are included at DHEC FOIA 0967-969, 977, 986. The AG provided a substantive response to DHEC by letter dated January 22, 1997, including an Executive Summary that "itemizes the areas of concern that have been brought to [AG Condon's] attention" and that he "would advise DHEC to resolve the issues raised in the [Executive Summary] prior to making a final approval in reference to this merger." (DHEC FOIA 1028-1031). On March 12, 1997, DHEC provided the AG with additional information regarding the COPA application and sought his "advice as to whether or not all of this additional information that has been submitted satisfies your concerns that you pointed out in your recommendation to

this Department." (DHEC FOIA 1218). The record demonstrates DHEC provided for the participation and input[4] of the AG from the date the COPA application was submitted through the date of DHEC's decision to approve the application.[5]

Finally, PHM's Motion briefly mentions the affiliation between Upstate Affiliate Organization d/b/a Greenville Health System (GHS) and Palmetto Health Alliance, resulting in the formation of Prisma Health and renaming of Palmetto Health Alliance to PHM. *See* PHM Mot. Summ. J., p. 4. PHM's claim that "the Department confirmed that the affiliation did not implicate COPA-97-01 and that the COPA would remain in effect and binding" is more accurately described as DHEC's "agreement" with an analysis submitted by PHM regarding the proposed affiliation. *Id.* This is because the only document evidencing any analysis or discussion of the proposed affiliation and the existing COPA is PHM's, which concluded, "[t]he transaction contemplated by the Agreement does not change Palmetto Health's provision of services or the service area described by the COPA that Palmetto Health and the Department entered into pursuant to S.C. Code Ann. § 44-7-330. S.C. Code Ann. § 44-7-510, et seq. is not implicated by the transaction." (DHEC FOIA 2032-2035). Other than an e-mail from DHEC to PHM stating its agreement with the letter (in response to multiple prompts from PHM), there is no evidence of an independent determination by DHEC of the impact, if any, of the Prisma affiliation on COPA-97-01. (DHEC FOIA 2032-2039). Thus, LMC disputes any suggestion as fact that DHEC made an independent

[4] Interestingly, DHEC also requested the AG's approval to hire an out-of-state attorney to assist with review of the COPA application, because the "review will require expertise in legal, financial, health care, and antitrust matters which is not currently possessed by Department staff" and that while DHEC "would greater prefer to use in-state legal counsel to assist [them] in the early stages and in developing this expertise, [DHEC is] not aware of any in-state attorney who has the require expertise and is not barred by a conflict due to representing one of the parties which will be filing an application." (DHEC FOIA 0958-960).

[5] Indeed, a File Memorandum dated May 9, 1997, memorializes a meeting between DHEC and representatives of the AG during which the COPA conditions were individually reviewed to ensure the AG's concerns were addressed, and in conclusion then-Director of DHEC's Health Facilities and Services wrote, "in future COPA reviews, the Attorney General or his representative was welcome to participate in developing the conditions, sit at the table during meetings with the applicant, and otherwise be a partner with the Department in developing our decision." (DHEC FOIA 1311).

determination of the impact of the Prisma affiliation on COPA-97-01.

B. Pending Transaction

PHM's discussion of the pending transaction is replete with unverified facts, intermittently sourced to affidavit testimony obtained to support unrelated motions and self-selected, highly redacted excerpts from transaction documents exchanged between Prisma Health and LifePoint Health. Despite that many of the representations are unverifiable at this preliminary stage of the contested case, particularly given the relevant, responsive documents that have not yet been produced by DHEC or PHM in discovery[6], what is significant is PHM's description in the Motion of its request to DHEC "[b]efore executing the APA" that led to the DHEC Decision, which were:

(1) To approve PHM's acquisition of the LifePoint Health Assets;

(2) To amend COPA-97-01 to include the LifePoint Health Assets; and

(3) To acknowledge DHEC would "monitor the LPNT Assets under COPA-97-01 and that it would make such updates and modification to COPA-97-01 as the Department deemed necessary in light of the amendment to include the LPNT Assets."

See PHM Mot. Summ. J., p. 5. PHM represents that "the Department later sought and obtained additional information from PHM," but LMC is not aware of nor received through FOIA or in discovery any documents evidencing a request for additional information from DHEC. *See id.*

Unlike the AG's participation during DHEC's review of BHS and RMH's COPA application in late 1996 and early 1997, it does not appear from the record that the AG's input was solicited to review the proposed change to COPA-97-01 prior to DHEC's Decision, but instead the AG's Office was engaged a few days prior to the Decision date to provide an advisory opinion on the deference a reviewing body may give to DHEC's interpretation of Regulation 61-31. In addition to Mr. Taylor's February 20, 2020 letter requesting the advisory opinion (*Ex. 11* to PHM's

[6] *See* Affidavit of Armand Balsano, ¶ 7 (attached as **Exhibit B**) (herein "Balsano Aff.").

Motion), Solicitor General Robert Cook received a detailed analysis from PHM detailing a legal framework for answering DHEC's question, and at least one private conversation took place between Mr. Cook, DHEC, PHM and its counsel prior to the opinion's issuance. (DHEC FOIA 2350-2355; *see also* PHM_00329-332 at **Exhibit C**.

It is unclear whether Mr. Cook was also given the Memorandum detailing "Prisma-Health Midlands[']s interpretation of sec. 508" that was provided to DHEC on February 6, 2020, which described a legal framework for evaluating whether the proposed transaction was a "substantial" change under Regulation 61-31. (DHEC FOIA 2341-2349). This Memorandum is significant in several respects, including the express incorporation of the Certification of Need and Health Facilities Licensure Act (the CON Act) as being the other (along with the COPA Act) of "two of the major programs that DHEC administers in promoting and protecting the public health." *Id.* at 2344. According to PHM, "[s]ince this Transaction involves the purchase of health care facilities, DHEC must also consider the purposes of the CON Act." *Id.* The Memorandum is also notable in that, at least as of February 6, 2020, PHM's analysis was that "Section 508 [of Regulation 61-31] clearly authorized DHEC to approve changes to the COPA Agreement conditions *without another review unless DHEC considers the change to be substantial*." (DHEC FOIA 2345 (emphasis added)).

It is undisputed that DHEC found the transaction proposed by PHM "might materially impact the benefits or disadvantages to the community to be served," *i.e.*, the change proposed by PHM to COPA-97-01 was substantial. DHEC Decision, p. 1; *see also* DHEC's Answers to LMC's Req. for Admis. No. 1 (attached as **Exhibit D**); Balsano Aff. ¶ 9. According to the DHEC Staff Response to the Requests for Final Review, "[i]nformation contained in a February 2020 submission, while propriety, was persuasive to the Department in conducting its review pursuant

to Section 508 without a public notice or comment period." DHEC Staff Resp. to RFR at p. 5, *Ex. C* to LMC's Req. for Contested Case. What is evidenced by the Department's record received through FOIA, and PHM's partial discovery production, is that the review that took place was dominated and directed by PHM in all facets – before, during, and after the reviewing bodies had the issues before them.[7] Thus, LMC disputes any representation of fact suggesting DHEC's review was independent under the facts and circumstances revealed to date. *See Lanham*, 349 S.C. at 362-63, 563 S.E.2d at 334 (finding error in grant of summary judgment to insurer without first ruling on discovery motions challenging insurer's refusal to produce documents asserting trade secret protections).

II. RESPONSE IN OPPOSITION TO PHM'S MOTION

A. Historical Context to Antitrust Immunity and Purpose of the COPA Act

As a threshold matter, PHM's discussion of antitrust immunity and the state action doctrine is notably incomplete. *See* PHM Mot. Summ. J., pp. 7-8. While neither the parties nor the Court need venture into a subject matter as complex as federal oversight of anticompetitive activities in order to resolve the issues presented by these Motions, the implication that immunity from federal antitrust laws for transactions involving competing health care providers is a foregone conclusion following the General Assembly's adoption of the COPA Act is misguided. In fact, in *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), the United States Supreme Court expressly rejected a holding "that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision." *Id.* at 631-32. The significance of the Supreme Court's discussion is highly relevant here:

[7] Additional documents demonstrating contacts by PHM with the AG, DHEC staff, and the DHEC Board are included at **Exhibit C** (PHM_0000521-522; 812, 1728, 1731, 1734-1735, 1745). Most concerning is the control exercised by PHM over the "additional conditions" identified in the DHEC Decision, with PHM in multiple respects rejecting conditions DHEC sought to impose to address the proposed transaction. (DHEC FOIA 2411-2436).

> Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.

Ticor Title Ins., 504 U.S. at 634-35; *see also N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494, 505 (2015) (explaining "active market participants cannot be allowed to regulate their own markets free from antitrust accountability"). Thus, the analysis adopted by the United States Supreme Court requires the active participation by state actors and their exercise of independent judgment and analysis[8] before an implication of immunity under federal antitrust law could even arise, not just the specter of oversight which is the most DHEC can demonstrate here.

B. Issues Presented by the Contested Case for Summary Judgment

PHM's Motion seemingly misapprehends the nature of the issues raised by LMC in this contested case. *See* PHM Mot. Summ. J., pp. 1, 10-11. For the sake of clarity, those issues presented for determination that are ripe for consideration on summary judgment are as follows:

(1) Whether DHEC has the authority to approve a proposed transaction involving two health care providers in which the assets of one health care provider are acquired by a competing health care provider in the same market without requiring the health care providers to first submit an application for a COPA and engage in the public review process set forth in the COPA Act and Regulation 61-31.

(2) Whether DHEC has the authority to amend an existing COPA previously issued to a health care provider by adding conditions purportedly to approve a new agreement to acquire the assets of a competing health care provider in the same market without engaging in the review process set forth in the COPA Act and Regulation 61-31.

(3) Whether Regulation 61-31 § 508 is unconstitutionally vague as applied to the facts underlying this contested case.

---

[8] In *North Carolina State Board of Dental Examiners*, the Supreme Court stated, "the question is whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Id.* at 515 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)).

See LMC Prehr'g Stmt., pp. 2-4.

In PHM's Motion, Issue No. 1 incorrectly represents that LMC only challenges whether DHEC "has the authority to amend an existing COPA." PHM Mot. Summ. J., p. 10. The nature of LMC's challenge, correctly stated, is whether DHEC can approve a proposed transaction between Prisma Health/PHM and LifePoint Health by way of "amendment" to the COPA issued 23 years ago, rather than requiring Prisma Health/PHM and LifePoint Health to engage in the process set forth in the COPA Act and Regulation 61-31 to receive a COPA, starting with the submission of an application. *See* S.C. Code Ann. § 44-7-530 (providing that health care providers may apply to DHEC for a COPA); *see also* Balsano Aff. ¶ 9. Whether DHEC has the authority to approve an amendment to an existing COPA as a rhetorical question is irrelevant to whether Prisma Health/PHM and LifePoint Health are required to submit an application in order to be eligible for any protections associated with a COPA. Similarly, whether DHEC has the authority to approve *an* amendment to COPA-97-01 is irrelevant to the questions presented to the Court. To the extent PHM's Motion is construed to seek judgment as a matter of law that "[t]he Department has the authority to approve, monitor and regulate an amendment to COPA-97-01" (PHM Mot. Summ. J., p. 10), the Motion should be denied. "The function of [the Court] is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981).

Regarding the second and third issues noted, PHM's summary rejection of the validity challenge to Regulation 61-31 § 508 is puzzling in light of the discussion among counsel and the Court on August 26, 2020, and specifically the Court's authority to hear as-applied challenges. Nonetheless, this Court is not foreclosed from considering the due process concerns attendant to

DHEC's application of Section 508, whereby DHEC undertook the equivalent of a private, internal "desk review" of a change proposed by PHM to COPA-97-01 that all parties agree was substantial. *See* Balsano Aff. ¶ 8; *see also* LMC Prehr'g Stmt., pp. 3-4; **Ex. D**, DHEC's Answers to LMC's Req. for Admis. at No. 1. The Supreme Court addressed this precise issue in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), nearly a decade ago:

> Initially, we take this opportunity to clarify our law regarding the power of an ALC to determine the constitutionality of a statute. It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation. In *Video Gaming Consultants*, we said those challenges present an exception to our preservation rules and should be raised for the first time on appeal to the circuit court. However, the legislature has since amended the process for appeals from the ALC, providing for a direct appeal to the court of appeals instead of the circuit court. This procedural change results in a conundrum for litigants bringing "as-applied" constitutional challenges to a statute or regulation: they must first bring an inherently factual issue before a tribunal generally not suited to make factual determinations. While we have not addressed this issue, the court of appeals, in a case arising before the change in the governing statutes, said, "While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights."
>
> We find the principle enunciated in *Dorman* and *Ward* to be sound and hold that ALCs are empowered to hear as applied challenges to statutes and regulations. ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision. We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court. Thus, the ALC in the case before us had jurisdiction to determine whether section 12–36–920 violates the Dormant Commerce Clause as applied to Travelscape. Accordingly, all of our preservation and exhaustion of remedies rules apply before the ALC and other administrative tribunals with respect to an as applied challenge.

Id. at 108-109, 705 S.E.2d at 38-39 (internal citations omitted) (quoting *Dorman v. Dept. of Health and Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002) and *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000)). Thus, to the extent PHM's Motion seeks judgment as a matter of law that the Court "does not have the authority to rule on the vagueness challenge

to section 508," the Motion must be denied as contrary to established law. Similarly, to the extent PHM's Motion seeks judgment as a matter of law that Regulation 61-31 § 508 authorizes DHEC "to determine what type of review it should conduct, based on the circumstance of [the] matter before it," PHM's Motion must again be denied as contrary to the law. *See S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control*, 363 S.C. 67, 74-75, 610, S.E.2d 482, 486 (2005) ("Allowing OCRM to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation.") These three issues are further discussed below as part of LMC's request for relief.

III. SUMMARY JUDGMENT IN FAVOR OF PETITIONER

A. The Proposed Transaction Requires a New Application.

LMC submits that as a matter of law, Prisma Health/PHM and LifePoint Health must submit a COPA application as provided by Section 44-7-530 in order to allow for review of the proposed transaction as set forth in Sections 540 to 560 of the COPA Act and Chapters 2, 3 and 4 of Regulation 61-31, and that DHEC lacks the authority to circumvent that process by way of additional conditions to COPA-97-01. As conceded by PHM, the COPA Act is a "comprehensive legislative scheme" that "establishes a process whereby the parties to a cooperative agreement may submit an application for a COPA to the Department." PHM Mot. Summ. J., pp. 12-13. PHM is also correct that, "[u]pon receipt of an application, the Department must conduct a review that includes public notice and the opportunity for a public hearing and the requirement that certain findings be made by the Department prior to the issuance of the initial COPA." *Id.* at p. 13. As has been noted in various filings with this Court, a COPA is not required for health care providers to negotiate and enter into mergers and acquisitions of assets; to the contrary, providers are free to conform their conduct to the applicable state and federal requirements, including antitrust laws.

See S.C. Code Ann. Regs. 61-31 § 103.

Despite the voluntary nature of a COPA, it appears the Court has reviewed information from PHM that suggests "the sale is conditioned on receipt of the COPA." Order Granting Mot. Intervene, p. 4. To date as of this filing, LMC has not been provided with the documents submitted in response to the Court's inquiry on August 6, 2020, despite the entry of a Consent Protective Order as demanded by PHM. *See* Balsano Aff. ¶ 7. LMC also does not know whether DHEC received the documents provided to the Court during this contested case, or for that matter what transaction documents were reviewed prior to the DHEC Decision, if any.

For purposes of a certificate of public advantage and the "comprehensive legislative scheme" of the COPA Act and Regulation 61-31, a "cooperative agreement" is defined as:

> **an agreement between two health care providers**, health provider networks, or health care purchasers **or among more than two health care providers**, health provider networks, or health care purchasers **for** the sharing, allocation, or referral of patients or the sharing or allocation of personnel, instructional programs, support services and facilities, medical, diagnostic or laboratory facilities, procedures, equipment, or other health care services traditionally offered by health care facilities or other health care providers or **the acquisition** or merger **of assets among** or by **two or more health providers**, health provider networks or health care purchasers, provided the agreement does not involve price-fixing or predatory pricing or illegal tying arrangements.

S.C. Code Ann. Regs. 61-31 § 102(3) (emphasis added); *see also* S.C. Code Ann. § 44-7-510(3). Prisma, PHM and LifePoint Health are each a "health care provider" as defined by the COPA Act and Regulation 61-31. *See* PHM Prehr'g Stmt, pp. 5-6; S.C. Code Ann. § 44-7-519(6); S.C. Code Ann. Regs. 61-31 § 102(5). It is undisputed that Prisma Health proposes ***the acquisition of assets*** owned by LifePoint Health pursuant to an agreement[9] – a transaction that clearly falls within the

[9] The Letter of Intent (LOI) dated September 13, 2019, offered as *Attachment A* to the Affidavit of Malcolm Isley and the only iteration bearing all signatures, clearly identifies the "Proposed Acquisition of Certain Facilities" to be "a sale of the Acquired Assets by Seller to Buyer" and is signed by Prisma Health, LifePoint Holdings 2, LLC, Providence Holding Company, LLC, and Kershaw Health Holdings, LLC. PHM's Mot. Summ. J., Ex. 9 at Attach. A, pp. 1, 8. Thus, a disputed factual issue with regard to PHM's Motion is whether Prisma Health is the real party in interest to

definition of "cooperative agreement" set forth above – and the statute is clear that in order to obtain the benefits of a COPA, an application must first be filed in order to be reviewed and approved by DHEC. *See id.*; *see also* S.C. Code Ann. § 44-7-530. The authority vested in the Department by the General Assembly is also clear: "The department shall issue a certificate of public advantage for a cooperative agreement if it determines that the applicants have demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement; . . . [and] reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result." S.C. Code Ann. § 44-7-560(A)(1)-(2). DHEC's own regulation succinctly provides,

> The Department shall issue a Certificate of Public Advantage for a cooperative agreement ***if it determines*** that the applicant has demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement; and the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result.

S.C. Code Ann. Regs. 61-31 § 401 (emphasis added). In this case, it is undisputed that DHEC did not determine the benefits of the proposed transaction outweighed the disadvantages. *See* DHEC's Answers to LMC's Req. for Admis. No. 2, at **Ex. D**; *see also* DHEC Decision, p. 1.

There is no provision in the law authorizing DHEC to informally support a new cooperative agreement by adding conditions to an existing COPA that approved a different cooperative agreement between different parties[10]. *See* S.C. Code Ann. Regs. 61-31 § 102(10) (defining "Party to a cooperative agreement" as "a person who negotiates or enters into a cooperative agreement"). To the contrary, the formal nature of the COPA is encompassed in the statutory definition, which

---

the proposed transaction such that Prisma Health lacks standing or authority to seek any changes to COPA-97-01 in the first instance. *See Lanham*, 349 S.C. at 362-63, 563 S.E.2d at 334.

[10] Though issued to BR Health, the parties to the cooperative agreement that was formally approved by COPA-97-01 were BHS and RMH. From the limited information made available to LMC, the parties to a cooperative agreement for the proposed transaction would include Prisma Health and PHM, as well as LifePoint Health and the Providence and Kershaw entities. *See* PHM's Mot. Summ. J., Ex. 9 at Attach. B.

is that a certificate of public advantage "means the formal approval, including any conditions or modifications, by the department of a contract, business or financial arrangement, or other activities or practices between two or more health providers, . . . that might be construed to be violations of state or federal antitrust laws." S.C. Code Ann. § 44-7-510(2).

The General Assembly clearly states the legislative intent for the COPA statutory scheme:

> (A) It is the intent of this article to require the State to provide direction, supervision, regulation, and control over approved cooperative agreements through the department and the Attorney General. This state direction, supervision, regulation, and control of cooperative agreements will provide immunity for health care providers, . . . who participate in discussions or negotiations authorized by this article from civil liability and criminal prosecution under federal or state antitrust laws.
>
> (B) A health care provider, . . . may negotiate, enter into, and conduct business pursuant to a cooperative agreement without being subject to damages, liability, or scrutiny under any state antitrust law. In addition, conduct in negotiating and entering into a cooperative agreement for which an application for a certificate of public advantage is filed in good faith is immune from challenge or scrutiny under state antitrust laws, regardless of whether a certificate is issued. It is the intention of the General Assembly that this article immunizes covered activities from challenge or scrutiny under federal antitrust laws. Nothing in this subsection creates immunity for a person for conduct in negotiating or entering into a cooperative agreement for which an application for a certificate of public advantage is not filed.

S.C. Code Ann. § 44-7-520. PHM's Motion and the voluminous filings to date offer no explanation for Prisma or PHM's refusal to apply for a COPA in order to obtain approval of this new transaction. In fact, and in light of the extensive negotiations evidenced by the multiple iterations of the LOI that predated the March 2, 2020 agreement (*see* Ex. 9 to PHM's Mot. Summ. J.), the absence of an application is even more bewildering because there is no antitrust immunity "for a person for conduct in negotiating or entering into a cooperative agreement for which an application for a certificate of public advantage is not filed." S.C. Code Ann. § 44-7-520(B).

The scope of the Department's authority is determined by the COPA Act, and includes the receipt and review of COPA applications using a review process clearly described in the statute

(S.C. Code Ann. §§ 44-7-530, -540), with a mandate to forward any applications to the AG for his or her review, who may then advise DHEC as to whether an application should be approved or denied (S.C. Code Ann. § 44-7-550(A)), and monitor and regulate "agreements approved under [the COPA Act]." S.C. Code Ann. § 44-7-570(A). The General Assembly sets forth in great detail a comprehensive (yet not all-inclusive) list of issues DHEC "shall consider" in "evaluating the benefits likely to result from the cooperative agreement" and "the disadvantages likely to result" from the agreement. *See id.* at § 44-7-560(A)(1)(a)-(b) (emphasis added). Similarly mandated are issues DHEC "shall consider" in evaluating the risks attendant to the reduction in competition. *See id.* at § 44-7-560(A)(2) (emphasis added). Fundamental to the entirety of the "complex legislative scheme" is that the General Assembly intends only for those agreements between health care providers that DHEC has determined "the applicants have demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement" are eligible for any protection under the COPA Act. *See* S.C. Code Ann. §§ 44-7-505(4), -560(A), -570(A)(2); *see also* S.C. Code Ann. Regs. 61-31 § 401.

By the plain terms of the COPA Act, the only method by which parties to a cooperative agreement can obtain State approval of a proposed transaction that may otherwise be contrary to federal and state antitrust laws is to apply for and receive a COPA. S.C. Code Ann. §§ 44-7-530, -550(B); *see also S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 17-18, 382 S.E.2d 11, 13 (Ct. App. 2011) (finding policy exclusion contrary to plain terms of the compulsory coverage statute and therefore invalid). This makes sense, because in order to even attempt to satisfy the requirements of state action immunity described in the COPA Act, the regulatory review must, among other things, be a deliberate and considered act of the State. *See* S.C. Code Ann. § 44-7-520(A); *see also Ticor Title Ins.*, 504 U.S. at 639 (declining to allow for a finding of active state

supervision where in fact there was none). Contrary to the outcome PHM seeks here, there is nothing in the COPA Act that suggests parties to a cooperative agreement can circumvent or avoid the requirements of the review process by "amending" an existing COPA to add additional conditions. There is also no support in the law that an asset purchase among competing health care providers can be informally approved without public notice, participation from the public and AG, and a determination by DHEC that the benefits outweigh the disadvantages in order to receive any protection under the COPA Act. *See* **Ex. D** at Req. for Admis. No. 2.

LMC submits that Prisma Health's agreement to acquire the assets of LifePoint Health, even if through its affiliate PHM, is a new cooperative agreement for which a COPA application must be submitted and reviewed in accordance with the COPA Act in order to receive the formal approval contemplated by the General Assembly. As such, the DHEC Decision must be reversed as a matter of law and the request to "amend" COPA-97-01 to include the competing facilities be denied.

B. DHEC's Interpretation of "Another Review" for a Substantial Change under Regulation 61-31 § 508 is Arbitrary, Capricious, and Manifestly Contrary to the Law.

The DHEC Decision references only Regulation 61-31 § 508 as authority for the "amendment" of COPA-97-01. The COPA Act provides, "[t]he department shall promulgate regulations to implement the provisions of this article including any fees and application costs associated with the monitoring and oversight of cooperative agreements approved under this article." S.C. Code Ann. § 44-7-570(D). The statute provides DHEC the authority to set conditions for a COPA and recognizes a power to "modify" those conditions in the definition of COPA at Section 44-7-510(2). DHEC's authority to impose conditions is more clearly described in Section 44-7-560(B) of the COPA Act:

The department may also establish conditions for approval that are reasonably

> necessary to ensure that the agreement and the activities engaged in under it are consistent with [the COPA Act] and its purpose to promote cooperation and limit health care costs, protect against abuse of private economic power, and to ensure that the activity is appropriately supervised and regulated by the State.

S.C. Code Ann. § 44-7-560(B); *see also* S.C. Code Ann. Regs. 61-31 § 312 (explicitly requiring that "[s]uch conditions shall be stated in the Certificate of Public Advantage and shall be fully enforceable.") PHM claims that DHEC has the authority to interpret Regulation 61-31 § 508 "to allow the Department to fashion the nature of the review on a case-by-case basis" based on the circumstances of each COPA. PHM Mot. Summ. J., p. 19. According to PHM,

> the phrase 'another review' for amendments to an existing COPA does not require the Department to utilize the review process outlined in Regulation [61-31] §§ 303, 304 and 305, which by their terms apply to new COPA applications. The phrase simply authorizes the Department to determine what type of review it should conduct, based on the circumstances of matter (*sic*) before it.

PHM Mot. Summ. J., p. 16. To the contrary, the Supreme Court was exceedingly clear in *South Carolina Coastal Conservation League*, that a regulation affording DHEC "unrestrained discretion" in deciding what constitutes a "small island" under the Small Island Regulation was impermissible and therefore invalid. *See id.*, 363 S.C. at 74-75, 610 S.E.2d at 486 ("The problem is there is nothing to interpret or apply. Allowing [DHEC] to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation.") The construction suggested in PHM's Motion similarly suggests DHEC has "unrestrained discretion" in deciding what type of review it will conduct of changes after issuance of a COPA based on unstated and therefore unknown parameters. The construction is unreasonable and manifestly improper.

(1) The regulation is plain and unambiguous.

"Regulations are interpreted using the same rules of construction as statutes." *Bruning v. S.C. Dept. of Health and Envtl. Control*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (2016). "All rules

of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purposes of the statute." *McLanahan v. Richland Cty. Council*, 350 S.C. 433, 567 S.E.2d 240 (2002). "The words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." *Charleston Co. Parents for Public Schools v. Moseley*, 343 S.C. 509, 519, 541 S.E.2d 533, 538 (2001). The plain meaning rule is based on the principle that "it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). Only where a regulation is silent or ambiguous will the court consider deference to an agency interpretation, assuming the interpretation is worthy of deference. *See Bruning*, 418 at 545, 795 S.E.2d at 294.

The COPA Act provides the process for review of agreements between health care providers seeking the protections of a COPA. *See* S.C. Code Ann. §§ 44-7-540, -550, -560. Indeed, the COPA Act mandates this same review process for the AG's pursuit of enforcement or criminal prosecution proceedings for actions exceeding the scope of an approved COPA. S.C. Code Ann. § 44-7-570(C) ("A review by the Attorney General must be conducted according to the standards set forth in this article.") LMC submits that Regulation 61-31 § 508 is plain and unambiguous, if an applicant amends an agreement after receipt of a COPA, "the Department will decide whether or not the amendment is substantial and thereby requires another review." S.C. Code Ann. Regs. 61-31 § 508. The only review is that set forth in the statute, and DHEC's failure to adhere to the statute was error. *See S.C. Dept. of Revenue v. Blue Moon of Newberry*, 397 S.C. 256, 262-63, 725 S.E.2d 480, 484-85 (2012) (rejecting agency's interpretation using notion of what terms should mean where language of regulation plainly met and imposed no other requirements).

(2) A substantial change under the CON Act's similar provision results in a new project.

DHEC promulgated Regulation 61-31 to "implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition." S.C. Code Ann. Regs. 61-31 § 101. The COPA Regulations are strikingly similar to the regulations DHEC has promulgated pursuant to the CON Act in several relevant respects. The interplay of these two major public health enactments was acknowledged by PHM.[11].

Regulation 61-31 § 309 provides that the COPA "if issued, is only valid for the project described in the application including parties involved, services to be offered, mergers or consolidations approved, or other factors as set forth in the application, except as it may be modified in accordance with these regulations." S.C. Code Ann. Regs. 61-31 § 309. The nearly identical limitation is found in Regulation 61-15, which provides that a CON "if issued, is valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors set forth in the application, except as may be modified in accordance with these regulations." S.C. Code Ann. Regs. 61-15 § 310.

In overseeing both the CON Program and the COPA Program, DHEC's regulations address changes that may be proposed by an applicant during the review and after issuance of a COPA or CON. In Chapter 3 (Disposition of Application) of the COPA Act, Section 308 addresses "Project Changes During Review Period" as follows:

The Department will review any amendments submitted during the review process

[11] As explained in PHM's Memorandum to DHEC interpreting Section 508, "[u]nder the statutory construction rubric of reading statutes *in pari materi*, in interpreting § 508, DHEC should look to the legislative findings of the COPA Act and the purposes of the CON Act together, since they are both statutes that deal with the same subject matter, i.e[.], promotion and protection of health care in this state." (DHEC FOIA 2344-2345).

> and may notify the applicant that the amendments constitute a new application, and that the requirements of Section 301, 302, and 303 of this regulation must be complied with. All applicable times shall be counted as though the amendment were a new application.

S.C. Code Ann. Regs. 61-31 § 308. The parallel provision for changes to a CON application during review is found at Regulation 61-15 § 310 (providing that DHEC will review amendments to CON applications during review to determine whether an amendment is substantial and constitutes a new application). In Chapter 5 (Monitoring) of the COPA Act, Section 508 addresses "Changes After Receipt of a Certificate of Public Advantage" and provides,

> If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, ***the Department will decide whether or not the amendment is substantial and thereby requires another review***. A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

S.C. Code Ann. Regs. 61-31 § 508. (emphasis added). This language for post-issuance changes and the significance of substantial amendments is also paralleled in the CON Regulations, which provide at Regulation 61-15 § 605 (Project Changes After Receipt of Certificate of Need): "If an applicant amends or alters his project after receipt of a Certificate of Need, the Department will decide whether or not the amendment is substantial *and thereby constitutes a new project.*" S.C. Code Ann. Regs. 61-15 § 605 (emphasis added).

While there is no jurisprudence addressing the COPA regulations, the Court of Appeals has addressed Regulation 61-15 § 605 in a contested case challenging changes after approval of a CON application. *See MRI at Belfair, LLC, v. S.C. Dept. of Health and Envtl. Control*, 394 S.C. 567, 575-76, 716 S.E.2d 111, 115 (Ct. App. 2011). In that case, the Court of Appeals affirmed the analysis under Section 605 for changes to a CON, finding "any change that would impact the

applicant's ability to comply with the same criteria as relevant evidence on whether the change is substantial enough to create a new project." *Id.* at 574-75, 716 S.E.2d at 114-15. The jurisprudence of the ALC is consistent, recognizing that substantial changes to a CON after approval would "constitute[] a new Project requiring further CON approval." *Providence Hosp. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 02-ALJ-07-0155-CC, 2002 WL 3143801 *12 (S.C. Admin. Law J. Div. Sept. 11, 2002). More recently, in *Carolina Regional Cancer Center v. South Carolina Department of Health and Environmental Control*, Docket No. 11-ALJ-07-0629-CC, 2015 WL 2159497 (S.C. Admin. Law J. Div. Apr. 30, 2015), this Court explained: "A finding that a project has substantially changed requires the CON applicant to start the CON process over again with the filing of a new CON application." *Id.* at *18. LMC submits this evidence of parallel provisions within the CON regulatory scheme and the interpreting jurisprudence demonstrates DHEC's method of review for a substantial change to COPA-97-01 was erroneous.

(3) There are compelling reasons to reject DHEC's interpretation.

A "regulation must be construed as a whole rather than read in its component parts in isolation." *Blue Moon of Newberry*, 397 S.C. at 261, 725 S.E.2d at 483. According to DHEC's request to Mr. Cook, "DHEC interprets 'another review' in Section 508 to allow it the discretion to conduct the review that may be required, in the event it deems the change to be 'substantial.' This review will depend on the facts and circumstances involved . . . ." Ex. 11 to PHM's Mot. Summ. J., p. 3. Apparently, DHEC enjoys "the inherent flexibility to determine the appropriate review of modifications pursuant to Section 508." *Id.* at p. 4. While DHEC makes mention of the legislature's "approval of DHEC's regulations" (*see id.*), it is undisputed this contested case involves an issue that was novel to DHEC. *See Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) (refusing to defer to recently adopted agency interpretation

that conflicted with legislative and administrative history of authorizing statutes).

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), the Supreme Court addressed DHEC's responsibility for managing the welfare of our public health systems. "In discharging these duties, DHEC has implemented practices and procedures which foster transparency and full disclosure in all matters regarding its regulatory authority." *Id.* at 430, 702 S.E.2d at 252-53. In this instance, DHEC has interpreted Regulation 61-31 § 508 in a manner that violates these important policies of the agency, abandoning transparency in a matter of widespread public concern. Where the Department's interpretation of "another review" is arbitrary, capricious or manifestly contrary to the COPA Act, the Court should refuse any deference. *See Kiawah Devel. Part., II v. S.C. Dept. of Health and Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) (holding that compelling reasons to differ from an agency interpretation include when the interpretation is arbitrary, capricious or manifestly contrary to the statute); *Brown v. S.C. Dept. of Health and Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (rejecting DHEC Board's interpretation that read a restriction into the regulation that was contrary to the clear meaning and plain language of the regulation); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (holding that there is no deference due to an agency construction that is contrary to the plain language).

LMC submits this Court can find as a matter of law, having determined the proposed transaction represents a substantial change to COPA-97-01, DHEC is required to "review the agreement again" as provided in the COPA Act and Regulation 61-31, which review process is detailed in Sections 44-7-530 to 560 of the Act and Parts 2, 3 and 4 of Regulation 61-31. *See* Balsano Aff. ¶¶ 8-9. In the alternative, the matter should be remanded to DHEC with instruction

to engage in the review process required by the COPA Act. This is so because "'[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.'" *Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (2008) (quoting *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)).

C. Regulation 61-31 § 508 Fails for Vagueness As-Applied.

In authorizing DHEC to promulgate regulations, the General Assembly directed the Department to address provisions for public hearings (Section 44-7-540) and "to implement the provisions of this article including any fees and application costs associated with the monitoring and oversight of cooperative agreements approved under this article." *Id.* § 44-7-570(D). PHM's suggestion that this grant of authority allows DHEC to "fill up the details" in a way that eviscerates the public's right to notice and participation in evaluating the benefits and disadvantages of major transactions of the kind at issue here would in actuality rewrite the law. "The Department, pursuant to § [44-7-570(D)], has the authority to promulgate necessary rules and regulations to carry out the provisions of the [article], but not to alter the material intent of the provisions." *Richard Street Partners, LLC, et al. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 04-ALJ-07-0304-CC, 2007 WL 1577990 *6 (S.C. Admin. Law J. Div. April 30, 2007). "Such rules are valid for the enforcement of the law, not for a non-enforcement or suspension of the law." *Heyward v. S.C. Tax. Comm'n*, 240 S.C. 347, 355, 126 S.E.2d 15 (1962) (holding agency lacked authority to adopt by regulation a method of reporting income for tax purposes not provided for by statute).

In *Young v. South Carolina Department of Highways and Public Transportation*, 287 S.C. 1008, 336 S.E.2d 879 (1985), the Supreme Court explained, "[t]he key issue in this case is whether the regulation is a proper exercise of authority granted to the Department." *Id.* at 112, 336 S.E.2d at 881. "'An administrative regulation is valid so long as it is reasonably related to the purpose of

the enabling legislation.'" *Id.* (quoting *Hunter & Walden Co. v. S.C. State Licensing Bd. for Contractors*. 272 S.C. 211, 213, 251 S.E.2d 186 (1978)). "Although a regulation has the force of law, it must fall when it alters or adds to a statute." *Soc'y of Prof. Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (holding DHEC regulation limiting public access to death certificates "invalid and repugnant to FOIA"). Agency rules or regulations that materially alter or add to the law are void. *See Milliken and Co. v. S.C. Dept. of Labor*, 275 S.C. 264, 267, 269 S.E.2d 763, 764 (1980).

"A facial challenge is a claim that a statute is unconstitutional on its face – that is, that it always operates unconstitutionally." *S.C. Dept. of Health and Envtl. Control v. Mastercare, Inc., a/k/a Mastercare Contracting, Inc.*, Docket No. 10-ALJ-07-0546-CC, 2011 WL 7119230 (S.C. Admin. Law J. Div. Mar. 15, 2011). "An as-applied challenge is an argument that the statute or regulation is unconstitutional as it has been applied to a specific party or class of individuals." *Id.* LMC's challenge is as-applied, and the ALC has jurisdiction to address the validity of Regulation 61-31 § 508 as applied by DHEC in this contested case. *See Travelscape, LLC*, 391 S.C. at 109, 705 S.E.2d at 39. In determining whether a statute or regulation is unconstitutionally vague, the Supreme Court has held, "[t]he concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)); *see also Huber v. S.C. State Bd. Of Phys. Therapy Exam'rs*, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994) ("The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies.")

A statute fails for vagueness unless it satisfies two criteria: "First, the statute must provide sufficient notice of the conduct prohibited. Second, the statute must also not be written in such a

manner as to permit or encourage arbitrary and discriminatory enforcement. If a challenger sufficiently proves the statute fails either prong, then the statute is impermissibly vague." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012) (Hearn, J., dissenting) (citations omitted). Applicable here is the second prong, and as illustrated in the context of criminal statutes, "[a] vague statute would [] allow police to be guided not by clear language, but by whim." *Id.* at 542, 737 S.E.2d at 843 (quotation omitted).

"As a creature of statute, [DHEC] has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *S.C. Coastal Conservation League*, 363 S.C. at 74, 610 S.E.2d at 485 (quotations omitted). "Where a statute provides controlling principles, an administrative agency may exercise a large measure of discretion within those principles." *S.C. Dept. of Revenue v. Clyde J. Burris, Sr., d/b/a C. Joseph Burris Liquors*, Docket No. 96-ALJ-17-0201-CC, 1996 WL 909574 *3 (S.C. Admin. Law J. Div. July 24, 1996) (citing 1 Am. Jur. 2d *Administrative Law* § 118 (1962)). The Department is required to "issue a certificate of public advantage for a cooperative agreement if it determines that" the likely benefits outweigh the likely disadvantages after review of an application and receipt of input from affected persons and the Attorney General. *See* S.C. Code Ann. §§ 44-7-530 to -560. "If the statute is to have meaning, it does not follow that the award of a permit can be presumed without some evaluation of the need for that permit." *Waste Mgmt. of Carolinas, Inc. v. S.C. Dept. of Heath and Envtl. Control*, Docket No. 07-ALJ-07-0429-CC, 2008 WL 4659522 *7 (S.C. Admin. Law J. Div. Sept. 24, 2008) (denying permit for restricted activity until agency properly develops test to determine need on remand).

In *MRI at Belfair, LLC v. South Carolina Department of Health and Environmental Control*, 392 S.C. 314, 709 S.E.2d 626 (2011), the Supreme Court rejected DHEC's treatment of

costs for determining whether projects required CON review: "Where, as here, DHEC's chosen method has no basis in the facts of the proposal and arbitrarily allows a potential applicant to avoid the CON review process, it is contrary to the purposes of the CON Act and therefore an error of law." *Id.* at 321-22, 709 S.E.2d at 630. DHEC's application of Section 508 to the substantial change proposed by PHM has done exactly what the Supreme Court cautioned against, by "creating incentives for potential applicants to manipulate" the COPA process "and avoid [COPA] review." *Id.* at 322, 709 S.E.2d at 630. Indeed, the suggestion that the type of review under Section 508 can be ever-changing "based on the circumstances of matter (*sic*) before" the Department would mean DHEC staff are "to be guided not by clear language, but by whim." *See* PHM Mot. Summ. J., p. 16; *Town of Mount Pleasant* at 542, 737 S.E.2d at 843. Because the question of whether or what type of review DHEC may require for substantial changes to existing COPAs lacks any practical criterion of fair notice, the Regulation is invalid as applied and the DHEC Decision must be reversed.

CONCLUSION

For the reasons stated herein, LMC respectfully requests the Court deny the Motion of PHM for Summary Judgment and grant judgment as a matter of law in favor of Petitioner on the issues raised herein, thereby reversing the DHEC Decision.

[Signature page follows]

Respectfully submitted,

Jennifer J. Hollingsworth (SC Bar No. 73535)
jhollingsworth@nexsenpruet.com
Shannon V. Lipham (SC Bar No. 103699)
svlipham@nexsenpruet.com
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803)771-8900
(803)727-1446 (fax)

Kelly M. Jolley (SC Bar No. 72573)
kjolley@jolleylawgroup.com
Ariail B. Kirk (SC Bar No. 71101)
akirk@jolleylawgroup.com
JOLLEY LAW GROUP, LLC
810 Bellwood Road
Columbia, SC 29205
(803) 830-6500
(877) 668-1766 (fax)

Counsel for Petitioner

Dated: September 14, 2020

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lexington County Health Services District, d/b/a Lexington Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Prisma Health-Midlands, Respondents.	Docket No. 20-ALJ-07-0108-CC

This is to certify the foregoing ***Petitioner's Opposition to Motion for Summary Judgment and Notice of Motion and Cross-Motion for Summary Judgment*** has been served upon counsel of record addressed as shown below, this 14 day of September, 2020.

VIA HAND DELIVERY AND E-MAIL
M. Elizabeth Crum, Esq.
Celeste T. Jones, Esq.
Pamela A. Baker, Esq.
BURR & FORMAN, LLP
1221 Main Street, Suite 1800
Columbia, SC 29201
Attorneys for Respondent
Prisma Health – Midlands

VIA U.S. MAIL AND E-MAIL
Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
Meredith W. Sella, Esq.
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201
Attorneys for Respondent
South Carolina Dep't of Health and Environmental Control

Nexsen Pruet, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District,
d/b/a Lexington Medical Center, *Petitioner/Respondent,*

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, *Respondents,*

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the *Respondents-Appellants*.

**APPELLANT/RESPONDENT PRISMA HEALTH-MIDLANDS'
MOTIONS TO CERTIFY CASE FOR REVIEW BY THE SUPREME COURT
AND TO EXPEDITE THE PROCEEDING
AND MEMORANDA IN SUPPORT OF MOTIONS**

EXHIBIT 13

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services
District Inc., d/b/a Lexington Medical Center, ...Petitioner/Respondent,

v.

South Carolina Department of Health and
Environmental Control, Prisma Health-
Midlands, Providence Hospital, LLC
d/b/a Providence Health, Providence Health
Northeast, Providence Health Fairfield,
and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center, ...Respondents,

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the Respondents-Appellants.

AFFIDAVIT OF MICHAEL BUNDY

---

1. I am a resident of Richland County, South Carolina, over twenty-one years of age and am competent to make this affidavit.

2. I am employed by Prisma ("Prisma") and serve as the Chief Executive Officer for Prisma Health Midlands Baptist ("Baptist") and Prisma Health Midlands Baptist Parkridge ("Parkridge") Hospitals. I routinely communicate with Robert Cofield, the Chief Executive Officer of Prisma Health Midlands Richland ("Richland").

3. South Carolina has been dealing with the novel coronavirus ("COVID-19") since at least March 13 2020, when Governor McMaster declares the first public emergency. PHM has been virtually overwhelmed with the virus during this time. The second surge that began in the late summer/early fall and continues to increase is putting significant stress on PHM. In spite of the advent of the vaccine, state, federal and world public health officials are concerned that COVID-19 will linger and wreak havoc with people and health care systems for many months, if not years, to come.

4. It is standard protocol for all hospitals to activate incident command centers during disasters and public health emergencies such as the current pandemic. PHM is the safety net health care provider for the Midlands region. The Institute of Medicine ("IOM") has defined a safety net health care provider as one that "who by mandate or mission offer access to care regardless of a patient's ability to pay and whose patient population includes a substantial share of uninsured, Medicaid, and other vulnerable patients." (IOM 2000). Safety net providers also typically provide higher acuity and specialty services not provided by the area hospitals. Richland provides the level one trauma services, the regional perinatal center, the certified stroke center, among other services, that are not provided by other hospitals in Richland, Kershaw, Fairfield, Newberry, Orangeburg, Lexington and Sumter Counties ("Midlands Area"). As the safety net provider, PHM is the health care provider of last resort in the Midlands Area.

5. With control of the LPNT Assets (Providence Downtown, Providence Northeast and Kershaw hospitals), PHM would have greater resources and flexibility to respond to the COVID-19 crisis and any other public health emergencies or disasters across Richland, Kershaw, Fairfield, Newberry, Orangeburg, Lexington and Sumter Counties ("Midlands Region"). This is

most critically important when time is of the essence and immediate decisions need to be made, such as transferring patients from one facility to another, opening up capacity for emergency response, isolating infectious patients in unique or specialized facilities, or improving region-wide coordination and response with EMS, fire, police, DHEC, National Guard, or Red Cross.

6. While well intentioned, collaboration between independent entities cannot out-perform, in terms of swiftness, efficiency and quality of performance/care, organizations that have central command and control in disasters and public health emergencies. Whether it is the COVID-19 pandemic, severe flu outbreaks, hazardous spills or leaks, or natural disasters, an integrated system can move much more quickly and effectively than a coalition.

7. Since the beginning of the pandemic, PHM is treating the vast majority of its COVID-19 patients at Richland, particularly those who have symptoms that are more acute and need care that is more specialized. Although the intensive care unit at Baptist has served critically ill COVID-19 patients, the focus at Baptist in the pandemic responses has been on patients with less acute COVID-19 symptoms. Parkridge was being used at the pandemic's outset for the bulk of outpatient and inpatient surgery and non-complicated births and the management of other immunocompromised patients. However, the growing capacity needs of the Midlands area required Parkridge quickly to pivot and treat COVID-19 patients and simultaneously take unprecedented volumes of transfer from both PHM and non-PHM facilities in the region. Even with these coordinated efforts, there have been consistent strains on the system, with Richland being significantly overtaxed.

8. In addition to the aforementioned Parkridge transfer acceptances, the other PHM hospitals are receiving transfer patients from other Midlands hospitals not part of PHM when the

hospitals do not have the resources (services and/or staff) to treat their patient volumes of both COVID-19 and other acute patients. The Transfer volumes into PHM correspond directly to COVID-19 surge time periods. For example, the June transfer rate into PHM midlands facilities from non-PHM entities was 741 transfers, the transfer rate responsive to the "4th of July" COVID-19 surge, was over 1300 patients. This mirrors the Labor Day COVID-19 surge, when August Transfers were 881 patients, which surged to 1040 in October after Labor Day. The end of the year holidays will assuredly mimic these results, but with exponentially higher numbers, because the baseline of COVID-19 hospitalization is much higher.

9. During the pandemic response, maximizing the acute care resources in the Midlands is only achievable through operationally integrated facilities. Early in PHM's response to the COVID-19 pandemic, we rapidly relocated immune compromised and other at-risk patient populations to different facilities within the PHM system in order to protect them and the staff who cared for them from COVID-19. During the spring of 2020, this includes moving neonates, pregnancies, and cancer patients into Parkridge. This allowed PHM initially to accept and safely care for COVID-19 patients primarily in specialized units in Richland, Baptist and Prisma Health Midlands Tuomey ("Tuomey"). As the Midlands need continued to grow, Parkridge was also needed to treat COVID-19 patients and accept COVID-19 and other acute transfers from PHM and non-PHM facilities. Being able to expand that unified approach with the LifePoint assets operationally and functionally integrated into PHM will benefit the community and the patients we serve in the Midlands by co-horting patients and staff based upon the capacity of each facility and the needs of the patients as they change and evolve over time.

10. In addition to COVID -19 patients, many critically ill non-COVID-19 patients have been transferred from other hospitals in the Midlands, including the Regional Medical Center of Orangeburg, Providence Downtown, Kershaw Health, Lexington Medical Center, to PHM facilities. Since the onset of the pandemic, the transfers to Richland alone are:

Orangeburg Regional Medical Center	537
Palmetto Health Baptist	512
Kershaw Health Medical Center	494
Lexington Medical Center	491
Providence Hospital - Northeast	443
Newberry County Memorial Hospital	312
Dorn VA	228
Providence Hospital - Downtown*	222

11. In addition, Richland provides tertiary services that other hospitals in the Midlands Area are not equipped to provide, such as complex stroke care, LVASD for heart failure patients, and level IV neonatology. It is necessary for the health of Midlands' patients that Richland have beds available for patients that cannot receive the requisite health services anywhere but Richland. Because these same non-PHM facilities also transfer directly into other PHM facilities, this further limits PHM to internally managing the demand and decanting Richland. These other patient transfer rates are into Baptist and Parkridge, all the while that patients are being transferred into Richland.

Kershaw Health Medical Center	161
Providence Hospital - Northeast	52
Orangeburg Regional Medical Center	52
Newberry County Memorial Hospital	50
Providence Hospital - Downtown*	47
MUSC HEALTH-LANCASTER MEDICAL CENTER	30
PROVIDENCE FAIRFIELD EMERGENCY ROOM	28
BAMBERG-BARNWELL EMERGENCY MEDICAL CENTER	20
Moncrief Army Community Hospital (Ft Jackson)	20

Dorn VA	19
Lexington Medical Center	18

12. With the LifePoint facilities integrated into the system, PHM would have the ability to direct admissions immediately from the point of patient presentation, or transfer request location, to the facility with appropriate clinical capacity and staffing and other resources to manage the patients' clinical needs, while better protecting patients for COVID-19, when it is the admitted patient's clinical diagnosis. This would result in maximization of the community benefit, minimization of needless expenditures for an already overtaxed system and fewer instances of single facility overcrowding and EMS diversion.

> Hypothetical Example: Richland has a sudden surge of ambulatory patients in its emergency room with various presenting symptoms, while its Level 1 trauma unit is managing trauma patients from a three-vehicle accident on interstate 77. The clinical care teams can rapidly make capacity at the Level 1 Trauma Center by transferring and/or directing low acuity cases to other PHM facilities. However, when the capacity at Baptist and Parkridge are already constrained because of COVID-19 issues and facility management or become simultaneously constrained due to surges in emergency department admissions and community transfers, our ability move patients around in the current system is constrained. Having the resources of Providence Downtown, Providence Northeast and Kershaw would provides much needed capacity in which to accommodate COVID-19 or other surge situations.

13. Diversion occurs when a health care facility informs local emergency medical services that its beds are full and it cannot take new patients. It is a temporary status. In spite of the fact that, during the pandemic, Baptist and Parkridge have taken unprecedented transfer patients from Richland, Richland is still struggling with an increasing number of diversionary hours. Richland has transferred over 1000 patients in just the months of July through November to Baptist and Parkridge. In those same months Baptist and Parkridge also served the transfer

needs of non-PHM facilities with another 500 patients. Having the LPNT assets as part of PHM would significantly help Midlands Area patient flow and placement and help protect the trauma services and other safety net services in the Midlands.

14. Although public health emergency declarations may allow for temporary interfacility privileging of providers across various health facilities, operationalizing the ability to get the appropriate physician / provider resource to the appropriate patient cohort remains a significant barrier. Additionally, we have no ability to influence the issuance of an emergency declaration. We may well have a public health emergency when one has not been declared.

> Example: Creating a cohort location for the most critically ill patients in Richland, Columbia's tertiary care center and thus allowing other PHM hospitals to maximize medical surgical and telemetry inpatient resources would require the movement of intensivist and critical care trained providers to Richland and hospitalist and internal medicine providers to the other PHM hospitals. Although the Lifepoint intensive care providers could get emergency privileges at Richland, there is no operational way to put them to work there (being employed by another facility). Conversely, PHM hospitalists and internal medicine service providers, don't have the operational knowledge to function effectively at Providence Northeast or Downtown. Only in an integrated delivery network model would these resources be able to be fully flexed to the most beneficial location across the Midlands to serve as many patients as possible in the correct setting.

15. As patient volumes continue to surge during this pandemic, the ability of the health system to meet nursing staff demands is significantly strained, direct patient care staffing is contracting COVID-19 (resulting is further burdens of staffing) and staff is experiencing increased burnout. In order to keep sufficient available staff to treat COVID-19 and other critically ill patients in units such as emergency department and Level 1 trauma, stroke, heart and neonate, PHM has been forced to employ numerous "travelers" (nursing and other allied health staff that are contract employees with hospitals for a time specific time) and extremely high hourly rates. For Richland, Baptist and Parkridge, we currently have a total of 84 travelers on site

with an additional 48 travelers arriving between December 28, 2020 and January 25, 2021. These travelers are assigned to the Emergency Departments, Critical Care, Med/Surg/Telemetry, post-anesthesia care unit ("PACU"), and operating room ("OR") units across all three campuses. Travelers are also assigned to the intensive recovery program ("IRP") to float to cover day-to-day shortages across the campuses. Rates range from $79.50/hr. to $173/hr. with an average rate of $103/hr. and are escalating. Certainly, having the Lifepoint facilities' staff integrated into the system would allow PHM to assign staff as needed to reduce or eliminate the current dependence on travelers.

16. Health systems must act to optimize and expand the nursing workforce. While PHM and the Providence hospitals are currently sharing staff in per diem positions in an attempt to lessen the effect of COVID-19 on the ability to staff hospitals, this leads to sub optimized staffing for all as we spread a limited number of nurses across hospitals providing duplicate services. Combining services across both systems will allow us to optimize workforce capacity and better utilize nurses by cohorting patient populations with like morbidities across acute, ambulatory and post-acute care to provide care that is more efficient and to avoid duplication of services.

17. With the ongoing pandemic there is a pressing need to expand nursing services in our Hospital at Home program (patients are treated at home instead of being treated in the hospital) and Home Recovery programs (patients are sent home earlier to recovery) to increase capacity for high acuity patients in the hospital setting and to lessen the risk of exposure to COVID-19 in the hospital. Central coordination of staff enables the strategic deployment of limited nurses across multiple care sites. Nurses currently working in non-clinical roles can be re-

deployed to fill acute care needs, while non-nursing duties can be absorbed through existing non-clinical teams. Additionally, the nursing management structure across PHM and LifePoint assets can be reduced with the re-assignment of some of those roles to direct patient care positions. Expanding and optimizing the nursing workforce requires time. Time is needed to organize and implement effective strategies to meet the growing demand of the aging population and patients with chronic disease and multiple co-morbidities. With the ongoing nursing shortage, and the unknown duration of the COVID-19 pandemic, action is needed now to ensure that an adequate supply of nurses is available to meet the present pandemic and future demands of safe patient care. Additionally, South Carolina is projected to have the fourth (4th) worse nursing shortage in the nation in the next few years, and hospitals in the Midlands Area are facing a significant nursing shortage.

18. To continue to be the Midlands Area safety net hospital and provide quality care for the duration of COVID-19 in a timely, efficient manner better and to utilize limited health care resources, services, beds and staffing, contain cost, and provide safety net services, it is imperative that the APA between PHM and LPNT go forward in the most expeditious manner.

[signature on next page]

FURTHER, the affiant saith not.

Michael Bundy, Chief Executive Officer

Prisma Health Midlands Baptist and Prisma Health Baptist Parkridge.

SWORN TO AND SUBSCRIBED BEFORE ME

This 22 day of December, 2020

Susan H. Whisnant

RECEIVED
Dec 29 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District Inc., d/b/a Lexington Medical Center, ... Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center, ...Respondents,

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the Respondents-Appellants.

CERTIFICATE OF SERVICE

I, Donna O'Daniel, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the **Appellant/Respondent Prisma Health-Midlands' Motions to Certify Case for Review by the Supreme Court and to Expedite the Proceeding and Memoranda in Support of Motion** was served upon all counsel of record in the above-captioned matter, via email at the email addresses listed below, and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 29th day of December, 2020, addressed as follows:

David B. Summer, Jr., Esq.
Faye A. Flowers, Esq.
Parker Poe Adams & Bernstein, LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com
Counsel for Respondents-Appellants Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center

Ashley C. Biggers, Esq.
Vito Wicevic, Esq.
Rita DeCarlis
SCDHEC-Office of General Counsel
2600 Bull Street
Columbia, SC 29201
biggerac@dhec.sc.gov
wicevivm@dhec.sc.gov
decarlrd@dhec.sc.gov
Counsel for Respondent SC Department of Health and Environmental Control

Jennifer J. Hollingsworth, Esq.
Shannon V. Lipham, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
jhollingsworth@nexsenpruet.com
svlipham@nexsenpruet.com
Counsel for Petitioner/Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center

Kelly M. Jolley, Esq.
Ariail B. Kirk, Esq.
Jolley Law Group, LLC
810 Bellwood Road
Columbia, SC 29205
kjolley@jolleylawgroup.com
akirk@jolleylawgroup.com
Counsel for Petitioner/Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center

Columbia, SC

Donna O'Daniel

BURR FORMAN McNAIR

M. Elizabeth Crum
lcrum@burr.com
Direct Dial: (803) 753-3240
Direct Fax: (803) 933-1484

Burr & Forman LLP
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address:
Post Office Box 11390
Columbia, SC 29211

Office 803.799.9800
Fax 803.753.3278

BURR.COM

December 29, 2020

Via Hand Delivery and Email (ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Lexington County Health v. SCDHEC, et al.
Appellate Case No. 2020-001610

Dear Ms. Kitchings:

On behalf of Prisma Health-Midlands, enclosed for filing with the Court is the original and one copy of Appellant/Respondent Prisma Health-Midlands' Motions to Certify Case for Review by the Supreme Court and to Expedite the Proceeding and Memoranda in Support of Motion along with a check in the amount of $50.00 for filing of the Motions. Pursuant to the Proof of Service, and by copy of this letter, as well as by electronic mail, copies of the aforementioned documents were served on counsel of record.

Please provide a filed copy of the above-stated documents in the enclosed self-addressed stamped envelope.

Very truly yours,

M. Elizabeth Crum

MEC/dmo
Enclosures

cc: **All w/enclosure**

Kelly M. Jolley, Esq. *(via email and U.S. Mail)*
Ariail B. Kirk, Esq. *(via email and U.S. Mail)*
Jennifer J. Hollingsworth, Esq. *(via email and Hand Delivery)*
Shannon V. Lipham, Esq. *(via email and Hand Delivery)*
Vito W. Wicevic, Esq. *(via email)*
Ashley C. Biggers, Esq. *(via email)*
Meredith W. Sella, Esq. *(via email)*
David B. Summer, Jr., Esq. *(via email and Hand Delivery)*
Faye A. Flowers, Esq. *(via email and Hand Delivery)*
Jana Shealy *(via email)*
Pamela A. Baker, Esq. *(via email)*
Celeste T. Jones, Esq. *(via email)*