

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

Joshua H. Stein, Attorney
General, *ex rel* Dogwood Health
Trust,

Plaintiff,

vs.

HCA Management Services, LP;
MH Master Holdings, LLLP;
MH Hospital Manager, LLC;
MH Mission Hospital, LLLP;
MH Hospital Holdings, Inc.; and
MH Master, LLC,

Defendants.

SUPERIOR COURT DIVISION
FILE NO. 23-CV-5013

**DEFENDANT’S ANSWER
AND COUNTERCLAIMS**

Defendant MH Master Holdings, LLLP (“HCA”), by and through its undersigned counsel, submits this Answer, Affirmative Defenses, and Counterclaims to the Complaint filed by Plaintiff Attorney General Joshua H. Stein on December 14, 2023 (ECF No. 3).¹

PARTIES, JURISDICTION, AND VENUE²

1. Defendant admits that North Carolina Attorney General Joshua H. Stein filed a lawsuit purporting to act on behalf of and in the

¹ Defendant’s Answer does not respond to the Complaint’s Preliminary Statement, headings, or footnotes, because those are not allegations to which a response is required. To the extent a response is required, Defendant denies those statements.

² HCA incorporates the general headings from the Complaint solely for convenience. By repeating the general headings, HCA does not adopt or admit anything therein.

name of Dogwood Health Trust. Except as expressly admitted herein, the allegations of paragraph 1 are denied.

2. Defendant admits that Dogwood Health Trust currently holds the rights of the Seller Representative under the Asset Purchase Agreement (“APA”). Except as expressly admitted herein, the allegations of paragraph 2 are denied.

3. Admitted. Defendant denies that HCA Management Services, LP is a proper defendant and understands that HCA Management Services, LP has moved for dismissal concurrently herewith.

4. Admitted.

5. Admitted.

6. Admitted. Defendant denies that MH Hospital Manager, LLC is a proper defendant and understands that MH Hospital Manager, LLC has moved for dismissal concurrently herewith.

7. Admitted. Defendant denies that MH Mission Hospital, LLLP is a proper defendant and understands that MH Mission Hospital, LLLP has moved for dismissal concurrently herewith.

8. Admitted. Defendant denies that MH Hospital Holdings, Inc. is a proper defendant and understands that MH Hospital Holdings, Inc. has moved for dismissal concurrently herewith.

9. Admitted. Defendant denies that MH Master, LLC is a proper defendant and understands that MH Master, LLC has moved for dismissal concurrently herewith.

10. Admitted as to Defendant. Defendant further admits, upon information and belief, that the other entities named in this paragraph are also subsidiaries of HCA Healthcare, Inc.

11. Upon information and belief, Defendant admits that HCA Healthcare, Inc. operates more than 180 hospitals and has a market capitalization of approximately \$70 billion. Defendant further admits that HCA Healthcare, Inc. had revenues exceeding \$60 billion in 2022. Except as expressly admitted herein, the allegations in paragraph 11 are denied.

12. Paragraph 12 contains legal conclusions to which no response is required.

13. Paragraph 13 contains legal conclusions to which no response is required.

14. Although the Attorney General is contractually prohibited from seeking monetary damages, Defendant admits that the value of the emergency, trauma, and oncology services that it provides at Mission Hospital (consistent with its obligations under the APA) exceeds \$1,000,000.

FACTUAL ALLEGATIONS

15. Admitted.

16. Defendant lacks sufficient information to admit that it is the only tertiary care facility in western North Carolina since 1998. However, Defendant admits that, per the APA, Mission Hospital is “the region’s only tertiary healthcare center” as of January 31, 2019.

17. Admitted.

18. Defendant admits that negotiations between HCA and Mission continued until August 2018. By way of further response, the Defendant admits that the Attorney General’s review of the APA began in August 2018 and concluded in January 2019 with the Attorney General permitting HCA to acquire Mission subject to the terms of the APA.

19. Denied in part. A contract between HCA and Mission was executed in August 2018. Defendant admits that the APA, the operative contract that the Attorney General reviewed and permitted the parties to enter, was executed in January 2019.

20. Admitted.

21. Defendant admits that the APA designates the Attorney General as an intended third-party beneficiary with respect to certain of HCA's obligations under the APA. By way of further response, the obligations set forth in the APA and that are at issue in this lawsuit were the same *before* the Attorney General's review as after. Except as expressly admitted herein, the allegations of paragraph 21 are denied.

22. The APA is a document that speaks for itself, therefore no response is required.

23. The APA and its associated schedules are documents that speak for themselves, therefore no response is required.

24. The APA is a document that speaks for itself, therefore no response is required.

25. The APA is a document that speaks for itself, therefore no response is required.

26. The APA is a document that speaks for itself, therefore no response is required. However, Defendant denies that paragraph 26 accurately reflects the circumstances in which Defendant may discontinue such services, which include both Force Majeure and Contingency.

27. The APA is a document that speaks for itself, therefore no response is required. However, the APA does not require the “change in the needs of the community” to be “significant” to qualify as a Contingency. Instead, the APA states that a Contingency includes “a change in the needs of the communities, including as a result of services being provided by one or more third parties, within the service area of the applicable [m]aterial [f]acility reasonably necessitating termination” of services.

28. Paragraph 28 contains legal conclusions to which no response is required. To the extent a response is required to the remaining allegations in paragraph 28, those allegations are denied. The commitments made by HCA under the APA are clear and unambiguous—and HCA has always satisfied them.

29. Denied. By way of further response, HCA has continued and expanded such services since the acquisition. For example, HCA has expanded oncology services by hiring two head and neck surgeons, a breast medical oncologist, and a surgical oncologist and investing \$12.4 million in capital improvements to the Mission Cancer Center and has continued Level II trauma services by providing high-quality emergency and trauma care and staffing beds consistent with Level II trauma center standards applicable when the APA was entered.

30. Defendant admits that the dedicated, hard-working medical professionals are doing their very best to provide excellent healthcare to their patients. Except as expressly admitted herein, the allegations of paragraph 30 are denied.

31. The APA and its associated schedules are documents that speak for themselves, therefore no response is required.

32. Defendant admits that North Carolina regulations require a Level II Trauma Program emergency department to be staffed 24-hours-per-day by physicians physically present in the emergency department and nursing personnel with experience in trauma care who continually monitor the trauma patients from hospital arrival to disposition to

another unit. Defendant further admits that the emergency department must have certain equipment for patients of all ages, including an electrocardiograph-oscilloscope-defibrillator with internal paddles. Except as expressly admitted herein, the allegations of paragraph 32 are denied.

33. Denied. HCA complies with the contractual standards for trauma care.

34. Denied. Mission continues to provide high-quality patient care to the residents of western North Carolina, consistent with the requirements for a Level II Trauma Program.

35. Denied. Mission endeavors to staff its emergency department at levels consistent with the needs and acuity of the patients under its care. Although Mission cannot control all variables, such as when staff unexpectedly call out from scheduled shifts, Mission strives to minimize wait times in its emergency department, recognizing that wait times for individual patients reflect unique factual circumstances at the time care is sought, including patient volume, the acuity of all patients in need of care, and regulatory constraints on inpatient capacity.

36. Defendant admits that applicable North Carolina regulations require that a Level II Trauma Program facility's intensive care unit have a ratio of one nurse per two patients on each shift. Except as expressly admitted herein, the allegations of paragraph 36 are denied.

37. Denied. Mission strives to maintain staffing levels that are adequate based on patient acuity and volume. When circumstances beyond Mission's control dictate, such as when staff unexpectedly call out from scheduled shifts, certain units may have higher nurse to patient ratios. However, even in these circumstances, Mission complies with applicable trauma care regulations and emergency services remain available, consistent with the contractual obligations set out in the APA.

38. Defendant admits as a general matter that inadequate staffing can affect patient care. Except as expressly admitted herein, the allegations of paragraph 38 are denied.

39. Denied.

40. Denied. In fact, Mission has undertaken concerted recruiting efforts to maintain adequate nurse staffing in its emergency department.

41. Defendant denies that the circumstances alleged in paragraph 41 are causally related to the number of nurses employed at

Mission. In fact, Mission has undertaken concerted recruiting efforts to maintain adequate nurse staffing in its emergency department.

42. Defendant admits that Mission nurses are doing the very best they can. Except as expressly admitted herein, the allegations of paragraph 42 are denied.

43. Denied. Mission endeavors to ensure that its emergency department is always adequately staffed with both CNAs and technicians. In fact, Mission has undertaken concerted recruiting efforts to maintain adequate staffing of nursing assistants and emergency department technicians.

44. Denied.

45. Defendant admits that 13 emergency department physicians (who were employed by a third-party provider of such physicians) left to pursue other opportunities in 2023. By way of further response, in that same period 14 new emergency department physicians were hired (by a third-party provider of such physicians) to work in Mission's emergency department. Except as expressly admitted herein, the allegations of paragraph 45 are denied.

46. Denied.

47. Denied. The only support for the Attorney General's allegation is an anonymously sourced article from March 2022. The Independent Monitor appointed pursuant to the APA concluded that HCA complied with its APA obligations in 2022.

48. Denied. In fact, average nurse wages at Mission have increased approximately twenty percent since HCA acquired Mission.

49. Denied. HCA offers competitive salaries and bonuses.

50. Defendant admits that HCA knows how to adequately staff its emergency department and has consistently sought to ensure its emergency department remains adequately staffed. Except as expressly admitted herein, the allegations of paragraph 50 are denied.

51. Defendant admits that Mission's emergency department often has a significant volume of incoming patients seeking emergency medical care. Except as expressly admitted herein, the allegations of paragraph 51 are denied.

52. Denied. By way of further response, the Attorney General's reliance on legally vague and undefined terms, such as "incredibly long," make it impossible to respond to his allegations.

53. Defendant admits that the allegations appear consistent with data available on the Centers for Medicare & Medicaid Services website. Except as expressly admitted herein, the allegations of paragraph 53 are denied. Mission's emergency department faces unique systemic challenges including high patient volume and high acuity as the only tertiary care facility in the 18-county area. Despite those challenges, Mission continues to undertake efforts to reduce emergency department wait times and reduce the length of time patients remain in the emergency department.

54. Defendant admits that the allegations appear consistent with data available on the Centers for Medicare & Medicaid Services website. Except as expressly admitted herein, the allegations of paragraph 54 are denied. By way of further response, Defendant notes that this comparison is inapt given the unique challenges Mission faces, as compared to other facilities in North Carolina.

55. Defendant admits that patient diagnosis and treatment often depends upon the results of laboratory tests. Except as expressly admitted herein, the allegations of paragraph 55 are denied.

56. Denied.

57. Denied. By way of further response, the Attorney General's reliance on legally vague and undefined terms, such as "extremely long," make it impossible to respond to his allegation.

58. Denied. Mission has created an Internal Processing Area ("IPA") that is separated from the waiting area. Mission uses the IPA to ensure patients can be assessed by providers as quickly as possible, even when all emergency department beds are occupied.

59. Admitted.

60. Defendant admits that it completed construction of a new hospital tower that included a new emergency department with approximately 40% more beds than the prior emergency department space. Except as expressly admitted herein, the allegations of paragraph 60 are denied. In fact, the design of the new emergency department (which was designed and finalized by Mission's prior owners) significantly decreased efficiency in the emergency department and made it more difficult to efficiently treat patients in the emergency department. Those inefficiencies contribute to wait times for emergency department patients, including those patients who arrive by ambulance.

61. Denied. Mission treats patients proactively and consistent with well-established triage approaches. Mission does so despite inpatient capacity constraints imposed by the State. When inpatient capacity is artificially constrained, patients may need to remain in the emergency department longer.

62. Denied. Mission staffs to its emergency department capacity and patient acuity, which are closely monitored and re-evaluated by nursing leadership every four hours.

63. Denied. Emergency department leadership monitors patient volumes throughout the day and night to determine the most efficient allocation of resources across the department and its various pods.

64. Denied. By way of further response, Mission faces inpatient capacity constraints imposed by the State. When inpatient capacity is artificially constrained, patients may need to remain in the emergency department longer.

65. Denied.

66. Denied. In fact, “boarding” is a common challenge facing leading hospitals across the country. That common challenge has been

identified as a public health emergency and systemic crisis by the American College of Emergency Physicians.

67. Denied.

68. Defendant lacks sufficient information to confirm or deny these allegations, and therefore denies them.

69. Defendant admits that patients who are transferred to Mission Hospital from an emergency department at another Mission facility typically are first brought to Mission Hospital's emergency department for evaluation. Except as expressly admitted herein, the allegations of paragraph 69 are denied.

70. Defendant lacks sufficient information to confirm or deny these allegations, and therefore denies them.

71. Denied.

72. Defendant admits that there is an IPA at Mission Hospital. By way of further response, the IPA is separated from the emergency department waiting room. Except as expressly admitted herein, the allegations of paragraph 72 are denied.

73. Denied. Patients in the IPA are separated from each other by privacy partitions, and Mission strives to maintain patient privacy to the maximum extent possible under the circumstances.

74. Denied. Mission strives to maintain patient privacy to the maximum extent possible under the circumstances.

75. Defendant lacks sufficient information to confirm or deny these allegations, and therefore denies them.

76. Defendant admits that, as a preliminary processing area, the IPA does not contain the same furniture as is used in some other patient care areas in the hospital. Except as expressly admitted herein, the allegations of paragraph 76 are denied.

77. The IPA is staffed by at least one midlevel provider and at least one physician each shift. Except as expressly admitted herein, the allegations of paragraph 77 are denied.

78. Denied. Providers in the IPA have access to equipment needed in service of the initial triage function for which the IPA is used. Except as expressly admitted, the allegations of paragraph 78 are denied.

79. Denied. Providers in the IPA have access to equipment needed in service of the initial triage function for which the IPA is used. Except as expressly admitted, the allegations of paragraph 79 are denied.

80. Denied. Providers in the IPA have access to equipment needed in service of the initial triage function for which the IPA is used. Except as expressly admitted, the allegations of paragraph 80 are denied.

81. Denied.

82. Denied. Providers in the IPA have access to the resources necessary to practice appropriate sanitation procedures.

83. Defendant admits that this paragraph accurately quotes the affidavits cited therein. Defendant otherwise lacks sufficient information to confirm or deny the allegations in paragraph 83, and therefore denies them.

84. Denied. To the extent paragraph 84 asserts a legal conclusion that the Level II Trauma Program regulations apply to the APA, no response is required.

85. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

86. Denied.

87. Defendant admits that efficiency is one among many relevant factors in patient transfers. Except as expressly admitted herein, the allegations of paragraph 87 are denied.

88. Defendant lacks sufficient information to confirm or deny these allegations in paragraph 88, and therefore denies them.

89. Defendant lacks sufficient information to confirm or deny these allegations in paragraph 89 and therefore denies them.

90. Defendant lacks sufficient information to confirm or deny these allegations in paragraph 90, and therefore denies them.

91. Defendant lacks sufficient information to confirm or deny these allegations in paragraph 91, and therefore denies them.

92. Defendant lacks sufficient information to confirm or deny these allegations in paragraph 92, and therefore denies them.

93. The figures in the table speak for themselves. Mission denies control over EMS turnaround times *after* it accepts transfer of care of the patient. To the extent paragraph 93 contains other allegations, except as expressly admitted herein, Defendant denies those allegations.

94. Admitted. However, wall time is only one part of turnaround time. After Mission accepts transfer of care, it does not control how long it takes for EMS to complete its turnaround.

95. Denied. The Complaint cites an article that provides no support for its purported figures regarding wall time and turnaround time at Mission. By way of further response, wall times at Mission decreased in 2023 and 2024, including for Buncombe County EMS.

96. Denied.

97. Defendant lacks sufficient information to confirm or deny the allegations in paragraph 97, and therefore denies them.

98. Defendant lacks sufficient information to confirm or deny the allegations in paragraph 98, and therefore denies them.

99. Defendant admits that McDowell County EMS implemented a “pause” on non-emergency transfers. Further, on January 18, 2024, McDowell County EMS resumed all transfers to Mission Hospital.³

³See Taylor Thompson and Brittany Whitehead, ‘*Significant improvements:*’ *McDowell County EMS resumes all transfers to Mission Hospital* (Jan. 18, 2024) <https://wlos.com/news/local/mcdowell-county-ems-ends-pause-transfers-to-mission-hospital-emergency-services-director-will-kehler-mission-health-hca-healthcare-significant-improvements-wait-times-no-delay>.

Except as expressly admitted herein, the allegations of paragraph 99 are denied.

100. Paragraph 100 contains legal conclusions to which no response is required.

101. Denied. The Complaint fails to define “advanced hospital facility” or to provide support for the proposition that Mission is the closest hospital offering oncology services for residents of 17 counties.

102. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

103. Denied.

104. Defendant admits that Mission currently does not employ an adult medical oncologist at the cancer center across the street from Mission Hospital. Defendant further states that Mission did not employ any adult medical oncologists when HCA acquired Mission. By way of further response, Defendant notes that there are several medical oncologists on Mission’s active medical staff, just as there were before the acquisition, and those providers can use Mission’s facilities to provide medical oncology care, if they so choose. Further, Mission employs three

pediatric medical oncologists who treat patients up to age 25. Except as expressly admitted herein, the allegations of paragraph 104 are denied.

105. Defendant admits Mission currently does not employ an adult medical oncologist at the cancer center across the street from Mission Hospital. Mission employs three pediatric medical oncologists. Except as expressly admitted herein, the allegations of paragraph 105 are denied.

106. Defendant admits that last summer, in response to a written question from the Attorney General's Office, Mission voluntarily provided the best information available to it regarding the number of appointments cancelled by the Mission Medical Oncology practice from 2020 to June 2023. Defendant notes that it did so despite the fact that this information is not tracked in the ordinary course of its business. Except as expressly admitted herein, the allegations of paragraph 106 are denied.

107. Mission admits that it facilitated transitions of care for patients who had been under the care of Mission-employed medical oncologists. Mission denies that it took any action to delay patient care

or put patient health at risk. Except as expressly admitted herein, the allegations of paragraph 107 are denied.

108. Defendant admits that Mission-employed oncologists were qualified to supervise first chemotherapy treatments. Except as expressly admitted herein, the allegations of paragraph 108 are denied.

109. Defendant admits that chemotherapy treatment is an important service. By way of further response, HCA makes available the facilities, equipment, and ancillary staff to provide this service. Credentialed providers are able to use Mission for these services.

110. Denied. HCA continues to provide chemotherapy services for all patients whose providers choose to use HCA's facilities for such services.

111. Denied. Mission provides high quality care to cancer patients and is diligently working to expand its offerings. Any delay in treatment for a particular individual is not the result of Mission's actions.

112. Denied. Defendant lacks sufficient information to address typical care across hospitals in different cities.

113. Denied. By way of further response, Mission did not reduce the number of staffed in-patient oncology beds. Instead, based on the

average daily medical oncology inpatient census from previous years, and at the request of oncology service line physician leadership, Mission dedicated 24 beds from a mixed-use unit to exclusively be used by oncology inpatients.

114. Denied. Mission continues to closely monitor community demand for inpatient oncology care.

115. Defendant lacks sufficient information to confirm or deny the allegations in paragraph 115, and therefore denies them.

116. Denied.

117. Denied.

118. Defendant admits that a ratio of one nurse for every four patients is, under certain circumstances, appropriate for an inpatient oncology unit. Except as expressly admitted herein, the allegations of paragraph 118 are denied.

119. Defendant admits that nurse to patient ratios should be adjusted based on patient acuity. Except as expressly admitted herein, the allegations of paragraph 119 are denied.

120. Defendant admits that oncology patients may need around-the-clock care from nurses because their condition can change rapidly.

Except as expressly admitted herein, the allegations of paragraph 120 are denied.

121. Denied. Mission appropriately staffs its inpatient oncology unit.

122. Denied. Mission appropriately staffs its inpatient oncology unit.

123. Defendant admits that Mission healthcare practitioners are devoted and committed. Except as expressly admitted herein, the allegations in paragraph 123 are denied.

124. Denied. Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients. Defendant cannot control whether certain providers choose to use or not use Mission's facilities to provide that care.

125. Defendant admits that Messino Cancer Center made the independent decision to no longer treat complex hematology cancer patients in the inpatient setting at Mission. Mission does not and cannot control Messino Cancer Center's independent decision in this regard. Mission Hospital continues to offer the facilities, equipment, and

ancillary providers necessary for the provision of inpatient care to complex hematology patients. Except as expressly admitted herein, the allegations of paragraph 125 are denied.

126. Denied. Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients. Defendant cannot speak to the motivations of a third party.

127. Denied. Mission employs several pharmacists trained in the provision of chemotherapeutics and infusion drugs.

128. Defendant admits that the pharmacist is not super-human. Except as expressly admitted herein, the allegations of paragraph 128 are denied.

129. Denied.

130. Denied. HCA actively manages its supply chain and strives to immediately address any issues caused by nationwide or regional shortages, particularly during and after the COVID-19 pandemic.

131. Denied.

132. Denied.

133. Denied. Although Defendant does not and cannot control the independent medical judgment of physicians, Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients.

134. Denied. Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients.

135. Denied. Defendant does not and cannot control the independent medical judgment of physicians. Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients.

136. Denied. Defendant does not and cannot control the independent medical judgment of physicians. Mission Hospital continues to provide the facilities, equipment, and ancillary providers necessary for the provision of inpatient care to complex hematology patients.

137. The APA is a document that speaks for itself, and therefore no response is required.

138. Admitted.

139. The APA is a document that speaks for itself, and therefore no response is required.

140. Paragraph 140 contains legal conclusions to which no response is required.

141. Paragraph 141 contains legal conclusions to which no response is required.

142. The APA is a document that speaks for itself, and therefore no response is required.

143. The APA is a document that speaks for itself, and therefore no response is required.

144. Admitted.

145. Defendant admits that December 12, 2023 is 40 days after October 31, 2023. Except as expressly admitted herein, the allegations of paragraph 145 are denied.

146. Denied.

147. Defendant incorporates its responses to the foregoing paragraphs of the Complaint.

148. Admitted.

149. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

150. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

151. Admitted.

152. Paragraph 152 contains legal conclusions to which no response is required.

153. Admitted.

154. Paragraph 154 contains legal conclusions to which no response is required.

155. Denied.

156. Defendant incorporates its responses to the foregoing paragraphs of the Complaint.

157. Admitted.

158. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

159. The APA and its associated schedules are documents that speak for themselves, and therefore no response is required.

160. Admitted.

161. Paragraph 161 contains legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 161 are denied.

162. Admitted.

163. Paragraph 163 contains legal conclusions to which no response is required.

164. Denied.

ANSWER TO PRAYER FOR RELIEF

The Prayer for Relief asserts legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiff is entitled to any form of relief from Defendant for the allegations set forth in the Complaint.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof, persuasion, or production not otherwise legally assigned to Defendant as to any element of the Attorney General's claims, Defendant asserts the following defenses:

1. Plaintiff fails to state a claim, in whole or in part, for which relief can be granted.

2. Plaintiff does not have standing to assert his claims and/or to seek some or all of the requested relief under applicable law.

3. To the extent Plaintiff's claims rely on conduct before January 1, 2023, Plaintiff expressly waived such claims by failing to raise them within the period set out in the underlying contract. *See* APA § 7.17(d).

4. Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

5. Plaintiff's claims are barred, in whole or in part, because Plaintiff has not sustained and will not sustain any cognizable injury under applicable law caused by any act or omission of any Defendant.

6. Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

7. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver or acquiescence.

8. Plaintiff's claims are barred, in whole or in part, under the doctrine of unclean hands.

9. Plaintiff's claims are barred, in whole or in part, because the alleged injuries are not attributable to the acts or omissions of Defendant.

10. Plaintiff's claims are barred, in whole or part, because Plaintiff failed to properly notify Dogwood Health Trust of specific acts or omissions constituting potential noncompliance with the APA, and therefore failed to provide Dogwood Health Trust and Defendant an opportunity to cure any alleged noncompliance with the APA, in violation of Section 13.13(b) of the APA.

RESERVATION OF RIGHTS

Defendant reserves the right to raise any additional defenses, cross-claims, and third-party claims not asserted herein of which it becomes aware through discovery or other investigation, as may be appropriate at a later time.

COUNTERCLAIMS

INTRODUCTION AND SUMMARY

In January 2019, HCA purchased Mission Health System, Inc. (“Mission”) after arm’s-length negotiations between HCA and Mission’s former owners (“Seller”). That negotiation resulted in an agreement, which HCA and Seller memorialized in a binding contract: the Asset Purchase Agreement (“APA”). HCA’s Counterclaims, like the Attorney General’s Complaint, are about just one provision of the contract: the commitments HCA made to not discontinue certain services at Mission Hospital for ten years after the purchase (“Hospital Service Commitments”). The Hospital Service Commitments are set out in Section 7.13(a) and an accompanying schedule to the APA, Schedule 7.13(a). Before the APA became effective, the Attorney General, for his part, secured a contractual right to sue to enforce the Hospital Service Commitments in certain circumstances. The Attorney General’s enforcement right is no broader than the Seller’s right, and does not include unilateral authority to amend the APA.

The Hospital Service Commitments are clear and unambiguous and HCA satisfies them. As relevant here, the Hospital Service

Commitments require that HCA (1) maintain Level II trauma capabilities at Mission Hospital, and (2) maintain the capabilities to provide the emergency services and oncology services that were provided at Mission as of January 2019. The Seller knew exactly what HCA would and would not be required to do when it sold Mission. In fact, the Hospital Service Commitments were extensively negotiated between HCA and the Seller. Although the Seller sought to include specific requirements by which to measure HCA's performance of the Hospital Service Commitments, HCA declined. HCA recognized that it would be impractical and irresponsible to make such specific promises on a ten-year time horizon, given the rapidly changing landscape of healthcare services in the United States and HCA's desire to be able to respond with flexibility to the needs of patients in western North Carolina.

The Attorney General accepted the as-negotiated scope of the Hospital Service Commitments before HCA acquired Mission. Because the Attorney General had a statutory right to review HCA's purchase of Mission, he had leverage to obtain changes in the APA's terms before HCA's purchase closed. The Attorney General used that leverage to, among other things, give himself contractual rights to sue to enforce

certain provisions of the APA—but he did not expand the Hospital Service Commitments beyond what was agreed to by HCA and the Seller. On January 31, 2019, the APA became final with the relevant portions of Section 7.13(a) and Schedule 7.13(a) unchanged from the version agreed to by HCA and the Seller before the Attorney General began his review—requiring that HCA “not discontinue” certain services at Mission.

Over five years as Mission’s owner, HCA has continuously demonstrated its commitment to meeting its contractual obligations, delivering high-quality care, state-of-the-art facilities, and advanced clinical services in western North Carolina. In the region, HCA operates 1,181 licensed beds across six acute care hospitals and one inpatient rehabilitation hospital. HCA also operates numerous care access points, CarePartners (a post-acute care provider), Asheville Specialty Hospital (a long-term acute care provider), and the region’s only dedicated Level II trauma center (collectively with the six acute care hospitals and inpatient rehabilitation hospital, the “Mission Facilities”). Mission is an essential element of western North Carolina’s healthcare delivery network, and HCA takes very seriously its role as an anchor institution in that network. HCA is a large employer driving economic growth, a

provider of critical healthcare services, and a leading player in fostering a healthy and thriving community.

HCA also substantially expanded Mission to meet the healthcare needs of western North Carolina. HCA has made more than \$630 million in capital investments in the Mission Facilities. These investments enabled Mission to, for example, build and open a new 120-bed Mental Health & Wellness Center, adding critically important behavioral health beds for patients in western North Carolina. HCA also opened the region's only pediatric emergency room. And HCA built and opened a burn and wound center, providing outpatient care previously unavailable in the region and preventing local families from travelling long distances for ongoing treatment of serious burns and wounds. As one more example, HCA completed a renovation of the Women's Tower at Mission Hospital, which included remodeling labor and delivery rooms, postpartum rooms, and opening a labor and delivery triage area for expecting families with private rooms and a dedicated entrance.

After acquiring Mission, HCA also invested heavily in Mission's care team members. In 2022, for example, HCA invested nearly \$20 million to increase the wages of Mission's nurses. Mission also expanded

access to quality nursing education to help address locally the nationwide nursing shortage by funding clinical faculty at local nursing schools and opening a Galen College of Nursing campus in Asheville. Mission's investments in wages and education for nurses are long-term commitments to address a national crisis; nursing vacancies grew from 1 million to 3.3 million during the COVID-19 pandemic. Although it remains a challenge to hire nurses in western North Carolina, Mission is taking concrete, substantial steps to address the nursing shortage.

HCA has earned recognition for its investments in Mission. Although awards and accolades are never the goal—high-quality patient care is—under HCA's ownership Mission has been recognized as a top hospital by several independent organizations that monitor the quality of care at hospitals in the United States. During each of the past four evaluation periods, Mission Hospital received the nation's top patient safety award—an "A" Leapfrog Hospital Safety Grade. In 2022, Leapfrog also recognized Mission Hospital as a Top Teaching Hospital. Those grades contrast with the "C" grade that Mission Hospital received from Leapfrog in the last review period that was based on data from before HCA acquired Mission. Further, for the third year in a row, Mission

Hospital was named as a Healthgrades' 50 Best Hospital—ranking it among the top 1% in the nation for providing the highest quality clinical care. Mission's Cardiovascular Surgery Program recently received a 3-star recognition rating, the highest rating from the Society of Thoracic Surgeons.

Mission has attracted and retained many world-renowned providers. For example, Mission Hospital is home to the only fellowship-trained musculoskeletal oncologist in western North Carolina, Dr. Donald Gajewski. Just last year, Mission hired two head and neck surgeons, a breast medical oncologist, and a surgical oncologist. The head and neck surgeons offer care and services that were never before available in western North Carolina. Mission's partnership with HCA's Sarah Cannon Cancer Institute further enhances community access to world class resources, cancer care providers, and clinical trials.

Western North Carolinians do not need to take HCA's word for its performance. When HCA acquired Mission, Attorney General Stein required that an Independent Monitor oversee HCA's compliance with the APA. In December 2023, just six days after the Attorney General filed his Complaint, the Independent Monitor confirmed that Mission

fully complied with its commitments in 2022. HCA works diligently to provide the highest quality care at Mission, even as issues intensified by the COVID-19 pandemic, such as a nationwide shortage of nurses, continue to have lasting impacts on hospitals across the country.

At bottom, though, this legal dispute is about a contract and whether it has been breached. The Hospital Service Commitments are simple and clear: they require that HCA continue certain service lines that existed in January 2019. HCA has absolutely done so.

PARTIES

1. Counterclaim-Plaintiff MH Master Holdings, LLLP is a limited partnership formed under the laws of the State of Delaware and registered with the North Carolina Secretary of State. Its principal place of business is in Nashville, Tennessee. It maintains a place of business at 509 Biltmore Avenue, Asheville, NC 28801.

2. MH Master Holdings, LLLP is identified as the “Buyer” in the APA. Pursuant to Section 7.10 of the APA, MH Master Holdings, LLLP is authorized to do business under brand names including “Mission Health,” “Mission Health System,” and “HCA.”

3. MH Master Holdings, LLLP, is a subsidiary of HCA Healthcare, Inc.

4. Counterclaim-Defendant Joshua H. Stein is sued in his official capacity as Attorney General for the State of North Carolina.

5. Dogwood Health Trust is a North Carolina non-profit corporation under Chapter 55A of the North Carolina General Statutes, with its principal office located in Asheville, North Carolina. Dogwood Health Trust is identified as the “Foundation” in the APA. Dogwood Health Trust is a party to these counterclaims in name only, as Plaintiff has usurped Dogwood Health Trust’s role as the party responsible for working with HCA to ensure the continued delivery of high-quality, affordable health care services in western North Carolina.

JURISDICTION AND VENUE

6. In connection with his complaint, as permitted under the APA, Attorney General Joshua Stein filed a Notice of Designation, certifying this action as a mandatory complex business case pursuant to N.C. Gen. Stat. § 55A-1-40(4). HCA does not contest this designation.

7. Mission's counterclaims arise under the APA, which was executed on January 31, 2019.⁴ This Court has jurisdiction over the subject matter of the counterclaims per N.C. Gen. Stat. § 1-82.

8. Counterclaim-Defendant has submitted to the personal jurisdiction of this Court with respect to HCA's Counterclaims by, without limitation, bringing a complaint alleging breach of the APA. Venue is proper in this district for several reasons, including because Counterclaim-Plaintiff maintains a place of business in Buncombe County.

9. Counterclaim-Plaintiff brings these Counterclaims pursuant to N.C. R. Civ. P. 13(a).

⁴ The APA was executed by and among Mission Health System, Inc., Mission Hospital, Inc., Mission Medical Associates, Inc., Mission Imaging Services, LLC, Blue Ridge Regional Hospital, Inc., Transylvania Community Hospital Inc., Angel Medical Center, Inc., MSJHS and CCP Joint Development Company, LLC d/b/a Asheville Specialty Hospital, the McDowell Hospital, Inc., Community CarePartners, Inc., Highlands-Cashiers Hospital, Inc., WNC CareSource, LLC, Avenu Health, Inc., McDowell Hospital Imaging Services, LLC, Transylvania Physician Services, Inc., Transylvania Services, Inc., Transylvania Hospital Imaging Services, LLC, Highlands-Cashiers Physician Services, Inc., the Eckerd Living Center LLC, MH Master Holdings, LLLP, HTI Hospital Holdings, Inc., and Dogwood Health Trust (collectively, the "Parties").

FACTUAL BACKGROUND

I. NEGOTIATIONS OF THE APA

10. Upon information and belief, the Seller began seeking a buyer for its health system in 2018. Mission identified several potential buyers, invited HCA to present to its Board, and engaged in arm's-length negotiations that culminated in a detailed term sheet. On March 21, 2018, HCA and Seller announced that HCA would acquire all of Mission Health System's assets, including Mission Hospital.

11. HCA and the Seller executed the first version of the APA in August 2018. In that agreement, HCA agreed to fund the construction of three large projects—a new acute care tower at Mission Hospital, a replacement facility at Angel Medical Center in Franklin, and a new 120-bed inpatient behavioral health hospital in Asheville. HCA also agreed to: (1) implement and maintain an uninsured and charity care policy chosen by the Seller; (2) create a fund to invest in innovative healthcare businesses in western North Carolina; and (3) expand graduate medical education at the Mission Facilities.

12. The August 2018 version of the APA included the Hospital Service Commitments. Through the Hospital Service Commitments, HCA promised to not discontinue the provision of the facilities, staff, and

equipment needed by medical staff members who provide certain categories of services at Mission Hospital for ten years after the sale, subject to limited exceptions. In other words, HCA promised to continue to support the services that physicians undertook at Mission Hospital before HCA's acquisition.

13. The Hospital Service Commitments were the subject of negotiations between HCA and the Seller, as reflected in numerous contemporaneous drafts and email correspondence between the Parties to the transaction.

14. Pursuant to N.C. Gen. Stat. § 55A-12-02(g), the Attorney General had authority to review the transaction before HCA could close on its purchase. Attorney General Stein's review of the proposed transaction included "[the] analysis of thousands of pages of documents," and "retaining an outside expert."⁵

15. During his review of the transaction, Attorney General Stein sought and secured changes to the agreement, including the requirement that an Independent Monitor oversee HCA's compliance with, among

⁵ See Exhibit 1 at 2 (Attorney General's January 16, 2019 Non-Objection Letter to Donald Esposito).

other things, the Hospital Service Commitments. As a result of Attorney General Stein’s review, HCA also agreed to narrow the definition of the “force majeure” conditions that could temporarily excuse HCA from certain of its obligations.⁶

16. The Attorney General did not, however, seek or secure any changes to the Hospital Service Commitments.

17. The scope of HCA’s contractual commitments was no secret in January 2019 (when the APA was executed) and is no secret today. As State Senator Julie Mayfield stated during the December 2023 press conference at which the Attorney General announced his lawsuit: “the sale agreement says nothing about maintaining the quality of care at any of the Mission facilities.”⁷

⁶ Additional changes are listed in Exhibit 1 (Attorney General’s January 16, 2019 Non-Objection Letter to Donald Esposito).

⁷ State Senator Julie Mayfield, Remarks at Mission Lawsuit Press Conference (December 14, 2023) (video available at <https://wlos.com/news/local/attorney-general-josh-stein-asheville-health-care-announcement-action-north-carolina-mission-hospital-hca-buncombe-county-dogwood-health-trust>). It is clear that Mission and the Attorney General have vastly different opinions about the quality of care provided at the Mission Facilities, with the latter largely focused on rumors and one-off anecdotes.

II. THE HOSPITAL SERVICE COMMITMENTS

18. The APA makes clear the services HCA must not discontinue for ten years and sets out scenarios when HCA may be excused, temporarily or permanently, from continuing those services. As relevant here, Section 7.13(a) of the APA says: “Unless otherwise consented to in writing by the Advisory Board for a period of ten (10) years immediately following the Closing Date, Buyer shall not discontinue the provision of the services set forth on Schedule 7.13(a) [] at the Mission Hospital Campus Facility, . . . subject to Force Majeure making the provision of such services impossible or commercially unreasonable (but only for the period of Force Majeure and the applicable Remediation Period).”

19. And, in relevant part, Schedule 7.13(a) says: “Inpatient and outpatient services must include: . . . Emergency and Trauma services generally consistent with the current Level II Trauma Program with emergency services for pediatrics and adults, ground/air medical transport services and forensic nursing services. . . . [and] Oncology Services— inpatient and outpatient cancer services, radiation therapy, surgery, chemotherapy, and infusion services.”

20. The text is plain. Section 7.13(a) of the APA and the accompanying Schedule 7.13(a) require HCA to provide the facilities, staff, and equipment necessary for certain healthcare services at Mission Hospital. The result of those commitments is that any provider on Mission Hospital's medical staff can use the facility to provide those services to her patients.

21. The plain text makes clear that the purpose of the Hospital Service Commitments was to ensure that Mission Hospital remained an option for physicians who wanted to care for patients in the community. The APA did not include any commitment from HCA to employ any number or specialty of physicians at Mission Hospital. Instead, the APA states that all services can be provided by medical staff members, who need not be employed by HCA. Notably the APA's definition of Contingency permits (after a period of time) discontinuation of the Hospital Service Commitments if there are insufficient providers on "the active medical staffs,"⁸ without any requirement that Mission hire providers to cure the insufficiency.

⁸ The definition states that a Contingency excusing HCA from its obligations to provide certain services includes "the **active medical staffs** of the applicable Material Facility not having qualified, available physicians and/or clinical staff that

22. As relevant here, through the Hospital Service Commitments, HCA promised to continue to facilitate the provision of Level II trauma care, emergency services, and oncology services that were available at Mission Hospital as of January 2019. HCA has done so.

23. Because the Attorney General advances a reading of the Hospital Service Commitments that would impose on HCA broader requirements than those to which HCA agreed, HCA brings these counterclaims to obtain a judicial construction of the disputed terms.

III. HCA HAS NOT DISCONTINUED ONCOLOGY SERVICES AT MISSION

24. HCA has fulfilled its obligation to not discontinue oncology services at Mission. In fact, after the acquisition, HCA made substantial investments and expansions in the oncology services available at Mission.

25. For example, Mission recently hired two head and neck surgeons, a breast medical oncologist, and a surgical oncologist. The head and neck surgeons provide oncology care that was not available in western North Carolina before HCA acquired Mission.

are in good standing and are necessary for Buyer or any of its Affiliates to provide such Mission Hospital / CarePartners Services or continue such operation, as applicable[.]” APA, “DEFINITIONS; INTERPRETATION” at 7 (emphasis added).

26. As another example, in October 2020, Mission partnered with HCA's Sarah Cannon Cancer Institute ("Sarah Cannon"). The partnership has enabled Mission's oncology service line to access world class resources, cancer care providers, and clinical trials that were not available at Mission before HCA's acquisition.

27. And Mission's comprehensive cancer program now includes the region's only CyberKnife—a noninvasive, robotic delivery system for radiation therapy. Mission's surgical oncologists use Mission Hospital's DaVinci surgical robots to provide cutting-edge surgical oncology care to treat adrenal, biliary/gallbladder, gynecology, liver, pancreatic, prostate, renal, small bowel, stomach, thoracic, and colorectal cancers.

28. Mission has extensive radiation oncology and imaging capabilities (such as mammography, PET/CT, and MRI) and recently purchased and installed two new linear accelerators, which treat nearly 1,000 patients with over 13,000 fractions per year.

29. In the five years since HCA's acquisition, Mission has invested \$12.4 million in capital improvements to the Mission Cancer Center ("Cancer Center"), including, but not limited to, a \$3.7 million renovation of the Mission Cancer Specialists office, and a \$2 million

upgrade to the compounding pharmacy. Mission also purchased and installed 39 new chemotherapy infusion chairs, which significantly improve the patient experience.

30. The Cancer Center provided a steady volume of medical oncology and chemotherapy services in 2020, 2021, 2022, and 2023, confirming that credentialed providers can still use the Cancer Center to provide oncology and chemotherapy services, as they could before HCA acquired Mission.

31. Mission's doors remain open for credentialed physicians who choose to provide oncology care at Mission, including inpatient care and outpatient care at the Cancer Center. The Cancer Center's infusion department is fully staffed with nurses and support staff. Oncology services are also available at several Mission facilities, such as the Hope Women's Cancer Center. Any credentialed provider who wishes to provide oncology care to a patient may use Mission's facility to do so 24 hours per day, 365 days per year.

32. The Attorney General's Complaint sets forth two obviously inaccurate narratives regarding oncology services at Mission, one related to first chemotherapy doses and the second to complex hematology care.

33. In fact and as required by the APA, Mission continues to offer the facilities, staff, and equipment necessary for credentialed physicians to provide “inpatient and outpatient cancer services, radiation therapy, surgery, chemotherapy, and infusion services” at Mission. APA, Schedule 7.13(a).

A. Chemotherapy Infusion

34. Before HCA acquired Mission, Mission did not employ medical oncologists. Then, as now, Mission offered the facilities (including the Cancer Center), staff and equipment necessary for Mission’s medical staff to care for oncology patients.

35. After the acquisition, the Messino Cancer Group (“Messino”) chose to open its own infusion and office facilities, away from Mission’s campus.⁹ To increase (rather than simply continue) access to oncology care in western North Carolina thereafter, HCA undertook significant recruiting efforts and hired five medical oncologists. Unfortunately,

⁹ Mission never employed Messino’s physicians before HCA acquired it. Messino was affiliated with Mission through a professional services agreement and Messino chose to terminate that agreement and to instead partner with the American Oncology Network, a private-equity backed national oncology network that is headquartered in Ft. Myers, Florida.

those physicians ultimately left Mission to pursue other opportunities outside of western North Carolina.

36. Today, Mission employs the same number of medical oncologists that Mission employed in January 2019: zero. The only contractually relevant fact is that Mission still provides the facilities, staff, and equipment necessary for patients to receive all forms of oncology care at Mission from credentialed providers—including the Messino physicians.

37. Unfortunately, Messino made an independent decision that now prevents some of its patients from receiving first doses of chemotherapy either at the Mission Facilities or in its own facilities. That decision was made by Messino alone. Mission had and has no control over the Messino physicians or contractual liability for the independent decisions of those physicians.

38. Ultimately, Messino's independent decision has resulted in delayed care for some patients in western North Carolina, and Mission regrets that fact very much.

39. When a patient receives her first dose of chemotherapy at an HCA facility, HCA policy requires a credentialed, experienced provider

to be present to directly supervise the treatment and monitor the patient for adverse reactions.

40. Although Mission does not employ medical oncologists to oversee first chemotherapy doses at the Cancer Center, community physicians with medical staff credentials—including the Messino physicians—can do so. Further, the facilities, staff, and equipment necessary for such services are in place at the Cancer Center.

41. Upon information and belief, Messino provides first and subsequent chemotherapy doses to most of its patients at its own facilities. However, in recent years Messino has sent many of its underinsured and uninsured patients to the Cancer Center for chemotherapy treatment, including first and subsequent doses.

42. If Messino is concerned about the access of its underinsured and uninsured patients to first chemotherapy doses, it has two options: Messino could either provide chemotherapy to those patients at its own facilities, or one of the many Messino physicians with medical staff privileges could come to the Cancer Center or Mission Hospital to oversee chemotherapy doses.

43. Unfortunately, Messino has, to date, rejected both options. Mission remains open to discussions with Messino regarding these circumstances and is committed to working with its physicians to develop solutions that benefit the community.

44. As relevant to the APA, though, Mission continues to be open and available for all chemotherapy and infusion services as required by that contract. Mission does not, and cannot, control which facilities physicians (including the Messino physicians) use to provide those services.

B. Complex Hematology Care

45. Before HCA acquired Mission, Mission Hospital did not employ any adult medical oncologists, let alone any that specialized in hematology.¹⁰ The same is true today.

46. In March 2020, Mission hired Dr. Albert Quiery, an expert in hematological cancers. The APA did not require that Mission hire Dr. Quiery, because the Hospital Service Commitments require only that Mission provide the facilities, staff, and equipment necessary for

¹⁰ Hematology Oncology is a specialized field focusing on the diagnosis, treatment and prevention of blood cancers and blood-related disorders.

credentialed providers to offer the same services that were offered at Mission before HCA's acquisition.

47. When he arrived, Dr. Quiery worked with Messino and Sarah Cannon to develop an adult blood cancer program at Mission. Unfortunately, several factors beyond Mission's control—including the COVID-19 pandemic and the nationwide shortage of experienced oncology nurses needed to expand capacity for clinically complex treatments—temporarily halted those efforts. Messino later disengaged from the discussions, and Dr. Quiery opted to return to academia in early 2023.

48. Following that, Messino resumed its pre-acquisition status as the only adult complex hematology provider in western North Carolina.

49. Although Mission did not have an adult blood cancer program before the acquisition, Messino physicians episodically provided inpatient care to complex hematology patients at Mission.

50. In September 2023, Messino announced that it would no longer use Mission to provide inpatient treatment to complex hematology cancer patients. Where Messino providers choose to offer care is their

independent choice, but the five rationales that Messino offered for its decision to discontinue using Mission for this care lack a factual basis.

51. First, Messino contended that nurse-to-patient ratios in Mission's inpatient oncology unit were too high. But Mission's nurse-to-patient ratios are consistent with the industry standard, and Mission's nurse-staffing is flexible and adaptable to patient acuity. In short, the nurse-to-patient ratios for inpatient oncology patients are not static—they are driven by patient need.

52. Second, Messino voiced concerns about chemotherapy-trained pharmacy staffing at Mission. But Mission meets the standard of care, providing double-check verification of chemotherapy orders by trained pharmacists 24 hours per day, seven days per week. Even during non-business hours, a chemotherapy-trained, licensed pharmacist assigned to the inpatient cancer unit provides the initial verification and that pharmacist is supported by a verifying pharmacist who received the same training.

53. Third, Messino stated that it was unhappy with care management support for inpatient oncology patients at Mission. Mission provides first-class, patient-specific care management programs.

54. Fourth, Messino voiced concerns with the timeliness of pathology and laboratory support services. Mission always strives for prompt turnaround of such services, and it has taken steps to better calibrate phlebotomy schedules to achieve more efficient specimen processing for cancer patients. Mission also is enhancing lab technician training, which should further reduce processing times, and undertaking a significant capital project to expand laboratory capabilities on the Mission Hospital campus.

55. Fifth, Messino made complaints—common at hospitals across the country in recent years—about drug and laboratory supply chain management. Although nationwide drug shortages have posed significant challenges for providers across the country and at all levels of care, Mission and its HCA partners, including Sarah Cannon, work diligently to ensure that Mission’s patients have access to necessary treatments, even in the face of difficult national shortages.

56. Mission remains committed to providing first-class care to all patients, including those needing complex hematology care.

57. Mission medical staff members and ancillary staff have offered, and continue to offer, hematology care to patients aged twenty-

five or younger through its pediatric oncology providers. In fact, Mission Children's Hospital offers the only pediatric hematology oncology practice in western North Carolina. Three world-class physicians lead the pediatric oncology team—Dr. Krystal Bottom, Dr. Doug Scothorn, and Dr. Katie Harris—and are supported by pediatric specialists at Mission Children's Hospital.

58. It is unfortunate that Messino's independent decision prevents its adult blood cancer patients from receiving local inpatient care. But this is Messino's independent decision; Mission does not and cannot control the clinical decision making of those physicians.

59. Most important to this lawsuit, the APA says nothing about Mission's blood cancer program. Notwithstanding Messino's choice, Mission remains open and available—with all of the necessary facilities, staff, and equipment—to credentialed providers who wish to admit complex hematology patients for care.

IV. HCA HAS NOT DISCONTINUED EMERGENCY AND TRAUMA SERVICES

60. Per the APA, Mission Hospital is the only Level II trauma center in western North Carolina. HCA promised in the APA to maintain

emergency and trauma services generally consistent with those available at the time of its acquisition. HCA has kept that promise.

61. Before and after the acquisition, Mission Hospital has been a state-designated Level II trauma center.

62. Among other criteria, Level II certification requires: 24-hour-per-day emergency department staffing by physicians physically present in the emergency department, 24-hour operating suite availability, and 24-hour immediate coverage by general surgeons, as well as coverage by the specialties of orthopedic surgery, neurosurgery, anesthesiology, emergency medicine, radiology, and critical care.

63. Mission meets those requirements now and has done so since 2019.

64. Mission's emergency department and trauma functions are staffed consistent with Level II trauma center standards. Specifically, Mission's emergency department is continuously staffed by both physicians who are board-certified in emergency medicine and who practice emergency medicine as their primary specialty and by nursing personnel with experience in trauma care.

65. The APA does not require any other staffing levels.

66. Although Mission now provides high-quality emergency and trauma care, it always strives to improve the care provided to western North Carolinians. Various factors beyond Mission's control have sometimes led to increased wait times and created challenges in Mission's emergency department.

67. The challenges are not simply a question of nurse staffing. Currently, Mission's emergency department beds are staffed, and Mission's emergency department staffing has remained generally consistent since the acquisition. Mission continues to enhance its staffing as needed to meet patient acuity and needs.

68. In recent months, though, a combination of factors—primarily increased patient acuity and insufficient inpatient acute-care bed capacity—has resulted in a cascading effect that has increased wait times in the emergency department.

69. Patients currently arriving at Mission's emergency department are, on average, sicker than in past years. That means that the patients coming to the emergency department, on average, need more care. On a percentage basis, more emergency department patients met the criteria for admission based on independent medical assessment in

2023 than in 2022. That increase in patient acuity is challenging because, although fully staffed, day-in and day-out, Mission generally is at capacity for inpatient acute care beds. When an emergency department patient needs to be admitted, she needs to be admitted to an inpatient bed. If no inpatient bed is available, she must remain in the emergency department until an inpatient bed becomes available.

70. Although Mission Hospital has 721 licensed inpatient beds, those beds cannot all be used for acute-care patients (even those admitted through the emergency department). Of those 721 inpatient beds, 82 are licensed for behavioral health and cannot be re-allocated to general acute care without a Certificate of Need (“CON”) under North Carolina law. An additional 51 inpatient beds are licensed for the neonatal intensive care unit (“NICU”). In addition to being treated differently from other hospital inpatient beds under the North Carolina CON regulatory framework, adult patients needing acute inpatient care simply cannot be placed in NICU bassinets. A further challenge arose from the fact that more than thirty of Mission’s inpatient acute care beds were undergoing renovation through much of 2023. When those beds re-opened in December 2023, emergency department wait times decreased.

71. Mission has tried to expand its inpatient acute care bed capacity. Mission submitted a CON for 67 additional acute care inpatient beds. Unfortunately, and at the urging of the Attorney General, those beds were awarded to another hospital that was not ready or able to open the inpatient beds it was awarded. Mission appealed this decision, again showing the need for the beds, but the appeal was denied.

72. Because Mission cannot either increase the number of inpatient beds it has or decrease the number of patients who walk into its emergency department, Mission opened an internal processing area near its emergency department to ensure that patients seeking emergent care receive it, even when emergency department beds are full. The internal processing area is a temporary solution to shorten the time between when a person walks into Mission's emergency department waiting room and when she first receives care. Of course, patients who require a higher level of care than is available in the internal processing area receive that higher level of care as promptly as possible, consistent with Mission's triage protocols.

73. Mission's circumstances are not unique. Many hospitals, non-profit and for-profit, in North Carolina and across the country face

significant challenges stemming from emergency department volume and inpatient capacity constraints. In fact, the crisis is so widespread and significant that the American College of Emergency Physicians convened the first national stakeholder summit on the issue in September 2023.

74. For its part, Mission's circumstances are not a result of too few providers. Mission has 73 emergency department providers. Although several emergency room physicians departed Mission in 2023, a near-equal number of new physicians have arrived or are in the process of onboarding. None of the emergency room physician departures in 2023 were because of a reduction in force by Mission.

75. Mission also strives to fully staff its emergency department with emergency room nurses, some employed by Mission and some contracted to work at Mission Hospital on a three- or six-month-term (also known as "travel nurses"). Consistent with its efforts to retain and recruit nurses, Mission reduced the turnover rate among emergency room nurses from 2022 to 2023, and the overall number of open nursing positions at Mission Hospital decreased from 2022 to 2023. As part of its effort to recruit and retain nurses to serve western North Carolinians,

Mission increased wages for nurses. In fact, average wages for nurses at Mission have increased approximately 20 percent since HCA acquired Mission.

76. Mission has also implemented a number of recruiting strategies to meet the continuous demand to hire new nurses, a demand which is common to hospitals throughout the United States. Mission's efforts include, but are not limited to, scholarships, tuition reimbursement programs, sign-on bonuses, and premium and incentive pay.

V. THE INDEPENDENT MONITOR FOUND HCA COMPLIED WITH THE HOSPITAL SERVICE COMMITMENTS

77. Dogwood Health Trust ("Dogwood"), is responsible for monitoring and assessing HCA's compliance with the APA. Dogwood has never sued HCA for breach of any of its commitments under the APA.

78. In fact, Dogwood and Gibbins Advisors, the firm that Dogwood engaged as the Independent Monitor of HCA's compliance with the APA, did not even raise any issues of *potential* noncompliance in either of the past two reporting periods (i.e., regarding Mission's operations in 2021 or 2022). Dogwood's most recent compliance report, released six days after

the Attorney General's Complaint was filed, specifically found that HCA complied with all APA requirements in 2022. *See* Exhibit 2.

**COUNTERCLAIM ONE: DECLARATORY JUDGMENT THAT
HCA DID NOT BREACH APA SECTION 7.13(a)**

79. The allegations contained in paragraphs 1 through 80 of this Counterclaim are incorporated by reference herein.

80. HCA has not discontinued the oncology or emergency and trauma services required under the APA.

81. Under N.C. Gen. Stat. § 1-253 et seq., HCA is entitled to a construction of the APA with respect to the factual allegations set out in the Attorney General's Complaint. A judicial declaration is necessary and appropriate so that HCA may ascertain its legal rights under the APA.

**COUNTERCLAIM TWO: DECLARATORY JUDGMENT THAT
SECTION 7.13 OF THE APA IS SILENT AS TO THE QUANTITY
OR QUALITY OF SERVICES REQUIRED**

82. The allegations contained in paragraphs 1 through 80 of this Counterclaim are incorporated by reference herein.

83. The contractual language, as well as the underlying negotiations, demonstrate that Mission's Hospital Service Commitments are not promises to meet subjective healthcare standards. HCA promised

only to continue to make its facilities, staff, and equipment available to medical staff physicians who want to use those facilities to offer the same services that Mission offered before HCA acquired it.

84. Under N.C. Gen. Stat. § 1-253 et seq., HCA is entitled to a construction of its obligations under the Hospital Service Commitments

WHEREFORE, Defendant respectfully prays the Court for the following relief:

1. That the Attorney General's Complaint be dismissed with prejudice.

2. That the Attorney General recover nothing for his claims.

3. That a judgment and declaration be entered that HCA has not breached Section 7.13(a) of the APA

4. That the Court declare that Section 7.13(a) of the APA does not obligate HCA to employ any particular number of providers.

5. That the Court declare that Section 7.13(a) of the APA does not obligate HCA to provide anything other than the facilities, equipment, and ancillary staff necessary for credentialed providers to use Mission to provide the services listed in Schedule 7.13(a)

6. That the costs of this action, including attorney's fees as may be allowed by law, be taxed to the Attorney General.

7. For such other and further relief as the Court deems just and proper.

This 13th day of February, 2024.

Respectfully submitted,

LATHAM & WATKINS, LLP

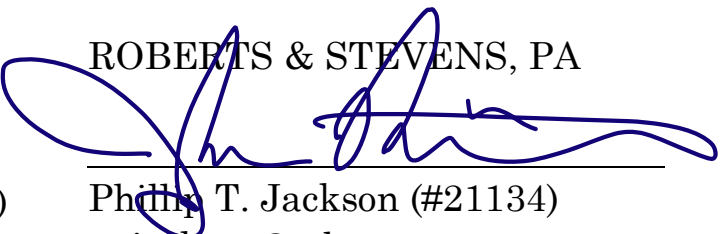
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CERTIFICATE OF SERVICE

Under Business Court Rule 3.9, the foregoing document was served on all parties on the date of filing via the Court's electronic filing system, which serves all counsel of record in this matter.



John David Noor