**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

| | | |
|---|---|---|
| **HEALTH CARE FOUNDATION OF GREATER KANSAS CITY,** | ) | |
| **Plaintiff,** | ) | |
| | ) | **Case No. 0916-CV30692** |
| **v.** | ) | **Division 14** |
| **HM ACQUISITION, LLC, and HCA, INC.,** | ) | |
| **Defendants.** | ) | |

# FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**JOHN M. TORRENCE**
**CIRCUIT JUDGE**
**DIVISION 14**
**CIRCUIT COURT OF**
**JACKSON COUNTY, MISSOURI**
**415 E. 12TH STREET**
**KANSAS CITY, MO 64106**

TABLE OF CONTENTS

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

| | | |
|---|---|---|
| **HEALTH CARE FOUNDATION OF GREATER KANSAS CITY,** | ) | |
| **Plaintiff,** | ) | |
| | ) | **Case No. 0916-CV30692** |
| **v.** | ) | **Division 14** |
| **HM ACQUISITION, LLC, and HCA, INC.,** | ) | |
| **Defendants.** | ) | |

# FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

By agreement of the parties this matter was heard by the Court without a jury for approximately three weeks commencing on October 17, 2011. Following the close of all the evidence, both parties requested preparation of a complete trial transcript before submitting proposed findings of fact and conclusions of law. Proposed findings of fact and conclusions of law were submitted by all parties in September, 2012. Plaintiff was represented by Paul Seyferth, Michael Blumenthal and Kevin Karpin of Seyferth, Blumenthal & Harris as well as Harold L. Lowenstein of Armstrong Teasdale. Defendants were represented by Thomas Kokoruda, Robert Henderson, Cathy Dean and Lauren Tucker McCubbin of Polsinelli Shughart.

## FINDINGS OF FACT

### A. Background Regarding the Asset Purchase Agreement.

1. Defendant Hospital Corporation of America ("HCA"), the largest for-profit hospital chain in the nation, purchased hospitals and other assets previously owned by Health Midwest. This transaction was the largest transfer of non-profit hospital assets to a for-profit

entity in the history of the United States. (Exhibit 40, at p. 1; Trial Transcript, at Vol. IV, 43:20-25.)

2. Prior to the purchase, HCA's then Chairman and Chief Executive Officer, Jack O. Bovender, Jr., ("Bovender"), acknowledged the public benefit that was served by Health Midwest's hospitals, stating publicly that Health Midwest was "*an absolutely precious community asset to the people of Kansas City and the other communities that Health Midwest serves.* (Trial Transcript, at Vol. IV, 130:12-131:9.)

3. Because of the charitable mission previously served by Health Midwest, HCA agreed to spend more than five hundred million dollars ($500,000,000.00) on charity care in the Kansas City community, and to spend four hundred fifty million dollars ($450,000,000) to improve the hospitals it purchased. These obligations were part of the "post-closing covenants" contained in the Asset Purchase Agreement ("APA") between HCA and Health Midwest. (Exhibit 13.)

4. The parties do not dispute that the APA's post-closing covenants *were for the benefit of the public, and were to serve the public interest.* (Trial Transcript, at Vol. IV, 131:14-132:4; Vol. V, at 72:10-13; Vol. VI, 9:18-25.)

5. After the closing of the APA, Health Midwest became known as Community Health Group ("CHG"). (Trial Transcript, at Vol. II, 117:10-13, Vol. X, 135:14-17, 166:24-167:2.) CHG is winding down the affairs of Health Midwest and intends to shut down eventually. (Trial Transcript, at Volume X, 165:5-9, 166:2-15.)

6. The Foundation was established by the Missouri Attorney General as a nonprofit public benefit corporation and health care conversion foundation to accept eighty percent (80%) of the net proceeds of Health Midwest's sale to HCA and to invest such proceeds and make

grants to organizations working to improve health care in the Kansas City area. (Trial Transcript, at Vol. II, 47:14-48:8, 51:12-20.)

7. Since its establishment, the Foundation has been a public charity dedicated to improving access and quality of health for under-served, uninsured, and under-insured individuals and communities in the Kansas City, Missouri area. (Trial Transcript, at Vol. II, 44:25-45:7, 51:12-20; Vol. VIII, 134:16-135:21.) The Foundation serves as the primary source of funding for the "safety-net" organizations that help serve the health care needs of the uninsured and underinsured in the Kansas City metropolitan area. (Trial Transcript, at Vol. II, 51:12-20; Vol. III, 134:16-21, 135:15-21.)

8. Pursuant to the Joinder Agreement to the Asset Purchase Agreement (the "Joinder Agreement") executed on or about August 30, 2004, the Foundation agreed to be made a party to the APA "solely for purposes of assuming the obligations of Seller" and the Foundation "assume[d] and consent[ed] to be bound by all post-closing terms and conditions of the Asset Purchase Agreement as 'Seller' . . . to the same extent as, jointly and severally obligated with, CHG." (Exhibit 46, at Attachment B.)

9. Tom Langenberg, a signatory to the Joinder Agreement and who became CHG's President and Chief Executive Officer after the sale to HCA, testified that one of the Seller's "obligations" under the APA was to monitor and enforce HCA's compliance with its post-closing covenants under the APA. (Trial Transcript, at Vol. X, 195:13-196:8.)

10. Section 4 of the Joinder Agreement further states, "Each party shall be entitled to specific performance of any of the provisions of this Joinder of the Asset Purchase Agreement in addition to any other equitable remedies to which such party may otherwise be entitled as a result

of a failure by the other party to comply with its obligations hereunder or thereunder." (Exhibit 46, at HCA00011746.)

11. The Foundation brought this lawsuit, *inter alia*, to obtain a declaration from the Court regarding the interpretation of the APA, regarding HCA's compliance with the APA, and for an accounting related to HCA's required reporting and compliance with the APA.

**B. <u>The Issues Presented at Trial, and the Court's General Rulings on Those Issues</u>.**

12. The first question presented at trial and addressed by the Court in these findings relates to the interpretation of Section 5.1 of the APA, and whether HCA was rightfully entitled to take credit for the construction of new facilities in order to satisfy the capital improvement requirements of Section 5.1. The Foundation believes Section 5.1 was intended to improve the "existing Facilities" purchased pursuant to the APA. HCA, by contrast, believes that Section 5.1 encompasses not only "existing Facilities," but should also be interpreted to allow it to take credit for the building of new or replacement hospitals and related "new" facilities.

13. On this first question, for the reasons stated in detail below, and based upon all reasonable inferences to be drawn from the evidence presented at trial, the Court finds in favor of the Foundation and against HCA. Because this finding of fact will be discussed extensively below, the Court will designate this finding as the "**Court's Finding Regarding Intent.**" Specifically, as used in these findings, the Court's Finding Regarding Intent refers to the Court's finding of fact that the capital improvement obligations of Section 5.1 of the APA related only to "existing Facilities" purchased by HCA in the APA.

14. The second question presented at trial and addressed by the Court in these findings relates to the effect of the last sentence of Section 5.1 of the APA in how HCA spent capital improvement monies in the Kansas City area. Specifically, this second question requires

the Court to determine whether HCA's construction of new facilities – regardless of whether HCA was allowed by the APA to take credit for the construction of new facilities under Section 5.1 – in fact "materially detracted" from the required maintenance and necessary improvement of the existing Facilities purchased under the APA.

15. On this second question, for the reasons stated in detail below, and based upon all reasonable inferences to be drawn from the evidence presented at trial, the Court finds in favor of HCA and against the Foundation. Because this finding of fact will also be discussed extensively below, the Court will designate this finding as the "**Court's Finding Regarding Materially Detract.**" Specifically, as used in these findings, the Court's Finding Regarding Materially Detract refers to the Court's finding of fact that, regardless of whether HCA could have properly taken credit for the construction of "new Facilities" pursuant to Section 5.1 of the APA, the construction of new facilities did not materially detracted from the required maintenance and necessary improvement of the existing Facilities purchased under the APA.

16. The third question presented at trial relates to the reporting done by HCA in connection not only with its capital improvement obligations outlined above, but also in connection with its obligations related to charity care. At its core, this third question requires this Court to determine whether HCA provided "reasonable detail" of its compliance with the APA, as outlined in Section 5.14 of the APA. This third question also relates to the issue of whether HCA properly "committed to spend" capital in accordance with its then applicable accounting policies and procedures, such that HCA could take credit for its "commitments" toward its $450 million capital improvement obligation.

17. On this third question, for the reasons stated in detail below, and based upon all reasonable inferences to be drawn from the evidence presented at trial, the Court finds in favor of

the Foundation. Because this finding of fact will be discussed extensively below, the Court will designate this finding as the "**Court's Finding Regarding An Accounting.**" Specifically, as used in these findings, the Court's Finding Regarding An Accounting refers to the Court's finding of fact that: (1) HCA improperly attempted to take credit for "commitments" that were not actually made as claimed by HCA; and (2) HCA did not provide "reasonable detail" of its alleged compliance with Section 5 of the APA, and that a Court-supervised accounting is warranted and necessary.

### C. Health Midwest Made it Clear To Potential Buyers That the Primary Reason for the Sale of Its Existing Facilities Was Because They Were "Starved For Capital."

18. The state and condition of the "existing facilities" purchased by HCA pursuant to the APA is of paramount importance in the Court's Findings Regarding the Intent of the parties to the APA generally, and the obligations contained in Section 5.1 in particular.

19. Founded in 1979, Health Midwest was a Missouri non-profit, public benefit corporation and an integrated health care delivery system serving the people of the greater Kansas City metropolitan area. (Exhibit 40, at pp. 3-5, ¶¶ 1, 2, 14.)

20. In 2002, faced with serious financial challenges and market pressures, Health Midwest's board decided to explore a potential sale of its hospitals and other assets. (Exhibit 40, at pp. 11-12, ¶¶ 69-73.)

21. Health Midwest was highly leveraged, had negative operating margins, had no additional access to capital, and was rapidly facing the prospect of technical default on bonds. (Trial Transcript, at Vol. III, 21:8-22:4; Vol. X, 122:10-17.)

22. Health Midwest was "starved for capital." Health Midwest was able to invest only approximately $25 million per year for capital improvements in its facilities when the

facilities' capital needs were actually $75 million to $100 million per year. (Exhibit 397, at 70:16-71:4; Trial Transcript, at Vol. III, 112:7-11, 211:8-212:1; Vol. IV, 195:22-196:3; Vol. VI, 11:19-12:1; Vol. X, 57:17-21, 60:9-15; Exhibit 331, at p. 5-1.)

23. Health Midwest's facilities were in need of significant capital improvements, and Health Midwest's lack of access to capital necessary to maintain, expand, and renovate the facilities was one of Health Midwest's primary reasons for considering a sale of its assets. (Trial Transcript, at Vol. III, 20:10-24:6.)

24. HCA, a publicly-traded corporation with its headquarters located in Nashville, Tennessee, is the largest for-profit health care provider hospital chain in the nation, operating approximately 160 U.S. hospitals in addition to six hospitals in London. (Trial Transcript, at Vol. IV, 18:13-18, 42:10-13; Vol. V, 49:7-10, 120:11-13; Vol. VI, 64:3-5.)

25. On August 7, 2002, David Atchison, Health Midwest's broker, sent a letter to HCA soliciting HCA to offer to buy the assets of Health Midwest and stating that HCA should be prepared to make a commitment, *inter alia,* including: "***Injection of new capital into the healthcare assets that currently comprise the Company*** [*i.e.*, Health Midwest] over the three to five years following closing, with specific statements of the amounts to be infused and the manner in which such infusion would be assured." (Exhibit 1, at p. 3.)

26. The Court finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that the central purpose of the sale of assets covered by the APA was to infuse drastically needed capital into the existing facilities purchased by HCA.

27. The Court further finds that Health Midwest itself began the process of seeking buyers in order to inject capital into the assets that *then* comprised the Company. Given the non-

profit nature of Health Midwest, and given further that its assets were, in effect, "public" assets, the Court finds the required maintenance and necessary improvement of these "precious assets" of the Kansas City community were the primary purposes for the sale.

### D. HCA Clearly Understood That Health Midwest's "Capital-Starvation" Was the Reason Why Health Midwest Was Selling Some of its Assets.

28. HCA's knowledge and awareness of the state of the facilities it was purchasing from Health Midwest has a direct bearing on the parties' intent with regard to the operation and effect of Section 5.1 of the APA.

29. On August 27, 2002, Health Midwest's leadership team and HCA's leadership team met at the law offices of Health Midwest's legal counsel in Kansas City, Missouri. (Trial Transcript, at Vol. III, 40:6-12; Vol. IV, 38:11-15, 64:3-9; Exhibit 397, at 56:8-19, 61:21-62:22.)

30. HCA representatives in attendance at that meeting included: Jack Bovender, then HCA's Chairman and Chief Executive Officer; Sam Hazen, then President of HCA's Western Group; and Carl George, then HCA's Vice President of Development. (Trial Transcript, at Vol. III, 40:13-23; Vol. IV, 64:3-9, 191:7-192:7, 197:21-24; Exhibit 397, at 56:8-19.)

31. Health Midwest's executive leadership team attending that meeting included, without limitation, Richard Brown, then Health Midwest's President and Chief Executive Officer, and Tom Langenberg, then Health Midwest's Chief Financial Officer. (Trial Transcript, at Vol. III, 40:24-41:18; Exhibit 397, at 63:7-9.)

32. The purpose of the meeting was to have a "comprehensive briefing" and an opportunity for Health Midwest "to respond to any question that HCA had regarding the opportunities that the Health Midwest system represented in their strategic future." (Trial Transcript, at Vol. III, 43:16-21.)

33. At the meeting, Brown discussed with HCA's leadership team that Health Midwest had insufficient access to capital and extensive capital needs. (Trial Transcript, at Vol. III, 44:12-22.)

34. Brown testified that he advised HCA on August 27, 2002 that he believed it would be worthwhile to consider building new facilities in Independence and Lee's Summit, but he admitted that he made those statements in response to an inquiry from HCA about what Health Midwest would do if it had no capital restraints. (Trial Transcript, Vol. III, at 126:13-127:23.) (*See also* Exhibit 397, at 75:6-11.)

35. George's notes corroborate that Brown's comments about building new facilities in Independence and Lee's Summit were only within the context of what type of strategic initiatives Health Midwest would undertake if it had "Unlimited Access to Capital." (Exhibit 73, at HCA0001143039; Exhibit 397, at 72:5-73:5, 75:6-11, 75:24-76:5.)

36. Although Health Midwest recognized in August of 2002 that its existing hospitals in Independence and Lee's Summit were aging and in need of significant improvements, Health Midwest had no specific plans to build a new hospital in either location. (Trial Transcript, at Vol. III, 114:3-18.)

37. As of the August 27, 2002 meeting, Health Midwest had not even began taking preliminary steps towards planning the construction of new facilities in Independence or Lee's Summit by, for example, applying for a Certificate of Need in connection with a proposed new hospital in either location. (Trial Transcript, at Vol. III, 53:20-25, 114:13-15.)

38. George's notes further corroborate that the existing facilities would require extensive investments in capital improvements, and that the purchased assets needed a "Capital Infusion" over the next five to ten years. George's notes also corroborate that Health Midwest

needed to spend the "Next 3 Yrs" to "Catch Up" before the facilities in need of capital infusions could then "go forward" with strategic capital improvements. (Exhibit 73, at HCA0001143048; Exhibit 397, at 84:2-7.)

39. George testified that his notes (Exhibit 73) about "catch up" over the "Next 3 Yrs" reflected HCA's understanding that Health Midwest had not invested sufficient capital in the past, "so they need[ed] to catch up and spend more money." (Exhibit 397, at 84:14-17.)

40. George testified, "From the very first discussions I knew they [Health Midwest] needed a lot of capital." (Exhibit 397, at 18:24-19:3, 85:6-7.)

41. George testified that when HCA submitted its bid for the purchase of Health Midwest's assets, HCA knew that Health Midwest had been spending only approximately $25 million per year for capital improvements in all of its facilities combined. (Trial Transcript, at Vol. III, 156:7-8; Exhibit 397, at 70:16-24,71:14-23.)

42. George admitted that HCA knew that Health Midwest had been "dramatically under-spending for capital improvements" and was unable to access the capital necessary to satisfy the needs of its facilities. (Trial Transcript, at Vol. III, 109:4-7; Vol. IV, 192:22-193:3; Exhibit 397, at 71:19-72:3.)

43. Brown testified that there were "glaring unmet needs" for capital improvements in the Health Midwest facilities at the time HCA submitted its bid for the purchase of the facilities. (Trial Transcript, at Vol. III, 66:3-7, 110:16-22.)

44. Brown further testified that the Health Midwest facilities were "distressed from the standpoint of capital improvements" and that this was disclosed to HCA. (Trial Transcript, at Vol. III, 109:4-110:10.)

45. Clifton Hills, Chief Financial Officer of HCA's Midwest Division, testified that

Health Midwest was "highly distressed economically and from a capital standpoint, that there would be a high demand for capital early on," and that "[w]e knew coming in that it was just a highly distressed hospital system." (Trial Transcript, at Vol. VI, 11:19-12:1, 12:14-18.)

46. Bovender admitted that HCA knew that Health Midwest had decided to sell its assets primarily because Health Midwest lacked access to the capital necessary for its facilities. (Trial Transcript, at Vol. IV, 36:19-25.)

47. The Court finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that, prior to making a bid to purchase any of Health Midwest's assets, HCA was well aware that substantial infusions of capital were necessary for the existing facilities to simply bring those facilities up to a level necessary to provide high-quality health care to the residents of the Kansas City community.

48. The Court further finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that Brown's comments about his desire to build new hospitals in Independence and Lee's Summit if there was an environment with "unlimited capital constraints" are not probative of the parties' intent that monies later agreed upon for capital improvements could be used for that purpose because the later agreed upon $450 million in capital improvement monies did not, on its face, constitute "unlimited capital" and the parties agreed that HCA's priority for spending that money was to perform the "required maintenance and necessary improvement" for the "existing Facilities."

## E. HCA's Purchase Offer Expressly Included an Investment of $400-$500 Million Into the Purchased Assets "[E]xcluding any [R]eplacement [H]ospitals."

49. The condition of the facilities subject to the APA was, in fact, recognized by HCA prior to making its offer to purchase the Health Midwest facilities, but also in its offer proposal, which ultimately led to the APA itself.

50. HCA made a purchase offer to Health Midwest on September 5, 2002. (Exhibit 40, at p 14, ¶81; Exhibit 47.)

51. HCA's purchase offer was extensively reviewed and approved by HCA's senior leadership, including Bovender, Bracken, George, Gregg Gerkin, and Sam Hazen. (Trial Transcript, at Vol. IV, 73:9-74:7, 204:17-205:10; Exhibit 397, at 95:18-96:24.)

52. Bovender, HCA's signator to the APA, described HCA's purchase offer as follows:

> I am very pleased to inform you that today HCA is submitting an offer to purchase Health Midwest at an enterprise value ranging between $850 million and $1 billion. As part of our proposal, we are also committing to make an additional $400 to $500 million of capital investments in healthcare facilities and equipment to the Health Midwest system over the next seven years. ***This capital investment could go substantially higher should we ultimately decide to build replacement hospitals in Independence and/or Lee's Summit.*** This places the total value of HCA's offer within a range of $1.25 billion to $1.5 billion ***excluding any replacement hospitals***.

(Exhibit 47, at p. 1 (emphasis supplied); Trial Transcript, at Vol. IV, 75:11-76:9.)

53. Bovender made similar representations in a separate September 5, 2002 letter to three other Health Midwest executives in which Bovender summarized the terms of HCA's offer to purchase Health Midwest's facilities:

> In addition, HCA envisions making capital expenditures over the next seven years with respect to the Health Midwest system of $400 to $500 million, with the amount and timing depending on the ability to obtain regulatory approvals, ***the needs of the facilities*** and other factors. ***This amount could go higher if we decide, after consultation with the local medical staffs,***

***community boards, and employees, to build a replacement facility in Lee's Summit or Independence.***

(Exhibit 47, at p. 4 (emphasis supplied).)

54. Confirming the Court's Findings Regarding Intent, in his September 5, 2002, letter to Brown, Bovender further stated, "**Health Midwest facilities also would receive priority with respect to future capital investments**, new medical technologies, clinical and informational technology systems implementation, and employee training programs." (Exhibit 47, at p. 2 (emphasis supplied).)

55. Explaining HCA's intention with respect to existing facilities, Bovender testified: "In relationship to other projects inside the company, yes, that we were saying to Dick [Brown] and Health Midwest at that time that because of the needs there, that **as we assessed capital needs throughout the whole company, that Health Midwest would be top priority**." (Trial Transcript, at Vol. IV, 80:1-18. (emphasis supplied).)

56. Bovender testified that Exhibit 47 "was my intent at the time as I understood what the board of directors had authorized." (Trial Transcript, at Vol. IV, 75:11-15.)

57. HCA's purchase offer was not for a "system." The APA specifically defines a subset of Health Midwest's assets that were being purchased by HCA. HCA's purchase offer ***excluded*** a significant number of Health Midwest's assets from the sale, including: "Investments;" the Trinity Lutheran hospital campus property; the old St. Mary's campus property; the Park Lane Medical Center campus property; the Wetzel Clinic; the Cancer Institute; Visiting Nurse Association Home Health; Research Eagle, Research Mental Health, Kansas City Hospice; all assets related to HMBC, L.L.C.; all assets related to Menorah Internal Medicine; executive life insurance policies; and eleven foundations. (Exhibit 13, at Section 2.2,

pp. 16-17, and at Schedule 2.2; Trial Transcript, at Vol. III, 174:24-175:3; Vol. X, 167:3-168:16.)

58. After September 5, 2002, Bovender did not speak to anyone at Health Midwest about the terms of the APA. (Trial Transcript, at Vol. IV, 77:7-12.)

59. HCA did not present to the Court any notes, emails, letters, or documentation of any discussions involving whether the capital improvement thresholds of Section 5.1 of the APA applied to existing facilities or "new construction." In the words of Bovender, "These were verbal reports." (Trial Transcript, at Vol. IV, 78:2-9.)

60. Bovender was not aware of and HCA did not present to this Court any documents that indicated the building of new or replacement hospitals was intended to be included in the $450 million capital expenditure contained in Section 5.1 of the APA. Bovender specifically testified:

> Q: Taking it a little bit further, you're not aware of any documents that state the building of new or replacement hospitals was intended to be inclusive of the $450 million capital expenditure outlined in Section 5.1?
>
> A: Not to my knowledge.

(Trial Transcript, at Vol. IV, 114:17-22.)

61. Bovender admitted that the subject of whether new construction was intended to count toward HCA's $450 million capital improvement obligation under Section 5.1 of the APA was not addressed anywhere during the negotiation process, either positively or negatively. Bovender testified:

> Q: In fact, have you seen anything, any document anywhere like by anybody that indicates that at any point in time in November 2002, HCA's intentions had in any way evolved through an iteration to state that new construction was intended to now include the inclusive of the $450 million for the replacement hospitals in Independence or Lee's Summit?
>
> A: I don't think it was addressed either positively or negatively.

(Trial Transcript, at Vol. IV, 113:14-23.)

62. The interpretation placed on a contract by the parties prior to the time it became a matter of controversy is entitled to great, if not controlling, influence in ascertaining the intent and understanding of the parties and the courts will generally follow such construction. *Housley v. Mericle*, 57 S.W.3d 360, 363 (Mo. App. S.D. 2001). In the context of the parties' evidence presented at trial, this statement of Missouri contract law is especially significant with regard to the Court's findings of fact because HCA did not present persuasive or credible evidence *contrary to* the intentions expressed by its Board of Directors (as described by Bovender) and/or the original offer letters that culminated in the APA.

63. The Court finds that, in light of the reasonable inferences to be drawn from Bovender's testimony and Exhibit 47, it was the intent of HCA's Board of Directors that the $400-$500 million of offered capital expenditures excluded the building of replacement hospitals in Independence and/or Lee's Summit. Significantly, HCA presented no evidence of a contrary intent from its Board of Directors, notwithstanding this Court's statement during trial that it found post-dispute statements of the parties' intent to be less than credible. (*See, e.g.*, Trial Transcript, at Vol. X, 32:18-23.)

64. The Court further finds that HCA's offer letter to Health Midwest submitted on September 5, 2002 expressed HCA's intent that it would spend $400-$500 million of capital improvements on the existing facilities purchased from Health Midwest, excluding any replacement hospitals. Given the clarity of that offer letter, and the lack of documentary evidence or evidence of contemporaneous statements made at the time of the transaction contradictory to such clear intent, the Court finds that Section 5.1 of the APA should be interpreted consistent with HCA's unambiguous statements in Exhibit 47.

65. The Court further finds that HCA's offer letter in Exhibit 47 expressly states HCA's intent that "HCA's offer" was "excluding any replacement hospitals." The letter indicated the purchase offer's "enterprise value" ranged between "$850 million and $1 billion." The letter further committed to make "an additional $400 to $500 million of capital improvements" to Health Midwest's facilities. The letter summarized the "total value of HCA's offer within a range of $1.25 billion to $1.5 billion, ***excluding any replacement hospitals***." The Court takes notice that the sum of the low-range of the enterprise value (*i.e.*, $850 million) added to the low-range of HCA's capital improvements offer (*i.e.*, $400 million) is $1.25 billion and that the sum of the high-range of the enterprise value (*i.e.,* $1 billion) added to the high-range of HCA's capital improvements offer (*i.e.*, $500 million) is $1.5 billion. Thus, HCA's offer letter expressly states HCA's intent that its offer was "excluding any replacement hospitals."

66. Based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, the Court finds that the capital improvement obligations of Section 5.1 related only to the "existing Facilities" purchased by HCA in the APA.

## F. HCA Informed the Public About Its Interpretation of Section 5.1 of the APA.

67. Having previously found that Section 5.1 of the APA is subject to two (2) reasonable interpretations, the Court heard substantial contemporaneous evidence regarding HCA's and Health Midwest's interpretations of Section 5.1. Significantly, this contemporaneous evidence demonstrates that HCA understood that the capital improvement requirements of Section 5.1 applied to the existing Facilities purchased by HCA, and not "new construction."

68. Health Midwest and HCA had agreed to the essential terms and conditions of the underlying APA – and specifically Section 5.1 – by November 18, 2002. (*See, e.g.,* Exhibits 14, 16, and 17.)

69. Immediately prior to November 18, 2002, HCA met with various segments of the Kansas City public and described its intent in entering into the APA, in general, and Section 5.1 of the APA in particular.

70. For instance, after the proposed sale was announced, clergy members within Kansas City's African-American community expressed concerns that HCA's potential private ownership of Health Midwest's publicly-owned hospitals would be harmful to the communities that depended upon those facilities for the delivery of healthcare to residents, particularly within Kansas City's urban core. (Trial Transcript, at Vol. IV, 114:23-115:6. *See also* Trial Transcript, at Vol. III, 137:13-138:7.)

71. In early November of 2002, Bovender traveled to Kansas City and had a breakfast meeting with a number of African-American ministers who had expressed concerns about HCA's potential purchase of Health Midwest's hospitals. (Trial Transcript, at Vol. IV, 114:23-115:19.)

72. During this breakfast meeting, Bovender made no mention of any plans to spend any of HCA's pledged $450 million in capital improvements on the construction of new or replacement hospitals in eastern Jackson County. (Trial Transcript, at Vol. IV, 115:13-117:3.)

73. After this meeting, the clergy group sent a letter to Bovender asking for HCA's "promise and commitment" that: "Of the $450 Million in capital improvements, a substantial amount [sic] designated specifically for the African American urban core." (Exhibit 65, at HCA0001229987- HCA0001229989.)

74. On November 14, 2002, Bovender authored a letter responding to the ministers' specific concerns and confirmed that the monies required to be spent in Section 5.1 of the APA applied to the Health Midwest facilities:

> Although we are not yet in a position to give a specific breakdown of how the $450 million in capital investments ***in the Health Midwest facilities*** will be spent, ***we fully expect a significant portion of those funds to be allocated to improvements in the Research and Baptist Facilities*.**

(Exhibit 64, at HCA0001229956, and Exhibit 65, at HCA0001229956 (emphasis supplied); *see also* Trial Transcript, at Vol. IV, 117:6-120:12.)

75. Brown testified that Bovender's statement as quoted in the immediately preceding paragraph was consistent with Health Midwest's intent as of November 14, 2002. (Trial Transcript, at Vol. III, 143:17-144:6.)

76. Bovender testified at trial that he never advised the ministers that HCA might spend any portion of the $450 million for the construction of new or replacement hospitals or other facilities. (Trial Transcript, at Vol. IV, 120:23-121:12.)

77. Bishop Mark Tolbert, who attended the breakfast meeting with Bovender, testified that Bovender never told him "anything differently than the money was going to be spent to improve the assets that they were acquiring." (Exhibit 641, at 101:2-6.)

78. Bishop Tolbert further testified that, based on his conversations with Bovender and his participation in hearings concerning HCA's potential purchase of Health Midwest's assets, it was his understanding that the $450 million of capital "was intended to be spent on the assets that were being acquired by HCA from Health Midwest." (Exhibit 641, at 100:8-15.)

79. The Court finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that Bovender's statements to the ministers, within days of signing the APA, are consistent with HCA's intent that Section 5.1 of the APA applied only to the "existing Facilities" purchased by HCA and that the construction of new or replacement hospitals was exclusive of that amount.

80. The Court further finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that Bovender's statements to the ministers corroborates the Court's finding that Exhibit 47 is clear evidence of HCA's intent with regard to the operation of Section 5.1 at or about the time that Bovender signed the APA on behalf of HCA.

## G. HCA Briefed Its Executives About How to Communicate the Terms of the Deal to the Public, and Confirmed Internally and to the Public That the $450 Million Would Be Spent on the Existing Facilities.

81. A further important indication of the parties' intent at the time the APA was either being negotiated or entered into relates to statements made in the presence of the top law enforcement officers of the States of Missouri and Kansas. These statements from the parties confirm that Section 5.1 was intended to apply to the "existing Facilities" purchased by HCA.

82. Missouri Attorney General Jay Nixon scheduled a public hearing to be conducted in Kansas City, Missouri on November 18, 2002 to provide a public forum for HCA and Health Midwest to address the public about the effect that HCA's purchase of Health Midwest's facilities would have on the delivery of healthcare in the Kansas City community. (Exhibit 65, at HCA0001229914, HCA001229920; Trial Transcript, at Vol. IV, 121:13-23, 127:13-128:16.)

83. Kansas Attorney General Carla Stovall scheduled a similar public hearing to be conducted in Leawood, Kansas on November 20, 2002. (Trial Transcript, at Vol. III, at 148:6-20.)

84. HCA created a "Briefing Packet" to prepare its executives to make their presentations and answer questions at these public hearings. (Exhibit 65; Trial Transcript, at Vol. IV, 122:9-17.) HCA presented no evidence to lead the Court to believe that the briefing

packet was something other than an expression of HCA's intent regarding its obligations under the APA, including those with respect to Section 5.1.

85. The Briefing Packet included a presentation slide stating HCA would "develop a plan for the $450 million capital expenditure." (Exhibit 65, at HCA0001229934; Trial Transcript, at Vol. IV, 122:18-123:7.)

86. The Briefing Packet also contained a sample "Health Midwest Q & A," anticipating possible questions – and scripting HCA's proposed answers to the public – which included the following sample question and answer:

> Q: What is the biggest change the average person in our community will notice as a result of the ownership change?
>
> A: Most patients won't notice any change at all initially. We hope that, over time, ***the significant capital improvements we have agreed to will result in more updated facilities and equipment for the hospitals***.

(Exhibit 65, at HCA0001229943, at ¶ 2 (emphasis supplied); Trial Transcript, at Vol. IV, 123:8-124:12.)

87. The Briefing Packet also included this sample question and answer:

> Q: Health Midwest is a local organization. Won't an out of town for-profit company simply take money out of the community and funnel it to Wall Street?
>
> A: Quite the contrary, HCA is committed to becoming an integral part of the Kansas City community. In fact, we have agreed to provide at least $450 million ***in capital improvements in the Health Midwest hospitals. This is one of the major benefits we expect to bring to Kansas City*.**

(Exhibit 65, at HCA0001229945, at ¶13 (emphasis supplied); Trial Transcript, at Vol. IV, 124:13-125:2.)

88. Brown testified that the answer from HCA's Briefing Packet, as quoted immediately above, was "not inconsistent" with Health Midwest's intent under Section 5.1 of the APA. (Trial Transcript, at Vol. III, 145:2-14.)

89. Nobody from HCA was called to testify as to their authorship of Exhibit 65, or why Exhibit 65, as excerpted above, should not be taken at face value as an expression of HCA's intent as of the time of the transaction.

90. Brown testified, and the Court specifically finds that, throughout the course of the negotiations between Health Midwest and HCA concerning the APA, "Hospitals" was a defined term and included only those facilities that would be sold to HCA. (Trial Transcript, at Vol. III, 146:7-17.) This is significant because the Briefing Packet contained in Exhibit 65 is a thorough document, and appears to have been written by individuals within HCA who were very familiar with the terms and conditions of the APA.

91. At trial, no witness from HCA credibly explained or attempted to explain why the Briefing Packet was something other than a contemporaneous expression of HCA's intent regarding the operation of Section 5.1 of the APA. At most, Richard Bracken, HCA's present Chairman and Chief Executive Officer and then President and Chief Operating Officer, testified that the above-quoted questions and/or answers from HCA's Briefing Packet were "inadequate" or "poorly worded," although Bracken offered no explanation for how or why those statements did not reflect HCA's intent at the time of the transaction. (Exhibit 396, at 85:3-86:7, 88:10-89:12.) This testimony directly contradicts Bovender's statements in Exhibit 47 and his statements to the clergy in Exhibits 64 and 65. Once again, the Court finds HCA's contemporaneous statements about the intent of Section 5.1 to be more credible than Bracken's post-dispute statements.

92. Moreover, the Court finds it significant that even Bracken admitted the Q&A within the Briefing Packet "seems to specifically refer to the hospitals that then existed and were owned and operated by Health Midwest." (Exhibit 396, at 85:23-86:7.)

93. The Briefing Packet included no scripted answers or any language stating that any portion of HCA's $450 million in capital spending would go toward the construction of new or replacement hospitals or other facilities. (Exhibit 65.)

94. The Court finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that HCA's internal documents, provided to HCA executives with information to be transmitted to the public on literally the eve of Bovender's execution of the APA clearly express HCA's intent that the operation of Section 5.1 of the APA was limited to the "existing Facilities" HCA purchased from Health Midwest.

95. The Court further finds, based upon the above facts and the reasonable inferences to be drawn from the testimony and exhibits introduced at trial, that the Briefing Packet embodied in Exhibit 65 corroborates HCA's intent as expressed in Exhibit 47 and Exhibits 64 and 65 (*i.e.*, that Section 5.1 created capital improvement obligations with respect to the "existing Facilities" HCA purchased from Health Midwest.)

## H. Bovender Spoke at Missouri Attorney General Nixon's Public Hearing on November 18, 2002, and Confirmed That the $450 Million Would Be Spent On the Existing Facilities.

96. The parties' intent regarding the operation of Section 5.1 is clear from the Bovender letter and HCA Briefing Packet, but that intent is further corroborated by public statements from HCA's officials made within days of HCA signing the APA.

97. On November 18, 2002, which was after the parties' lawyers finished drafting the language of the APA and four days before he signed the APA, Bovender participated in Attorney

General Nixon's public hearing on the proposed sale of Health Midwest's assets to HCA. (Trial Transcript, at Vol. IV, 121:13-23.)

98. The public hearing was held at the Linwood Multi-Purpose Center in Kansas City, Missouri. (Trial Transcript, at Vol. IV, 127:13-18.)

99. Bovender understood at the time of the November 18, 2002 public hearing that the Missouri Attorney General and the public would be closely scrutinizing the proposed transaction between HCA and Health Midwest, that he could not withhold relevant information, and that he needed to choose his words very carefully. (Trial Transcript, at Vol. IV, 127:13-128:22, 129:19-130:3.)

100. Bovender's testimony at the November 18, 2002 public hearing included the following statements:

> I appreciate all of you being here tonight. ***It is a testimonial to what we knew to begin with, that the hospitals of Health Midwest are an absolutely precious community asset to the people of Kansas City and the other communities that Health Midwest serves*.**
>
> ***
>
> ***These hospitals*** need significant capital investment if they are to provide the care that is needed over the next five years, ten years, 20 years.
>
> ***
>
> We will develop a plan, ***and this is key***, for ***spending $450 million in capital into these hospitals*** over the next five years. Believe it or not, it's hard to intelligently spend $450 million in five years ***in these hospitals*** and we're going to need a lot of input from people in this community, in particular, doctors, our nurses, and other health professionals as to where that money and how that money will need to be spent.
>
> ***
>
> In fact, I would estimate, not knowing, we haven't gotten in there to do the analysis yet, that ***the most significant portion of the***

> ***capital investment is going to have to be made in Research [Medical Center] over the next five years to catch up with the technology, renovating facilities, and so forth.***
>
> ***
>
> [The proposed sale of Health Midwest]…[p]rovides ***an unparalleled infusion of capital into the urban core, in addition to other Health Midwest facilities.***

(Trial Transcript, at Vol. IV, 130:9-131:9, 132:5-133:6, 135:2-16, 139:4-12.)

101. Bovender further admitted telling the public at the November 18, 2002 public hearing that HCA was "going to make a commitment of capital into Baptist to see if we can't make that hospital go to make it successful in the next few years." (Trial Transcript, at Vol. IV, 138:16-139:3.)

102. Bovender admitted advising the public that HCA would "develop a plan" for "spending $450 million in capital into these hospitals." (Trial Transcript, at Vol. IV, 100:6-15.)

103. Bovender made no mention at the November 18, 2002 public hearing of any plans to spend any portion of the $450 million capital improvement obligation on the construction of new or replacement hospitals in eastern Jackson County. (Trial Transcript, at Vol. IV, 135:15-21,140:5-11.)

104. When Bovender stated HCA would be infusing $450 million of capital into "these hospitals," he was referring to the entities that HCA ultimately purchased from Health Midwest pursuant to the Asset Purchase Agreement. (Trial Transcript, at Vol. IV, 134:17-135:1.)

105. There is no evidence that, during the November 18, 2002 public hearing, Bovender ever advised the audience that his definition of "these hospitals" was in any way different from or more expansive than the definitions of "Hospitals" or "Facilities" that were included in the APA.

106. When pressed at trial to explain why he did not inform the public at the November 18, 2002 hearing that – as HCA now contends – HCA intended to spend the capital improvement money on replacement hospitals, Bovender conceded that he had, in fact, told members of the public that HCA was making a capital commitment of $450 million "and that figure could go higher if, in fact, we build replacement hospitals." (Trial Transcript, at Vol. IV, 139:13-141:1, 141:11-19.) Bovender testified:

> Q: And to come back to the comment that you think you might have told the public or told someone that but you can't remember what you said, was the amount was $450 million ***but it could go higher if you build replacement hospitals; right***?
>
> A: ***Yes***.

(Trial Transcript, at Vol. IV, 141:11-16 (emphasis supplied).)

107. The above-quoted trial testimony from Bovender, elicited under cross-examination by Plaintiff's counsel, was directly contrary to HCA's post-dispute position taken throughout the trial. Moreover, Bovender's above-quoted trial testimony is entirely consistent with Bovender's offer letter (Exhibit 47) and other statements that he made contemporaneous to this transaction.

108. The Court finds the above-quoted trial testimony from Bovender, elicited on cross-examination and made without contradiction through redirect examination by HCA's counsel, to be more credible than any post-dispute statements or testimony from any other HCA witness.

109. The Court finds that the above-quoted trial testimony from Bovender is a clear admission by HCA that the $450 million in capital improvements with Section 5.1 of the APA was intended for the "existing Facilities" purchased by HCA from Health Midwest, and that the

amount of capital spending "could go higher if [HCA] built replacement hospitals." (Trial Transcript, at Vol. IV, 141:11-16.)

110. The Court further finds that the above-quoted trial testimony from Bovender is a clear admission by HCA that the $450 million in capital improvements required under Section 5.1 of the APA was intended for the "existing Facilities" purchased by HCA from Health Midwest, and that HCA's capital commitment was "excluding replacement hospitals," as consistently stated by Bovender in his offer letter found in Exhibit 47.

## I. Bracken Spoke at Attorney General Stovall's Public Hearing on November 20, 2002, and Through His Silence Confirmed That the $450 Million Would Be Spent on the Existing Facilities.

111. HCA officials spoke at and were present for discussions regarding the intent of Section 5.1 in Kansas as well. These statements, made by Health Midwest officials and not contradicted by HCA's officials, further demonstrate that Section 5.1 applied to the "existing Facilities" purchased by HCA.

112. Kansas Attorney General Stovall held a "Public Comment Session" conducted at the Leawood City Hall on November 20, 2002. (Trial Transcript, at Vol. III, 148:6-20.)

113. By November 20, 2002, the APA already had defined "the Facilities" to include only the existing Health Midwest facilities that HCA would be purchasing. (Trial Transcript, at Vol. III, 154:11-15.)

114. Bracken told the public at the Kansas Public Comment Session that HCA was going to develop a plan for spending the $450 million in capital. (Exhibit 396, at 74:5-15.)

115. When Bracken advised the public that HCA would be developing a five-year capital plan for satisfying its $450 million commitment, he envisioned that such plan would be

developed "at the local facility level with the local management teams in concert with the division management." (Exhibit 396, at 75:24-76:18.)

116. Bracken also was present at the Kansas Public Comment Session when Brown made the following statements about Health Midwest's potential sale to HCA:

> ***We believe that it provides an unparalleled [infusion] of capital into the urban core, in addition to the other Health Midwest facilities that we operate. . . .***

(Trial Transcript, at Vol. III, 149:8-18 (emphasis supplied).)

117. At the Kansas Public Comment Session, Brown also showed a PowerPoint slide titled, "Why Is The Sale To HCA Good For Kansas City?" which stated: "Provides an unparalleled infusion of capital ***into the urban core in addition to other Health Midwest facilities***." (Exhibit 250 (emphasis supplied); Trial Transcript, at Vol. III, 153:6-14, 154:2-10.)

118. Brown acknowledged that HCA's capital obligations were front-loaded because the Health Midwest hospitals were distressed and in need of such capital. (Trial Transcript, at Vol. III, 157:23-158:2.)

119. Brown testified that the sale to HCA would bring about "a massive infusion of capital affecting the hospitals that from my definition had urban core challenges . . . ." (Trial Transcript, at Vol. III, 155:13-24.)

120. Brown further testified that, given its "massive infusion of capital" into the urban core hospitals, he expected HCA to be spending more than $25 million per year on capital improvements for the Health Midwest facilities. (Trial Transcript, at Vol. III, 156:9-14.)

121. Brown never told the public that HCA would be building replacement hospitals in Independence or Lee's Summit. (Trial Transcript, at Vol. III, 150:15-19.)

122. There was no evidence presented to the Court that Bracken or any other HCA representative in attendance ever objected to, clarified, or "corrected" any of Brown's statements made during the November 20, 2002 Public Comment Session.

123. Hazen, who was in attendance at the November 20, 2002 public comment session, did not clarify or correct any of the statements Bracken made to the group. (Trial Transcript, at Vol. IV, 219:2-20.)

124. The Court finds that Brown's above-quoted statements to the public are consistent with the other above-referenced contemporaneous and pre-dispute statements regarding the parties' intent for Section 5.1 of the APA.

125. The Court finds that neither Bracken nor any other HCA executive corrected or modified Brown's statements about the operation of Section 5.1 of the APA, and that HCA therefore adopted Brown's statements as a reflection of HCA's intent about its obligation to spend the $450 million under Section 5.1 of the APA in the "existing Facilities."

126. The Court further finds that Brown's above-quoted statements to the public, made in the presence of the Kansas Attorney General, corroborate Bovender's public statements made in the presence of the Missouri Attorney General, as well as Bovender's statements in Exhibits 47 and 64. These statements are also consistent with Bovender's trial testimony that the $450 million set forth in Section 5.1 was intended for the "existing Facilities" purchased by HCA from Health Midwest, excluding the construction of new or replacement hospitals.

## J. All of the Contemporaneous Statements to the Public Made at the Time the APA Was Entered Into Support Plaintiff's Position in This Case.

127. The Foundation presented a wide range of evidence from several different sources regarding the parties' intent for the operation of Section 5.1 of the APA. The Court finds,

examining the trial record in its entirety, that the public statements made by HCA and Health Midwest demonstrate that Section 5.1 of the APA was intended to apply to the "existing Facilities" purchased by HCA from Health Midwest.

128. The Court finds, examining the trial record in its entirety, that the public statements made by HCA and Health Midwest demonstrate that the capital improvement obligations within Section 5.1 of the APA were intended to be exclusive of the cost of building new or replacement hospitals.

129. The Court further finds, examining the trial record in its entirety, that HCA did not present any evidence of any pre-dispute statement made contemporaneous with the transaction showing that the capital improvement obligations within Section 5.1 of the APA were intended to be inclusive of the cost of building new or replacement hospitals.

## K. All the Documents Created at the Time the APA Was Entered Into Support Plaintiff's Position.

130. It is clear that HCA's purchase offer, HCA's internal documents (such as the Briefing Packet), and the APA itself were given very significant attention by HCA's senior management, from September 2002 through the date of the APA's execution on November 22, 2002. Paradoxically, HCA did not offer into evidence any documents evidencing its intent contrary to the interpretation of Section 5.1 offered by the Foundation.

131. HCA admits it has no knowledge of any document or statement in which HCA advised Health Midwest or the public that HCA intended for any portion of its $450 million capital improvement commitment to include the building of new hospitals in Independence or Lee's Summit. (Exhibit 398, at 140:11-15; Trial Transcript, at Vol. IV, 127:4-11, 141:2-10.)

132. HCA is likewise unaware of any documents stating that HCA's $450 million capital improvement commitment was intended to include expenditures associated with the building of new or replacement hospitals. (Exhibit 398, at 140:11-15; Trial Transcript, at Vol. IV, 114:17-21; Vol. X, 55:14-17.)

133. Hazen, referred to by HCA as one of the most senior of the HCA executives involved in this transaction, testified that he is unaware of the existence of a single document that was authored between September 5, 2002, and November 22, 2002, and that specifically states that HCA intended the $450 million obligation under Section 5.1 of the APA to include funds spent or committed for the building of new or replacement hospitals. (Trial Transcript, at Vol. IV, 218:3-15.)

134. Specifically, HCA did not introduce into evidence a single document that was authored between September 5, 2002, and November 22, 2002 that specifically states that HCA intended the $450 million obligation under Section 5.1 of the APA to include funds spent or committed for the building of new or replacement hospitals.

135. The Court finds, examining the trial record in its entirety, that the pre-dispute documents introduced into evidence demonstrate that Section 5.1 of the APA was intended to apply to the "existing Facilities" purchased by HCA from Health Midwest.

136. The Court finds, examining the trial record in its entirety, that the pre-dispute documents introduced into evidence demonstrate that the capital improvement obligations within Section 5.1 of the APA were intended to be exclusive of the cost of building new or replacement hospitals.

137. The Court further finds, examining the trial record in its entirety, that HCA did not present any evidence of any pre-dispute document made contemporaneous with the

transaction showing that the capital improvement obligations within Section 5.1 of the APA were intended to be inclusive of the cost of building new or replacement hospitals.

## L. Health Midwest and HCA Entered Into the APA on November 22, 2002.

138. Health Midwest and HCA formally executed the APA on November 22, 2002. (Exhibit 13.)

139. Bovender signed the APA on behalf of HCA. (Exhibit 13; Trial Transcript, at Vol. IV, 63:4-8.)

140. Bovender testified that he did not read the APA in its entirety before he signed it. (Trial Transcript, at Vol. IV, 61:23-62:3.)

141. Bovender testified, in response to questions from Plaintiff's counsel regarding the operation or meaning of the last sentence of Section 5.1, that the sentence was merely "legalese." (Trial Transcript, at Vol. IV, 147:15-19.)

142. Brown signed the APA on behalf of Health Midwest. (Exhibit 13; Trial Transcript, at Vol. III, 11:16-12:5.)

143. As was noted above, Health Midwest's sale of its assets to HCA represented the largest sale of a non-profit health care organization's assets to a for-profit corporation in the history of the United States. (Exhibit 40, at p. 1; Trial Transcript, at Vol. IV, 43:20-25.)

144. The Court finds, based upon the above facts and the reasonable inferences to be drawn from those facts, that HCA's intent regarding the legal effect and operation of Section 5.1 of the APA remained consistent from the time of its original offer on September 5, 2002 through the November 22, 2002 execution of the APA by Bovender.

## M. Health Midwest Filed Lawsuits Against the Missouri Attorney General and the Kansas Attorney General Four Days After Signing the APA, and Confirmed That the $450 Million Was to Be Spent on the Existing Facilities.

145. Shortly after the execution of the APA by the parties on November 22, 2002, two lawsuits were filed by Health Midwest seeking a declaration of the rights and obligations of the parties under the APA. These lawsuits addressed, *inter alia*, some of the very same issues before this Court.

146. On November 26, 2002, Health Midwest filed a lawsuit against Missouri Attorney General Jay Nixon in the Circuit Court of Cole County, Missouri, Case No. 02CV326118 (the "*Nixon* case"), in which Health Midwest challenged the Attorney General's authority to stop the intended sale to HCA. (Exhibit 36.)

147. Consistent with HCA's repeated representations about its obligations under the APA to make capital improvements to the purchased Health Midwest facilities, Health Midwest's Petition in the *Nixon* case stated:

> In addition to the $1,125,000,000 sale price, HCA has further pledged, at Health Midwest's demand, to commit $450,000,000 for capital improvements ***to the purchased hospitals*** and has stated that it will likely continue to provide the extensive charitable and uncompensated care past the term of the covenants in the Agreement.

(Exhibit 36, at p. 8, ¶25 (emphasis supplied).)

148. The same day, November 26, 2002, Health Midwest filed a similar lawsuit against Kansas Attorney General Carla Stovall, who was later replaced in the case by incoming Kansas Attorney General Phill Kline, in the District Court of Johnson County, Kansas, Case No. 02CV08043 (the "*Kline* case"). (Exhibit 37.)

149. In its Petition for the *Kline* case, Health Midwest made virtually identical representations as those made in the *Nixon* case, including the following:

> In addition to the Sale Price, HCA, at Health Midwest's direction, has further pledged to commit $450 million for capital improvements ***to the purchased hospitals*** and has stated that it will likely continue to provide the extensive charitable and uncompensated care past the term of the covenants in the Agreement.

(Exhibit 37, at p. 10, ¶32 (emphasis supplied).)

150. Brown and the rest of Health Midwest's board gave very careful consideration to the *Nixon* and *Kline* lawsuits, and approved those lawsuits before they were filed. (Trial Transcript, at Vol. III, 158:8-23, 159:23-160:3.)

151. Brown testified that the above-quoted portions of the *Nixon* and *Kline* Petitions accurately state the intent of the parties to the APA. (Trial Transcript, at Vol. III, 165:17-23, 168:14-19.)

152. At the time Health Midwest filed the *Nixon* and *Kline* Petitions, "purchased hospitals" had already been defined in the APA. (Trial Transcript, at Vol. III, 164:25-165:3, 167:25-168:6.)

153. HCA, as a party to the APA and as a party with a substantial stake in the determination of the rights and obligations of the parties to the APA, did not object to Health Midwest's filing of the *Kline* lawsuit. (Trial Transcript, at Vol. III, 195:6-14.)

154. HCA presented no evidence that it ever objected to Health Midwest's filing of the *Nixon* lawsuit.

155. The Court finds, based upon the above facts and the reasonable inferences to be drawn from those facts, that Health Midwest's court filings excerpted above corroborate the Court's Finding Regarding Intent of the parties for the operation of Section 5.1 of the APA. This Court was presented with no evidence that the above court filings inadvertently misstated the intent of Health Midwest regarding the meaning of Section 5.1, and, given the obvious

importance of the litigations filed by Health Midwest, the Court believes that Health Midwest was clearly indicating its intent regarding the application of Section 5.1*, i.e.*, that it applied to the "purchased hospitals."

## N. During the *Kline* Case and the *Nixon* Case, Health Midwest Continued Making Material Representations About HCA's Capital Improvement Obligations Under the APA, and Confirmed That the $450 Million Was To Be Spent on the Existing Facilities.

156. The statements made by Health Midwest in the *Nixon* lawsuit and the *Kline* lawsuit were not inadvertent or merely imprecise. Health Midwest continued to make those specific representations over the course of several months of hotly-contested litigation.

157. On November 26, 2002, the same day that Health Midwest initiated its separate lawsuits against the Missouri and Kansas Attorneys General, Brown attended a public hearing conducted by Attorney General Nixon in Independence, Missouri, and advised the public that "HCA has made a very strong commitment to the future of our individual system hospitals." (Trial Transcript, at Vol. III, 149:19-150-7.)

158. At the Independence public hearing, Brown further stated that the $450 million HCA was obligated to spend under the APA "will meet the needs for upgraded facilities, equipment and state-of-the-art technology." (Trial Transcript, at Vol. III, 150:8-12.)

159. Brown admits that at neither the Leawood nor the Independence public hearing did he say that HCA would be building replacement facilities in Independence or Lee's Summit. (Trial Transcript, at Vol. III, 150:13-20.)

160. Brown did not tell the Independence public while speaking in that community at the November 26, 2002 hearing that the parties intended – as HCA now asserts – to use any of the $450 million to build a new hospital in Independence or Lee's Summit. (Trial Transcript, at

Vol. III, 150:13-20.) In contrast, Bovender told the public at the November 18, 2002 public hearing – while speaking in the community where Research and Baptist were located – that the parties intended to spend a significant portion of the $450 million in those specific hospitals. (Trial Transcript, at Vol. IV, 136:8-136:20, 138:16-193:3.) The Court finds, under these circumstances, that Brown's failure to tell the eastern Jackson County public that a significant portion of the capital improvement monies was going to be spent to build new hospitals in that community is probative of the parties' intent. Given the parties' willingness to disclose plans for spending a significant portion of the $450 million in the existing facilities (*e.g.*, Research and Baptist), there is no good reason why the parties did not disclose a plan to spend a significant portion of that money to build new hospitals in eastern Jackson County had that been the parties' intent. Accordingly, the Court finds that Brown's failure to disclose at the November 26, 2002 public hearing any plan to spend any portion of the capital improvement monies to build new hospitals in the Independence or Lee's Summit communities corroborates the Court's Finding Regarding Intent.

161. Brown's deposition testimony given in the *Kline* case also supports the Court's Finding Regarding Intend. On December 30, 2002, Brown testified that the Foundation had a role "to assure, for example, the $450 million of capital, ***if it's not spent in the hospitals***, [there's] an obligation to pay it" to the Foundation. (Trial Transcript, at Vol. III, 175:24-176:11, 176:23-177:9 (emphasis supplied).)

162. On January 27, 2003, as the parties approached trial in the *Kline* case, Health Midwest submitted its Proposed Findings of Fact, in which Health Midwest proposed that the trial court find the following:

> In addition to payment of the sale price, HCA is contractually obligated to commit $450 million for capital improvements ***to the purchased hospitals.***
>
> ***
>
> Prior to voting to approve the mergers of their corporation [sic] into Health Midwest, the Boards of Directors of HMJC, Menorah, OPRMC, TLM and HMDG were informed of the terms of the Asset Purchase Agreement, including: …b. The purchase price of $1,125,000,000.00 and the capital investments of $450,000,000.00 HCA had agreed ***to pay and invest for and to improve the assets of Health Midwest***.

(Exhibit 39, at pp. 21-22 (emphasis supplied).)

163. At the time Health Midwest submitted its Proposed Findings of Fact in the *Kline* case, the APA already defined the purchased assets and excluded assets of Health Midwest. (Trial Transcript, at Vol. III, 174:13-20.)

164. The Court finds, based upon the above facts and the reasonable inferences to be drawn from those facts, that Health Midwest's pleadings and proposed findings of fact are persuasive evidence of its intent regarding Section 5.1 of the APA.

## O. The *Kline* Court's Decision and Health Midwest's Appeal of That Decision Confirm That the $450 Million Was To Be Spent on the Existing Facilities.

165. On February 4, 2003, after the late January trial of the *Kline* case, the District Court of Johnson County, Kansas entered a Memorandum Decision, expressly finding as Health Midwest had suggested in its Proposed Findings of Fact:

> In addition to payment of the sale price, HCA is contractually obligated to commit $450 million for capital improvements ***to the purchased hospitals***.

(Exhibit 40, at p. 15, ¶92 (emphasis supplied).) (*See also*, Trial Transcript, at Vol. III, 171:19-22.)

166. Despite suggesting that this Memorandum Decision was subsequently "vacated," HCA did not introduce any evidence demonstrating that the Decision was, in fact, vacated in whole or in part. In any event, the material point with respect to the Decision is that, regardless of any alleged subsequent court action, the District Court of Johnson County, Kansas adopted the proposed findings of fact that had been offered by Health Midwest.

167. Health Midwest appealed the trial court's Memorandum Decision of February 4, 2003 in the *Kline* case to the Kansas Supreme Court (Case No. 03-90195-S), but Health Midwest never took issue with the *Kline* court's finding that HCA's capital expenditure commitment was for the purpose of making "capital improvements to the purchased hospitals." On the contrary, Health Midwest repeated the same fact and cited to the trial court's finding in its appellate brief filed March 13, 2003:

> In addition to the purchase price, HCA is obligated to commit $450 million for capital improvements ***to the purchased hospitals.***

(Exhibit 41, at p. 9, ¶1 (emphasis supplied).)

168. HCA contended at trial that the statements made by Health Midwest (and the Court) in the *Kline* and *Nixon* cases are irrelevant to this Court's examination of Section 5.1 of the APA. This contention is belied by HCA's inaction in response to those statements.

169. HCA was closely monitoring the representations that Health Midwest was making in the *Kline* case and in the *Nixon* case. (Exhibit Bracken 254, at pp. 2-8; Exhibit 403; Trial Transcript, at Vol. V, 4:18-22, 8:18-22.)

170. Not only did HCA's lawyers receive numerous pleadings filed in the *Nixon* case and in the *Kline* case, but they also attended the three-day bench trial of the *Kline* case before Judge Foster in the District Court of Johnson County, Kansas. (Exhibit Bracken 254, at pp. 2-8.)

171. On February 5, 2003, at least seven different HCA employees or representatives received copies of the Johnson County District Court's February 4, 2003 Memorandum Decision in the *Kline* case: Bob Waterman (HCA's General Counsel), Blake Watt, Sam Hazen, David Critchlow, Bryan Rogers, Ron Hein, and Mike Winter. (*Id.*)

172. There was contact between HCA's attorneys and Health Midwest's litigation counsel with respect to the *Nixon* case and/or the *Kline* case on at least each of the following dates: November 26, and 27, 2002, December 3, 4, 5, 6, 9, 11, 12, 13, 16, 19, 20, 26, 27, 28, and 30, 2002, January 2, 6, 7, 9, 10, 13, 14, 21, 25, 27, 28, 29, 30, and 31, 2003, February 5, 6, 10, 12, 14, 17, and 26, 2003, and March 12 and 13, 2003. (*Id.*)

173. Including both attorneys and non-attorneys, the Court finds that twenty-two different HCA employees or representatives had contact with Health Midwest concerning the *Nixon* case and/or the *Kline* case during the time period of November 2002 through March 2003. (Exhibit Bracken 254, at pp. 2-8; Exhibit 403.)

174. Despite their close monitoring of Health Midwest's representations in the *Nixon* and *Kline* cases, there is no evidence demonstrating that any of HCA's representatives ever clarified, "corrected," or qualified any representations regarding the parties' intent regarding Section 5.1 of the APA.

175. The Court finds, based upon the above facts and the reasonable inferences to be drawn from those facts, that if HCA believed Health Midwest had misstated the intent of Section 5.1 of the APA, one of its twenty-two representatives would have brought this to Health Midwest's attention, and/or would have sought to have Health Midwest or HCA correct any such misstatements. It is clear from the testimony given to the public by Brown and Bovender that Health Midwest and HCA were closely coordinating their communication strategies regarding

the APA. The Court has been given no reason to believe that HCA and Health Midwest did not understand the effect of the consistent statements made by Health Midwest in its pleadings.

176. The Court further finds that the myriad statements made in the Health Midwest pleadings corroborate its findings above regarding the parol evidence related to the operation of Section 5.1 of the APA. Specifically, the Court finds that the pleadings and HCA's inactions in response to those pleadings make it more likely than not that the capital improvement obligations within Section 5.1 of the APA were intended to apply to the existing facilities purchased by HCA.

**P. The Missouri Attorney General Warned HCA That the Post-Closing Covenants Applied to the Health Midwest Hospitals, Were Potentially Ambiguous, and That Any Ambiguities Will Be Construed in the Public's Favor.**

177. Between November 22, 2002, the date on which the APA was executed, and April 1, 2003, the date the parties closed on the APA, HCA was engaged in discussions with the Missouri Attorney General's Office concerning the post-closing covenants contained in the APA. (*See, e.g.*, Exhibit 72A.)

178. Significantly, the Missouri Attorney General specifically informed HCA that the Section 5 covenants within the APA applied to the operation of Health Midwest's hospitals. On March 14, 2003, approximately two weeks before HCA was scheduled to close on the APA, Charles Hatfield, Counsel to the Missouri Attorney General, sent a letter to HCA's counsel stating, *inter alia*, the following:

> I write to bring some closure to the conversations we have been having with HCA, Inc., and to memorialize our agreement on the sole area in which HCA has been willing to depart from the terms of its agreement with Health Midwest ("HMW"). From before the Asset Purchase Agreement with Health Midwest was signed, our office has communicated to HCA – both informally and formally – that *there was a great opportunity to improve* ***the post-closing covenants that would apply to HCA's operations of the HMW hospitals*** after the sale. Initially, we perceived that HCA was

> willing to address ***deficiencies in these covenants*** in order to ensure that the sale would close. In fact, Mr. Bovender testified at the first public hearing as to his willingness to extend the indigent care commitment beyond its current ten-year term.
>
> Once we came to an agreement in January with HMW, however, we noticed a definite shift in tone. As recent correspondence from HCA confirms, your client is now unwilling even to discuss any changes to any of the post-closing covenants, and only a single change to the scope of the non-compete clause, which change is set forth below. Our attempt to explain why certain changes to the post-closing covenants would not only be in the best interests of the communities HCA is seeking to join but also in the best interests of HCA have been rebuffed. HCA's actions have left the Attorney General no choice but to either permit the sale to close on its present terms or stop the sale solely on the ***deficiencies of the post-closing covenants***.
>
> ***
>
> ***As for us, we are convinced that "clarification" from HCA at this point on any of the ambiguities in the post-closing covenants is not in the public interest. Under law, these ambiguities will be construed in favor of the public in the future and HCA's performance of these obligations will be measured against that standard….***

(Exhibit 72A, at pp. 1, 3 (emphasis supplied).)

179. Equally significant, HCA was put on notice in connection with Exhibit 72A that any ambiguities relating to its obligations would be construed in favor of the public.

180. HCA admits that the hospitals of Health Midwest were "an absolutely precious community asset to the people of Kansas City and the other communities that Health Midwest served." (Trial Transcript, at Vol. IV, 130:12-131:9.)

181. HCA admits that Health Midwest's hospital assets benefited the public. (Trial Transcript, at Vol. IV, 131:10-13.)

182. HCA does not dispute that Section 5.1 of the APA and the other post-closing covenants contained within Article 5 of the APA were intended to serve the public interest. (Trial Transcript, at Vol. IV, 131:14-132:4.)

183. HCA does not dispute that such covenants were "of course" for the benefit of the Kansas City area community. (Trial Transcript, at Vol. V, 72:10-13.)

184. HCA admits that the post-closing covenants were important to the Kansas City community and to the public. (Trial Transcript, at Vol. VI, 9:18-25.)

185. Hazen, who became HCA's President of Operations in February of 2011, responded to the Missouri Attorney General in a March 21, 2003 letter, stating that HCA did "not agree with the statements in Mr. Hatfield's letter concerning 'ambiguities' in the APA." However, Hazen offered no explanation to the Missouri Attorney General about why HCA believed the post-closing covenants were unambiguous, nor did he dispute that the covenants applied to the operation of the HMW hospitals. (Exhibit 86, at p. 3.)

186. Hazen could not recall doing anything to ascertain whether there were, in fact, ambiguities in the APA before he responded to Hatfield's letter. (Trial Transcript, at Vol. IV, 227:12-228:2.)

187. The Court finds, based upon the above facts and the reasonable inferences to be drawn from those facts, that HCA would have objected to the Missouri Attorney General's characterization in Exhibit 72A had HCA disputed that the post-closing covenants (including Section 5.1) were intended for the benefit of the Health Midwest hospitals. The fact that HCA did not dispute that characterization corroborates the Court's Finding Regarding Intent.

188. The Court further finds that HCA disregarded the Attorney General's warning that the APA was ambiguous and that those ambiguities would be construed in favor of the

public interest in the future, and chose instead to close on the APA with knowledge that a court such as this one might later be asked to construe those ambiguities in favor of the public interest.

## Q. The Language of the APA As a Whole Supports the Court's Finding Regarding Intent

189. HCA and Health Midwest closed on the APA on April 1, 2003. (Trial Transcript, at Vol. IV, 83:3-6, 228:4-7; Vol. V, 148:19-24.)

190. The APA was between Health Midwest and HCA's "wholly owned subsidiary," Defendant HM Acquisition, LLC. Pursuant to the APA, "HCA guaranteed the performance of each and every covenant, obligation, and agreement, connected with or related to the Agreement, including the continuation of services previously provided by [Health Midwest]." (Exhibit 40, at p. 14, ¶88. *See also* Exhibit 13, at p. 84, ¶¶14-18.)

191. Pursuant to the APA, HCA purchased the majority of Health Midwest's assets but declined to purchase or otherwise acquire other significant assets and liabilities of Health Midwest.

192. The assets the parties agreed were not subject to the APA were valued at approximately $200 million and included, without limitation, the following: executive life insurance policies; the Trinity Lutheran hospital campus property; the old St. Mary's campus property; the Park Lane Medical Center campus property; the Wetzel Clinic; the Cancer Institute; Visiting Nurse Association Home Health; Research Eagle; Research Mental Health; Kansas City Hospice; all assets related to HMBC, L.L.C.; all assets related to Menorah Internal Medicine; and the eleven foundations identified in Schedule 2.2 of the APA. (Exhibit 13, at Section 2.2, pp. 16-17, and at Schedule 2.2; Trial Transcript, at Vol. III, 174:24-175:3; Vol. X, 167:3-168:16.)

193. The APA included a provision whereby HCA reserved the right to purchase certain assets – expressly defined in the APA as the "Core Facilities" – even if Health Midwest had not satisfied all of its pre-closing obligations with respect to other facilities. (Exhibit 13, at Section 9.8, p. 59, and at Schedule 9.8.)

194. The APA also contained a provision whereby Health Midwest could not operate its retained facilities and other assets, as set forth above, in competition with HCA. (Exhibit 13, at Section 12.6, pp. 73-74; Trial Transcript, at Vol. III, 175:4-12; Vol. IV, 126:4-127:3.)

195. Several sections of the APA are of further relevance to the Court's Finding Regarding Intent. The Court will now quote from those sections and describe their relevance to its findings regarding the parties' intent.

196. Section 1.1 of the APA defines "Hospitals" as follows:

> **"Hospitals"** means Research Medical Center, Baptist Lutheran Medical Center, Independence Regional Health Center, Medical Center of Independence, Menorah Medical Center, Overland Park Regional Medical Center, Lee's Summit Hospital, Research Belton Center; but only to the extent (a) such Hospitals are transferred to Buyer at the Closing and (b) with respect to any such Hospital in which substantially all of its assets are leased from a third party, the applicable underlying lease remains in effect.

(Exhibit 13, at p. 7 (emphasis in original) (*See also* Trial Transcript, at Vol. III, 146:7-11, 164:25-165:3, 202:15-19.)) Section 1.1 specifically defines the "Hospitals" purchased by HCA, and this definition belies HCA's efforts to call the transaction embodied in the APA a purchase of a "system."

197. The Court finds that the APA specifically defines which Health Midwest assets were or were not purchased. This corroborates the Court's Finding Regarding Intent because, if HCA's interpretation of the contract were correct, the APA would reflect HCA's acquisition of the entirety of the Health Midwest enterprise, including all its assets.

198. The APA specifically defines "Facilities" as the Health Midwest "hospitals and/or other health care facilities set forth on **Schedule Two"** of the APA. (Exhibit 13, at p. 1 (emphasis in original) (*See also* Trial Transcript, at Vol. III, 202:20-22.))

199. Schedule Two of the APA lists the following "Facilities" as those being sold by Health Midwest to HCA: Research Medical Center; Baptist Lutheran Medical Center; Independence Regional Health Center; Medical Center of Independence; Menorah Medical Center; Overland Park Regional Medical Center; Lee's Summit Hospital; Research Belton Hospital; Lafayette Regional Health Center; Allen County Hospital; Research Psychiatric Center; Surgicenter of Johnson County; Outpatient Physician Clinics of Health Midwest Medical Group; Medical Office Buildings of Health Midwest Office Facilities Corporation; Occupational Medicine Clinics of Employer Health Services; and other facilities operated by System Entities listed on Schedule One. (Exhibit 13, Schedule Two.)

200. Consistent with the APA's definition of "Hospitals," its definition of "Facilities" contradicts HCA's position that it purchased the entire Health Midwest "system" and that its post-closing covenants were not intended to relate solely to the specific assets HCA purchased. The Court finds these provisions of the APA to represent substantial evidentiary support for the Court's Finding Regarding Intent.

201. Section 2.1 of the APA states, in part:

> Notwithstanding the preceding sentence, Seller will sell and Buyer will buy the stock (as opposed to the assets.), free and clear of all Encumbrances, of LSII, MCII, and HMVG, and by virtue of the acquisition of the stock of HMVG, will indirectly acquire the stock of the other Acquired Entities.

(Exhibit 13, at p. 16.)

202. As with the APA's above-quoted definitions of "Hospitals" and "Facilities," Section 2.1 of the APA provides further support for the Foundation's position that HCA did not,

in fact, purchase an entire "system" from Health Midwest. Section 2.1 demonstrates that HCA and Health Midwest understood how to convey entire enterprises through the exchange of an entity's stock but that they chose not to do so with respect to all of the entities owned by Health Midwest prior to the transaction. Accordingly, the existence of Section 2.1 is additional support for the Court's Finding Regarding Intent.

203. Section 5.2 of the APA provides as follows:

> **Continued Operations of Facilities**. For a period of three (3) years after Closing, Buyer agrees not to close any of the Hospitals. For purposes of Allen County Hospital and Lafayette Regional Health Center, this means Buyer will not exercise any early termination rights available to the Lessee/Tenant of the Hospital until after the three (3) year period following Closing expires. Notwithstanding the foregoing, during such three (3) year period Buyer shall be permitted to close a Hospital or Hospitals (other than Research Medical Center, Baptist-Lutheran Medical Center and Research Psychiatric Center) in connection with the opening of a replacement hospital or its consolidation into an existing Hospital if (i) the services at the replacement or consolidated hospital are the same as, or substantially similar to, the services provided at the Hospital, (ii) the replacement or consolidated hospital is located within an eight (8) mile radius of the Hospital, and (iii) in the event of consolidation into an existing Hospital, the existing Hospital is improved and/or expanded as needed to handle the expected transfer of medical staff, patients and operations from the closed Hospital. By way of illustration, the following is an example of a permissible closure:
>
> > Hospital (A) and Hospital (B) may be closed by Buyer if a new replacement hospital (C) is constructed, staffed and opened by Buyer to provide substantially the same services as those offered in Hospital (A) and Hospital (B). Hospital (C) is located no further than either eight (8) miles from Hospital (A) or eight (8) miles from Hospital (B).

(Exhibit 13, at p. 31 (emphasis in original).)

204. Section 5.2 also provides further support for the Court's Finding Regarding Intent. By specifying only very limited circumstances under which any new hospital could be considered as a "replacement" for a hospital HCA purchased pursuant to the APA, this Section

again demonstrates the contracting parties' understanding that the Article 5 covenants generally related only to the existing specific hospitals and other assets that HCA purchased from Health Midwest.

205. Section 5.3 of the APA provides as follows:

> **Substantial Reduction or Change in Services.** For a period of three (3) years after Closing, Buyer will not terminate or change in any material way a substantial service, program or type or level of care offered at a Hospital at Closing. A service or program is substantial if during the six (6) month period immediately prior to its termination, the service or program accounts for 20% of the net revenues (gross revenues less contractual adjustments) of the Hospital. A substantial change in character or purpose would include, but not be limited to, a change in purpose of a specialty facility (e.g., change from a psychiatric facility to a rehabilitation facility) or a significant change in the level of care (e.g., from a tertiary care facility to a general acute care facility, or from a general acute care facility to an outpatient surgery facility). This section will not prevent a replacement or consolidation of a Hospital in compliance with **Section 5.2** above, provided that this **Section 5.3** will continue to apply to the substantial services and programs of the replacement or consolidated hospital.

(Exhibit 13, at p. 31 (emphasis in original).)

206. Section 5.4 of the APA provides as follows:

> **Emergency Room.** For a period of five (5) years after Closing, Buyer agrees to continue to keep open and operate the Emergency Departments of all Hospitals at levels of service consistent with that offered by the Hospitals at Closing. This covenant shall not require Buyer to keep a Hospital open solely for the purposes of keeping open the Emergency Department of such Hospital; provided that this **Section 5.4** will continue to apply to the Emergency Department of any replacement or consolidated hospital contemplated by **Section 5.2**.

(Exhibit 13, at p. 31 (emphasis in original).)

207. Like Section 5.2, both Sections 5.3 and 5.4 are consistent with and provide persuasive additional support for the Court's Finding Regarding Intent. Each of these Sections further demonstrates that the focus of Article 5 of the APA was on HCA's continuing obligations

with respect to the specific, existing hospitals and other facilities that HCA was purchasing from Health Midwest rather than on any new facilities HCA might choose to build in the Kansas City area or elsewhere.

208. Section 5.5 of the APA provides as follows:

> **Charity, Indigent and Uncompensated Care.** For a period of ten (10) years after Closing, Buyer will annually provide at least the same aggregate dollar amount of charity, indigent and other uncompensated care as were provided by the Hospitals, in the aggregate, for the 12-month period prior to Closing. Charity and indigent care is based upon gross charges foregone as recorded in the records of Seller prior to Closing and of Buyer following Closing. Uncompensated care is based upon bad debt expense as recorded on the records of Seller prior to Closing and Buyer following Closing. In the event that modifications are made to Medicare, Medicaid and other federal, state, and/or local governmental programs which provide coverage for health care, or replacement or substitute governmental programs are enacted or implemented, which have the effect of reducing the number of people whose care is now considered charity, indigent, or other uncompensated care, then Buyer's obligation under this section will be reduced proportionate to the reduction in people whose care is so considered.

(Exhibit 13, at pp. 31-32 (emphasis in original).)

209. The Court finds that Section 5.5 represents persuasive support for both the Court's Finding Regarding Intent and the Court's Finding Regarding An Accounting. As with the vast majority of the other provisions of Article 5, Section 5.5 specifically refers to HCA's post-closing obligations with respect to the "Hospitals," as expressly defined in the APA to include only the existing hospitals that HCA purchased from Health Midwest. Further, Section 5.5 establishes that, with respect to those same existing hospitals, HCA was – and still is – required to provide charity care, indigent care, and other uncompensated care at the specific thresholds detailed in the Section. Those thresholds and HCA's provision of charity, indigent, and other uncompensated care in relation to those thresholds are readily measurable through

objective data available from HCA and Health Midwest.

210. Section 5.6 of the APA provides as follows:

> **Medicare and Medicaid**. For a period of ten (10) years after Closing, Buyer will participate in the Medicare and Medicaid programs at each Hospital and will provide services to beneficiaries of such programs in accordance with substantially the same policies and procedures followed by Seller and System Entities prior to Closing, including, without limitation, nondiscrimination in the provision of care to beneficiaries of such programs. This covenant will no longer apply to a Hospital which is no longer operated by Buyer or any Affiliate of Buyer, so long as Buyer complies with Section 5.2 above in connection with ceasing such Hospital's operations, provided that this Section 5.6 will continue to apply to the Medicare and Medicaid participation of the replacement or consolidated hospital.

(Exhibit 13, at p. 32 (emphasis in original).) By repeatedly referencing "Hospital," as expressly defined in the APA to include only the existing hospitals purchased by HCA, this Section further supports the Court's Finding Regarding Intent.

211. Section 5.7 of the APA provides as follows:

> **Physicians; Medical Staff Bylaws.** As of the Closing Date, so long as the physicians on the medical staff are in compliance with the terms of HCA's Corporate Integrity Agreement, Buyer shall grant medical staff privileges to all physicians on the medical staffs of the Hospitals operating in accordance with **Section 5.2** above that are identical in all respects to such physicians' pre-Closing privileges at such Hospitals. Subject to **Section 5.2** above, such grants shall be for practice privileges at the same Hospitals as the physicians were practicing prior to Closing. Continuation of such privileges after the Closing will be subject to the standards and criteria of the medical staff bylaws, rules and regulations of the applicable Hospital. The medical staff bylaws, rules and regulations in effect as of the Closing at each Hospital operating in accordance with **Section 5.2** above shall remain in effect after the Closing, subject to the right of the community board established pursuant to **Section 5.8** below to modify the same in accordance with the provisions thereof. In connection with any Hospital closing or consolidation, Buyer will facilitate the transfer of Medical Staff membership and clinical privileges to new or consolidated hospitals and/or to other Hospitals consistent with the Medical Staff bylaws, rules and regulations of such facilities.

(Exhibit 13, at p. 32 (emphasis in original).)

212. The Court finds that Section 5.7 is significant in providing support for the Court's Finding Regarding Intent. Not only does the Section repeatedly reference the "Hospitals," as defined in the APA as the existing facilities, but it goes further by expressly distinguishing "new or consolidated hospitals" from "other Hospitals." This language is compelling evidence that the parties intended all of HCA's post-closing obligations with respect to the "Hospitals" or any one "Hospital" to relate only to the hospital facilities that were in existence and conveyed to HCA under the APA.

213. Section 5.8 of the APA provides as follows:

> **Community Boards.** Buyer will establish a community board for each Hospital to which Buyer will delegate authority to: (a) establish, modify and amend the medical staff bylaws, rules and regulations for such Hospital; and (b) make all decisions, after receiving recommendations from the medical staff executive committee, regarding medical staff membership and clinical privileges. Each Hospital's community board shall consist primarily of nonphysician and physician members of the communities served by the applicable Hospital and shall be representative of the racial and ethnic diversity of the applicable community. In addition to the delegated authority described above, Buyer will consult with each Hospital's community board regarding Hospital operations, services and programs offered, capital expenditures, strategic planning, and other business matters.

(Exhibit 13, at p. 32 (emphasis in original).)

214. Further support for the Court's Finding Regarding Intent is found in Section 5.8 because that Section specifically references HCA's obligation to confer with the community boards of each Hospital, as defined in the APA, with respect to "capital expenditures." The Court finds that this language provides additional persuasive evidence that the capital expenditures referenced in Section 5.1 were intended by the contracting parties to be made in the existing hospitals that HCA purchased from Health Midwest.

215. At trial, HCA was unable to present any evidence that it consulted with the community boards of Medical Center of Independence, Independence Regional Health Center, or Lee's Summit Hospital before HCA used capital expenditure monies within Section 5.1 to close those Hospitals and build new hospitals in those communities. In fact, Bovender, who was HCA's Chairman and Chief Executive Officer at the time of the transaction, testified that he did not know whether HCA had even consulted with such community boards during HCA's due diligence about the possibility of building replacement facilities. (Trial Transcript, at Vol. IV, 103:4-16.)

216. The Court finds that HCA's failure to consult with each of those respective existing Hospital's community boards regarding capital expenditures spent on new construction – as they were obligated to do pursuant to Section 5.8 of the APA – supports the Court's Finding Regarding Intent.

217. Section 5.10 of the APA provides as follows:

> **Religious and Cultural Identity and Traditions.** For a period of at least ten (10) years after Closing, Buyer shall operate each of the Hospitals in a manner which maintains its religious and cultural identity and traditions. This shall include, without limitation: (a) continued use of each Hospital's name (subject to any limitations required by any religious organizations included in a Hospital's name); (b) continuation and support for each Hospital's pastoral care and religious programs, including place(s) of worship and religious and clergy programs for patients; (c) continuation and support for the auxiliary and volunteer organizations associated with each Hospital; (d) continuation of the types of community education and screening programs identified on **Schedule 5.10** consistent with System practice prior to the Closing, and (e) continuation and observance of the types of items listed on **Schedule 5.10**; provided that, with respect to continuation and support of the matters described in clauses (d) and (e), Buyer may evaluate specific programs from time to time with input from the community board to determine whether they are responsive to community needs and an effective use of hospital resources and based upon such evaluation Buyer may replace, modify,

> supplement or discontinue such programs. Following expiration of the ten (10) year period, continuation of any Hospital's religious and cultural identity and traditions will be subject to continuing support of the community board and medical staff. This covenant will no longer apply to a Hospital which is no longer operated by Buyer or any Affiliate of Buyer so long as Buyer complies with **Section 5.2** above in connection with ceasing such Hospital's operations, provided that (x) this **Section 5.10** will continue to apply to the replacement or consolidated hospital and (y) in the event of a Hospital closure, Buyer will maintain all plaques and other items recognizing contributions to such Hospital at the replacement or consolidated hospital or such other location as may be reasonably acceptable to Seller.

(Exhibit 13, at p. 33 (emphasis in original).)

218. The evidence at trial showed that the new hospital built in Independence – Centerpoint Medical Center – did not include the continued use of either "Medical Center of Independence" or "Independence Regional Health Center." The Court finds that HCA's decision to use a new name for Centerpoint – rather than the continued use of each Hospital's name as would be required under Section 5.10(a) had the new hospital been a continued operation of the existing Hospitals – supports the Court's Finding Regarding Intent.

219. By repeatedly referencing "Hospitals," as expressly defined in the APA to include only the existing facilities purchased by HCA, Section 5.10 further supports the Court's Finding Regarding Intent. Even more significantly, Section 5.10, like Section 5.7, provides further support for the Court's Finding Regarding Intent because the Section expressly distinguishes between a "Hospital" and a "replacement or consolidated hospital."

220. Section 5.12 of the APA provides as follows:

> **Diversity Commitment.** Buyer will implement for the Facilities those diversity initiatives for employment and purchasing activities that Buyer has implemented for its existing operations.

(Exhibit 13, at p. 33 (emphasis in original).) By referencing "Facilities," as expressly defined in the APA to include only the existing facilities purchased by HCA, this Section further supports the Court's Finding Regarding Intent.

221. Section 5.13(b) of the APA provides as follows:

> Buyer will implement, as soon as reasonably practicable, the following safety initiatives in the Hospitals operating in accordance with **Section 5.2**: (i) Meditech clinical systems, (ii) electronic medication administration systems and (iii) electronic physician order-entry systems.

(Exhibit 13, at p. 34 (emphasis in original).) By referencing "Hospitals," as expressly defined in the APA to include only the existing hospitals purchased by HCA, this Section further supports the Court's Finding Regarding Intent.

222. Section 5.14 of the APA provides as follows:

> **Accounting and Reporting**. Within 90 days of the end of each twelve (12) month period following Closing, for a period as long as Buyer is performing any operating covenants pursuant to this Article 5, Buyer shall provide to Seller a report setting forth in reasonable detail how it complied with the operating covenants, including a specific accounting of capital expenditures Buyer agrees to make in accordance with Section 5.1.

(Exhibit 13, at p. 34 (emphasis in original).)

223. Section 5.14 represents compelling support for the Court's Finding Regarding An Accounting. By expressly requiring HCA to provide annual reports with "reasonable detail" regarding its alleged compliance with the Article 5 covenants, including without limitation "a specific accounting of capital expenditures [HCA] agrees to make in accordance with Section 5.1," this Section plainly demonstrates the contracting parties' intent that HCA be bound to provide data that is comprehensive and specific enough to enable a reasonable examiner to determine whether HCA has or has not complied with its post-closing covenants.

224. Section 5.15 of the APA sets forth the remedies that are available to the Foundation in this case:

> **Remedies**. ***Breach or nonperformance of any operating covenant set forth in this Article 5 will entitle Seller to the indemnification rights set out in Article 13 and/or any and all other remedies at law or equity (including monetary damages suffered by the community as a result of such breach or nonperformance, specific performance, and restraining order, injunction or other equitable relief).*** In addition, if the annual report shows that, for any applicable period, Buyer has not spent or committed to spend dollars on capital expenditures during such period at least equal to the amount Buyer agreed to provide in Section 5.1, then ***Buyer will immediately pay such shortfall to Seller.)*** Moreover, if Buyer has not spent $450,000,000 on capital expenditures (and amounts paid to Seller pursuant to this Section 5.15) within a reasonable period of time after the fifth anniversary of the Closing (which period of time will take into account the reasonable plans, including anticipated timeframes, for spending any capital expenditures committed to by Buyer, as well as any delays in spending such amounts based on matters outside of Buyer's control (such as regulatory matters), then ***Buyer will immediately pay such shortfall to Seller.***

(Exhibit 13, at p. 34 (emphasis supplied).)

225. Section 5.15 is relevant to the Court's order and award of damages described further below. Aside from the Foundation's common law rights to relief, this Section establishes that the contracting parties contemplated the availability of legal and equitable remedies for harm "to the community" for any failure by HCA to comply with the terms and conditions of its post-closing covenants. All relief requested by the Foundation in this case falls squarely within the scope of Section 5.15.

226. Section 5.16 of the APA provides as follows:

> **Subsequent Sale.** If Buyer decides to sell, merge, or otherwise transfer or consolidate any of the Hospitals during a period when Buyer is performing any operating covenants pursuant to this **Article 5**, Buyer will ensure that such subsequent owner agrees to fulfill Buyer's obligations under this **Article 5**.

(Exhibit 13, at p. 34 (emphasis in original).)

227. Section 5.16 provides further support for the Court's Finding Regarding Intent not only because the Section again demonstrates the contracting parties' repeated use of "Hospitals," as expressly defined in the APA, but also because it reinforces the Court's conclusion that the post-closing covenants represent personal covenants under Missouri law.

228. The Court finds that Section 5.16 of the APA is particularly relevant because it demonstrates that the contracting parties intended to create personal covenants relating to the real property actually purchased by HCA pursuant to the APA. The purpose and intent of Section 5.16 was plainly to ensure that any successive owner of the Health Midwest facilities (*i.e.*, "the existing Facilities") would acquire those facilities from HCA with knowledge of the post-closing covenants and would therefore be bound by such covenants under Missouri law. (*See* Conclusions of Law, at ¶¶ 764-768.)

229. Section 8.8 of the APA provides as follows:

> **Efforts to Close**. Seller and Buyer shall use their reasonable commercial efforts to satisfy all of the conditions precedent set forth in Articles 9 and 10 of this Agreement to the extent that such party's action or inaction can control or influence the satisfaction of such conditions, so that the Closing will occur on December 31, 2002. Notwithstanding the foregoing or anything else in this Agreement or elsewhere to the contrary, Buyer shall have no obligation whatsoever to make any commitments with respect to operation of the Facilities or Purchased Assets in addition to those set forth in Article 5 hereof, whether at the request of any Governmental Entity or otherwise, and Seller and the System Entities shall make no such commitments that could be binding on Buyer.

(Exhibit 13, at p. 53 (emphasis in original).) The Court finds this section of the APA to be especially relevant because the language "[n]otwithstanding the foregoing or anything else in this Agreement to the contrary" demonstrates HCA was to have no obligations under Section 5 except with respect to "the Facilities or Purchased Assets. . . ." Specifically, the Court finds that

this Section 8.8 specifically connects Article 5 compliance to the Facilities or Purchased Assets, and not "new construction."

230. Section 12.6(a) of the APA provides as follows:

> (a) Except as permitted in this **Section 12.6**, during the period commencing on the Closing Date and ending on the tenth anniversary of the Closing Date, Seller agrees that it shall not and shall cause each of its Affiliates and successors not to, directly or indirectly (including by making a donation or providing other financing), (i) engage in the construction or operation of any Competing Business within the Kansas City metropolitan statistical area or **a radius of 10 miles of any Facility** or (ii) acquire, lease, own or be a shareholder, partner, member or equity holder of, exercise management control over, provide consulting services for, or acquire or maintain any interest in, any Competing Business that is operated or conducted within the Kansas City metropolitan statistical area or **a radius of 10 miles of any Facility.**

(Exhibit 13, at p. 73 (emphasis supplied).) The Court finds that this Section 12.6(a) is further supportive of its Finding Regarding Intent, because the APA clearly contemplates that Health Midwest would be prohibited from engaging in certain forms of competitive activity, and that Health Midwest would specifically be prohibited from operating a competing business for a defined time within a specified geographic radius of "any Facility" purchased under the APA.

231. Section 14.2(a) of the APA provides as follows:

> The parties agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Missouri, without giving effect to any choice or conflict of law provision or rule thereof.

(Exhibit 13, at p. 79.) The importance of this Section 14.2(a) is self-explanatory, and the Court has applied Missouri law throughout these findings.

232. Section 14.16 of the APA provides as follows:

> **Specific Performance**. The parties acknowledge that **the Facilities and the Purchased Assets are unique,** that a failure by either party to complete the transactions contemplated by this

> Agreement will cause irreparable injury to the other party, and that actual damages for any such failure may be difficult to ascertain and may be inadequate. Accordingly, either party shall be entitled to specific performance of any of the provisions of this Agreement in addition to any other equitable remedies to which such party may otherwise be entitled for a failure by the other party to complete **the transactions contemplated by this Agreement.**

(Exhibit 13, at p. 84 (emphasis supplied).) Section 14.16 confirms that the Facilities and Purchased Assets subject to the APA are unique, and that each party had specifically defined rights and obligations related to those Facilities and Purchased Assets.

233. Most significantly, Section 5.1 of the APA provides as follows:

> **Capital Improvements.** Within two (2) years following the Closing Date, Buyer will either spend or commit to spend at least Three Hundred Million Dollars ($300,000,000) in capital expenditures. In each of the three (3) years subsequent to the two-year period following the Closing Date, Buyer will either spend or commit to spend at least Fifty Million Dollars ($50,000,000) in capital expenditures. Any amounts spent in any period that are in excess of the required amount for such period will be credited against amounts required to be spent or committed to be spent in subsequent periods. Moreover, any Permitted Capital Expenditures and any capital expenditures made by Seller or System Entities which are approved by Buyer shall be credited against Buyer's obligations under this **Section 5.1**. The amount of capitalized expenditures made under this **Section 5.1** will be determined in accordance with Buyer's then applicable accounting policies and procedures. The construction of new facilities by Buyer will not materially detract from the required maintenance and necessary improvement of existing Facilities.

(Exhibit 13, at p. 30 (emphasis in original).) The Court has extensively discussed the intent of the parties regarding Section 5.1. Within the four corners of Section 5.1, however, the Court finds it significant that the last sentence of Section 5.1 clearly distinguishes between "new facilities" and "existing Facilities."

234. The Court finds the distinction between "new facilities" and "existing Facilities" to be a key element supportive of its Finding Regarding Intent because this distinct use of

language within Section 5.1 rebuts HCA's contention that "new construction" or "new facilities" is synonymous with the "existing Facilities." Stated differently, the Court finds that there would be no need for the contract to have the last sentence of Section 5.1 if those terms were intended to be synonymous.

235. The APA consistently refers to the "Hospitals," the "Facilities," and the "Purchased Assets" as specifically defined assets being conveyed by Health Midwest to HCA. In contrast, the APA nowhere defines "new construction" or "new facilities." The Court finds that the latter undefined terms must be read in harmony with the remainder of the APA, and specifically in harmony with the definitions describing the assets being conveyed. Accordingly, the Court finds as a factual matter that the parties intended the last sentence of Section 5.1 to clearly delineate that "new facilities" are not synonymous with "existing Facilities."

236. Section 5.1 of the APA is also referenced in Sections 5.14, 5.15, and 5.16. (Exhibit 13, at p. 34.) The Court finds this relevant to the parties' intent because the parties clearly knew how to incorporate Section 5.1's obligations into other post-closing covenants. This finding becomes particularly important because the parties did not – as shown in the next Finding of Fact – incorporate Section 5.1 into Section 5.2, which permitted HCA to build "replacement hospitals" under certain conditions.

237. Section 5.2 of the APA is also referenced in Sections 5.3, 5.4, 5.6, 5.7, 5.10, 5.13, and 5.16. (Exhibit 13, at pp. 31-34.) The Court finds this relevant to the parties' intent because the parties clearly knew how to incorporate Section 5.2's obligations into other post-closing covenants. Section 5.2 makes no mention, however, of Section 5.1, which shows that the parties did not intend for the cost of building replacement hospitals (which is governed specifically under Section 5.2) to be included among the $450 million obligated under Section 5.1.

238. The Court is mindful that the parties agreed in Section 14.12 of the APA that the headings used "shall have no legal effect in construing the provisions of this Agreement." (Exhibit 13.) The Court would therefore be obligated to ignore the heading of Section 5.1 if this case was one of contract construction (which is a question of law). Having found that Section 5.1 is ambiguous, however, the Court must examine all the extrinsic evidence – including the manner in which the contract's sections are denominated – to ascertain the parties' intent. Here, the parties chose to title Section 5.1 "Capital Improvements." This nomenclature is important in the context of this case because it is axiomatic that one cannot improve that which does not exist. The Court therefore finds that the parties' use of the term is probative to support the Court's finding of fact that the parties intended for the $450 million in capital expenditures to be used solely for "the existing Facilities."

## R. HCA's Creation of the "HCA – Midwest Division 5-Year Capital Plan" Evidences an Intent That the Capital Improvements in Section 5.1 Were Intended for the "Existing Facilities."

239. As shown below in Paragraphs 272 through 331 (which are incorporated by reference into this Section), HCA undertook extensive efforts throughout Fall 2002 and Spring 2003 to assess the capital needs of the Health Midwest facilities that HCA acquired, culminating in HCA's creation of the "HCA – Midwest Division 5-Year Capital Plan" dated April 29, 2003 ("5-Year Capital Plan"). (Exhibit Bracken 257.)

240. The 5-Year Capital Plan is a "roughly $800 million, 5-year capital plan" (Exhibit 143) that details the projected capital spending requirements for the existing Facilities as well as for the cost of building new hospitals in Independence and Lee's Summit over the initial five years following April 1, 2003. (*See* Exhibit Bracken 257.)

241. Including annual expenditures for "routine capital," the 5-Year Capital Plan detailed at least $450 million in capital expenditures to address the capital needs of the existing Facilities over the 5-year covenant period. (Trial Transcript, at Vol. VI, 57:13-22.)

242. The 5-Year Capital Plan detailed $375 million in additional capital expenditures – above and beyond those necessary for the existing Facilities – to build new hospitals in Independence and Lee's Summit. (Exhibit Bracken 257, at HCA0001728199-8200.)

243. The Court finds that the timing of the creation of 5-Year Capital Plan, which was created as a process that began before the parties entered into the APA and continued through mid-April 2003 – and the fact that the amount of expenditures for existing Facilities in HCA's 5-Year Capital Plan is the same as the amount found within Section 5.1 – evidences an intent of the parties that further supports the Court's Finding Regarding Intent. Specifically, the Court finds that the 5-Year Capital Plan shows that HCA intended – as of April 29, 2003 – to spend at least $450 million in capital expenditures in "the existing Facilities" and that the amount would go beyond that requirement (to "roughly $800 million") in the event that HCA built replacement hospitals in Independence and Lee's Summit.

244. The Court also finds the timing and amount of the expenditures for "new or replacement" facilities to be consistent with its Finding Regarding Intent, and consistent with Exhibit 47 and Bovender's trial testimony, because the 5-Year Capital Plan shows that HCA understood the $450 million in capital expenditures "would go higher" if HCA were to build new or replacement facilities in Independence and Lee's Summit.

## S. HCA Maintained and Improved the Existing Facilities.

245. At trial, the Foundation presented the Court with a second or alternative theory of HCA liability under Section 5.1 of the APA. Specifically, the Foundation presented evidence

that HCA's construction of new facilities, *regardless of whether such construction was properly credited as a "capital improvement" under the APA*, nevertheless materially detracted from the required maintenance and necessary improvement of the existing facilities. As such, the Foundation contended that the construction of new facilities by HCA, standing alone, was in violation of Section 5.1 of the APA.[1]

246. The APA provides that the "construction of new facilities by [HCA] will not materially detract from the required maintenance and necessary improvement of existing Facilities." [Ex. 13, HCA1180513 at § 5.1]

247. The Foundation claims that the new construction materially detracted from the required maintenance or necessary improvements of existing facilities because HCA changed its April 29, 2003 5-Year Capital Plan. The Court finds that this argument fails because it mischaracterizes the 5-Year Capital Plan and is contrary to the evidence.

248. The 5-Year Capital Plan is not part of the APA. [Tr. Vol. V, 115:8-16, Hazen] It did not exist when the APA was signed. [Compare: Ex. 13, HCA1180478 ("Dated as of November 22, 2002") and Ex. 257, HCA0001728199 (dated "April 29, 2003")] It did not create legally binding obligations on HCA.

249. The 5-Year Capital Plan was a preliminary plan. It was dated April 29, 2003, which was 29 days after HCA purchased the System. [*See* Ex. 257; Tr. Vol. IV, 237:15-17,

[1] Throughout these Findings of Fact and Conclusions of Law, the Court will reference the Foundation's position that HCA's construction of new facilities materially detracted from the required maintenance and necessary improvement of the existing Facilities regardless of whether the expenses of such new construction could otherwise be properly credited to HCA under Section 5.1 of the APA. The Foundation has at no time conceded that any of HCA's alleged new-construction expenses should or could properly be credited to HCA under Section 5.1of the APA, and no statement or omission in these Findings of Fact and Conclusions of Law should be construed in any way to suggest: (1) that the Foundation has made any such concession; or (2) that the Court has, in fact, found that any portion of HCA's alleged new-construction expenses may be credited to HCA under Section 5.1.

Hazen; Tr. Vol. V, 119:5-12, Hazen]. Hazen, who was responsible for the document, testified that it was merely the beginning of a planning process. [*See, e.g.*, Tr. Vol. IV, 256:21-23, Hazen ("Starting point one, yes."); Tr. Vol. V, 112:17-113:1, Hazen ("It seems like a lot to me, and potentially too much, and so we were worried about that as a starting point, but it was a placeholder for right now."); *id.* 113:2-13 ("It was just the list to begin the process.")]

250. The preponderance of the evidence supports the finding that the 5-year Capital Plan was not a list of "required" maintenance and "necessary" improvements. It was a list of potential expenditures for the various hospitals that HCA could use in determining how to intelligently deploy capital, after careful consideration of, among other things, whether the proposed expenditure was physically and economically feasible, and whether regulatory approval would be required. [Tr. Vol. IV, 240:15-22, Hazen (does not reflect "capital needs" of facilities); *id.* 260:22-261:1, Hazen ("Yeah, it's a tool, but it doesn't determine compliance."); Tr. Vol. V, 86:16–89:24, Hazen (explaining the capital deployment process); *id.* 116:1–117:2 (same)]

251. The items listed needed further assessment. See for example, the proposed $10 million new wing at the Allen County Hospital. [Ex. 257, Tab 2] There was no need for a new wing and building a new wing would cause the hospital to lose its "critical access hospital designation," which would cause it to lose current funding and jeopardize the facility's survival. [Tr. Vol. VII, 79:18-81:5, King] The proposed new wing was an idea that, upon experienced review, should not be implemented.

252. The testimony of Sheilahn Davis-Wyatt also supports the finding that the 5-Year Capital Plan was a list that required further evaluation and business judgment. Ms. Davis-Wyatt worked at Menorah Medical Center for Health Midwest and HCA. [Tr. Vol. V, 165:7-24, Davis-

Wyatt] She testified that deployment of capital requires business judgment and sometimes people at the division have a broader perspective than the people at the hospital. [Tr. Vol. V, 185:1-10, Davis-Wyatt] Ms. Davis-Wyatt identified two items on the list that were not funded, a $5 million parking structure and a "Security System and Nursery Med, $472,500." [Ex. 257; Tr. Vol. V, 177:8-178:19, Davis-Wyatt]

253. Ms. Davis-Wyatt testified that there were *no* instances where something that was needed or required for patient care was not provided. [Tr. Vol. V, 187:6-20, Davis-Wyatt]

254. The $472,500 security system was listed to provide a security system on the birthing unit "[t]o prevent infant abductions or, in the event there was an abduction to at least have a record." [Tr. Vol. V, 178:18-179:6, Davis-Wyatt] The requested system was not purchased; but Ms. Davis-Wyatt admits the hospital was able to accomplish the same goal by installing VCRs on the doors and having a routine to change the tapes and file them. [Tr. Vol. V, 179:18-180:20, Davis-Wyatt] Thus, HCA used its business judgment to address the perceived need in a different way.

255. HCA also made significant investments and improvements in the existing hospitals during the five-year period.

256. For example, at the old Lee's Summit Hospital, HCA made improvements and maintenance repairs including the following:

- Performed a "complete facelift" of the physical facility by installing new carpet and painting the facility, [Tr. Vol. X, 39:5-13, Rogers] and thoroughly cleaning it. [Tr. Vol. XII, 126:5-19, Caldwell]

- Purchased new imaging equipment, including a CT machine and MRI. [Tr. Vol. XII, 126:5-19, 127:7-20 at 127:10-14, Caldwell]

- Replaced the roof. [Tr. Vol. XII, 129: 5-22, Caldwell]

- Built a training area. [*Id.* at 129:16-18]
- Modified the pharmacy area. [*Id.* at 129:18-19]
- Replaced equipment that broke, including surgery lights. [*Id.* at 130:1-23]

257. The CEO of the Lee's Summit Hospital during the relevant period testified that there were no items of required maintenance or necessary improvements that were not performed because HCA was building a new hospital. [Tr. Vol. XII, 131:5-11, Caldwell.] The hospital saw patients and remained fully operational until the new hospital opened. [*Id.* at 131:12-14]

258. The CEO of Lee's Summit Hospital also explained that she understood that "you would continue to maintain the older facility, making sure that your patients are safe. You are continuing to provide care, and provide any of the necessary upgrades that would be required prior to moving to the new facility." [*Id.* at 124:5-13; *see also* Tr. Vol. VII, 70:16-21, King ("HCA 'definitely' made every effort to keep Lee's Summit Hospital open and operating and equipped during the period of time the new hospital was being built in Lee's Summit.")]

259. At Medical Center of Independence ("MCI"), HCA made improvements and maintenance repairs including the following:

- Improved the physical building by purchasing new patient beds, putting in fire sprinklers, painting, installing new carpet, and thoroughly cleaning the building. [Tr. Vol. XII, 27:24-28:17, Jones; Tr. Vol. X, 38:9-20, Rogers; Tr. Vol. VII, 67:20-24, King]

- Purchased new equipment, including "imaging equipment, cath labs, surgical equipment, anesthesia machines, basic day-to-day nursing equipment, monitoring units, pulse oximeters." [Tr. Vol. XII, 27:24-28:17, Jones]

- Installed a new electronic medial records system and purchased new mobile computer systems for the nursing units. [*Id.*]

- Added a Level 3 neonatal intensive care unit, which included physical construction, recruiting the necessary doctors, and upgrading the associated services. [Tr. Vol. XII, 28:18-30:18, 30:24-31:2, Jones; Tr. Vol. VII, 67:13-19 King]

260. The CEO of MCI during the relevant period testified that there was never a time when he was not able to provide required maintenance or able to make necessary improvements because HCA was building a new hospital in Independence. [Tr. Vol. XII, 31:3-14, Jones; *see also* Tr. Vol. VII, 67:3-6, King (HCA did not allow MCI to deteriorate while Centerpoint was under construction); Tr. Vol. X, 38:21-25, Rogers (MCI was "maintained quite nicely" while Centerpoint was under construction)]

261. At Independence Regional Health Center ("IRHC"), HCA made improvements and maintenance repairs including the following:[2]

- Purchased equipment including anesthesia machines, surgical equipment, imaging equipment, including CTs, MRIs, a nuclear camera, and other state of the art equipment. [Tr. Vol. XII, 22:2-13, Jones; Tr. Vol. XI, 12:12-13:2, Gallion]

- Reinstituted the Level 2 trauma services and performed renovations to sub-acute services, including the geri-psych unit. [Tr. Vol. XII, 22:25-23:9, Jones; Tr. Vol. XI, 13:3-8, Gallion]

- Improved the physical building by improving the heating and ventilation systems, the water systems, sealing the building, replacing the carpeting, painting the hallways, replacing furniture, and purchasing new hospital beds. [Tr. Vol. XII, 22:25-23:9, Jones; Tr. Vol. XI, 12:12-24, 13:9-14:3, Gallion]

- Installed new cath labs. [Tr. Vol. XII, 22:25-23:9, Jones; Tr. Vol. X, 37:19-38:5, Rogers; Tr. Vol. XI, 12:12-24, Gallion]

262. The CEO of IRHC during the relevant period testified that there was never a time when he was not able to provide required maintenance or able to make necessary improvements because HCA was building a new hospital in Independence. [Tr. Vol. XII, 31:3-14, Jones; *see*

[2] *See also* Tr. Vol. VII, 67:25-68:5, King (HCA made improvements to IRHC similar to those at MCI).

*also* Tr. Vol. VII, 67:3-6, King (HCA did not allow IRHC to deteriorate while Centerpoint was under construction); Tr. Vol. X, 38:21-39:4, Rogers (IRHC was "maintained quite nicely" while Centerpoint was under construction)]

263. When asked whether he had any observation that, "in fact," maintenance was not done during the four years at IRHC, Dr. Gallion responded "heavens no." [Tr. Vol. XI, 14:4-11 at 14:11, Gallion; *see also id.* at 14:23-15:1 (not aware of any required improvements or equipment that he asked for that was not provided)]

264. At Overland Park Regional Medical Center, HCA made improvements and maintenance repairs including the following:

- Reopened and enhanced the open heart and trauma services, including an orthopedic trauma unit and a new cath lab. [Tr. Vol. XI, 35:23-36:11, Hicks; *id.* 41:4-17; *id.* 42:5-13; Tr. Vol. XI, 136:3-137:25, Romito; Tr. Vol. VII, 57:24-58:11, King]

- Replaced imaging and other equipment, including a new permanent MRI and new CT scanners. [Tr. Vol. VII, 77:1-12, King; Tr. Vol. XI, 41:4-42:1, Hicks; Tr. Vol. XI, 134:24-135:11, Romito]

- Expanded and remodeled the emergency department. [Tr. Vol. XI, 35:23-36:11, Hicks]

- Rebuilt the intensive care unit, doubling its size. [Tr. Vol. X, 53:23-54:1, Rogers; Tr. Vol. VII, 77:1-12, King; Tr. Vol. XI, 41:4-17, Hicks]

- Completely updated the physical facility and grounds, including a facelift of the common areas and patient rooms, and a new lobby. [Tr. Vol. XI, 35:23-36:11, Hicks; Tr. Vol., XII 78:1-83:13, Collier; Tr. Vol., VII 77:1-12, King]

- Built a new Level 3 neonatal intensive care unit. [Tr. Vol. X, 34:12-24, Rogers; Tr. Vol. VII, 77:1-12, King; Tr. Vol. XI, 35:23-36:11, Hicks, *id.* 40:5-17; Tr. Vol. XI, 139:20-141:19, Romito]

- Built a women's surgical unit. [Tr. Vol. XI, 138:21-139:17, Romito]

265. The CEO and CFO during the relevant time period and a doctor at Overland Park testified that there were no necessary improvements or required maintenance that was not done.

[Tr. Vol. XI, at 63:23-64:1, 64:15-22, Hicks; Tr. Vol. XII, 84:1-17, Collier; Tr. Vol. XI, 143:23-144:7, Romito]

266. Dr. Romito testified that he had "not seen any evidence of things that are needed for patient care since HCA took over that we haven't gotten." [Tr. Vol. XI, 143:21-22, Romito]

267. At Baptist Lutheran Medical Center, HCA made improvements and maintenance repairs including the following:

- Completely renovated the sixth floor, including that HCA privatized the rooms and renovated the nursing unit. [Tr. Vol. VII, 59:25-61:2, King; Tr. Vol. IX, 95:16-96:12, Krajicek; Tr. Vol. X, 33:14-24, Rogers].

- Upgraded imaging equipment and the linear accelerator. [Tr. Vol. VII, 60:11-61:19, King; Tr. Vol. X, 33:14-24, Rogers].

- Bringing in an open heart surgeon to revitalize the heart program that it had lost under Health Midwest. Tr. Vol. IX, 95:17-96:12, Krajicek].

268. At Research Medical Center, HCA made improvements and maintenance repairs including the following:

- HCA doubled the size and capacity of the emergency department. [Tr. Vol. VII, 55:11-56:4, King; Tr. Vol. X, 53:10-22, Rogers; Tr. Vol. XI, 42:23-43:6, 43:12-24, Hicks; Tr. Vol. XII, 110:17-23, 111:20-112:4, Maliszewski].

- Enhanced the women's services department, including providing private rooms, acute services, and a Level 3 NICU. [Tr. Vol. VII, 55:11-56:4, King; Tr. Vol. XI, 49:10-51:1, Hicks].

- Upgraded the trauma center, which is now a Level 1 trauma center. [Tr. Vol. VII, 57:5-11, King; Tr. Vol. XI, 43:25-44:9, Hicks; Tr. Vol. XII, 110:17-112:4, Maliszewski].

- Expanded and renovated the gastrointestinal laboratory. [Tr. Vol. XI, 42:23-43:6, 44:22-45:7, Hicks; Tr. Vol. XII, 113:18-20, 114:4-13, Maliszewski].

- Completely renovated patient rooms. [Tr. Vol. XI, 42:23-43:6, 45:8-19, Hicks; Tr. Vol. XII, 110:17-23, 111:2-10, Maliszewski].

- Replaced and upgraded imaging, medical, and laboratory equipment. [Tr. Vol. X, 33:14-24, Rogers; Tr. Vol. XI, 45:20-47:2, Hicks; Tr. Vol. XII, 111:20-113:2, Maliszewski].

- Overhauled and upgraded the cancer center to a now fully integrated, full service center. [Tr. Vol. XI, 42:23-42:6, 47:11-49:9, Hicks; Tr. Vol. XII, 111:20-112:4, Maliszewski].

- Enhanced the cardiovascular services. [Tr. Vol. VII, 74:7-75:12, King; Tr. Vol. XI, 51:13-52:7, Hicks; Tr. Vol. XI, 17:10-19:21, Gallion].

- Rebuilt the medical staff. [Tr. Vol. XI, 52:12-54:24 Hicks; Tr. Vol. XII, 115:3-25, Maliszewski].

- Created a computerized medical record system. [Tr. Vol. XII, 111:2-19, Maliszewski].

269. The prior CEO and doctors at Research testified that there were no necessary improvements or required maintenance that was not done. [Tr. Vol. XI, 63:17-65:9, 79:11-17, Hicks; Tr. Vol. XII, 116:6-15, Maliszewski]. Dr. Maliszewski testified that he was not aware of anything the medical staff asked for or patients needed that was not provided. [Tr. Vol. XII, 116:16-24 Maliszewski; *see also* Tr. Vol. XI, 65:17-24, Hicks; Tr. Vol. X, 54:2-10; *id.* 93:22-94:10, Rogers].

270. At no time did any of the hospitals lose accreditation. [Tr. Vol. VII, 64:13-65:7, King; Tr. Vol. X, 90:24-91:6, Rogers; Tr. Vol. XII, 117:7-9, Maliszewski].

271. The Court finds the testimony regarding the maintenance and improvements at these specific hospitals to be proof that HCA made significant investments in the existing hospitals, in both maintenance and improvements, while HCA was building Centerpoint Medical Center and Lee's Summit Medical Center.

272. The Court finds that the April 29, 2003 Capital Plan does not provide sufficient evidence of required maintenance or necessary improvements nor does it provide sufficient evidence that constructing new hospitals materially detracted from any required maintenance or necessary improvement to the existing facilities.

273. Healthcare is dynamic, and as patients' needs, technology, and the national healthcare landscape changes, capital plans need to be able to adapt accordingly. [Tr. Vol. V,

118:6-119:4, Hazen ("I think it's important to understand here that a capital expenditure process is a fluid process. It's not a static process that starts with one document and then is determined to be in stone. The business doesn't work that way, the marketplace doesn't work that way. So as time passes and marketplace dynamics change, capital priorities and capital decisions start to get adjusted."); Tr. Vol. VII, 30:18–31:5, King ("very fluid process"); Tr. Vol. XI, 118:23–119:12, Hicks ("iterative" or "interactive" process)].

274. The evidence clearly demonstrated that HCA, when confronted with financial difficulties between 2003 and 2008, chose to spend less than previously planned on capital improvements in the existing facilities in Kansas City. However, the Court finds that there is no credible evidence that any of the facilities were unable to meet patient needs because of a failure to maintain them or make necessary improvements.

275. Similarly, the Court finds that there is no credible evidence that the construction of new replacement hospitals, standing alone, caused a material detraction in any required maintenance or necessary improvement of the existing facilities.

## T. HCA Issued Annual Reports on Its Efforts to Comply With Article 5 of the APA.

276. Pursuant to Section 5.14 of the APA, HCA was required to produce annual reports detailing its alleged compliance with its post-closing covenants set forth in Article 5 of the APA, including Section 5.1. (Exhibit 13, at p. 34.)

277. HCA produced annual reports pursuant to Section 5.14 of the APA on or about each of the following dates:

- August 19, 2004 ("First Annual Report") (Exhibits 56 and 378);
- July 5, 2005 ("Second Annual Report") (Exhibits 57 and 379);

- July 29, 2006 ("Third Annual Report") (Exhibits 94 and 380);
- August 22, 2007 ("Fourth Annual Report") (Exhibits 95 and 381);
- July 30, 2008 ("Fifth Annual Report") (Exhibits 107 and 382); and
- June 30, 2009 ("Sixth Annual Report") (Exhibit 44).

278. Pursuant to the Second Annual Report, HCA claimed to have spent approximately $114 million for capital improvements between April 1, 2003, and March 31, 2005. (Exhibit 379.)

279. The Court has determined that HCA purportedly expended roughly $91 million for capital improvements in the existing Facilities during the first two years of the covenant period of Section 5.1. This sum is arrived by reducing from the $114 million the amount HCA spent during that time to acquire land in eastern Jackson County, Missouri (*i.e.*, $8,279,459 on November 30, 2003, and $14,654,959 on June 30, 2004), which would not constitute capital expenditures on the existing Facilities. Thus, by this calculation, the Court finds that HCA actually claimed to spend no more than $91,423,573 on capital improvements in the existing Facilities during the first two years of the covenant period. (Exhibits 57, 379, and 390.)

280. During that same two-year time period, HCA claims to have "committed to spend" no more than $96,078,074 for capital improvements to the existing Facilities. This figure includes HCA's alleged commitments for the following items: (1) "purchase order" commitments of $49,410,151; (2) ambulatory surgery center at Overland Park Regional Medical Center, $6,351,928; (3) emergency department remodel at Research Medical Center, $23,680,022; and (4) neonatal intensive care unit improvements at Overland Park Regional Medical Center, $16,635,973. (Exhibits 57 and 379.) The Court will address the legitimacy of these so-called "commitments" and whether HCA can properly take credit for them in

Paragraphs 371 through 421, below. However, even accepting HCA's claimed amounts for commitments in the first two years, the evidence still shows that HCA failed to meet its obligations under Section 5.1.

281. Combining the amounts of $91,423,573 in claimed actual spending and $96,078,074 in claimed commitment, HCA allegedly spent or committed to spend a total of $187,501,647 in the existing Facilities between April 1, 2003, and March 31, 2005.

282. The total of $187,501,647 is $112,498,353 short of the $300 million that HCA was required to spend or commit to spend between April 1, 2003, and March 31, 2005, pursuant to Section 5.1 of the APA.

283. If "new construction" is not encompassed by Section 5.1 of the APA, HCA is in breach of the APA because of this $112,498,353 shortfall on capital spending in the existing Facilities.

## U. The Majority of HCA's Alleged Capital Expenditures and Commitments Reported in HCA's Annual Reports Related to New Hospitals In Independence and Lee's Summit, and Not the Existing Facilities.

284. HCA alleges that, between April 1, 2003, and March 31, 2008, it spent or committed to spend $599,393,726 for capital improvements pursuant to Section 5.1 of the APA. (Exhibit 44, at pp. 2, 4.)

285. HCA alleges it spent $249,424,314 to construct Centerpoint Medical Center and $92,519,961 to construct Lee's Summit Medical Center, representing 57% of the total amount HCA alleges it spent or committed to spend in the "Health Midwest System" and 75% of the $450 million promised under Section 5.1. (Exhibit 44, at p. 4; Trial Transcript, at Vol. IX, 10:13-21.)

286. HCA admits that Centerpoint Medical Center and Lee's Summit Medical Center do not constitute "replacement" facilities as defined in Section 5.2 of the APA. (HCA's Reply Memorandum regarding the parties' cross-motions for partial summary judgment, filed May 27, 2011, at p. 12, fn. 14 ("HCA's Reply Brief").)

287. Centerpoint Medical Center did not continue the use of the name of either Medical Center of Independence or Independence Regional Health Center, as would be required of any "replacement" hospital pursuant to Section 5.10(a) of the APA. (Trial Transcript, at Volume XII, 47:14-48:25; Exhibit 13, at p. 33.)

288. Centerpoint Medical Center maintains just 257 licensed beds whereas Independence Regional Health Center maintained 360-370 licensed beds and Medical Center of Independence maintained an additional 185 licensed beds. (Trial Transcript, at Vol. XII, 36:12-19, 51:14-17.)

289. Further, Centerpoint Medical Center did not continue providing certain services and specialties that were offered in Medical Center of Independence and/or Independence Regional Health Center. (Trial Transcript, at Vol. XII, 51:14-54:19.) For example, Centerpoint Medical Center maintains no dedicated pediatric beds and no sub-acute services, such as skilled nursing, geriatric psych, and in-patient rehab, even though such beds and services were maintained in the former Independence hospitals. (Trial Transcript, at Vol. XII, 51:14-54:4.)

290. Lee's Summit Medical Center maintains only 64 licensed beds despite the fact that Lee's Summit Hospital maintained 107 beds. (Trial Transcript, at Vol. XII, 128:10-15.)

291. HCA alleges it spent or committed to spend only $4,813,276 in capital expenditures to Baptist Lutheran Medical Center in the five years beginning April 1, 2003, representing .8% of the total HCA alleges it spent or committed in the "Health Midwest System"

and less than 1% of the $450 million that HCA agreed to spend or commit to spend under Section 5.1 of the APA. (Exhibit 44, at p. 4.)

292. HCA alleges it spent or committed only $11,809,155 in capital expenditures at Research Belton Hospital in the five years beginning April 1, 2003, representing less than 2% of the money HCA alleges it spent or committed to spend in the "Health Midwest System" and less than 3% of the $450 million that HCA agreed to spend or commit to spend under Section 5.1 of the APA. (Exhibit 44, at p. 4.)

293. HCA alleges it spent or committed only $3,859,660 in capital expenditures at Allen County Hospital in the five years beginning April 1, 2003, representing less than .7% of the money HCA alleges it spent or committed in the "Health Midwest System" and less than .9% of the $450 million that HCA agreed to spend or commit to spend under Section 5.1 of the APA. (Exhibit 44, at p. 4.)

294. HCA alleges it spent or committed only $2,364,480 in capital expenditures at Research Psychiatric Center in the five years beginning April 1, 2003, representing less than .4% of the money HCA alleges it spent or committed in the "Health Midwest System" and less than .6% of the $450 million that HCA agreed to spend or commit to spend under Section 5.1 of the APA. (Exhibit 44, at p. 4.)

295. Section 5.2 of the APA prohibited HCA from closing Research Medical Center, Baptist Lutheran Medical Center, and Research Psychiatric Hospital for three years following the April 1, 2003 closing date. (Exhibit 13, at p. 31.)

296. On or about April 1, 2006, which was the first possible date that HCA could have closed that facility pursuant to Section 5.2 of the APA, HCA closed Baptist Lutheran Medical

Center as an inpatient facility and consolidated that hospital's inpatient operations into those provided by Research Medical Center. (Trial Transcript, at Vol. V, 14:5-13; Vol. XII, 60:9-12.)

297. Section 5.4 of the APA required HCA to keep open and operate the Emergency Departments of all the Hospitals acquired from Health Midwest for five years. (Exhibit 13, at p. 31.) However, HCA admitted that, although the Emergency Department at Baptist Lutheran Medical Center technically remained open after April 1, 2006, Baptist Lutheran Medical Center's Emergency Department stopped providing substantially the same services that HCA was previously providing before HCA essentially closed Baptist Lutheran Medical Center as an acute-care hospital. (Trial Transcript, Vol. V, 14:23-15:2.) Specifically, after April 2006, HCA began transporting by ambulance from Baptist Lutheran Medical Center to Research Medical Center any patients who came to Baptist Lutheran Medical Center's Emergency Department for emergent care. (Trial Transcript, at Vol. V, 14:17-22.)

## V. Background Regarding HCA's Failure to Provide "Reasonable Detail" of Its Compliance with HCA's Article 5 Post-Closing Obligations.

298. Section 5.1 of the APA includes the following: "Within two (2) years following the Closing Date, Buyer will either spend or commit to spend at least Three Hundred Million Dollars ($300,000,000) in capital expenditures. In each of the three (3) years subsequent to the two-year period following the Closing Date, Buyer will either spend or commit to spend at least Fifty Million Dollars ($50,000,000) in capital expenditures." (Exhibit 13, at p. 30.)

299. The Court finds that Section 5.1 therefore contains four separate temporal spending covenants. The first covenant required HCA to spend or commit to spend at least $300 million by April 1, 2005. The second covenant required HCA to spend or commit to spend at least an additional $50 million by April 1, 2006. The third covenant required HCA to spend or

commit to spend at least an additional $50 million by April 1, 2007. And the fourth covenant required HCA to spend or commit to spend at least an additional $50 million by April 1, 2008.

300. Section 5.1 additionally states: "The amount of capitalized expenditures made under this Section 5.1 will be determined in accordance with Buyer's then applicable accounting policies and procedures." (Exhibit 13, at p. 30.)

301. The Court finds that any expenditure for which HCA seeks to take credit toward its obligation to spend or commit to spend the $450 million required under Section 5.1 needed to be capitalized and made in accordance with HCA's "then applicable accounting policies and procedures."

302. Section 5.5 of the APA provides as follows:

> **Charity, Indigent and Uncompensated Care.** For a period of ten (10) years after Closing, Buyer will annually provide at least the same aggregate dollar amount of charity, indigent and other uncompensated care as were provided by the Hospitals, in the aggregate, for the 12-month period prior to Closing. Charity and indigent care is based upon gross charges foregone as recorded in the records of Seller prior to Closing and of Buyer following Closing. Uncompensated care is based upon bad debt expense as recorded on the records of Seller prior to Closing and Buyer following Closing. In the event that modifications are made to Medicare, Medicaid and other federal, state, and/or local governmental programs which provide coverage for health care, or replacement or substitute governmental programs are enacted or implemented, which have the effect of reducing the number of people whose care is now considered charity, indigent, or other uncompensated care, then Buyer's obligation under this section will be reduced proportionate to the reduction in people whose care is so considered.

(Exhibit 13, at pp. 31-32 (emphasis in original).)

303. HCA was therefore required to "annually provide the same aggregate dollar amount of charity, indigent and other uncompensated care as was provided by the Hospitals, in the aggregate, for the 12-month period prior to Closing."

304. Section 5.14 of the APA provides as follows:

> **Accounting and Reporting**. Within 90 days of the end of each twelve (12) month period following Closing, for a period as long as Buyer is performing any operating covenants pursuant to this Article 5, Buyer shall provide to Seller a report setting forth in reasonable detail how it complied with the operating covenants, including a specific accounting of capital expenditures Buyer agrees to make in accordance with Section 5.1.

(Exhibit 13, at p. 34 (emphasis in original).)

305. The Court finds that Section 5.14 required HCA to provide an annual report to the Seller commencing April 1, 2004 (*i.e.*, the end of the first twelve month period following Closing) containing: (1) "reasonable detail" of how it complied with each of the post-closing covenants in Article 5 of the APA; and (2) a "specific accounting of capital expenditures" made by HCA "in accordance with Section. 5.1."

306. Mindful of the foregoing contractual obligations and the evidence detailed below, the Court finds that the Foundation has met each of the elements necessary to establish the need for a Court-supervised accounting to determine whether HCA fully satisfied its obligations under Sections 5.1 and 5.5 of the APA. Specifically, the Court finds: (1) that HCA's Annual Reports did not provide: (a) "reasonable detail" of its compliance with Sections 5.1 and 5.5, or (b) "a specific accounting of capital expenditures" made in accordance with Section 5.1, such that there is a need for an independent determination of whether HCA fully satisfied its obligations; (2) given the complicated nature of HCA's bookkeeping and financial records and HCA's failure to provide the financial data required by Section 5.14, a Court-supervised accounting is necessary; (3) the Foundation, as a party for whose benefit HCA was required to make the transactions and expenditures set forth in Article 5 – coupled with HCA's obligation to fulfill the obligations under Article 5 for the benefit of the public – creates a fiduciary relationship; and (4) there is no

other legal remedy to adequately determine whether HCA satisfied its obligations under Sections 5.1 and 5.5 of the APA.

## W. HCA's Annual Reports Contain Numerous Errors, Inconsistencies, and Unexplained Expenditures.

307. The Foundation at trial provided persuasive evidence of a number of defects in the Annual Reports related to their preparation, their internal consistency, and their failure to give the Court an adequate basis for determining whether HCA complied with Article 5 of the APA.

308. For example, the First and Second Annual Reports reflect significantly different alleged expenditures and commitments (and significantly different amounts) for the period of April 1, 2003 through March 31, 2004. (Exhibits 378 and 379; *See also* Trial Transcript, at Vol. VII, 158:6-10; Exhibit 406, at 130:11-140:25.)

309. Mills – the self-described "quarterback" of compliance under Section 5.1 – acknowledged that "virtually none of the entries within the First Annual Report find their way onto a date entry for the Second Annual Report." (Trial Transcript, at Vol. VI, 142:5-17.)

310. Although Mills was extensively cross-examined at trial by the Foundation about the inadequacies of the Annual Reports that he "quarterbacked," HCA failed to elicit any testimony on direct examination by Mills to explain how these inadequacies occurred, what he or anyone else at HCA did to prevent these issues from arising, or what he or anyone else at HCA did to cure the defects in the Annual Reports. HCA's failure to have Mills or anyone else explain these issues creates an inference that there was no logical or credible explanation for the problems within the Annual Reports.

311. Jerry Rooker, HCA Midwest Division's Controller, prepared the first three Annual Reports. Rooker testified that he read Article 5 of the APA, but that he otherwise took no action to determine what information should be included in the Annual Reports. (Exhibit 406, at 17:3-7, 20:5-21:6.)

312. Rooker further testified that he did not confer with anyone at HCA to determine what would constitute "a specific accounting" or "reasonable detail," as required by Section 5.14. (Exhibit 406, at 29:9-30:5.)

313. Rooker did not undertake any process whatsoever to ensure that the claimed capital expenditures in the Annual Reports were, in fact, "capitalized expenditures . . . determined in accordance with [HCA]'s then applicable accounting policies and procedures" as required by Section 5.1 and Section 5.14. (*See* Exhibit 13, at Section 5.1.) Nor is Rooker aware of any other HCA employee having done so. (Exhibit 406, at 67:23-68:7, 75:2-10.)

314. Rooker did not do anything to ensure that the facilities were correcting any errors they found with respect to reported capital expenditures, and he is not aware of any other HCA employee having done so. (Exhibit 406, at 84:1-13.)

315. Despite having a fully staffed internal auditing department, at no time did HCA request or perform any audit of the capital expenditures being claimed under Section 5.1 of the APA. (Trial Transcript, at Vol. V, 56:7-10; Vol. VII, 155:3-6; Exhibit 398, at 105:20-106:22.)

316. The Annual Reports include multiple instances of double counting, where the same alleged capital expenditures and/or commitments were erroneously recorded twice. (Trial Transcript, at Vol. VII, 154:5-6, 165:23-166:14, 167:4-168:11.)

317. Such double counting persisted even in the Sixth Annual Report, despite that HCA prepared that Annual Report to cure defects that the Foundation pointed out before filing this lawsuit. (Trial Transcript, at Vol. VII, 175:3-19.)

318. In each of the Annual Reports, the total amount of alleged capital expenditures and commitments reflected on the Summary Page for the Report does not match the total amount of those items as reflected in the detail provided for the same Report. (Trial Transcript, at Vol. VII, 154:6-8, 163:12-164:4), and specifically as follows:

a. The Summary Page of the First Annual Report reflects a total of $65,765,365 in capital expenditures and commitments for the first covenant period, but the detail within the First Annual Report totals only $64,409,031, representing a difference of $1,356,334. (Exhibits 56 and 378);

b. The Summary Page of the Second Annual Report reflects a total of $513,316,182 in capital expenditures and commitments for the covenant period, but the detail within the Second Annual Report totals only $504,868,385, representing a difference of $8,447,797. (Exhibits 57 and 379);

c. The Summary Page of the Third Annual Report reflects a total of $550,448,248 in capital expenditures and commitments for the covenant period, but the detail within the Third Annual Report totals only $532,804,585, representing a difference of $17,643,663. (Exhibits 94 and 380);

d. The Summary Page of the Fourth Annual Report reflects a total of $586,188,415 in capital expenditures and commitments for the covenant period, but the detail within the Fourth Annual Report totals only $575,390,703, representing a difference of $10,797,712. (Exhibits 95 and 381); and

e. The Summary Page of the Fifth Annual Report reflects a total of $603,070,431 in capital expenditures and commitments for the covenant period, but the detail within the Fifth Annual Report totals only $602,921,898, representing a difference of $148,533. (Exhibits 107 and 382).

319. In addition, the Annual Reports reflect different numbers of line items for the same time periods. (Trial Transcript, at Vol. VII, 159:5-160:10.) Specifically, the First Annual Report reflects 681 line items, the Second, Third, and Fourth Annual Reports reflect 1,787 line items, the Fifth Annual Report reflects 1,779 line items, and the Sixth Annual Report reflects 1,788 line items. (Trial Transcript, at Vol. VII, 159:22-160:10.)

320. Each of the Annual Reports includes numerous instances where complete descriptions and dates of alleged capital expenditures and/or commitments were omitted. (Trial Transcript, at Vol. VII, 164:5-165:17.)

321. For example, dates were not provided in the Second Annual Report with respect to items reflecting 76% of the total amount allegedly spent or committed. (Trial Transcript, at Vol. VII, at 165:2-7.)

322. Similarly, the Second Annual Report reflects undated, aggregate entries totaling $49.4 million for alleged purchase order commitments, and the Annual Reports for subsequent years reflect alleged undated, aggregate purchase order commitments of between $11 million and $13 million. (Trial Transcript, at Vol. VII, 180:21-181:12.)

323. In each the Second, Third, Fourth, and Fifth Annual Report, HCA included only one line item for its alleged commitments/expenditures for the entirety of Lee's Summit Medical Center, ranging between $71 million and $85 million. (Exhibit 379, pp. 2, 59; Exhibit 380, pp. 2, 83; Exhibit 381, pp. 2, 100; and Exhibit 382, at p. 102.)

324. Similarly, in each the Second, Third, Fourth, and Fifth Annual Report, HCA included only one line item for its alleged commitments/expenditures for the entirety of Centerpoint Medical Center, ranging between $181 million and $212 million. (*Id.*)

325. As an additional example, there was only one line item in the Fifth Annual Report for almost $200 million with respect to the entire cost of construction of Centerpoint Medical Center. (Exhibit 107, at P000757.)

326. Mills admitted that including one line item for $200 million in capital expenditures would not constitute "reasonable detail." (Trial Transcript, at Vol. VI, 167:4-168:11.)

## X. HCA's Annual Reports Do Not Comply with HCA's Own Accounting Policies and Procedures.

327. HCA's "then applicable accounting policy" governing capital expenditures required HCA to maintain specific information about its alleged capital expenditures. For example, HCA's accounting policy – *i.e.*, HCA Accounting Policy Guide No. 03, referred to as "APG#3") – required HCA to maintain specifically for each capital expenditure: asset identification numbers, general ledger account numbers, and vouchers or invoice numbers. (Exhibits 42, 43, 228; Trial Transcript, at Vol. VIII, 63:1-64:19.)

328. Neither the Annual Reports nor the documents HCA produced during discovery in this case contain any asset numbers or general ledger numbers identifying the alleged expenditures or acquired assets. (Exhibits 44, 56, 57, 94, 95, 107, 378, 379, 380, 381, and 382; Trial Transcript, at Vol. VIII, 68:14-69:22.)

329. The Foundation's expert witness at trial, Shawn Fox (a certified public accountant), also testified that he would have expected to see more detail in HCA's reporting of its alleged capital commitments as a "specific accounting," as required by Section 5.14. HCA's

alleged commitments were listed, however, by only single line items with aggregate amounts per hospital, and no dates were provided showing when any so-called commitments were made by HCA. (Trial Transcript, at Vol. VIII, 71:7-72:10.)

330. In addition to the need to comply with AGP#3, all of the expenditures claimed by HCA needed to conform with Generally Accepted Accounting Principles, known as "GAAP." (Trial Transcript, at Vol. VIII, 36:14-19; Exhibit 43.)

331. HCA's Code of Conduct – which has been in effect at all applicable times and which was adopted by HCA as a part of a settlement with the federal government of an accounting fraud that allegedly occurred – specifically requires that "[a]ll financial information must reflect actual transactions and conform to generally-accepted accounting principles ("GAAP")." The Code of Conduct specifically states in relevant part:

> We have established and maintain a high standard of accuracy and completeness in documenting, maintaining, and reporting financial information. This information serves as a basis for managing our business and is important in meeting our obligations to patients, colleagues, shareholders, suppliers, and others. It is also necessary for compliance with tax and financial reporting requirements.
>
> **All financial information must reflect actual transactions and conform to generally-accepted accounting principles ("GAAP")**.

(Exhibit 231; Trial Transcript, at Vol. V, 53:5-10 (emphasis supplied).)

332. HCA, through the testimony of Mills, admitted that its Annual Reports contain "financial information" and that the information therein must therefore conform with HCA's Code of Conduct. (Trial Transcript, at Vol. VI, 122:15-123:13.)

333. HCA, through testimony of Hazen, admitted that the Foundation is one of the "others" referenced in the Code of Conduct which would rely on "a high standard of accuracy

and completeness in documenting, maintaining, and reporting financial information." (Trial Transcript, at Vol. V, 55:14-17; Exhibit 231.)

334. Fox also testified that GAAP should apply to HCA's Annual Reports because HCA is required to follow GAAP due its status as a registered, publicly traded company. (Trial Transcript, at Vol. VIII, 35:23-36:4.)

335. HCA applied GAAP in certain situations within the Annual Reports when it was to HCA's economic advantage to do so. For example, HCA applied GAAP within the Annual Reports to capitalized interest and capitalized leases. (Trial Transcript, at Vol. VIII, 72:11-74:4, 75:6-10.)

336. Similarly, HCA's expert certified public accountant, Stan Bever, conceded that HCA applied GAAP to its treatment of capitalized leases, capitalized interest, and other items, thereby accepting the financial benefit of GAAP treatment to such items. (Trial Transcript, at Vol. IX, 17:9-18:3.)

337. GAAP does not permit companies to cherry pick whether to follow GAAP. GAAP prohibits a business from selectively applying GAAP only when it benefits them to do so. (Trial Transcript, at Vol. VIII, 74:5-6.) Rather, a business subject to GAAP must apply both the benefits and the burdens of GAAP in connection with its financial information and financial reporting.

338. Contrary to GAAP, HCA's Annual Reports reflect incidences where HCA claimed the original cost of items instead of claiming their net book value when those items were transferred between HCA divisions. (*See, e.g.*, Trial Transcript, at Vol. VIII, 58:7-23.)

339. As of December 31, 2002, even before HCA had acquired Lee's Summit Hospital, Medical Center of Independence, Independence Regional Health Center, and Baptist

Lutheran Medical Center, the assets of these facilities had a total book value of approximately $82 million. (Trial Transcript, at Vol. VIII, 28:5-23.)

340. HCA's Annual Reports did not provide any accounting of such assets or of other items that were allegedly purchased for Lee's Summit Hospital, Medical Center of Independence, Independence Regional Health Center, or Baptist Lutheran Medical Center and then which were transferred, sold, or otherwise disposed of when those facilities were closed. (Trial Transcript, at Vol. VII, 154:18-23, 177:21-179:14; Vol. VIII, 27:9-28:23, 30:10-31:2.)

341. AGP#3 detailed the method by which HCA was required to account for the disposition of assets. (Trial Transcript, at Vol. VIII, 26:3-27:8; Exhibit 43, at p. 8, ¶ I.)

342. The individual Annual Reports do not, however, contain information reflecting the assets that HCA allegedly transferred, sold, or otherwise disposed of during the relevant time periods. (Trial Transcript, at Vol. VII, 178:3-25.)

343. The Court finds that HCA's failure to account for assets transferred, sold, or otherwise disposed of within the Facilities – and specifically the $82 million worth of assets that existed in Lee's Summit Hospital, Medical Center of Independence, Independence Regional Health Center, or Baptist Lutheran Medical Center at the time they were closed – constitutes HCA's failure to specifically account for its capitalized expenditures in accordance with APG#3 and GAAP in breach of its obligations under Section 5.1 to ensure that HCA's expenditures were made in accordance with HCA's then applicable accounting policies and procedures.

344. The Annual Reports also include instances in which HCA failed to reduce the acquisition price of assets to reflect any credits, rebates, or discounts it received, as HCA was required to do pursuant to APG#3. (Trial Transcript, at Vol. VIII, 60:7-12, 61:2-62:3; Exhibit 43.)

345. HCA attempted to take credit for expenditures made outside of the five-year covenant period of April 1, 2003 through March 31, 2008. The Annual Reports reflect capital expenditures and commitments which were actually made, if at all, before April 1, 2003 or after March 31, 2008. Those expenditures therefore fall outside of the covenant period and HCA was prohibited from taking credit for them. (*See, e.g.*, Trial Transcript, at Vol. VIII, 56:4-57:1.)

346. As discussed in greater detail below in Paragraphs 371 through 450, the Annual Reports also attempt to take credit for capital commitments allegedly made despite the absence of any obligation to a third party (which is required to take credit for a commitment under GAAP). The Court finds that HCA's attempt to improperly take credit for commitments not actually made constitutes HCA's failure to follow HCA's then applicable accounting policies and procedures and HCA's failure to follow GAAP. (Trial Transcript, at Vol. VIII, 37:4-38:14, 40:3-42:15.)

347. Similarly, Hazen also testified that the Annual Reports reported financial information but "this financial report is not a financial report" within the meaning of the Code of Conduct and, accordingly, that GAAP did not apply. (Trial Transcript, at Vol. V, 69:13-71:14.) The Court finds that Hazen's testimony lacks credibility, particularly in light of the clear language of the Code of Conduct requiring that "all financial information" conform with GAAP and that the Annual Reports were made in accordance with the APA's "**Accounting and Reporting**" obligation found in Section 5.14.

348. The Court finds that to conform with HCA's applicable accounting policies and procedures, the Annual Reports were required to comply with HCA's Code of Conduct and, accordingly, the Annual Reports were required to comply with GAAP.

## Y. The Foundation's Expert Witness' Testimony Shows That There Is Inadequate Accounting Support for HCA's Claimed Expenditures.

349. Fox tested HCA's alleged capital expenditures for Research Medical Center as reflected in the Sixth Annual Report to confirm whether HCA's claimed expenditures were made in accordance with HCA's then applicable accounting policies and procedures. (Trial Transcript, at Vol. VIII, 51:24-52:5.)

350. Fox selected Research Medical Center as the test subject because HCA claimed to have made more capital expenditures in that facility than in any other existing Facility it purchased from Health Midwest. (Trial Transcript, at Vol. VIII, 52:5-11.)

351. Fox decided to test the alleged expenditures within the Sixth Annual Report because he felt the quality of the data would be strongest in that the report. (Trial Transcript, at Vol. VIII, 52:11-13.)

352. Fox tested all of the individual alleged capital expenditures in the Sixth Annual Report for Research Medical Center that exceeded $100,000. These alleged expenditures represented 131 separate line items and a total of $78.8 million of the $96.5 million that the Sixth Annual Report reflects as having been spent on Research Medical Center. (Trial Transcript, at Vol. VIII, 52:20-53:9.)

353. Fox employed a three-step process in testing these alleged expenditures: first, he reconciled the tested items to HCA's general ledger; second, he analyzed HCA's supporting documentation for the alleged expenditures, including such documents as invoices, purchase orders, contracts, quotes, and correspondence; and third, he attempted to reconcile HCA's proof of payments to the supporting documentation "to confirm and verify that HCA had actually spent that money." (Trial Transcript, at Vol. VIII, 53:10-54:12.)

354. Fox was able to find actual invoice support for only $64.3 million of the $78.8 million in alleged capital expenditures that HCA claimed to have made at Research Medical Center in the Sixth Annual Report. (Trial Transcript, at Vol. VIII, 54:13-55:1.)

355. Fox was able to find actual proof-of-payment support for only $49.4 million of the $78.8 million in alleged capital expenditures that HCA claimed to have made at Research Medical Center in the Sixth Annual Report. (*Id.*)

356. Fox also specifically examined whether there was proof-of-payment support for expenditures claimed in the Sixth Annual Report that were allegedly made in the first two years of the covenant period (*i.e.*, from April 1, 2003 through March 31, 2005). Fox was able to find actual proof-of-payment support for only $8 million of the $17.5 million that HCA had allegedly spent in Research Medical Center over that time period. (Trial Transcript, at Vol. VIII, 55:2-14.)

357. In addition, Fox identified numerous "errors and inconsistencies" and specific examples of HCA not following its own accounting policies in connection with alleged expenditures and commitments for Research Medical Center, as reflected in HCA's Sixth Annual Report. (Trial Transcript, at Vol. VIII, 55:15-56:2; 62:22-25.)

358. As one example, Fox found that the Sixth Annual Report reflects an alleged commitment of $2.355 million for the acquisition of a narrow interventional biplane replacement machine for Research Medical Center. However, this expenditure was not even proposed within HCA until August 13, 2008, well after the March 31, 2008 termination of the covenant period. (Trial Transcript, at Vol. VIII, 56:4-13; Exhibit 44, at p. 112 of 149.)

359. Similarly, Fox found that the Sixth Annual Report reflects an alleged commitment of $3.45 million for construction and infrastructure improvements at Research Medical Center, including waterproofing, reroofing, repair/replacement of HVAC equipment, a boiler, an

elevator, and a chiller. However, the proposals and agreements for this work were completed no earlier than April 4, 2008, after expiration of the five-year covenant period. (Trial Transcript, at Vol. VIII, 56:14-57:1; Exhibit 44, at p. 112 of 149.)

360. Fox also found, for example, that HCA claimed an expenditure of $335,000 on March 31, 2006 for land at 801 Northwest U.S. Highway, when HCA had actually acquired that land from Health Midwest in 2003 pursuant to the APA itself. (Trial Transcript, at Vol. VIII, 57:4-17; Exhibit 44, at p. 79 of 149.)

361. As a further example, Fox testified that the Sixth Annual Report includes nine entries totaling $1,025,000 for an "elevator modernization" project, but HCA only provided supporting invoices totaling $972,000. Moreover, this specific project was completed before January 31, 2003, well before the April 1, 2003 commencement of the five-year covenant period. (Trial Transcript, at Vol. VIII, 57:18-58:6; Exhibit 44, at p. 10 of 149.)

362. Fox also found that, in the Sixth Annual Report, HCA improperly claimed $26,535 for four I.V. pumps that were transferred to Research Medical Center from one of HCA's Florida hospitals. Fox testified that the $26,535 represented the original cost of the equipment and that HCA should have claimed credit for only the net book value of the equipment, which was just $5,307. (Trial Transcript, at Vol. VIII, 58:7-23; Exhibit 44, at p. 110 of 149.)

363. As another example, Fox testified that the Sixth Annual Report includes an alleged expenditure of $604,345 for monitoring equipment but the invoices HCA produced demonstrate that the equipment had been purchased on January 9, 2003, well before the beginning of the covenant period. In addition, HCA's invoice support totaled only $182,718,

and other documentation showed HCA received a refund of that amount in February of 2003. (Trial Transcript, at Vol. VIII, 58:24-59:11; Exhibit 44, at p. 20 of 149.)

364. Fox also found, with respect to an alleged cath-lab expenditure of $1,115,230, that the supporting invoice reflected an actual lesser amount and that HCA also failed to properly account for its trade-in equipment or for the trade-in allowance it received. (Trial Transcript, at Vol. VIII, 59:14-60:6; Exhibit 44, at p. 40 of 149.)

365. Similarly, Fox found with respect to a "Spectra link system" reflected on the Sixth Annual Report, that HCA failed to account for a $5,000 rebate it had received. (Trial Transcript, at Vol. VIII, 60:7-12; Exhibit 44, at p. 72 of 149.)

366. As another illustration, Fox testified that HCA had not applied credits of more than $21,000 it had received in connection with "tech refresh" construction projects reflected on the Sixth Annual Report. (Trial Transcript, at Vol. VIII, 61:2-23; Exhibit 44, at p. 95 of 149.)

367. The Sixth Annual Report and underlying documentation also show that HCA double-counted certain vital sign monitors for Research Medical Center and also failed to properly account for the monitors when it subsequently traded them in toward the purchase of other monitors. (Trial Transcript, at Vol. VIII, 62:4-17: Exhibit 44, at pp. 28, 29, 31, 73-75 of 149.)

368. The Court finds Fox's testimony to be credible and that the testing he performed demonstrates HCA's Annual Reports do not contain financial information that can be reasonably relied upon to determine whether HCA satisfied its obligations under Section 5.1 of the APA.

369. The Court finds that HCA failed to provide "reasonable detail" in the Annual Reports showing "how it complied with the operating covenants" included in Sections 5.1 and 5.5, in breach of its obligations under Section 5.14.

370. The Court finds that HCA failed to provide "a specific accounting of capital expenditures" that HCA made in accordance Section 5.1, in breach of its obligations under Section 5.14.

## Z. HCA's Commitments Reported In the Annual Reports Failed To Conform With GAAP, As Was Required.

371. Section 5.1 required HCA to "either spend or commit to spend" at least $300 million for capital improvements in the first two years after acquiring the Facilities from HCA. (Exhibit 13.)

372. The parties disputed at trial whether the term "commit to spend" is synonymous with a "commitment" as that term is used under GAAP. HCA attempted to distance itself from the phrase "commitment" as being synonymous with "commit to spend" because HCA would not be able to take credit for a number of commitments claimed in the Annual Reports if GAAP applies to those items.

373. All the expenditures claimed by HCA in the Annual Reports needed to be "determined in accordance with Buyer's then applicable accounting policies and procedures." (Exhibit 13, at Section 5.1, p. 30.)

374. HCA does not have any specific accounting policies or procedures that define either the phrase "commit to spend" or "commitment." (Trial Transcript, at Vol. VIII, 36:20-23; Exhibit 406, at 87:3-88:8.)

375. In the absence of a specific accounting policy defining those terms, HCA – per its own Code of Conduct and as a publicly traded company – must follow GAAP. (Trial Transcript, at Vol. IV, 42:10-13; Vol. V, 49:7-10; Vol. VIII, 36:24-37:1-3.)

376. Both Fox and Bever testified that C.C.H.'s Accounting Research Manager is an authoritative source and is regularly relied upon by accounting professionals "to inform issues and interpret questions arising under GAAP." (Trial Transcript, at Vol. VIII, 35:9-17; Vol. IX, 13:25-14:14.)

377. Section 440-10 of C.C.H.'s Accounting Research Manager defines "commitments" under GAAP as follows:

> Commitments are agreements to perform in the future where the parties to the agreement have certain specified rights and/or obligations. . . . Some commitments are recognized as assets and liabilities while others are not. Whether the rights and obligations associated with a commitment shall be recognized depends on whether those rights and obligations: (a) satisfy the definitions of assets and liabilities and (b) can be measured with reasonable reliability.

(Trial Transcript, at Vol. VIII, 34:8-35:13; Vol. IX, 46:1-16.)

378. The Court finds that to be a "commitment" under GAAP, there must be: (1) an agreement; (2) that has "certain specified rights and/or obligations; (3) which satisfy GAAP's definitions of "assets" and "liabilities;" and (4) which "can be measured with reasonable reliability."

379. During the drafting of the APA, "spend or enter into binding commitments to spend" was revised to state "spend or commit to spend." (Exhibit 12, at HCA 0001159860.) The Court finds that this revision was not intended to and did not, in fact, represent a substantive change with respect to HCA's obligations under Section 5.1. Foremost, it made sense to strike the word "binding" from the language of Section 5.1 because that word was redundant. As reflected in the Court's preceding finding, a commitment can only exist where there is an "agreement" giving rise to "specified rights and/or obligations" that constitute "assets" or "liabilities." Thus, there can be no "commitment" unless it involves a binding obligation and

striking that word from before "commitments" or "commit to spend" merely eliminated the redundancy within earlier drafts. Further, the edit in the drafts of the APA was merely a stylistic revision such that both "spend" and "commit" would be stated in the same verb tense.

380. Other than HCA's witnesses' conclusory assertions that "commit to spend" meant something other than "commitment" as that term is used under GAAP, the extrinsic evidence presented at trial showed that "commit to spend" was intended to be synonymous with "commitment" as that term is used under GAAP.

381. For example, in his September 5, 2002 offer letter to Health Midwest, Bovender stated that the proposal was not a "binding commitment." Bovender explained: "Until a definitive agreement regarding a transaction has been executed and delivered by the parties, neither party shall be under any legal obligation nor have any liability to the other party of any nature whatsoever with respect to a transaction by virtue of this letter or any other oral or written statement." (Exhibit 47, at p. 9.)

382. Bovender, who signed the APA on behalf of HCA, admitted on cross-examination that HCA's practice required a "commitment" to have "an agreement between parties giving rise to an obligation." Bovender testified:

> Q: So you understood and it was HCA's practice in 2003 that for there to be a commitment, there needed to be an agreement between parties giving rise to an obligation; fair?
>
> A: Correct.

(Trial Transcript, at Vol. IV, 111:1-19.)

383. The Court finds that Bovender's testimony about HCA's definition of a "commitment' is consistent with the definition of GAAP espoused by Section 440-10 of C.C.H.'s Accounting Research Manager.

384. Similarly, Brown, who signed the APA on behalf of Health Midwest, testified that Section 5.1 of the APA required HCA to ***"[o]bligat[e] the funds***" within the first two years of the covenant period. (Trial Transcript, at Vol. III, 157:22-158:7 (emphasis supplied).)

385. Other HCA witnesses – including HCA's corporate representative at trial, Sam Hazen – also testified at trial using the term "commitment" as synonymous with the phrase "commit to spend." (*See, e.g.*, Trial Transcript, at Vol. IX, 49:8-11 (Bever); and Vol. V, 54:9-13 (Hazen).)

386. Hazen admitted under cross-examination that he specifically used the term "commitment" synonymously with the phrase "commit to spend" – as that phrase is used in Section 5.1 of the APA – in a May 24, 2011 affidavit that HCA filed with the Court in support of HCA's Motion for Partial Summary Judgment. (Trial Transcript, at Vol. V, 66:14-67:17.)

387. Rooker – HCA Midwest Division's Controller who actually prepared the Second and Third Annual Reports – testified that "PO Committed" items for which HCA took credit in the Annual Reports needed an "obligation" to conform with GAAP's requirements. Rooker testified:

> Q: If I ask you to rattle off what makes one of these total commitments a PO committed, what makes a PO committed? What – what does that mean?
>
> A: Okay. All right. I – I want to be respectful here.
>
> Q: Sure.
>
> A: Any accountant will understand what a purchase order is.
>
> Q: Okay.
>
> A. A purchase order is your ***obligation*** to purchase something. So if you make an arrangement with a vendor to purchase office supplies you're going to issue them a purchase order. Once you do that, it's my understanding that ***you're obligated*** to follow through

with the purchase. That's just a general accounting term that everybody should understand.

Q: Okay.

A: And so the purpose of saying this was, these are commitments. ***These aren't just wishes and want-to-be's***. In other words it's not where the facility is saying I want this to be a capital expenditure. ***This is where they have physically written a purchase order and given it to the vendor and that's why I keep using the term obligated***. It has nothing to do with the APA, it has to do with an accounting term.

(Exhibit 406, at 89:7-90:1 (emphasis supplied).)

388. As additional examples showing that a "commit to spend" is synonymous with a "commitment" under GAAP, HCA repeatedly used the word "commitments" in the Annual Reports to describe whether HCA complied with Section 5.1. Specifically:

a. In the Second Annual Report, HCA used the word "commitments" five times on its Summary Page (Exhibit 379; Trial Transcript, at Vol. V, 67:18-68:18), at the top of each of the fifty-seven pages in the Report's detail, and then ten more times on the last page of the detail. (Exhibit 379);

b. In the Third Annual Report, HCA used the word "commitments" five times on its Summary Page, at the top of each of the eighty-two pages in the Report's detail, and 11 more times on the last page of the detail. (Exhibit 380);

c. In the Fourth Annual Report, HCA used the word "commitments" five times on its Summary Page, at the top of each of the ninety-eight pages in the Report's detail, and eleven more times on the last pages of the detail. (Exhibit 381);

d. In the Fifth Annual Report, HCA used the word "commitments" six times on its Summary Page, at the top of each of the one-hundred pages of the Report's detail, and seven more times on the last page of the detail. (Exhibit 382); and

e. In the Sixth Annual Report, HCA used the word "commitments" in its cover page and summary table, at the top of each of the one-hundred and eight pages of the Report's detail, and ten more times on the last page of the detail. (Exhibit 44).

389. HCA only used the term "commitment" and never used "commit to spend" in its Annual Reports when reporting upon its purported compliance with its obligations under Section 5.1 of the APA. (Trial Transcript, at Vol. VIII, 124:25-125:9.)

390. The Court finds that HCA's witnesses' consistent use of the phrase "commitment" interchangeably with the phrase "commit to spend" shows that HCA intended for the terms to be synonymous.

391. The Court finds that HCA's consistent use of the phrase "commitment" interchangeably with the phrase "commit to spend" in its Annual Reports shows that HCA intended for the terms to be synonymous.

392. The Court finds that, because the Annual Reports were required to conform with GAAP (*see supra,* Paragraph 589), the "commitments" reported within the Annual Reports demonstrate HCA's intent and understanding that Section 5.1's "commit to spend" obligation was required to conform with GAAP.

393. The Court finds that, because GAAP applies to the "commitments" reported within the Annual Reports, there needed to be an agreement giving rise to an obligation (*i.e.,* an asset or liability.) within the temporal covenant corresponding to each Annual Report, in order for HCA to properly take credit for any "commitment" within that period of time. (*See* Paragraphs 376 through 378.)

## AA. HCA Improperly Attempted To Take Credit For $49 Million In Alleged Commitments Labeled As "PO Committed" In the Second Annual Report.

394. HCA's Second Annual Report claimed that HCA committed $49,410,151 in "PO Committed, not rev'd/paid" expenditures" in the first two-year covenant that required HCA to spend or commit to spend $300 million during that covenant period. (Exhibit 379, at pp. 2, 59.)

395. HCA's Third Annual Report claimed that HCA had an additional $10,700,175 in "PO Committed, not rev'd/paid" expenditures" in the next one-year covenant that required HCA to spend or commit to spend $50 million during that covenant period. (Exhibit 380, at pp. 2, 84.)

396. The parties referred at trial to the "PO Committed, not rev'd/paid" expenditures" in the Annual Reports as the "PO Committed" items, and the Court will adopt that vernacular for ease of reference.

397. The Court specifically notes that the issue of HCA having taken credit for PO Committed items in the Second Annual Report was raised by the Foundation in the form of pre-trial discovery motions, pre-trial depositions, in opening statements, and throughout trial. HCA was thus well aware of the Foundation's position that HCA would not be able to show that the PO Committed items reflected actual "commitments."

398. Rooker admitted that HCA's accounting policies and procedures required HCA to "have physically written a purchase order and given it to the vendor," giving rise to an "obligation," in order for HCA to properly take credit for any of the PO Committed items. (Exhibit 406, at 89:7-90:1.)

399. The Foundation showed at trial that the PO Committed items in the Second and Third Annual Reports did not reflect monies actually obligated as of the dates of those Annual Reports.

400. As Fox explained, the Third Annual Report shows that the PO Committed items claimed in the Second Annual Report were not actual commitments. Fox testified that the dollars claimed as "PO Committed" items in the Second Annual Report should equal no less than the amount of actual expenditures made in the third year (as reported in the Third Annual Report) or those dollars should roll forward into the next year as continuing PO Committed dollars. (Trial Transcript, at Vol. VIII, 45:12-46:25, 50:12-23.)

401. For example, because the Second Annual Report reflects alleged PO Committed items totaling $640,769 for Allen County Hospital, Fox would have expected to see in the Third Annual Report "actual capital expenditures or the year three purchase order commitments that would be reasonably close to that figure on the year two report, at a minimum." (Trial Transcript, at Vol. VIII, 47:1-25; Exhibits 57 and 379.)

402. However, the Third Annual Report for Allen County Hospital actually reflects capital expenditures of only $117,362 for April 1, 2005 through March 31, 2006, and no continuing PO Committed items. This represents an unexplained discrepancy at a single small hospital of $523,407 between the PO Committed items in the Second Annual Report versus those reported in the Third Annual Report. (Trial Transcript, at Vol. VIII, 48:1-49:14; Exhibits 94 and 380.)

403. As additional examples, similar discrepancies also exist between the Second Annual Report and Third Annual Report with respect to PO Committed items claimed for Research Medical Center, Baptist Lutheran Medical Center, Independence Regional Health Center, and Research Belton Hospital. (Trial Transcript, at Vol. VIII, 49:15-22.)

404. Combined, the alleged year-two PO Committed items for just those five facilities (*i.e.*, Allen County Hospital, Research Medical Center, Baptist Lutheran Medical Center,

Independence Regional Health Center, and Research Belton Hospital) represent approximately $29 million, as compared to their combined year-three actual capital expenditures of $13 million and their combined year-three alleged purchase order commitments of $7.1 million. This represents an unexplained discrepancy of $8.9 million between the PO Committed items in the Second Annual Report versus the expenditures and purchase order commitments reported in the Third Annual Report for just those five hospitals. (Trial Transcript, at Vol. VIII, 49:23-50:11.)

405. Fox summarized the discrepancy with respect to those five hospitals as follows: "The year two purchase order commitments exceeded the year three capital expenditures plus the year three purchase order commitments by almost $9 million. So it appears that the expenditures, the PO commitments were not spent that were reported in year two." (Trial Transcript, at Vol. VIII, 50:12-17.)

406. Rooker admitted he would expect PO Committed items to "show up" as actual expenditures in subsequent Annual Reports. (Exhibit 406, at 105:19-106:2.)

407. Like Rooker, Mills admitted that PO Committed items included in one year's annual report should generally be "online and fully reportable" as actual expenditures in the next year's annual report. (Trial Transcript, at Vol. VI, 147:18-149:2.)

408. Mills further testified, "Typically, purchase orders are like supply-chain level transactions that happen typically within 30 or 45 days of the event." (Trial Transcript, at Vol. VI, 164:24-165:1.)

409. Mills would have expected there to be actual purchase orders for all PO Committed entries listed in the Second Annual Report. (Trial Transcript, at Vol. VI, 146:21-25.)

410. HCA never reconciled the Annual Reports against the actual purchase orders and expenditures to verify whether any of the claimed PO Committed items in the Annual Reports resulted in actual expenditures by HCA. (Exhibit 406, at 105:4-10, 155:18-156:1.)

411. HCA's expert accountant, Bever, testified that he did not verify any of the specific purchase orders for any of the $49.4 million in PO Committed items that HCA attempted to take credit for in HCA's Second Annual Report. (Trial Transcript at Vol. IX, 50:9-24, 52:6-8.)

412. HCA did not present a single purchase order or otherwise draw the Court's attention to any documents that substantiated the $49 million of claimed PO Committed items in the Second Annual Report.

413. HCA did not direct the Court to any evidence at trial showing that the $49 million in claimed PO Committed items in the Second Annual Report were reflected in actual "purchase orders" or otherwise supported by any agreements giving rise to any "obligations" by HCA to spend the $49 million (or any part thereof).

414. The Foundation's evidence and cross-examinations demonstrated that the $49 million of PO Committed items in the Second Annual Report were merely a "budgeting tool" and did not reflect actual obligations to make expenditures as of the date of Second Annual Report.

415. Bever conceded that "[p]urchase orders tend to be a budgeting tool." Bever further admitted that he did not verify whether the $49 million in PO Committed entries on the Second Annual Report were anything more than a "budgeting tool" used by HCA. (Trial Transcript, at Vol. IX, 72:25-73:11.)

416. HCA's internal 2005 business plan for the HCA Midwest Division was prepared in December 2004 and demonstrates that the PO Committed items in the Second Annual Report were included as a budgeting tool and did not reflect actual "obligations" as of April 1, 2005. (Exhibit 407.)

417. Exhibit 407 detailed HCA Midwest Division's historical capital spending from April 2003 projected through 2005. (Trial Transcript, at Vol. VI, 157:5-162:6; Exhibit 407.) When the items shown in that capital deployment schedule were accounted for at trial through the testimony of Mills, however, Exhibit 407 showed that HCA did not include as part of HCA's business plan the $49 million worth of PO Committed items that would be spending in the future had that amount actually been obligated. (*See* Trial Transcript, at Vol. VI, 162:7-164:2.) The $49 million would have had to be within the business plan's capital deployment schedule, however, if HCA had actually "committed to spend" – and been actually obligated by an agreement – to incur those expenditures in the future.

418. Mills could not credibly explain how HCA's 2005 business plan prepared in December 2004 failed to include $49 million worth of PO Committed items allegedly obligating HCA to make expenditures, as HCA reported three months later in the Second Annual Report. Mills testified:

> Q: But, Mr. Mills, taking off what you just said, that it would have been reflected in our business planning documents, the reality is that there are only $49 million left that could be accounted for by this purchase order committed dollars on this business plan for 2005, right? I've accounted for everything else on this document.
>
> A: Well, there's a materiality question. I mean there could be some small dollar capital events that had POs associated with them that frankly, because of their small size and nature, you know, we don't cover this division-wide management report.

Q: Well, how could you not cover it in your division-wide management report but you would be covering it three months later in the second annual report summary?

A: Materiality.

(Trial Transcript, at Vol. VI, 163:21-164:13.)

419. The Court finds that $49 million of a $500 million capital deployment schedule in HCA's 2005 business plan represented a material amount, and that Mills' explanation that the amount did not give rise to "materiality" lacked credibility. HCA did not do any re-direct examination of Mills and HCA otherwise failed to provide any credible explanation for how the $49 million in claimed PO Committed dollars contained in the Second Annual Report contained a material amount that was not reflected within HCA's business planning documents.

420. The Court finds HCA did not actually "commit to spend" the $49,410,151 in PO Committed claimed in the Second Annual Report. This finding is supported by the above findings, and specifically that: (1) the claimed PO Committed dollars do not reconcile as spent or carried over purchase order commitments between the Second Annual Report and the Third Annual Report; (2) HCA never audited or otherwise did anything to verify that the PO Committed dollars reported in the Second Annual Report were actually supported by purchase orders; (3) HCA never audited or otherwise did anything to verify that the PO Committed dollars reported in the Second Annual Report were actually spent in subsequent years; (4) HCA failed to direct the Court to any purchase orders or agreements demonstrating that there were actual commitments for the $49 million as of the date of the Second Annual Report; and (5) HCA would have included the $49 million in its 2005 business planning document had HCA actually been planning to spend that amount.

421. In light of the foregoing finding, the Court finds that HCA improperly took credit for $49,410,151 in PO Committed items in the Second Annual Report and that HCA did not spend or commit to spend that amount during the first two years following its acquisition of the Facilities.

## BB. HCA Improperly Attempted To Take Credit For $269,836,093 In Commitments Relating To the Construction of New Hospitals In the Second Annual Report.

422. The Court's Finding Regarding Intent (*see* Paragraph 13) means that HCA could not take any credit for "new construction" toward any of its "capital improvement" obligations under Section 5.1 of the APA. Even if the APA permitted HCA to take credit for the construction of new facilities, however, the evidence shows that HCA's "commitments" with regard to the construction of those new facilities in the Second Annual Report do not meet HCA's own accounting standards.

423. HCA's Second Annual claims credits for having made a capital "commitment" of $85,574,000 for the construction of Lee's Summit Medical Center by March 31, 2005. (Exhibit 379, at p. 59 of 59; Trial Transcript, at Vol. VIII, 40:5-21.)

424. There is no evidence showing, however, that HCA was "obligated" to build Lee's Summit Medical Center by April 1, 2005, or that HCA otherwise entered into any agreement constituting a "commitment" under GAAP as of that date.

425. HCA did not internally approve construction of Lee's Summit Medical Center until August 5, 2005. (Exhibit 394; Trial Transcript, at Vol. VIII, 40:19-21.)

426. HCA's corporate representative at trial, Sam Hazen, admitted that internal approval for the construction of new hospital does not obligate or bind HCA. Hazen testified:

Q: In fact, when HCA's senior leadership approves the construction of a hospital, it actually retains the authority to cancel that project if it desires, doesn't it?

A: It does.

(Trial Transcript, at Vol. V, 45:9-13.)

427. HCA did not enter into any contract relating to the construction of Lee's Summit Medical Center until January 2006. (Trial Transcript, at Vol. VIII, 40:9-18.)

428. As Fox testified, until HCA actually had executed the relevant construction contract, "the project and scope" could change. "There's lots of things that can happen." (Trial Transcript, at Vol. VIII, 41:3-6; *See also* Trial Transcript, at Vol. VIII 42:1-5.)

429. HCA attempted to show at trial that it had made a "commitment" to build Lee's Summit Medical Center by March 31, 2005 because it had submitted on November 9, 2004 a Certificate of Need ("CON") application to the State of Missouri for its proposed construction of Lee's Summit Medical Center. (Exhibit 615.)

430. The CON application expressly stated on its face, "A CON shall be subject to forfeiture for failure to incur an expenditure on any approved project six (6) months after the date of issuance, unless obligated or extended by the Committee for an additional six (6) months." (Exhibit 615 at p. HCA0000015959.)

431. HCA prepared an Executive Management Review on June 17, 2005 – ***which was after the reporting period covered by the Second Annual Report*** – stating that HCA had obtained CON approval and that "HCA must now move forward with the project in order to retain the CON approval." (Exhibit 394, at HCA 0001679566.) Exhibit 394 therefore proves that HCA had not even internally approved the construction of Lee's Summit Medical Center, much less entered into any agreement obligating HCA to do so, as of March 31, 2005.

432. Holly King testified that obtaining a CON represents approval but not an obligation to build the project at issue. (Trial Transcript, at Vol. VII, 102:2-12.)

433. The Court finds that a CON application does not obligate a hospital operator such as HCA to actually build the potential new hospital that is the subject of the application and that the application does not constitute an "agreement" that is binding on the operator so as to represent a "commitment" under GAAP.

434. The Court finds there is no evidence showing that HCA actually made a capital "commitment" of $85,574,000 for the construction of Lee's Summit Medical Center as of March 31, 2005, as claimed in the Second Annual Report.

435. The Court further finds that HCA had not "spent or committed to spend" the $85,574,000 claimed for the construction of Lee's Summit Medical Center in the Second Annual Report.

436. The Court therefore finds that HCA improperly attempted to take credit for $85,574,000 in the Second Annual Report as a "commitment" that had not actually been made for the construction of Lee's Summit Medical Center as of March 31, 2005.

437. HCA's Second Annual Report claims credit for a capital "commitment" of $196,404,466 for the construction of Centerpoint Medical Center. (Exhibit 379, at p. 59; Trial Transcript, at Vol. VIII, 41:11-17.)

438. As of March 31, 2005, HCA had contracted for only $12,142,373 with J.E. Dunn, pursuant to its agreement with J.E. Dunn for construction of Centerpoint Medical Center. (Trial Transcript, at Vol. VIII, 41:15-42:5.)

439. HCA attempted to show at trial that it had made a "commitment" to build Centerpoint Medical Center by March 31, 2005 because it had submitted on May 7, 2004 a CON

application to the State of Missouri for its proposed construction of Lee's Summit Medical Center. (Exhibit 612.)

440. As with the CON application for the proposed Lee's Summit Medical Center, the application for the proposed Centerpoint Medical Center expressly stated on its face, "A CON shall be subject to forfeiture for failure to incur an expenditure on any approved project six (6) months after the date of issuance, unless obligated or extended by the Committee for an additional six (6) months." (Exhibit 612, at HCA000001614.)

441. Similarly, King's testimony that obtaining a CON represents approval for the project at issue but does not give rise to an obligation by a hospital operator to build the project is important in the context of this situation. (Trial Transcript, at Vol. VII, 102:2-12.)

442. As stated, the Court has found that a CON application does not obligate a hospital operator such as HCA to actually build the potential new hospital that is the subject of the application and that the application does not constitute an "agreement" that is binding on the operator so as to represent a "commitment" under GAAP.

443. HCA did not provide the Court with any documents – including agreements with vendors such as architects, builders, financers, etc. – showing that HCA had actually made a "commitment" to build Centerpoint Medical Center as of March 31, 2005. Although HCA had purchased land and taken some preliminary steps with a builder toward constructing that hospital, there is no evidence that HCA had actually committed to spend the $196,404,466 for which it attempted to take credit in the Second Annual Report.

444. HCA could not even identify the source of the data for how it arrived at the conclusion that HCA had allegedly committed a combined total of $281,978,404 for the construction of Lee's Summit Medical Center and Centerpoint Medical Center as of March 31,

2005. Rooker recalled King assisting him with pulling the information. (Exhibit 406, at 91:20-96:12.) However, King denied at trial being the source of the dollar amounts for the "new construction" commitments reflected in the Second Annual Report. (Trial Transcript, at Vol. VII, 15:19-16:16, 24:10-13.)

445. The Court finds that HCA witnesses' post-dispute testimony that HCA intended to build new hospitals in Independence and Lee's Summit at the time it reported "commitments" in the Second Annual Report has little credibility. (S*ee, e.g.*, Trial Transcript, at Vol. X, 32:3-33:7.)

446. The Court finds there is no evidence showing that HCA actually made a capital "commitment" for the construction of Centerpoint Medical Center totaling $196,404,466 as of March 31, 2005, as claimed in the Second Annual Report.

447. The Court further finds that HCA had not, as of March 31, 2005, "spent or committed to spend" the $196,404,466 for the construction of Centerpoint Medical Center, as claimed in the Second Annual Report.

448. Crediting HCA for having spent $12,142,373 per its agreement with J.E. Dunn for that hospital, the Court finds that HCA improperly attempted to take credit for the total of $184,262,093 in the Second Annual Report as a "commitment" that had not actually been made for the construction of Centerpoint Medical Center as of March 31, 2005.

449. The Court therefore finds that HCA improperly took credit for "commitments" that had not been made relating to the construction of new hospitals in the total amount of $269,836,093 (representing the sum of the $85,574,000 improperly claimed for the construction of Lee's Summit Medical Center and the sum of the $184,262,093 improperly claimed for the construction of Centerpoint Medical Center).

450. HCA attempted to take credit for $513,316,182 in total expenditures and commitments in the Second Annual Report. (Exhibit 379.) Even if the Court were to have found that HCA was permitted to include "new construction" toward satisfaction of its $300 million obligation under Section 5.1 – and even if the Court has found that HCA's construction of new hospitals did not, in fact, materially detract from the required maintenance and necessary improvement of the existing Facilities – HCA's improper attempt to take credit for "commitments" for the construction of those new hospitals would still result in a $56 million shortfall of its obligations under Section 5.1. That is, taking the $513,316,182 at face value (and ignoring the PO-Committed issues described above) and subtracting the $269,836,093 that HCA improperly claimed as commitments for new construction, HCA would have spent or committed to spend only $243,480,089 by March 31, 2005. This means that, at the very minimum, HCA was $56,519,911 short of its $300 million minimum capital improvement obligation arising in the first covenant period of Section 5.1, ending March 31, 2005.

## CC. HCA's Annual Reports of Charity, Indigent, and Uncompensated Care Failed To Include Sufficient Detail To Determine Its Compliance With Post-Closing Covenants and This Problem Is Compounded By HCA's Numerous Inconsistent Statements Concerning the Amount of Charity, Indigent, and Uncompensated Care It Actually Provided Post-Closing.

451. As quoted in full in Paragraph 208 above, Section 5.5 of the APA requires HCA, for a period of ten years commencing March 1, 2003, to annually provide at least the same aggregate dollar amount of charity, indigent, and other uncompensated care as the Health Midwest hospitals provided in the 12-month period prior to the sale. (Exhibit 13.)

452. HCA acknowledges that its charity, indigent, and uncompensated care obligation under Section 5.5 of the APA is at least $653,310,000 during this ten year period. (Exhibit 406, at 46:4-21; Exhibit 78, at p. 2.)

453. Section 5.5 of the APA also provides guidance as how the base period obligation is to be calculated and how HCA's compliance with the covenant is to be measured.

454. The Court finds that HCA's $653 million charity, indigent, and uncompensated care obligation arising under Section 5.5 of the APA is HCA's single largest post-closing financial commitment.

455. As quoted in full in Paragraph 222 above, Section 5.14 of the APA requires HCA to annually report – "in reasonable detail" – how it complied with each of the operating covenants, which includes the charity, indigent, and uncompensated care requirement of Section 5.5.

456. Before filing this lawsuit, the Foundation, CHG, the Missouri Attorney General, and the Kansas Attorney General all raised questions and concerns to HCA about the content of HCA's Annual Reports. (*See, e.g.,* Exhibits 46, 49, 51, and 54.)

457. On July 9, 2004, after he had received HCA's First Annual Report, Langenberg sent a letter to HCA, stating: "CHG and its legal representatives believe that the report forwarded by Mr. Gerken does not contain the 'reasonable detail' required by Section 5.14. Therefore, we are requesting additional detail regarding the particular post-closing covenants identified below." (Exhibits 74 and 249, at p. 1; Trial Transcript, at Vol. X, 171:17-21.)

458. Langenberg's letter also requested that HCA "separate the amount stated in the categories of 'charity and indigent care' on the one hand and 'uncompensated' care on the other" and that HCA "provide financial statements which evidence the amounts claimed." (Exhibits 74 and 249, at p. 2.)

459. Langenberg's letter further stated: "The matters referred to above are of significant importance to CHG, the attorneys general of Kansas and Missouri and the community

in Kansas City, and Langenberg believed this statement to be true." (Exhibits 74 and 249, at p. 2; Trial Transcript, at Vol. X, 175:9-14.)

460. Langenberg "expected HCA to provide some more information" in response to his requests of July 9, 2004. (Trial Transcript, at Vol. X, 173:13-18.)

461. HCA never provided Langenberg with financial statements for each of the hospitals in connection with his request. (Trial Transcript, at Vol. X, 174:12-15.)

462. HCA never separated out the categories of charity case and indigent care as Langenberg had requested. (Trial Transcript, at Vol. X, 174:16-19.)

463. On July 12, 2004, the Kansas Attorney General's office also requested through its counsel the same charity-care information Langenberg had previously requested. The Kansas Attorney General's office instructed HCA as follows: "HCA, Inc. should breakout bad debts in its uncompensated care category and provide the requested financial statements for each hospital. HCA, Inc. should also provide its policy on indigent care and discount programs for the system and each individual hospital." (Exhibit 322, at SBLSG 000949; Trial Transcript, at Vol. X, 185:6-17.)

464. On July 14, 2004, CHG's counsel, Joe Hiersteiner, responded to the letter of the Kansas Attorney General's counsel of July 12, 2004. Hiersteiner acknowledged that the additional documents the Kansas Attorney General's Office was requesting "would be very helpful in evaluating the performance of HCA under the post-closing covenant." Nevertheless, he suggested that CHG "withhold any further demands for information until we have a sense of whether HCA intends to respond in any way [to Langenberg's letter of July 9, 2004]." (Exhibit 322, at SBLSG 000947.)

465. On March 6, 2009, the Missouri Attorney General wrote HCA, raising several questions about the information contained in HCA's Annual Reports. With respect to charitable and indigent care, the Missouri Attorney General stated: "The reports previously provided do not, in our opinion, set forth 'reasonable detail' concerning the amounts expended by HCA for fiscal years 2004-2008." (Exhibit 54, at p. 2.)

466. Mark Flaherty, who is the Foundation's General Counsel and was an original member of the Foundation's Board of Directors before becoming Chair of its Audit Committee, reviewed the First Annual Report in late 2004 or early 2005 after he received it through CHG. (Trial Transcript, at Vol. II, 45:8-46:19, 53:25-54:1, 70:17-22, 78:6-10, 129:9-12; Exhibits 56 and 378.)

467. In reviewing the Second Annual Report, Flaherty noticed that, according to the Report, HCA's charity care in Research Medical Center had decreased considerably from the benchmark year and HCA's charity care in Overland Park Regional Medical Center had increased dramatically from the benchmark year. This was puzzling to Flaherty because, given its size and location, he would have expected Research Medical Center to continue requiring the largest amount of charity care given its location within Kansas City's "urban core" and given that Overland Park Regional Medical Center was in the relatively affluent suburbs in Johnson County, Kansas. (Trial Transcript, at Vol. II, 91:25-92:15.)

468. Flaherty was also curious about the calculation of HCA's benchmark for charity care, and he was surprised to see a sharp acceleration of HCA's claimed charity care in the Third Annual Report. (Trial Transcript, at Vol. II, 109:14-24.)

469. As Flaherty testified, he was particularly concerned with what he saw in the charity care portion of the Fourth Annual Report: "As I pointed out, in the third year report, I

was somewhat startled to see that charity care looked to be being reported at double what it had been in the base year. Now we get just one year later, it appears to be triple what it is in the base year. And that surprised me." (Trial Transcript, at Vol. II, 111:16-24.)

470. HCA ignored CHG's interpretation of the reasonable detail required to demonstrate compliance with Section 5.5 and ignored CHG's request for "financial statement" backup for the amounts claimed, which would have required that GAAP accounting standards be followed in the calculation of HCA's provision of charity, indigent and uncompensated care.

471. HCA also ignored the Kansas Attorney General's virtually identical concerns and requests for additional detail and financial statement backup.

472. On March 6, 2008, the Missouri Attorney General wrote HCA about HCA's compliance with its Article 5 post-closing obligations. (Exhibit 54.) The Missouri Attorney General wrote:

> It appears the two principal obligations of HCA are in the areas of capital improvements . . . and charity and uncompensated care at the same rate as previously provided by Health Midwest. A full and accurate performance of this office's duties to the public under this Agreement (APA.) is not possible without further information and clarification by HCA. Therefore, could you please provide the following:
>
> * * *
>
> Charitable and Indigent Care
>
> 1. To evaluate this requirement, we need to know the amount expended by Health Midwest as a "baseline" under the Agreement to measure HCA's compliance.
>
> 2. The reports previously provided do not, in our opinion, set forth "reasonable detail" concerning the amounts expended for fiscal years 2004-2008.
>
> 3. Are the amounts provided in each report the same as Medicare cost data provided by HCA for the facilities encompassed by the Agreement?

(Exhibit 54.)

473. The portions of HCA's Annual Reports that dealt with post-closing charity, indigent, and uncompensated care were not prepared in conformance with GAAP accounting standards. (*See* Exhibits 56, 57, 94, 95, 107, 44, 378, 379, 380, 381, and 382.)

474. The portions of HCA's Annual Reports that dealt with post-closing charity, indigent, and uncompensated care failed to provide reasonable detail for anyone, including this Court, to determine whether HCA had met its charity, indigent, and uncompensated care commitments. (*See id.*)

475. HCA made various written public statements that claimed differing amounts of charity, indigent, and uncompensated care were provided for the same time periods. For example, in HCA's Community Benefit Report (Exhibit 48), HCA provided $48 million as the cost of its charity care in the Kansas City community in 2009, but HCA indicated on a different Community Benefit Report found on HCA's website that it provided more than $87 million in uncompensated care during the same time period. (Exhibit 392.) In contrast, HCA's charity and uncompensated care reported in its Annual Report for the same time period indicated that HCA spent $185 million in uncompensated and charity care. (Exhibit 46; *see also* Trial Transcript, at Vol. VIII, 77:2-79:7.)

476. HCA provided no explanation at trial for why it communicated publicly in its Community Benefit Report amounts for charity care over the same time period that differed from the amounts reported in the Annual Reports. When asked specifically about this discrepancy at trial, the current President of HCA's Midwest Division testified:

> Q: Okay. Do you know why that number would be quite a bit different than the numbers listed for instance, for the year 2009 in your Exhibit 46 there? I mean, we're talking, you know, over $100 million difference?
>
> A: I do not.

Q: Who would be able to tell me how that difference computes or what the explanation for that difference is?

A: I would think our finance department should be able to answer that question.

Q: Who at your finance department?

A: That would be Clifton Mills or John Krajicek.

(Exhibit 398, at 159:24-160:12.)

477. Clifton Mills and John Krajicek both testified at trial. Neither witness explained why the charity care figures in the Annual Reports differed from other public statements HCA made about the amount of charity care it had allegedly provided for the same time period. HCA's failure to elicit this explanation from either Mills or Krajicek creates an inference that there is no credible explanation for the differences.

478. Section 5.5 of the APA required that Health Midwest's records of charity, indigent, and uncompensated care be used to calculate HCA's annual commitment, but Rooker, an HCA employee, performed his own calculations to determine that $65,331,000 was HCA's annual charity, indigent, and uncompensated care obligation. (Exhibit 406, at 46:4-21; Exhibit 78, at p. 2.)

479. Rooker did not contact Langenberg or Hiersteiner of CHG or anyone within HCA to confirm that he had correctly calculated the benchmark to be $65,331,000. (Exhibit 406, at 48:6-14, 190:13-21.)

480. Langenberg never personally calculated Health Midwest's charity care for the twelve months immediately preceding the closing of the APA. (Trial Transcript, at Vol. X, 194:17-195:1.)

481. CHG's only attempt to verify Rooker's benchmark calculation was done by reviewing Health Midwest's IRS Form 990 for calendar year 2002. CHG never made any attempt to perform its own calculation of charity, indigent, and uncompensated care in the twelve-month period immediately preceding the sale, as was required by APA, Section 5.5. (Trial Transcript, at Vol. VIII, 76:7-18.)

482. Bishop Tolbert, one of HCA's witnesses at trial, testified that he would have expected "the person primarily responsible for monitoring HCA's compliance with its charity and indigent care covenant to have reviewed Health Midwest's financial statements for the year preceding the . . . closing of the sale, to determine in fact how much charity care Health Midwest had provided to be used as a baseline for what HCA was going to do." (Exhibit 406, at 130:25-131:09.)

483. Langenberg never obtained or reviewed HCA's charity, indigent, and uncompensated care policies. (Trial Transcript, at Vol. X, 193:20-24.)

484. Langenberg never obtained HCA's indigent care discount policy. (Trial Transcript, at Vol. X, 193:25-194:2.)

485. Langenberg does not know whether HCA was following its own charity care policy or its own indigent care discount policy. (Trial Transcript, at Vol. X, 194:3-6.)

486. Langenberg never hired an accounting firm to audit any of the annual reports. (Trial Transcript, at Vol. X, 194:7-10.)

487. Langenberg does not know whether HCA's charity care policy changed – or how it changed, if at all – during the relevant time period. (Trial Transcript, at Vol. X, 194:10-16.)

488. Taking into account all of the evidence presented, the Court finds Langenberg's testimony about his efforts to monitor HCA's compliance with its Article 5 obligations to be unpersuasive and lacking credibility.

489. HCA attempted to show that Langenberg and representatives of the Missouri and Kansas Attorneys General were members of a "compliance committee" that reviewed HCA's Annual Reports and that the compliance committee never took issue with HCA's Annual Reports. The Court finds that the silence of the compliance committee or any other third-party concerning whether HCA complied with its Article 5 obligations to be unpersuasive and lacking in probative value on the issues before the Court. (*See* Trial Transcript, at Vol. X, 149:18-151:25.)

490. HCA presented no documentary evidence, or fact or expert witness testimony, showing that it actually provided charity, indigent, and uncompensated care at the levels required by the APA.

491. The Court agrees, as similarly expressed by the Foundation, CHG, the Missouri Attorney General, and the Kansas Attorney General, that HCA has not provided in reasonable detail information showing its compliance with its charity, indigent, and uncompensated care covenant under Section 5.5. These concerns and conclusions were raised first by CHG in July, 2004 and were repeated by the different organizations up to the filing of this action in 2009. HCA has had more than ample opportunity to provide the requested "reasonable detail" and GAAP-compliant financial statement backup required by Section 5.14, but has consistently, including through the trial of this action, failed and refused to do so.

492. In light of the foregoing, the Court finds that HCA's Annual Reports do not contain reasonable detail sufficient to determine whether HCA satisfied its charity, indigent and uncompensated care covenants under Section 5.5.

493. The Court finds that, in light of HCA's failure to provide that information up and through trial, a Court-supervised accounting is necessary to determine whether the annual benchmark of $65,331,000 for charity care was the same aggregate dollar amount of charity, indigent, and other uncompensated care as were provided by the Hospitals, in the aggregate, for the 12-month period prior to Closing, as was required by Section 5.5.

494. The Court finds that, in light of HCA's failure to provide that information up and through trial, a Court-supervised accounting is necessary to determine whether HCA's purported charity and indigent care amounts reported in the Annual Reports were based upon gross charges foregone as reflected in the records of Health Midwest prior to Closing and in the records of HCA following Closing, as required by Section 5.5.

495. The Court finds that, in light of HCA's failure to provide that information up and through trial, a Court-supervised accounting is necessary to determine whether HCA's purported uncompensated care reported in the Annual Reports was based upon bad debt expense as reflected in the records of Health Midwest prior to Closing and in the records of HCA following Closing, as required by Section 5.5.

496. The Court finds that, in light of HCA's failure to provide that information up and through trial, a Court-supervised accounting is necessary to determine whether HCA's purported charity, indigent, and uncompensated care reported in the Annual Reports was calculated in accordance with HCA's then-existing policies regarding the provision of charity, indigent, and uncompensated care.

## DD. The Testimony of HCA's Expert Accountant Corroborate the Court's Findings Regarding Commitments and the Need For an Accounting.

497. HCA attempted to show at trial that it met its $450 million capital improvement obligation by showing that HCA could, through "proof of payment," show that it actually spent more than $450 during the five-year covenant period. HCA attempted to make this showing through its expert, Stan Bever, who testified that he "vouched" for HCA having spent in excess of $450 million during the five-year covenant period.

498. For the reasons detailed below, the Court finds that Bever's conclusion lacked probative value. Foremost, Bever did not undertake any analysis of whether the amounts were actually spent or properly committed during any of the four temporal covenants and he could not offer any opinion to show that HCA actually spent or committed to spend at least $300 million in the first two-year covenant period. Bever's "vouching" analysis also failed to consider a host of other factors that would be necessary to determine whether HCA's expenditures claimed in the Annual Reports were actually made in accordance with HCA's then applicable accounting policies and procedures.

499. For example, Bever's analysis was limited to the alleged expenditures and commitments set forth in HCA's Sixth Annual Report, and he admitted having only "glanced through" the other reports. (Trial Transcript, at Vol. VIII, 169:22-170:2, 174:3-11, 174:23-175:4, 186:14-187:7; Vol. IX, 68:21-69:6.)

500. Significantly, Bever did not determine whether HCA spent or committed to spend $300 million between April 1, 2003 and March 31, 2005, and his opinions were offered without regard to that issue. (Trial Transcript, at Vol. VIII, 211:17-20; Vol. IX, 7:10-8:12.)

501. Bever admittedly could not testify as to how much HCA had actually spent for capital expenditures in any of the former Health Midwest facilities between April 1, 2003 and March 31, 2005. (Trial Transcript, at Vol. IX, 43:7-44:1.)

502. Bever examined only whether HCA had spent or committed to spend $450 million between April 1, 2003, and March 31, 2008 – "looking at it as a single block of time" – and he was not even made aware – before his deposition was taken in this case – that Section 5.1 contained four discrete temporal covenants that required HCA to spend or commit to spend $300 million by March 31, 2005, $50 million by March 31, 2006, $50 million by March 31, 2007, and $50 million by March 31, 2008. (Trial Transcript, at Vol. IX, 5:17-6:7, 6:21-8:22.)

503. Bever examined whether the alleged expenditures and commitments reflected in HCA's Sixth Annual Report could be properly capitalized but he did not match the alleged expenditures against HCA's general ledger in order to determine whether HCA had, in fact, capitalized any of those alleged expenditures. (Trial Transcript, at Vol. IX, 18:15-20:1.)

504. Bever did not evaluate or verify any of HCA's alleged commitments, including without limitation, items labeled "P.O. Committed" in HCA's Annual Reports. (Trial Transcript, at Vol. IX, 50:9-24, 52:6-8, 53:10-16.)

505. Bever offered no testimony or opinion about whether HCA has complied with its charity and indigent care covenant under Section 5.5 of the APA. (Trial Transcript, at Vol. IX, 5:12-16.)

506. Bever did not review HCA's Code of Conduct and did not, at the time of his testimony, know the contents of that document. (Trial Transcript, at Vol. IX, 16:21-17:1.)

507. Bever did not determine whether HCA's alleged capital expenditures were adjusted for sales, trade-ins, or disposals. (Trial Transcript, at Vol. IX, 23:22-24:6.)

508. Bever did not know that, at the time HCA closed Lee's Summit Hospital, Independence Regional Health Center, Medical Center of Independence, and Baptist Lutheran Medical Center, HCA had approximately $80 million in net book value of assets in those facilities. (Trial Transcript, Vol. IX, 24:25-25:5.)

509. Bever did not in any way account for any distribution, transfer, or disposal of the $80 million in assets that would have been disposed of as a result of the closing of Lee's Summit Hospital, Independence Regional Health Center, Medical Center of Independence, and Baptist Lutheran Medical Center. (Trial Transcript, at Vol. IX, 25:12-22.)

510. Bever did not do anything to determine whether any of the assets in the Sixth Annual Report (or in any other Annual Report) may have been transferred to HCA divisions outside of Kansas City. (Trial Transcript, at Vol. IX, 25:23-26:8.)

511. Other than with respect to the Sixth Annual Report, Bever did not determine whether any of Annual Reports' Summary Pages were consistent with the detail pages of the same report. (Trial Transcript, at Vol. IX, 34:23-35:2.)

512. For the foregoing reasons, the Court finds that Bever's testimony did not aid the Court in its determination of whether HCA complied with its various obligations under Sections 5.1, 5.5, and 5.14 of the APA.

## CONCLUSIONS OF LAW

513. In a bench-tried case such as this, the Court may "accept as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard the contrary

evidence." *Evans v. Werley*, 31 S.W.3d 489, 491 (Mo. Ct. App. W.D. 2000). *See also Cook v. Martin*, 71 S.W.3d 677, 680 (Mo. Ct. App. W.D. 2002).

514. "As the trier of fact, the court determines the credibility of witnesses and is free to believe or disbelieve all or part of the witnesses' testimony. . . . This is the case even where the testimony of a witness is not contradicted by other testimony as 'it is well settled that the trial court is free to believe or disbelieve all, part or none of the evidence, including disbelieving evidence that is uncontroverted.'" *Exchange Bank of Missouri v. Gerlt*, 367 S.W.3d 132, 136 (Mo. Ct. App. W.D. 2012) (internal citations omitted). *See also Harrison v. Deheus*, 230 S.W.3d 68, 74 (Mo. Ct. App. S.D. 2007); and *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. Ct. App. S.D. 2006).

515. As the Court ruled previously, the Foundation has standing to pursue this action. Pursuant to the Joinder Agreement, the Foundation assumed all of CHG's obligations under the APA, including without limitation CHG's obligations to monitor and enforce HCA's compliance with the post-closing covenants set forth in Article 5 of the APA.

516. In any event, the Foundation also has standing under Missouri law to seek equitable relief because it is a public charity and, by virtue of being the primary beneficiary of Health Midwest's sale of assets to HCA, it has a special interest in HCA's compliance with the terms and conditions of the APA. *See, e.g., Burnside v. Gilliam Cemetery Assn. of Gilliam,* 96 S.W. 3d 155, 159 (Mo. Ct. App. W.D. 2003) (finding a man who owned grave plots in a cemetery and whose father had been buried in the cemetery had special-interest standing to sue the cemetery association for an equitable accounting).

517. "The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent. The terms of a contract are read as a whole to

determine the intention of the parties and are given their plain, ordinary, and usual meaning." *Dunn Industrial Group, Inc. v. City of Sugar Creek, Mo.* 112 S.W.3d 421, 428 (Mo. 2003).

518. "[E]ach term of a contract is construed to avoid rendering other terms meaningless." *State ex rel. Gayle Vincent, et al. v. Schneider,* 194 S.W.3d 853, 860 (Mo. 2006).

519. A contract "interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *See Foley Co. v. Walnut Associates, et al.,* 597 S.W.2d 685, 689 (Mo. App. W.D. 1980) (citing Section 229 of the Restatement 2d of the Law of Contracts).

520. As set forth in this Court's Order entered September 21, 2011, the APA is ambiguous regarding whether HCA's capital expenditures and commitments for new construction should be credited against HCA's $450 million obligation pursuant to Section 5.1 of the APA.

521. Where a contract is ambiguous, the contracting parties' intent must be established by extrinsic evidence. *See, e.g., West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 15 (Mo. Ct. App. W.D. 2010).

522. Where a contract can be fairly interpreted in two possible ways, "The more probable and reasonable of the two available constructions should be utilized to the exclusion of one which produces a 'redundant, illusory, absurd, and therefore unreasonable result.'" *Rathbun v. CATO Corp.*, 93 S.W.3d 771, 781 (Mo. App. 2002) (quoting *Rouggly v. Whitman*, 592 S.W.2d 516, 521 (Mo. App. 1979).

523. "Covenant" has a particular meaning as a matter of law. The Missouri Court of Appeals has summarized Missouri law on the meaning of "covenants" as follows:

> A covenant is simply an agreement between the grantor and grantee which requires the performance or nonperformance of

> some specified duty with regard to real property, including an agreement to do or not to do a particular act. . . . There are two types of covenants: personal covenants, which do not run with the land; and real covenants, which do. Personal covenants are "personal" promises made by grantor and grantee generally concerning the use of the land.

*Klokkenga v. Carolan*, 200 S.W.3d 144, 159 (Mo. App. 2006) (quoting *Whispering Valley Lakes Improvement Ass'n v.* Franklin *County Mercantile Bank*, 879 S.W.2d 572, 574 (Mo. App. 1994); and *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 312 n. 6 (Mo. App. 1981)).

524. Real covenants "run with the land." *Id*. Personal covenants – which "creat[e] rights and duties relating to land" – are binding only on successive owners of land who purchase with actual or constructive knowledge of the covenants. *Whispering Valley Lakes*, 879 S.W.2d at 574.

525. In expressly identifying the duties arising under Article 5 (including those in Section 5.1) as "covenants," the APA establishes that those duties are intended to relate to the real property that was being conveyed by Health Midwest to HCA as part of the APA (*i.e*., the former Health Midwest facilities).

526. The contracting parties plainly understood the special meaning of "covenants" under Missouri law. Significantly, throughout the APA they distinguished "covenants" from other types of commitments, including "agreements," "obligations," "duties," "representations," and/or "warranties." *See*, *e.g.*, Section 13.2 (p. 76) (relating to HCA's indemnification duties, including HCA's duty to indemnify Health Midwest and/or its assigns in connection with "any material breach or non-fulfillment of any covenants or other agreements made by Buyer in this Agreement (including the Post Closing Operating Covenants contained in Article 5)"). *See also* Section 14.18 (p. 84) (concerning HCA's duties as guarantor and referencing HM Acquisition, LLC's "each and every obligation, covenant, and agreement" under the APA); Section 13.3(e)

(p. 77) (referencing compliance with "any representation, warranty, term, covenant or condition of Seller"); Section 13.7 (p. 79) (referencing the "representations, warranties, covenants, and agreements" in the APA); and the introduction to the APA (p. 1) (referencing the parties' "agreements, covenants, representations and warranties").

527. It is the Court's conclusion that the purpose and intent of Section 5.16 was to ensure that any successive owner of the Health Midwest facilities would acquire such facilities from HCA with knowledge of the covenants, thereby binding such subsequent owners, under Missouri law, to the covenants' continuing duties relating to those facilities.

528. The Missouri Supreme Court has defined an "improvement" as: "A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to [make] the property more useful or valuable as distinguished from ordinary repairs." *State ex rel. Curators of Univ. of Mo. v. Neill*, 397 S.W.2d 666, 669 (Mo. 1966) (en banc). *See also McGrath v. VRA I Ltd. Partnership*, 244 S.W.3d 220, 226 (Mo. App. 2008).

529. In referencing HCA's obligation to spend $450 million on capital expenditures, Section 5.1 is consistent with the remaining portions of the APA in demonstrating the parties' intent that HCA would invest the required capital in bettering the "***existing*** Facilities" that HCA was acquiring from Health Midwest.

530. Based upon the Court's review of the APA as a whole, including without limitation each of the sections of the APA referenced in the Court's Findings of Fact, the Court finds that the contracting parties intended that any capital expenditures and commitments relating to the construction of new facilities would not count toward HCA's $450 million capital improvement obligation in Section 5.1 of the APA. HCA was required to spend or commit to

spend $450 million for capital improvements in the existing Facilities in the first five years following Closing, with the first $300 million of that amount to be spent or committed to be spent by March 31, 2005.

531. "In choosing among the reasonable meanings of a promise or agreement or a term thereof; a meaning that serves the public interest is generally preferred." The Restatement (Second) of Contracts, Section 207. Defendants persuasively argue that this principle of contract construction should not be invoked where sufficient evidence of the intent of the parties exists. To be clear, this Court finds and concludes that the evidence regarding the intent of the parties consistently demonstrates that new hospital construction costs were not intended to satisfy the 5.1 obligation to spend or commit to spend $450 million during the specified post-closing timeline. The principles of contract construction set forth in Section 207 of the Restatement and those set forth in paragraph 773 below are noted by the Court as further support for the Court's findings and conclusions herein.

532. "The rule preferring an interpretation which favors an interest of the public applies only to agreements which affect a public interest. It is a rule of legal effect as well as interpretation, and rests more on considerations of public policy than on the probable intention of the parties." Comment to the Restatement (Second) of Contracts, Section 207. *See also* 11 Richard A. Lord, *Williston on Contracts* § 30:9, citing Restatement (Second) of Contracts § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term, a meaning that serves the public interest is generally preferred."); 11 Richard A. Lord, *Williston on Contracts* § 32:19 (4th ed. 1999) ("The rule that contracts affecting the public interest are to be liberally construed in favor of the public interest applies not only where a public entity is a contracting party but where an agreement between purely private parties is perceived to entail

some benefit to the public at large."); and 5 A. Corbin, *Corbin on Contracts* § 24.25 (rev. 1998) ("courts favor a construction in the public interest . . . contracts by which the public interest is affected should be interpreted in the manner most favorable to the public . . .").

533. Missouri common law is in accord with the above-quoted treatises and with Section 207 of the Restatement (Second) of Contracts. *See, e.g., Memphis Electric Light, Heat & Power Co. v. City of Memphis,* 271 Mo. 488, 196 S.W. 1113 (1917).

534. The purchased hospitals were accumulated on a tax-free basis by Health Midwest, a not-for-profit IRC § 501(c)(3) corporation, for the benefit of the Kansas City community. HCA does not dispute that the Article 5 covenants were for the benefit of the public. Section 5.15 of the APA recognizes the parties' intent that "the community" would suffer "monetary damages" as a consequence of HCA's breach of the APA.

535. The Foundation's interpretation of Section 5.1 of the APA is more favorable to the public's interest than is HCA's interpretation of that provision and the Court concludes that, consistent with this Court's findings regarding the intent of the parties, the interpretation of the contract should weigh in favor of that public interest.

536. It is a "well-established principle that the interpretation placed on a contract by the parties before it becomes a matter of controversy is entitled to great weight in ascertaining their intent and understanding, and the courts will generally follow the parties' own practical interpretation of the agreement." *Stone v. Farm Bureau Town & Country Ins. Co. of Missouri*, 203 S.W.3d 736, 745 (Mo. App. 2006) (citing *Rhoden Inv. Co., Inc. v. Sears, Roebuck & Co.*, 499 S.W.2d 375, 383 (Mo. 1973)). (*See also,* Trial Transcript, at Vol. X, 32:18-23.)

537. Based upon the pre-dispute extrinsic evidence presented, as reflected in the Court's Findings of Fact, the Court finds that HCA and Health Midwest intended that all the

$450 million of capital improvements required by Section 5.1 of the APA were for the existing Facilities, and that the capital expenditures and/or commitments required by Section 5.1 were not intended to be used for HCA's construction of new hospitals or other facilities.

538. In addition, HCA closed on the underlying transaction with knowledge that Health Midwest had repeatedly represented to the public and to the courts – including the Circuit Court of Cole County, Missouri (in the lawsuit styled *Health Midwest v. Nixon,* case no. 02CV326118), the District Court of Johnson County, Kansas (in the lawsuit styled *Health Midwest v. Kline,* case no. 02CV08043), and the Supreme Court of Kansas (in the appeal of the *Kline* matter, appellate case no. 03-90195-S) – that HCA had agreed in Section 5.1 of the APA to make $450 million worth of capital improvements *to the existing Facilities* of Health Midwest.

539. If HCA disagreed or was unwilling to accept the terms Health Midwest was representing to the public, HCA had a duty to speak out and correct or object to Health Midwest's representations. *See, e.g., Medical West Building Corp. v. E. L. Zoering & Co.*, 414 S.W.2d 287, 293 (Mo. 1967) (stating it is "well recognized" that "silence may give rise to an estoppel" when "common honesty and fair dealing demand" that a party speak).

540. Rather than ever objecting to any of Health Midwest's repeated public representations that the $450 million was intended to be spent on the purchased facilities, HCA remained silent, choosing instead to close on the APA without any clarification of its intent.

541. Based upon the above-referenced facts and under settled Missouri law, HCA adopted Health Midwest's interpretation of Section 5.1 of the APA. "The rule of adoption of an adverse party's construction or interpretation of a contract provision, so as to bar the other party from an assertion to the contrary, has much countenance in the law. 'As a general rule, the language of a contract, in case of ambiguity, should be interpreted in the sense that the promisor

knew, or had reason to know, that the promisee understood it. . . .'" *Boone County v. Blue Cross Hosp. Service, Inc. of Missouri,* 526 S.W.2d 853, 858 (Mo. App. 1975) (internal citation omitted.)

542. The Restatement (Second) of Contracts, Section 201, states in relevant part: "Where the parties have attached different meaning to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." Restatement (Second) of Contracts § 201(2)(b). *See also U.S. v. Stuart*, 489 U.S. 353, 368, 109 S.Ct. 1183, 1192 (1989) (it is "hornbook contract law that the proper construction of an agreement is that given by one of the parties when 'that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party'") (quoting Restatement (Second) of Contracts § 201(2)(b)). One widely read treatise explains that the rationale for this rule is that "a party who makes a contract knowing of a misunderstanding is sufficiently at fault to justify his being subjected to the other party's understanding." 2 E. Allan Farnsworth, *Contracts* § 7.9 (1990).

543. The doctrine of equitable estoppel further supports the Foundation's position in this matter. "[I]nherently equitable" in nature, the doctrine of equitable estoppel "forecloses one from denying his own expressed or implied admission which was in good faith accepted and acted upon by another." *Jackson v. City of Blue Springs*, 904 S.W.2d 322, 336 (Mo. App. 1995).

544. Equitable estoppel requires the following elements: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting

from allowing the first party to contradict or repudiate the admission, statement or act." *Id. See also Missouri Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, 811 S.W.2d 28, 34 (Mo. App. 1991).

545. The Court concludes that the Foundation has demonstrated each of these elements. The underlying facts, as set forth in the Court's Findings of Fact, establish that: (1) HCA previously made several admissions and statements and engaged in other conduct inconsistent with its present position that capital expenditures and commitments for new construction were to count toward its capital obligations described in Section 5.1 of the APA; (2) the Foundation, Health Midwest/CHG, the Missouri and Kansas state courts, the Missouri and Kansas Attorneys General, and the public relied upon HCA's statements and conduct in accepting the underlying transaction between HCA and Health Midwest; and (3) the parties that relied on HCA's previous statements and conduct would be injured to the extent that HCA did not, in fact, invest in capital improvements in the existing facilities in the amounts set forth in Section 5.1 of the APA.

546. It is well settled under Missouri law that, "A party is bound by the uncontradicted testimony of the party's own witness, including that elicited on cross-examination." *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo. App. 2002) (emphasis supplied).). *See also Simpson v. Johnson's Amoco Food Shop, Inc.,* 36 S.W.3d 775, 776 (Mo. App. 2001). Accordingly, HCA is bound to the testimony of its own witnesses, including without limitation the testimony of Bovender and Mills.

547. Regardless of whether HCA could count new-construction expenditures and/or commitments toward satisfaction of the $450 million covenant, the last sentence of Section 5.1 represents, at a minimum, a condition on HCA's right to do so. That is, HCA could under no circumstances receive credit for new-construction expenditures or commitments toward

satisfaction of the $450 million covenant if those expenditures or commitments operated to "materially detract from the required maintenance and necessary improvement of existing Facilities."

548. The Court concludes that it is a question of fact whether HCA's "new construction" materially detracted from the required maintenance and necessary improvement of existing Facilities. As detailed above, the Court has made factual findings on this issue in favor of HCA and against the Foundation.

549. Construing Section 5.1 in accordance with Missouri law and the Court's factual findings above, "commit to spend" as used in Section 5.1 of the APA is synonymous with undertaking a binding obligation to make the expenditures at issue, consistent with GAAP.

550. In addition, the Court finds that GAAP applies to HCA's post-closing covenants and that a Court-supervised accounting is necessary in order to determine, under GAAP, the full extent to which HCA has satisfied its obligations under Sections 5.1 and 5.5 of the APA.

551. A court-supervised accounting is appropriate where the evidence establishes: "1) the need of discovery, 2) the complicated nature of the accounts, 3) the existence of a fiduciary or trust relationship, and 4) the inadequacy of legal remedies." *Bossaler v. Red Arrow Corp.*, 897 S.W.2d 629, 630 (Mo. Ct. App. E.D. 1995) (citing *Ballesteros v. Johnson*, 812 S.W.2d 217, 200 (Mo. App. 1991)). The Court finds that the Foundation has demonstrated each of these elements.

552. The Court concludes that HCA is a fiduciary to the Foundation. "One is said to act in a 'fiduciary capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying

and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executer, or broker, a director of a corporation, and a public officer." *Estate of Ewing v. Bryan*, 883 S.W.2d 545, 548-49 (Mo. App. 1994).

553. Missouri courts have found fiduciary relationships in a wide variety of contexts. *See, e.g., Engelsemann v. Holekamp*, 402 S.W.2d 382, 388 (Mo. banc 1966) (finding that beneficiaries of a will have a fiduciary relationship with the trustee of the will and can demand an equitable accounting); *McCreary v. McCreary*, 954 S.W.2d 433, 451 (Mo. Ct. App. W.D. 1997) (finding a fiduciary relationship existed between divorced husband and wife because husband was responsible for paying child support for the benefit of his ex-wife and child); and *Burnside,* 96 S.W.3d at 158 (finding a man who owned grave plots in a cemetery and whose father had been buried there could properly seek an equitable accounting from the cemetery association).

554. The fact that Section 5.14 of the APA requires HCA to make detailed annual reports, each including a "specific accounting" of HCA's alleged expenditures pursuant to Section 5.1, is particularly significant in demonstrating that HCA has been acting in a fiduciary capacity.

555. As a fiduciary, HCA was required to maintain complete and accurate records and it bears the burden of proving what any absent records would show. "It is the obligation of the fiduciary to keep complete and accurate accounts or records and if he has not done so all doubts and obscurities are resolved against him. Loss or absence of records does not absolve the fiduciary of the obligation to render a full account and he bears the burden of proving what the

lost or absent records would show." *Zelch v. Ahlemeyer*, 592 S.W.2d 482, 485 (Mo. App. 1979). *See also Estate of Condren*, 756 S.W.2d 599 (Mo. App. 1988).

556. For the foregoing reasons, the Court finds that the Foundation is entitled to an accounting to determine HCA's compliance with Article 5 of the APA.

## THE COURT'S REMEDY AND DAMAGES

### EE. The APA Grants the Court Wide Discretion To Fashion Remedies In Light of Its Findings.

557. Section 5.15 of the APA contains a "Remedies" section, which states the following:

> Breach or nonperformance of any operating covenant . . . will entitle Seller . . . all other remedies at law or equity (including monetary damages suffered by the community as a result of such breach or nonperformance, specific performance . . . or other equitable relief). In addition, if any annual report shows that, for any applicable period, Buyer has not spent or committed to spend dollars on capital expenditures during such period at least equal to the amount in Section 5.1, then Buyer will immediately pay such shortfall to Seller.

558. The Court has found HCA to be in breach of the APA. Section 5.15 and Missouri law provide the Court with the legal and equitable power to order all remedies at law or equity, including specific performance of the provisions of the APA. Accordingly, as described below, the Court hereby ORDERS HCA to "immediately pay" to the Foundation the "shortfalls" related to HCA's breach of the APA.

**FF. Remedy In Connection With the Court's Finding Regarding Intent**

559. Having ruled in favor of the Foundation in the Court's Finding Regarding Intent, the Court hereby ORDERS HCA to immediately pay to the Foundation the ***minimal*** shortfall in the Second Annual Report in the amount of $112,498,353. (*See supra*, Paragraphs 278 through 283.) As found above, this is the shortfall resulting from HCA's attempt to take credit in the Second Annual Report for "new construction."

**GG. Remedy In Connection With the Court's Finding Regarding Commitments.**

560. Having ruled in favor of the Foundation in the Court's Finding Regarding An Accounting concerning what constitutes "commitments" under the APA, and having further found that HCA improperly attempted to take credit for "PO Committed" items in the Second Annual Report that do not constitute "commitments" under GAAP standards, the Court hereby ORDERS HCA to pay to the Foundation the ***minimal*** shortfall in the Second Annual Report in the amount of $49,410,151. (*See supra*, Paragraphs 420 and 421.)

**HH. Remedy In Connection With the Court's Finding Regarding an Accounting.**

561. Having ruled in favor of the Foundation in the Court's Finding Regarding An Accounting, the Court hereby ORDERS a Court-supervised accounting to be conducted to determine whether: (1) HCA actually made the capital expenditures in the existing Facilities for which it could properly take credit in accordance with the APA and consistent with this Court's findings, as claimed by HCA in the Annual Reports; and (2) whether HCA actually provided in the ten years after Closing at least the same aggregate dollar amount of charity, indigent, and

other uncompensated care as were provided by the Hospitals, in the aggregate, for the 12-month period immediately preceding Closing.

562. Specifically, taking into account the Court's instructions with regard to the accounting, the Court hereby ORDERS that the accounting include the following determinations with regard to determining HCA's compliance with Section 5.1 of the APA:

a. whether the amounts claimed in the Second Annual Report for the existing Facilities were actually spent or properly committed to be spent by HCA in accordance with HCA's then applicable accounting policies and procedures;

b. whether the amounts claimed in the Third Annual Report for the existing Facilities were actually spent or properly committed to be spent by HCA in accordance with HCA's then applicable accounting policies and procedures;

c. whether the amounts claimed in the Fourth Annual Report for the existing Facilities were actually spent or properly committed to be spent by HCA in accordance with HCA's then applicable accounting policies and procedures;

d. whether the amounts claimed in the Fifth Annual Report for the existing Facilities were actually spent or properly committed to be spent by HCA in accordance with HCA's then applicable accounting policies and procedures; and

e. whether the amounts claimed in the Sixth Annual Report for the existing Facilities were actually spent or properly committed to be spent by HCA in accordance with HCA's then applicable accounting policies and procedures.

563. Additionally, the Court hereby ORDERS that the accounting of the matters specified in the foregoing Paragraph shall give consideration of: (1) whether expenditures in the existing Facilities for which HCA could properly take credit in accordance with APA and this

Court's findings were: (a) actually expended, and (b) actually capitalized in accordance with HCA's then applicable accounting policies and procedures; (2) whether and to what extent HCA had actually entered into agreements giving rise to obligations or otherwise entered into actual "commitments" for items relating to the existing Facilities and identified as "commitments" in any of the Annual Reports; and (3) whether and to what extent HCA properly accounted for the net book value of Medical Center of Independence, Independence Regional Health Center, Lee's Summit Hospital, and Baptist Lutheran Medical Center, and the equipment and other assets of those facilities upon their closing.

564. Specifically, taking into account the Court's instructions with regard to the accounting, the Court further hereby ORDERS that the accounting include the following determinations with regard to determining HCA's compliance with Section 5.5 of the APA:

a. whether the annual benchmark of $65,331,000 used by HCA for charity care was the same aggregate dollar amount of charity, indigent, and other uncompensated care as were provided by the Hospitals, in the aggregate, for the 12-month period immediately preceding Closing;

b. whether HCA's purported charity and indigent care amounts reported in the Annual Reports were based upon gross charges foregone as reflected in the records of Health Midwest prior to Closing and of HCA, using GAAP standards, following Closing;

c. whether HCA's purported uncompensated care reported in the Annual Reports was based upon bad debt expense as reflected in the records of Health Midwest prior to Closing and of HCA, using GAAP standards, following Closing; and

d. whether HCA's purported charity, indigent, and uncompensated care reported in the Annual Reports was calculated in accordance with HCA's then existing policies, including GAAP standards, regarding the provision of charity, indigent, and uncompensated care.

565. The Court finds further that, under the circumstances presented, a special master should be appointed pursuant to Rule 68.01 of the Missouri Rules of Civil Procedure to conduct the accounting. Specifically, such an appointment is necessary because this is clearly a "matter of account and of difficult computation of damages," as stated in Rule 68.01(b).

566. The Court hereby ORDERS that the special master in this matter shall be Shawn Fox, a forensic accountant and certified public accountant with RSM McGladrey, Inc. Fox has previously reviewed many of the documents relevant to the accounting and he testified as an expert witness during the trial of this case. Accordingly, Fox is already familiar with the issues relating to the necessary accounting and he is well positioned to serve the Court as a special master pursuant to Rule 68.01. Fox is qualified to serve as a master pursuant to Rule 68.01(c.). The special master shall take the oath required by Rule 68.01(d), shall have powers to the full extent contemplated by Rule 68.01(e), shall conduct all proceedings necessary for the required accounting pursuant to the procedures set forth in Rule 68.01(f), and shall prepare and submit a report pursuant to Rule 68.01(g). The special master shall be compensated for his services and the services of his staff at reasonable hourly rates not to exceed $250.00 per hour and HCA shall bear all costs associated with such compensation. Likewise, HCA shall bear all other costs and expenses relating to and reasonably necessary for completion of the accounting and report. Mr. Fox shall notify the Court no later than February 1, 2012 whether he will accept the appointment on these terms and conditions.

567. The Court further ORDERS that, in the course of such accounting, the special master shall have access to all relevant records, documents, and software at HCA's facilities in the Kansas City metropolitan area.

568. The Court further ORDERS that, in conducting the accounting and preparing his report, the special master shall adopt, incorporate, and take into consideration all of the Court's findings of fact and conclusions of law set forth herein.

569. The Court further ORDERS that the special master shall submit his report to the Court. Upon the Court's review of such report, the Court will enter a final Order and Judgment concerning the results of the accounting, make any additional findings regarding whether there are additional adjustments to be made regarding HCA's obligations under Section 5.1, and fashion any other remedies at law or equity, including without limitation monetary damages suffered by the community as a result of any breach or nonperformance of HCA's obligations under Section 5.5.

## II. The Court's Remedy In Connection With Attorneys' Fees and Costs.

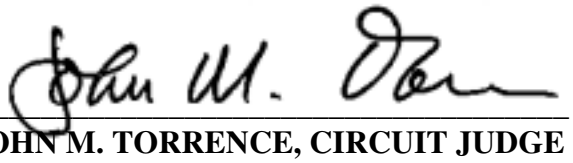
570. Section 14.2(b) of the APA states that "the prevailing party . . . in any legal proceedings or actions in connection with this Agreement shall be entitled to recover reasonable attorneys' fees and costs." Having ruled in favor of the Foundation, the Court finds that the Foundation is entitled to an award of reasonable attorneys' fees and costs. The Court hereby further ORDERS that the Foundation shall file its initial fee application within thirty (30) days following this Court's Order. HCA shall have fifteen (15) days to object to the Foundation's fee application. The Court further ORDERS that HCA shall pay for the reasonable attorneys' fees and costs incurred by the Foundation in connection with the accounting, in an amount to be

determined after the Court receives the report of the special master and makes any further findings with regard to HCA's compliance with its Article 5 obligations.

**JJ. <u>The Court's Ruling on the Foundation's Request for Prejudgment Interest.</u>**

571. The Foundation seeks prejudgment interest pursuant to RSMo. § 408.020. The Court specifically finds that the damages awarded in this judgment were neither liquidated nor capable of being reasonably ascertained at the various times that HCA violated the APA. *Ken Cucchi Construction v. O'Keefe*, 973 S.W.2d 520, 528 (Mo.App.E.D. 1998). Consequently, the Foundation's prayer for prejudgment interest is DENIED.

IT IS SO ORDERED.



_____January 24, 2013____
**DATE**

_____
**JOHN M. TORRENCE, CIRCUIT JUDGE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by (__) United States Mail, postage prepaid; (____) fax; (__X__) E-mail; (____) Federal Express; and/or (____) Hand Delivery this 24th day of January, 2013, to:

Paul D. Seyferth, Esq.
Michael L. Blumenthal, Esq.
Kevin J. Karpin, Esq.
Seyferth Blumenthal & Harris, LLC
300 Wyandotte Street, Suite 430
Kansas City, MO 64105
816-756-0700
Fax: 816-756-3700
paul@sbhlaw.com
mike@sbhlaw.com
kevin@sbhlaw.com

ATTORNEYS FOR PLAINTIFF HEALTH CARE FOUNDATION OF GREATER KANSAS CITY

Harold L. Lowenstein, Esq.
Armstrong Teasdale LLP
2345 Grand Boulevard, Suite 2000
Kansas City, MO 64108
816-221-3420
Fax: 816-221-0786
hlowenstein@armstrongteasdale.com

Thomas G. Kokoruda, Esq.
Robert A. Henderson, Esq.
Cathy J. Dean, Esq.
Lauren E. Tucker McCubbin, Esq.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105
(816) 421-3355
Fax No.: (816) 374-0509
tkokoruda@polsinelli.com
rhenderson@polsinelli.com
cdean@polsinelli.com
ltucker@polsinelli.com

ATTORNEYS FOR DEFENDANTS HM ACQUISITION, LLC AND HCA INC.

Courtney Holt

LAW CLERK, DIVISION 14