STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 2023CVS5013
JOSHUA H. STEIN, Attorney General, ex rel. DOGWOOD HEALTH TRUST, Plaintiff, v. HCA MANAGEMENT SERVICES LP; MH MASTER HOLDINGS, LLLP; MH HOSPITAL MANAGER, LLC; MH MISSION HOSPITAL, LLLP; MH HOSPITAL HOLDINGS, INC.; and MH MASTER, LLC, Defendants.	**BRIEF IN SUPPORT OF BUNCOMBE COUNTY'S MOTION TO INTERVENE**

Proposed Intervenor Buncombe County, North Carolina, pursuant to BCR 7.2, respectfully submits this brief in support of its motion to intervene in the above-captioned action. As detailed in the proposed intervention complaint filed herewith (as Exhibit A to the motion), Buncombe County seeks to intervene to recover damages and equitable relief for the excessive wait times its EMS crews have experienced as a result of Defendants' misconduct including its deliberate understaffing of the Mission Hospital emergency department. For the reasons discussed below, the Court should grant the County's motion to intervene.

BACKGROUND

In the years following their acquisition of the previously nonprofit Mission hospital system in early 2019, Defendants have disregarded their statutory, contractual, and common-law obligations, allowing emergency services at the Emergency Department at Mission Hospital (the "Mission ER") to deteriorate dramatically. In particular, during relevant times, Defendants intentionally understaffed the Mission ER so that Buncombe County's EMS crews often experienced excessive wait times to transfer patients to the Mission ER, requiring EMS personnel to attend to emergency room patients long after arriving at the Mission ER.

Indeed, Buncombe County EMS crews' average wait time at the Mission ER increased from approximately 9:41 minutes in the first quarter of 2020 to 17:41 minutes in the third quarter of 2023. Concurrently, "90th percentile times"—the time in which 90% of EMS-to-ER patient transfers occur—increased from approximately 16 minutes to over 32 minutes. These 90th percentile times far exceeded the 20-minute national standard reported by the National Emergency Medical Services Information System.

The substantial increases in EMS wait times occurred despite numerous demands from the County beginning in or about 2019 that Defendants improve their practices and meet their duties, and

notwithstanding the efforts of Buncombe County's EMS personnel themselves (1) to move and to offload ER patients into examination rooms to expedite transfer of care, and (2) to clean and to prepare vacant ER rooms for emergency care patients--actions which pulled BCEMS supervisors and crews from the field and left them unable to respond to EMS system needs.

Defendants continued to shirk their responsibility to emergency care patients at the expense of the County until (1) the North Carolina Attorney General ("NCAG") filed this action on December 14, 2023, and (2) the U.S. Centers for Medicare and Medicaid Services ("CMS"), on December 9, 2023, identified the Mission ER as a candidate for "immediate jeopardy" classification and, after an intensive investigation, issued notice that Mission Hospital was in "immediate jeopardy" of losing CMS funding due to its disregard of ER patients' health and safety.[1] Only after such action by the

[1] CMS's 384-page report details numerous horrific examples of Defendants' neglect of Mission ER patients, finding that patients were endangered at Mission Hospital in 2022 and 2023 following significant delays and lapses of care in the emergency department and other areas. CMS concluded, *inter alia*, that the hospital "failed to ensure a safe environment for the delivery of care to emergency department patients by failing to accept patients on arrival to the emergency department resulting in delays or failure to triage, assess, and implement orders." ECF No. 39.3, at page 1 (emphasis added). *See also id.* at page 91, describing the "Subject of Deficiency" as: "The hospital's leadership failed to ensure emergency care and services were provided according to policy and provider orders by failing to accept patient upon arrival to the emergency department, evaluate, monitor and provide treatment to emergency department patients to prevent delays and/or lack of triage, nursing assessment, and implementation of orders, including lab, telemetry and medication orders." (Emphasis added).

NCAG and CMS did Defendants begin to take action to adequately staff the ER rather than deliberately relying on BCEMS to treat Mission's ER patients.[2] However, at any time Defendants may choose to revert to their prior practices, which both endanger patient safety and run up Plaintiff's costs while unjustly enriching Defendants at Plaintiff's expense.

Buncombe County employees have been the source of a substantial portion of the information alleged by the NCAG in this action. Further, Defendants' inadequate staffing of the Mission ER and the resulting excessive EMS wait times are among the central allegations supporting the breach of contract claims in the NCAG's Complaint. *See, e.g.,* Complaint ¶¶ 39-58, 60-65, 85-100. This means that the same evidence—much of which will come from the County's documents and employees—will be needed to establish both the NCAG's and the County's claims against Defendants.

LEGAL STANDARD

"Liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as possible with efficiency and due process." *Feller v. Brock,* 802 F.2d 722, 729 (4th

[2] To date in 2024, as a result of the above-described governmental action, Defendants have caused EMS wait times at the Mission ER to decrease so that the rate of transfers within the 20-minute benchmark improved to approximately 93%, for the moment. However, it is unknown how long that situation will continue.

Cir. 1986) (internal citation omitted).[3] Rule 24 of the North Carolina Rules of Civil Procedure, which provides the framework for allowing an entity to intervene in a civil action, states in relevant part:

> (a) *Intervention of right*. -- Upon timely application anyone shall be permitted to intervene in an action:
>
> > (1) When a statute confers an unconditional right to intervene; or
> >
> > (2) *When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.*
>
> (b) *Permissive intervention*. -- Upon timely application anyone may be permitted to intervene in an action.
>
> > (1) When a statute confers a conditional right to intervene; or
> >
> > (2) *When an applicant's claim or defense and the main action have a question of law or fact in common*. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the

[3] Our state courts frequently cite federal cases for guidance in deciding intervention issues. *See, e.g., Harvey Fertilizer & Gas Co. v. Pitt Cty.*, 153 N.C. App. 81, 87, 568 S.E.2d 923, 927 (2002) ("In that Rule 24 of the North Carolina Rules of Civil Procedure is virtually identical to Rule 24 of the Federal Rules of Civil Procedure, we appropriately look to federal court decisions for guidance").

> court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(Emphasis added). In addition, Intervenor Plaintiff notes that the same permissive standard that allows the Court in its discretion to allow motions to amend pleadings under Rule 15 analogously permits the Court to approve of a motion to intervene permissively under Rule 24. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 474, 515 S.E.2d 675 (1999). A third party may be permitted to intervene under Rule 24(b) *inter alia* "when an applicant's claim or defense and the main action have a question of law or fact in common," under G.S. § 1A-1, Rule 24(b). Permissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court. *See State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). *Cf. Booth v. Maryland,* 337 F. App'x 301, 312 (4th Cir. 2009) (district court has "broad discretion concerning motions to amend pleadings" under Federal Rule 15).

Upon intervention, whether as of right or permissive, the successful intervenor is bestowed with the same rights as any party in the litigation. *See Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007). ("Rule 24 has long been interpreted to mean that a successful intervenor under subsection (a) *or* (b) enters the case

as a party"); *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 78, 311 S.E.2d 1, 4 (1984) ("After intervention, an intervenor is as much a party to the action as the original parties are and has rights equally as broad.") (citation omitted).

A. Buncombe County is Entitled to Intervene as of Right.

Intervention as of right under Rule 24(a)(2) is appropriate when the proposed intervenor can show that "(1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani*, 350 N.C. 449, 459 (citing *Alford v. Davis*, 131 N.C. App. 214, 217-19, 505 S.E.2d 917, 920 (1998)).

1. Buncombe County Has a "Direct and Immediate Interest" in the NCAG's Action.

In order to establish the "direct and immediate interest" requirement under Rule 24(a)(2), the movant must show that has a "legal interest of such direct and immediate character that [it] will gain or lose by direct operation of the judgment." *Alford v. Davis*, 131 N.C. App. 214, 218-19, 505 S.E.2d 917, 920 (1998) (cleaned up). Further, "an interest which is contingent upon the outcome of pending litigation …. [must] be 'significantly protectable.'" *Id.* (quoting *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991)). "[T]he interest

requirement is 'not a mechanical rule,'" but instead "requires courts to exercise judgment based on the specific circumstances of the case." *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1392 (10th Cir. 2009) (quoting *San Juan Cnty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007)).

It is straightforward that Buncombe County will gain or lose depending on the outcome of the NCAG's action. Both the NCAG and Buncombe County intend to prove that the Defendants knowingly caused excessive EMS wait times at the Mission ER and unlawfully[4] relied on EMS crews to provide care

[4] Defendants' actions not only are in breach of the Asset Purchase Agreement, but they also violate federal law, including the Emergency Medical Treatment & Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. EMTALA requires the ER to provide a patient with an appropriate and timely medical screening examination and stabilizing treatment. "[T]he EMTALA responsibility of a hospital with a dedicated ED begins when an individual arrives on hospital property (ambulance arrival) and not when the hospital 'accepts' the individual from the gurney. An individual is considered to have 'presented' to a hospital when he/she arrives at the hospital's dedicated ED or on hospital property and a request is made by the individual or on his/her behalf for examination or treatment of an emergency medical condition…. Once an individual comes to the emergency department of the hospital, whether by EMS or otherwise, the hospital has an obligation to provide an appropriate medical screening examination and, if an emergency medical condition is determined to exist, provide any necessary stabilizing treatment or an appropriate transfer… Failure to meet these requirements constitutes a potential violation of EMTALA." CMS letter to State Survey Directors, "EMTALA Issues Related to Emergency Transport Services" (Apr. 27, 2007) (citing 42 CFR 489.24(a) and (b)) (emphasis added). "Hospitals that deliberately delay moving an individual from an EMS stretcher to an emergency department bed do not thereby delay the point in time at which their EMTALA obligation begins. Furthermore, such a practice of 'parking' patients arriving via EMS, refusing to release EMS equipment or personnel, jeopardizes patient health and adversely impacts the ability of the EMS personnel to provide emergency response services to the rest of the community." CMS State Operations Manual Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases (Rev. 191,

for ER patients. *Accord N.C. Green Party v. N.C. State Bd. of Elections*, 619 F. Supp. 3d 547, 562 (E.D.N.C. 2022) (permitting political parties to intervene in support of N.C. Board of Elections' litigation position; "the intervenors assert an interest in this action because of the numerous allegations in plaintiffs' amended complaint *concerning* the intervenors…. The court concludes the intervenors have demonstrated protectable interests in this action") (emphasis in original).

Further, the County, as representative of its citizens, has a significant interest in the outcome of *all* of the NCAG's claims, not just those claims related to EMS wait times. *See, e.g., Chiglo v. City of Preston,* 104 F.3d 185, 188 (8th Cir. 1997) ("In this case, the proposed intervenors claim that they want to intervene to protect children from smoking. This concern falls squarely within the City's interest in protecting public health … Therefore, the proposed intervenors have articulated an interest that coincides with the City's role as protector of its citizens"); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 485 (1995) ("[T]he Government here has a significant interest in protecting the health, safety, and welfare of its citizens"); *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 595, 83 A.3d 901, 919-20 (2013) ("[A] political

---

7/19/2019). Essentially, EMTALA requires that "[t]here must be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility." 42 CFR § 482.55.

subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders"); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[C]ertain public concerns may constitute an adequate 'interest' within the meaning of [Rule 24(a)(2)]") (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967)).

2. NCAG's Representation of Buncombe County's Interest May Be Inadequate for Purposes of Rule 24(a)(2).

In establishing intervention as of right, the proposed intervenor has the burden of establishing that it is inadequately represented by the existing parties. *Harvey Fertilizer & Gas Co. v. Pitt Cty.,* 153 N.C. App. 81, 90, 568 S.E.2d 923, 928 (2002). The burden of showing inadequate representation is generally considered to be minimal. *See, e.g., Trbovich v. UMW*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 (1972) (inadequate representation element "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal").

Here, the Attorney General has filed this action as representative of the Dogwood Trust to enforce the Defendants' obligations under the Asset Purchase Agreement—obligations that were included in the APA for the protection of the local citizenry not just the benefit of the contracting parties. The NCAG will be leaving office this year, and it remains to be seen whether

his replacement will vigorously prosecute this action. The County manifestly should have a say in the outcome of this litigation, regardless of who holds political office.

This situation is similar to the facts giving rise to the U.S. Supreme Court, in *Trbovich*, *supra*, reversed an order denying a union member's effort to intervene as of right in an action filed by the U.S. Secretary of Labor to set aside an election of a union's officers. The union member had himself initiated the proceeding by filing a complaint with the Secretary of Labor, who, in turn, filed the action. The Supreme Court reasoned that (1) "the Secretary of Labor in effect becomes the union member's lawyer" for purposes of enforcing certain rights against the union, and (2) "the Secretary has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." 404 U.S. at 538-39 (cleaned up). The Court reasoned that "[i]ntervention in the suit by union members will not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit. Thus, at least insofar as petitioner seeks only to present evidence and argument in support of the Secretary's complaint, there is nothing in the language or the history of the LMRDA to prevent such intervention." 404 U.S. 528, 536-37. The Court concluded that

"[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24 (a)(2)." 404 U.S. 528 at 538-39. *See also Marshall v. International Brotherhood of Teamsters*, 617 F.2d 154, 156 (6th Cir. 1980).

Here, as in *Trbovich,* the proposed intervenor (1) has provided the plaintiff with the facts upon which the action is based and (2) would be seeking to present evidence and argument in support of the plaintiff's claims in the case. Moreover, since the proposed intervenor here is a local government, rather than a private citizen, there is little risk of any unnecessary burden on the NCAG's prosecution of this matter.

B. <u>Alternatively, this Court Should Permit Buncombe County Permissively to Intervene in the Action.</u>

Rule 24(b)(2) provides, in relevant part, that "anyone may be permitted to intervene in an action . . . [w]hen an applicant's claim or defense and the main action have a *question of law or fact in common*." (Emphasis added). In this respect, the requirements for permissive intervention under Rule 24(b) are to be liberally construed. *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.,* 179 F.R.D. 505, 507 (W.D.N.C. 1998); *German v. Federal Home Loan*

Mortgage Corp., 899 F. Supp. 1155, 1166 (S.D.N.Y. 1995); G. Gray Wilson, 1-24 NORTH CAROLINA CIVIL PROCEDURE § 24-4 (2015). An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation. *See, e.g., Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 507, 631 S.E.2d 884, 889 (2006); *In re Southeastern Eye Center-Pending Matters*, 2020 NCBC LEXIS 95, *6, 2020 NCBC 58, 2020 WL 5792545 (N.C. Super. Oct. 11, 2017).

The Court should allow Buncombe County to intervene permissively, to pursue its claims for damages and equitable relief and for the purpose of monitoring and supporting the NCAG's breach of contract claim, as discussed below.

1. *Permissive Intervention to Pursue Independent Claim.*

As discussed previously, Buncombe County's claims include for declaratory and injunctive relief and to recover damages and disgorgement from Defendants for their use of the County's EMS personnel to provide emergency care to patients waiting for treatment at the Mission ER. These claims plainly have "questions of law or fact in common" with the NCAG's claims in its action. Indeed, one of the primary claims in the NCAG Complaint is for exactly this same "wall time" practice of which the Intervenor Plaintiff complains.

The fact that NCAG Complaint does not include an unjust enrichment claim in no way prevents Buncombe County from intervening to pursue such a claim. *See Genentech, Inc. v. Bowen*, 676 F. Supp. 301, 308 n. 20 (D.D.C. 1987) ("[T]here is no basis for Lilly's argument that the intervenors may not raise claims not raised by [plaintiff in the main action]"); *Stewart-Warner Corp. v. Westinghouse Elec. Corp.,* 325 F.2d 822, 827 (2d Cir. 1963) ("Where there exists a sufficiently close relationship between the claims and defenses of the intervenor and those of the original defendant to permit adjudication of all claims in one forum and in one suit without unnecessary delay—and to avoid as well the delay and waste of judicial resources attendant upon requiring separate trials—the district court is without discretion to deny the intervenor the opportunity to advance such claims").

2. *Permissive Intervention to Support the NCAG's Breach of Contract Claim.*

Facts derived from Buncombe County and its personnel, as noted above, supplied substantial factual background to the NCAG in the investigation leading up to the filing of this action and will likely be a primary source of evidence in the litigation. *See Students for Fair Admissions v. Univ. of N.C.,* 319 F.R.D. 490, 496 (M.D.N.C. 2017) ("In determining whether to allow permissive intervention, courts may consider whether such intervention will contribute to full development of the underlying factual

issues in the suit and to the just and equitable adjudication of the legal questions presented") (cleaned up; citation omitted). Moreover, the citizens and government of Buncombe County have a significant interest in the litigation because they are suffering the brunt of the harm caused by HCA's breaches of the contract. *See N.C. League of Conservation Voters v. Hall*, 2021 N.C. Super. LEXIS 226, *6-7 (N.C. Super. Ct. Dec. 15, 2021) ("As to Intervenor-Applicant's Motion to intervene permissively, this Court finds that Intervenor-Applicant's claims have questions of law or fact in common with the main action. Intervenor-Applicant is a non-profit, nonpartisan democracy organization whose mission is dedicated to fair elections. Intervenor-Applicant has members, staff and supporters in every district of the challenged Enacted Plans"); *Commack Self-Service Kosher Meats v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (granting permissive intervention where "[t]he intervenors *will bring a different perspective to the case and will contribute relevant factual variations that may assist the court* ... Considerations of fairness weigh in favor of the intervenors in light of their knowledge and strong interest in the subject matter of this action")

CONCLUSION

For all of the reasons stated, Buncombe County's motion to intervene in the action should be granted.

Respectfully submitted this the 3rd day of April, 2024.

/s/ Robert N Hunter, Jr.
Robert N Hunter, Jr.
(N.C. Bar No. 5679)
John Bloss
(N.C. Bar No. 23947)
Higgins Benjamin, PLLC
301 N Elm Street, Suite 800
Greensboro, NC 27401
336-273-1600
Fax: 336-274-4650
rnhunterjr@greensborolaw.com
jbloss@greensborolaw.com

/s/ Mona L. Wallace
Mona L. Wallace
(N.C. Bar No. 09021)
John S. Hughes
(N.C. Bar No. 22126)
Olivia Smith
(N.C. Bar No. 58375)
WALLACE & GRAHAM, P.A.
525 N. Main St.
Salisbury, NC 28144
704-633-5244 Telephone
mwallace@wallacegraham.com
jhughes@wallacegraham.com
osmith@wallacegraham.com

Attorneys for Intervenor-Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that in accordance with Business Court Rule 7.8, the brief above does not exceed 7,500 words.

/s/ Mona L. Wallace
Mona L. Wallace
(N.C. Bar No. 09021)
John S. Hughes
(N.C. Bar No. 22126)

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Business Court Rule 3.9, on the date of filing I served the foregoing document via the Court's electronic filing system, which automatically serves all counsel of record in this matter.

/s/ Mona L. Wallace
Mona L. Wallace
(N.C. Bar No. 09021)
John S. Hughes
(N.C. Bar No. 22126)