

IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
GREENVILLE DIVISION

IN RE:

CAH ACQUISITION COMPANY # 1, LLC,	)	Case Number 19-00730-5-JNC
d/b/a WASHINGTON COUNTY	)	
HOSPITAL, et al., <sup>1</sup>	)	Chapter 11
	)	
Debtors.	)	Administratively Consolidated Lead Case

**OBJECTION BY BRENT KING, CHAPTER 11 TRUSTEE OF CAH ACQUISITION COMPANY # 1 (d/b/a HILLSBORO COMMUNITY HOSPITAL), BANK OF HAYS, CITY OF HILLSBORO, KANSAS, PUBLIC BUILDING COMMISSION OF HILLSBORO, AND SECURITY BANK OF KANSAS CITY, KANSAS TO MOTION FOR ENTRY OF ORDER CHANGING VENUE OF AFFILIATED CASES TO THE EASTERN DISTRICT OF NORTH CAROLINA**

COME NOW Chapter 11 Trustee, Brent King (“**Hillsboro Trustee**” or “**Mr. King**”) of the Debtor, CAH Acquisition Company # 5, LLC d/b/a Hillsboro Community Hospital (“**Hillsboro Hospital**”), Bankr. Case No. 19-10359 (Bankr. D. Kan.) (“**Hillsboro Case**”), along with Bank of Hays, the City of Hillsboro, Kansas, the Public Building Commission of Hillsboro, and Security Bank of Kansas City, Kansas (collectively, the “**Hillsboro Secured Creditors**”), and for their joint Response to the Motion for Entry of Order Changing Venue of Affiliated Cases to the Eastern District of North Carolina (the “**Motion to Transfer**”), state the following:

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<sup>1</sup> The Debtors in this case, along with each Debtor’s case number are: (i) CAH Acquisition Company #1, LLC, Case No.19-00730-5-JNC; (ii) CAH Acquisition Company #2, LLC, Case No. 19-01230-5-JNC; (iii) CAH Acquisition Company #3, LLC, Case No. 19-01180-5-JNC; (iv) CAH Acquisition Company #4, Inc. Case No. 19-01228-5-JNC; (v) CAH Acquisition Company 6, LLC, Case No. 19-01300-5-JNC; (vi) CAH Acquisition Company 7, LLC, Case No. 19-01298-5-JNC; and (vii) CAH Acquisition Company #16, LLC, Case No. 19-01227-5-JNC

### Overview

Hillsboro Hospital serves rural Kansans as a critical access hospital. It is located in central Kansas, approximately two and a half hours from Kansas City and one hour from Wichita. Hillsboro Hospital provides life-saving services to residents of this rural area who have no other alternatives for readily accessible hospital care.

The Hillsboro Secured Creditors are local creditors and each has ties to Hillsboro Hospital that run far deeper than just a debtor/creditor relationship. Hillsboro Hospital is an essential part of this rural community and its wellbeing is of the utmost importance to the Hillsboro Secured Creditors, who also serve many of the same constituents as Hillsboro Hospital (e.g. the City of Hillsboro provides utility services to patients, staff, and local vendors of Hillsboro Hospital). The Hillsboro Hospital employs several citizens of the City of Hillsboro, which generates revenue for the benefit of the City of Hillsboro. In addition, Bank of Hays is headquartered in Hays, Kansas – only two and a half hours from the Hillsboro Hospital – and has deposit relationships with hospital employees and other citizens of the City of Hillsboro.

All of the relevant connections typically found in a bankruptcy case (e.g. secured lenders, landlords, employees, regulators, vendors, and contractors) are found only in Kansas. This case is not just personal to the objecting parties; it is personal to the State of Kansas and its communities.

In an unlawful attempt to circumvent the orders entered by the Bankruptcy Court for the District of Kansas and also the orders entered by the Marion County, Kansas District Court in the receivership that preceded the filing of the Hillsboro Hospital case, Jorge Perez (“**Perez**”), as the manager of Health Acquisition Company, LLC (“**HAC**”), seeks to transfer the Hillsboro Case to the Eastern District of North Carolina. Hillsboro Hospital is a Delaware limited liability company. Upon information and belief, Health Acquisition Company, LLC (“**HAC**”) holds an 80%

membership interest<sup>2</sup> and HMC/CAH Consolidated, Inc. (“**HMC**”) holds a 20% membership interest. Upon information and belief, Perez is one of the members of HAC. Upon information and belief, James and Phyllis Shaffer (“**Shaffers**”) are shareholders of HMC.

The Hillsboro Trustee and the Hillsboro Secured Creditors are united in their strong opposition to the Motion to Transfer as more fully set out below. Hillsboro Hospital is not connected to the North Carolina CAH Debtors referenced in the Motion to Transfer except to the extent each of those critical access hospitals appears to have also been pre-petition victims of fraud and malfeasance by Perez and the debtors' respective owners and managers.

The evidence will demonstrate that the transfer of the Hillsboro Case from Kansas would have an immediate and disastrous impact on the operation of the Hillsboro Hospital, its patients, staff, creditors, and the value and viability of the its assets. The request to transfer the Hillsboro Case away from the location of its property, its operations, and its creditors is not warranted by either the interest of justice or the convenience of the parties. The Motion to Transfer should be denied as to Hillsboro Hospital.

### **Procedural Background**

1. On April 2, 2019, this Court entered its Order Directing Joint Administration of Chapter 11 Cases (Dkt. 75), ordering that the seven CAH Acquisition Company Debtors (as more fully described therein; collectively, “**the North Carolina CAH Debtors**”) be jointly administered and designating CAH Acquisition Company # 1 d/b/a Washington County Hospital (the “**Washington County Hospital Case**”), as the lead case.

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<sup>2</sup> HAC's interest is the subject of a separate lawsuit filed against, *inter alia*, Perez and HAC in the United States District Court for the Western District of Missouri where the plaintiffs assert claims against Perez and HAC for fraud in what is described as a "hostile takeover" of the CAH entities, including but not limited to Hillsboro Hospital.

2. On April 4, 2019, counsel for HAC filed an Application to Employ Counsel for the Debtor in the Washington County Hospital Case (Dkt. 80) (the “**Retention Application**”) seeking to retain Spilman, Thomas & Battle, PLLC (“**Spilman**”) on behalf of the Debtor in this case. Although the Retention Application seeks authority to employ Spilman as counsel for the Debtor (presumably Washington County Hospital), the engagement letter attached as Exhibit A to the Retention Application identifies HAC as the “Client” and was executed by Perez, as manager of HAC. Thus, while the Retention Application and the Motion to Transfer try to create the appearance that Spilman is representing the Debtor’s interests in this case, the engagement letter makes clear that Spilman’s ultimate client is HAC, an entity controlled by Perez.<sup>3</sup> The attempt by Perez and HAC to retain counsel for all CAH Acquisition Hospitals, including Hillsboro, is in direct contravention to terms and conditions of the Order Granting Emergency Motion for Order Granting the Receiver Additional Powers Pursuant to Kan. Stat. Ann. § 60-1303 (the “**Second Receivership Order**”) entered in the Marion County, Kansas District Court, Case No. 2019-CV-0001, on March 5, 2019. A true and correct copy of the Second Receivership Order is attached hereto, incorporated herein, and identified as **Exhibit A**.

3. The Motion for Entry of Order Changing Venue of Affiliated Cases to the Eastern District of North Carolina (“**Motion to Transfer**”) (Dkt. 81) was filed on April 4, 2019. Although the Motion to Transfer was nominally filed on behalf of the Debtor, as noted above, the true party behind the Motion to Transfer is HAC, acting through and on behalf of Perez.

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<sup>3</sup> Because Spilman also represents the interests of HAC, the equity owner of the CAH Acquisition Hospitals, and based on the allegation in the Motion to Transfer that intercompany transfers exist which may create Chapter 5 causes of action, it does not appear that Spilman can represent the Debtor as a “disinterested person.”

4. A Motion to Shorten Notice Regarding Motion for Entry of Order Changing Venue of Affiliated Cases to the Eastern District of North Carolina (“**Motion to Shorten Notice**”) (Dkt. 82) was also filed on April 4, 2019. The Motion to Shorten Notice alleges, without support, that “[i]t will be in the best interests of the bankruptcy estates of the Debtors and Lauderdale, Hillsboro, and Fairfax for the Motion to be resolved as soon as possible, to prevent duplication of administration of the cases or uncertainty about the course of administration of the cases.” (Dkt. 82, p. 2, ¶ 4, Motion to Shorten Notice.)

5. The Motion to Shorten Notice was not served on the Hillsboro Trustee or any creditors in the Hillsboro Case.

6. On April 5, 2019, the Court entered the Order to Shorten Time granting the Motion to Shorten Notice. (Dkt.86.)

7. The Certificate of Service filed in connection with the Motion to Transfer states that the Order to Shorten Time was mailed on Friday, April 5, 2019, giving parties only until 5:00 PM on Tuesday, April 9, 2019, to file a written response. (Dkt.95.)

8. Attached hereto, incorporated herein and identified as **Exhibit B** is a true and correct copy the Hillsboro Hospital creditors’ matrix as of April 5, 2019. Despite the express requirement in Fed. R. Bankr. Proc. 1014(b) regarding service, the Certificate of Service indicates that neither the Motion to Transfer nor the Order to Shorten Time was served on all creditors of all the North Carolina CAH Debtors or to all of Hillsboro Hospital’s creditors. Additionally, the Motion to Transfer and the Order to Shorten Time was not served on Cohesive Healthcare Management + Consulting, LLC (“**Cohesive**”), the receiver appointed by the Marion County, Kansas District Court prior to the date Hillsboro Hospital filed its bankruptcy petition. Upon

information and belief, creditors and receivers in the Lauderdale and Fairfax cases were also not served with the Motion to Transfer.

9. Moreover, the creditors' matrix available in the Hillsboro Hospital case is incomplete because of the prepetition theft of Hillsboro Hospital's patient, billing, and employee records (the "**Hillsboro Hospital Records**") on or about January 20, 2019, by one or more members of the Perez ownership group, (including but not limited EmpowerHMS, LLC, iHealthcare, Inc., along with other Perez owned and/or controlled entities with connections to Hillsboro Hospital, collectively, the "**Perez Ownership Group**").

#### **Hillsboro Hospital Background**

10. The City of Hillsboro, Kansas is a small community of less than 3,000 residents, and the Hillsboro Hospital is its only local access to healthcare.

11. The Hillsboro Hospital, located in Hillsboro, Kansas, was newly constructed in 2015, utilizing the effort of the Bank of Hays, the City of Hillsboro, Kansas, the Public Building Commission of Hillsboro, and Security Bank of Kansas City, Kansas, who each made significant investments to maintain local access to healthcare in the Hillsboro, Kansas area.

12. The property on which the Hillsboro Hospital is located is owned by the Public Building Commission of Hillsboro, leased to the City of Hillsboro, and subleased to Hillsboro Hospital. The Public Building Commission of Hillsboro issued taxable revenue bonds in 2015, in the amount of \$1,325,000, to finance the construction of infrastructure, utilities, parking lot, and other improvements on the property for eventual use as a hospital. The trustee of the bonds is Security Bank of Kansas City, Kansas, another Kansas-headquartered creditor.

13. Hillsboro Hospital's sublease payments to the City of Hillsboro are in default. In the Sublease, Hillsboro Hospital agreed the Sublease was subject to Kansas law and submitted

itself to the exclusive jurisdiction of the Courts in Marion County, Kansas or the United States District Court for the District of Kansas, sitting in Wichita, Kansas.

14. To the extent funds generated from the leasing of the property by the Public Building Commission of Hillsboro are not available to re-pay the bond debt, such debt remains an obligation of the Public Building Commission of Hillsboro and alternative sources (e.g., tax revenues of the City of Hillsboro) would have to be identified to pay the bonds.

15. The City of Hillsboro, in addition to being the sublessor of the property to Hillsboro Hospital, is the provider of utilities to the Hillsboro Hospital, which during various times immediately prior to Hillsboro Hospital's bankruptcy filing in Kansas were on the verge of being shut-off due to non-payment.

16. The viability of the Hillsboro Hospital is of significant local concern from the standpoint of continued access to quality healthcare and local finances invested in the building of the Hillsboro Hospital.

17. The Bank of Hays, a banking creditor headquartered in Hays, Kansas, loaned approximately \$9,700,000, to finance the construction of the new Hillsboro Hospital, and holds a mortgage and security agreement on the assets.

18. The Bank of Hays, City of Hillsboro, Kansas, and Public Building Commission of Hillsboro are the largest secured creditors of Hillsboro Hospital, with obligations owing to them in an aggregate total in excess of \$11,000,000.

19. Representatives, employees, and elected officials of the Bank of Hays, City of Hillsboro, Kansas, and Public Building Commission of Hillsboro, all of which are potential witnesses in the Hillsboro Case, live, reside, and work in Kansas.

20. On January 9, 2019, Bank of Hays commenced a foreclosure (the “**Foreclosure**”) in the District Court of Marion County, Kansas (the “**Marion County, Kansas District Court**”) seeking to foreclose its mortgage and security interest in the Hillsboro Hospital's real and personal property and citing a payment default on Hillsboro Hospital’s secured loan to Bank of Hays.

21. On January 18, 2019, at the joint request of Bank of Hays, the City of Hillsboro, and the Public Building commission of Hillsboro, the Marion County, Kansas District Court appointed Cohesive as the Receiver (“**First Receiver Order**”).

22. Under the terms of the First Receiver Order, the Marion County, Kansas District Court granted Cohesive the right to manage and operate the Hillsboro Hospital.

23. On or about January 20, 2019, the Perez Ownership Group stole the Hillsboro Hospital Records and cut off all access to the Hillsboro Hospital Records in retaliation for the appointment of the Receiver and in direct contravention of the First Receiver Order.

24. On March 5, 2019, after an evidentiary hearing in which CAH Acquisition Company #5, LLC was represented by counsel and given an opportunity to be heard, the Marion County, Kansas District Court entered its Second Receiver Order granting Cohesive, as the Receiver, additional powers, including the exclusive authority and power to file a bankruptcy petition for the Hillsboro Hospital.

25. Thus, as of March 5, 2019, HAC and HMC no longer held a full membership interest in the Hillsboro Hospital; their interests became nothing more than economic interests in Hillsboro Hospital.

26. On March 13, 2019 (“**Hillsboro Filing Date**”), Debtor, by and through Cohesive under its authority as the state court-appointed receiver, commenced a voluntary case (the



“**Hillsboro Case**”) under Chapter 11 of the United States Code (“**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Kansas.

27. On March 22, 2019, the Honorable Robert E. Nugent, United States Bankruptcy Judge for the District of Kansas, entered an Order in the Hillsboro Hospital Bankruptcy Case directing the appointment of a Chapter 11 trustee.

28. On March 26, 2019, Judge Nugent entered the Order appointing Mr. King as the Chapter 11 Trustee of the Hillsboro Hospital Bankruptcy Estate.

29. Hillsboro Hospital operates a rural health care facility in central Kansas that holds the designation as a “critical access hospital” for purposes of Medicare and Medicaid reimbursement.

30. Hillsboro Hospital has eight (8) licensed hospital beds and, upon information and belief, has estimated annual revenue of \$8,800,000. Hillsboro Hospital currently has approximately 40 fulltime employees and approximately 30 part-time employees, including two doctors, two physician assistants, and two nurse practitioners.

31. The Second Receiver Order resulted from an evidentiary hearing to address numerous issues reported by Cohesive after it took over management and operation of Hillsboro Hospital. Those issues are summarized in the Amended Emergency Consent Motion of Bank of Hays for Appointment of a Trustee under 11 U.S.C. § 1104 filed on March 14, 2019 (Dkt. 14, Hillsboro Hospital, Bankr. Case No. 19-10359, Bankr. D. Kan.) and more fully described in the Initial Report of Receiver filed on January 25, 2019 by Cohesive in the Foreclosure (Dkt. 14-8, p. 14-2, Hillsboro Hospital, Bankr. Case No. 19-10359, Bankr. D. Kan.) and the Statement of Deficiencies and Plan of Correction issued by the Kansas Department of Health and Human Services (“**KDHHS**”) regarding deficiencies at the Hillsboro Hospital (Doc. 14-8, p. 23-59,

Hillsboro Hospital, Bankr. Case No. 19-10359, Bankr. D. Kan.). A true and correct copy of the Initial Report of Receiver and KDHHS Statement of Deficiencies are attached hereto, incorporated herein and identified as **Exhibit C and D**, respectively.

32. The Shaffers filed a lawsuit in the United States District Court for the Western District of Missouri on August 7, 2018, derivatively on behalf of HMC, alleging that Perez and his related entities used the Hillsboro Hospital (and nine other hospitals in Kansas, Missouri, and Oklahoma; collectively, the “**CAH Acquisition Hospitals**”) to perpetrate an illegal billing scheme. (See Order entered March 5, 2019, *James Shaffer, et al. v. Health Acquisition Company, LLC, et al*, Case No. 4:18-cv-00601-NKL, p. 1-2.) A copy of the March 5, 2019 Order is attached hereto, incorporated herein, and identified as **Exhibit E**.

33. Upon information and belief, and consistent with the allegations set out in the *Shaffer v. HAC* litigation, the Perez Ownership Group orchestrated and controlled the laboratory information system (“**LIS**”) of Hillsboro Hospital and other CAH Acquisition Hospitals to perpetrate a fraudulent scheme related to Medicare and Medicaid billing. Upon information and belief, although the Perez Ownership Group utilized at one time one physical location in North Kansas City to perpetuate the fraudulent scheme, Hillsboro Hospital Records are separate and distinct (though they may be housed on a single server with records from other critical assess hospitals controlled by the Perez Ownership Group). Upon information and belief, the North Kansas City offices have been closed and it is unclear where the Perez Ownership Group moved the servers and other equipment.

34. Cohesive’s Initial Report and the State of Kanans Report detailed significant problems impacting Hillsboro Hospital’s performance and its treatment of patients and staff as a result of the mismanagement by the Perez Ownership Group. (Ex. C & D).

**Arguments and Authorities**

**Hillsboro Hospital Is Not An Affiliate  
Under the Bankruptcy Code, and Rule 1014 Does Not Apply**

35. The Bankruptcy Code defines "affiliate" as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . . ." 11 U.S.C. § 101(2)(A). The Hillsboro Hospital is a Delaware limited liability company. In the Second Receiver Order, the court removed all control and voting authority from the previous managers and members of Hillsboro Hospital, and the court vested Cohesive with the sole authority to vote on and control the business of Hillsboro Hospital. (Ex. A). As a consequence, as of March 5, 2019, the members of Hillsboro Hospital – HAC and HMC – held nothing more than an economic interest in Hillsboro Hospital. Thus, no entity held any voting securities in Hillsboro Hospital as of March 5, 2019.

36. Whether a debtor is an affiliate of another entity is measured as of the petition date. Accordingly, this Court must determine whether Hillsboro Hospital was an affiliate of CAH Acquisition Company #1, LLC as of March 13, 2019 – the Hillsboro Filing Date. As of that date, Hillsboro Hospital was not an affiliate of Washington County Hospital because neither HAC nor HMC held any voting securities of Hillsboro Hospital at that time. Because Hillsboro Hospital is not an affiliate of the Washington County Hospital, there is no basis to transfer venue of the Hillsboro Case under Fed. R. Bankr. P. 1014(b). The Motion to Transfer must be denied accordingly.

**Federal Rule of Bankruptcy Procedure 1014(b)**

37. To the extent the Court determines Hillsboro Hospital is an affiliate of the Washington County Hospital (which it is not), the statute governing venue of bankruptcy cases is 28 U.S.C. § 1408. Under Subsection 1, a case may be commenced in the district court for the

district in which the “principal assets” of the entity had been located for the 180 days immediately preceding the filing. For Debtor CAH Acquisition Company, #5, LLC, its assets, the Hillsboro Hospital, are located in Kansas. No party can dispute that venue for the Hillsboro Case is proper in Kansas.

38. 28 U.S.C.A. § 1412 provides, “A district court may transfer a case or proceeding under title 11 to a district court for another district, *in the interest of justice or for the convenience of the parties.*” (emphasis added).

39. Similarly, Rule 1014(b) of the Federal Rules of Bankruptcy Procedure provides: “If petitions commencing cases under the Code are filed in different districts by or against ... a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice ... the court may determine, *in the interests of justice or for the convenience of the parties*, the district or districts in which the case or cases should proceed.” (emphasis added).

40. The moving party, in this case, the Perez Ownership Group, has the burden to establish by a preponderance of the evidence that transfer of the Hillsboro Case is in the interest of justice or for the convenience of the parties.

41. The “interest of justice” factors include whether: (1) transfer will promote economic and efficient administration of the bankruptcy estate; (2) interests of judicial economy will be served by a transfer; (3) parties will be able to receive a fair trial in each of the possible venues; (4) either forum has an interest in having the controversy decided in its borders; (5) enforceability of any judgment; and (6) original forum should be respected. *In re Dunmore Homes, Inc.*, 380 B.R. 663, 672 (Bankr. S.D.N.Y. 2008); *In re Harnischfeger Indus., Inc.*, 246 B.R. 421 (Bankr. N.D. Ala. 2000).

42. Courts interpreting Fed. R. Bankr. Proc. 1014(b) note the following factors courts

should consider in determining whether to change venue for the “convenience of parties” include: (1) location of parties; (2) ease of access to necessary proof; (3) convenience of witnesses and relative physical and financial condition; (4) availability of subpoena power for unwilling witnesses; and (5) expense of obtaining presence of unwilling witnesses. *In re Dunmore Homes, Inc.*, 380 B.R. at 672.

43. A court should base its analysis on the facts underlying each particular case. *See Enron Corp. v. Arora (In re Enron Corp.)*, 317 B.R. 629, 638 (Bankr. S.D.N.Y. 2004); *Gulf States Exploration Co. v. Manville Forest Prod. Corp. (In re Manville Forest Prod. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990) (review should be on individualized basis).

44. “[T]he power to transfer a case [or proceeding] should be exercised cautiously.” *In re Enron*, 317 B.R. at 638 (citing *In re Toxic Control Technologies, Inc.*, 84 B.R. 140, 143 (Bankr. N.D. Ind. 1988)). A debtor's selection of a proper venue is “entitled to great weight” in the consideration of change of venue motions. *In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002). As a result, “a heavy burden of proof rests on the moving party to demonstrate that the balance of convenience clearly weighs in his favor.” *Lionel Leisure, Inc. v. Trans Cleveland Warehouses, Inc. (In re Lionel Corp.)*, 24 B.R. 141, 142 (Bankr. S.D.N.Y. 1982).

45. The movant, here the Perez Ownership Group, has the burden of proof on each of the factors. *See In re Excelite Corp.*, 49 B.R. 923, 13 (Bankr. N.D. Ga. 1985); *In re Pinehaven Assocs.*, 132 B.R. 982 (Bankr. E.D.N.Y. 1991); *In re Weatherly Frozen Food Group, Inc.*, 133 B.R. 862 (Bankr. N.D. Ohio 1991); *In re Buffets Holdings, Inc.*, 397 B.R. 725 (Bankr. D. Del. 2008).

46. This burden must be carried by the preponderance of the evidence. *Matter of Peachtree Lane Associates, Ltd.*, 150 F.3d 788 (7th Cir. 1998); *In re Shorts Auto Parts of Warren*,

*Inc.*, 136 B.R. 30 (Bankr. N.D.N.Y. 1991); *In re Buffets Holdings, Inc.*, 397 B.R. 725 (Bankr. D. Del. 2008).

### **Interest of Justice**

47. Each of the “interest of justice” factors weighs in favor of denying the Motion to Transfer. The “interest of justice” factors include whether: (1) transfer will promote economic and efficient administration of the bankruptcy estate; (2) interests of judicial economy will be served by a transfer; (3) parties will be able to receive a fair trial in each of the possible venues; (4) either forum has an interest in having the controversy decided in its borders; (5) enforceability of any judgment; and (6) original forum should be respected. *In re Dunmore Homes, Inc.*, 380 B.R. at 672.

48. As to the first and second “interest of justice” factors, the requested transfer will not promote economic and efficient administration of the Hillsboro Hospital Bankruptcy Estate, but instead could result in the closing of the facility as the Bank of Hays has indicated it may not be willing to continue to offer post-petition financing or agree to the use of cash collateral if the case does not remain in Kansas and in close proximity to Bank of Hays.

49. In addition, transfer would not promote economic and efficient administration of the Hillsboro Hospital Bankruptcy Estate and serve juridical economy, because the Hillsboro Hospital has absolutely no connection to North Carolina. For that matter, with the exception of the Washington County Hospital, and on information and belief, none of the other North Carolina CAH Debtors has a connection to North Carolina. Rather, it appears the only reason the North Carolina CAH Debtors filed for protection before this Court was for the Perez Ownership Group to promote their own economies and efficiencies, and to take control of the Washington County Hospital Case that was initially filed as an involuntary case. There is no efficiency or economic

advantage to having the Hillsboro Case administered in North Carolina. The Hillsboro Case involves secured debts, held by Kansas creditors, in excess of \$11,000,000. Upon information and belief, it is the only CAH Acquisition Hospital that involves municipal bond financing. With a Chapter 11 Trustee already fully engaged in Kansas, the only party to be benefitted economically by a transfer of the Hillsboro Case would be the Perez Ownership Group, the very group that abandoned the Hillsboro Hospital and defied the orders of the Marion County, Kansas District Court when a receiver was appointed. On the other hand, a transfer would be more costly and less efficient for the Kansas-based creditors of the Hillsboro Hospital that have already expended significant time and money to attempt to keep the Hillsboro Hospital open, by adding costs and time for hiring additional attorneys in this venue, travel to this venue to participate in contested matters, and other expenses.

50. The requested transfer would also not serve the interests of judicial economy as to the operation of Hillsboro Hospital or its eventual sale. The Hillsboro Hospital has its own unique issues regarding its physical location, its staff, patients, creditors, bond financing, and assets. There are ongoing issues regarding critical trade vendors, executory contracts, equipment needs, supplies that are all distinct as to this particular facility. There is no factual support for any argument that any other court may handle these issues more efficiently than leaving the case with Judge Nugent to decide these issues. The court's time and attention to the needs of Hillsboro Hospital will not be more efficiently used by drawing it into the apparent crisis that exists as to the Washington County Hospital Case. It seems equally true that the Court's time and resources will be not be spared or conserved by trying to shoehorn the individual critical access hospitals into one jurisdiction.

51. The third “interest of justice” factor requires that a transfer must take into account the parties’ ability to receive a fair trial in each of the possible venues. The Hillsboro Trustee and Hillsboro Secured Creditors do not doubt a fair trial can be obtained in either of the possible venues. However, the same is true as it relates to the Perez Ownership Group. Nothing is preventing the Perez Ownership Group from obtaining a fair trial in the Hillsboro Case before Judge Nugent in Kansas. The Motion to Transfer is merely an attempt by the Perez Ownership Group to gain a tactical advantage and avoid the impact of prior adverse rulings. Hillsboro Hospital, while still under the control of the Perez Ownership Group, was represented by counsel in the Marion County, Kansas District Court, and because Hillsboro Hospital (while controlled by the Perez Ownership Group) failed to abide by the engagement requirements of that counsel, such counsel withdrew. Nevertheless, Hillsboro Hospital (while still controlled by the Perez Ownership Group) was represented by counsel in the Marion County, Kansas District Court during the evidentiary hearing in the Foreclosure that resulted in the Second Receiver Order, and was afforded all opportunity to present evidence and be heard on the matter. This goes to show the Perez Ownership Group, through its control of Hillsboro Hospital at the time, actively participated in the actions in Kansas, proving it was not inconvenient for the Perez Ownership Group to do so, and that it was afforded fair opportunities to be heard.

52. Under the fourth “interest of justice” factor, a court must evaluate whether either forum has an interest in having the controversy decided within its borders. This is perhaps the factor most heavily weighted in favor of not transferring the Hillsboro Case to this venue. The state of North Carolina and the Eastern District of North Carolina Federal Court have no interest in any aspect of Hillsboro Hospital, a special purpose entity that owns a single asset—a hospital in Kansas. The only purported relationship this venue possibly has to this case is that the Perez



Ownership Group chose to hire counsel in North Carolina to file other voluntary bankruptcies in this district and to take over the Washington County Hospital Case initially filed as an involuntary action.

53. Everything about Hillsboro Hospital gives the courts in Kansas a vested interest in administering the Hillsboro Case—the assets are located there, the employees are located there, suppliers and vendors are located there, the major secured creditors are located there, and the patients are located there. Further, the Perez Ownership Group cannot deny the strong interest Kansas has in keeping this case in its own courts, as it chose to do business in Kansas through Hillsboro Hospital, and therefore, availed itself of the jurisdiction of Kansas courts. While the CAH Acquisition Hospitals may have run their billing through the Perez Ownership Group, the evidence will demonstrate they were operated independently under the prior management. Since the appointment of Cohesive as the Receiver on January 18, 2019, the Hillsboro Hospital has operated entirely independent from any of the other CAH Acquisition Hospitals. The Hillsboro Hospital is a purely Kansas hospital and only Kansas courts should have an interest in administering the Hillsboro Case.

54. Likewise, the proximity (or lack thereof) of the Hillsboro Hospital to this venue, is strong evidence that the Hillsboro Hospital and its creditors will be severely handicapped in their ability to effectively and efficiently participate in the case, if not outright prevented from being involved in the case. The cost to hire local counsel or to make the trip from Kansas to North Carolina to take part in the case is cost prohibitive for many creditors and impossible for several potential witnesses, which include the former and current employees and executives of the Hillsboro Hospital, almost all of whom still reside in Kansas. Considering the very local issues that are involved in operating and selling Hillsboro Hospital, the Hillsboro Secured Creditors must

be involved. While the requested relief may promote the Perez Ownership Group's agenda to avoid the impact of prior receivership orders, it will harm the real parties in interest – the creditors, the staff, the patients, and the community. If a party with a key interest in the case is unable to participate because the case is transferred away from Kansas, that is unfair to the real parties in interest.

55. Under the fifth “interest of justice” factor, a court must evaluate and respect the original forum chosen. Here, the original forum for the Hillsboro Case is Kansas. The Second Receiver Order vested the exclusive authority in the receiver, Cohesive, in filing a bankruptcy for Hillsboro Hospital. The Perez Ownership Group, through its control of Hillsboro Hospital at the time, had an opportunity to object and be heard at the hearing that resulted in the Second Receiver Order. Cohesive, acting under the powers granted it by the Second Receiver Order, filed the Hillsboro Case in Kansas, as it was entitled to do. Now, the Perez Ownership Group is seeking to defy the Second Receiver Order and choose the forum for the Hillsboro Case. Had the Perez Ownership Group wanted Hillsboro Hospital to be in bankruptcy in North Carolina, or some venue other than Kansas, it could have done so prior to the Second Receiver Order, but it did not. Accordingly, the filing of the Hillsboro Case in Kansas must be respected as the original forum chosen, and deference must be given to that choice of forum.

56. This last factor relative to the interests of justice analysis raises a compelling point of equity in this matter. The only reason the Motion to Transfer is before this Court for determination is because of the first-to-file rule in Fed. R. Bankr. Proc. 1014(b). However, the only “affiliate” bankruptcy case (if there were any affiliates of Hillsboro Hospital, which there are not) to be filed before the Hillsboro Case was filed in Kansas was the *involuntary* case involving the Washington County Hospital. Importantly, Washington County Hospital, on its own or through

the Perez Ownership Group, *did not* initiate the Washington County Hospital Case. Now, because the filing of the Washington County Hospital Case gives the Perez Ownership Group the possibility of having the Hillsboro Case transferred to this Court, the Perez Ownership Group wants to use the filing of the involuntary case as a sword to avoid the impacts of prior receivership orders in Kansas. But for the Washington County Hospital's involuntary case being filed by Washington County Hospital's creditors, the Hillsboro Hospital case in Kansas would have been the first-to-file.

**Perez Ownership Group's Theft & Deprivation of Historical Patient, Billing, and Employee Records Preclude Perez's Counsel's Request for Relief.**

57. The Motion to Transfer alleges without support that it is in the best interest of the bankruptcy estate of the North Carolina CAH Debtors, Lauderdale, Hillsboro, and Fairfax for the Motion to Transfer to be resolved as soon as possible. The feigned concern by the Perez Ownership Group for the immediate needs of Hillsboro Hospital is in sharp and irreconcilable contrast to the fact that the Perez Ownership Group effectively abandoned the operations of the Hillsboro Hospital and then stole Hillsboro Hospital's Records on or about January 20, 2019, in retaliation for the appointment of Cohesive as the Receiver and in direct violation of the First Receiver Order. These callous actions left Hillsboro Hospital, its staff, and creditors in a horrific position and resulted in significant damages to Hillsboro Hospital.

58. Yet, the Perez Ownership Group now contends that their access to the Hillsboro Hospital Records, which were wrongfully withheld by them, is one reason to transfer venue from Kansas to North Carolina. The Perez Ownership Group should not be permitted to benefit from its violations of prior court orders.

59. At the hearing before this Court on March 28, 2019, Mr. Waldrep, the Trustee appointed in the North Carolina CAH Acquisition Bankruptcies, stated that iHealthcare, Inc. has

access to all of the current and historical patient, billing, and employee records of the Washington County Hospital. (Dkt. 68, Bankr. Case No. 19-00730, audio transcript of hearing on Motion to Approve Consent Order). Upon information and belief, iHealthcare, Inc., or another member of the Perez Ownership Group, has possession and control of the Hillsboro Hospital Records.

60. The Perez Ownership Group must be required to turn over the Hillsboro Hospital Records, which in large part amount to allowing Hillsboro Hospital's IT person to have access to the servers that house the information so that electronically stored records of Hillsboro Hospital may be copied, and by providing passwords, administrative rights, and access credentials.

61. Turnover of Hillsboro Hospital Records, which are distinct to its operations, is a time-sensitive issue. The use of common software by prior management does not weigh in favor of drawing these cases together. Hillsboro Hospital did not have access to other CAH Acquisition Hospitals' records; these electronic records exist as to each separate entity. The failure to turn over rests squarely on the party seeking this relief. In the interest of justice, Hillsboro Hospital should be given its Records without further delay or complication.

### **Convenience of Parties**

#### **Convenience of Parties Factors Do Not Support Transfer of the Hillsboro Hospital Bankruptcy Case to the Eastern District of North Carolina.**

62. Courts interpreting Fed. R. Bankr. Proc. 1014(b) note the following factors courts should consider in determining whether to change venue for the "convenience of parties" include: (1) location of parties; (2) ease of access to necessary proof; (3) convenience of witnesses and relative physical and financial condition; (4) availability of subpoena power for unwilling witnesses; and (5) expense of obtaining presence of unwilling witnesses. *In re Dunmore Homes, Inc.*, 380 B.R. at 672.

**i.) Proximity of Creditors**

63. The Hillsboro Secured Creditors, as well as the Hillsboro Creditor Matrix, illustrate that the Hillsboro Hospital creditors are primarily in Kansas. (*See* Exhibit B.) National vendors with unsecured claims are not the creditors at the heart of a venue question. Those national creditors may easily file their claims in the case, and they routinely appear in bankruptcy cases throughout the country. The creditors who are entitled to the greatest access to the Court in regard to the Hillsboro Case are the Hillsboro Secured Creditors, who are located in Kansas, and they unanimously insist that their cooperation with the Hillsboro Trustee and the Hillsboro Hospital will likely continue only if the Hillsboro Case remains in Kansas. *See In re B.L. McCandless LP*, 417 B.R. 80, 83 (Bankr. N.D. Ill. 2009). In *B.L. McCandless*, much as in this case, the only secured creditors were a local bank and two taxing authorities. This fact weighed heavily in the Court deciding the separate cases should be consolidated where the secured creditors were located. Specifically, the Court held: “In a Chapter 11 case, creditors may want to appear and be heard on any number of issues, including assumption or rejection of executory contracts, the use of cash collateral, the adequacy of a disclosure statement, and plan confirmation, to name but a few of the issues that can arise in a reorganization...Therefore, the location of creditors weighs in favor of transferring the case to the [District the secured creditors are located in.]”

64. The Hillsboro Secured Creditors, who are all in Kansas, would be extremely prejudiced by being forced to participate in a bankruptcy more than a thousand miles away, when dealing with extremely time-sensitive issues as have been presented in this case and the Hillsboro Case. Likewise, the Hillsboro Trustee has spent numerous days at the facility since his appointment, addressing local vendors and creditors, as well as addressing patient care and personnel issues. A trustee residing more than a thousand miles away would be hard pressed to

do little more than rely on on-site management. However, that would be woefully inadequate as a means of dealing with evolving creditor issues, particularly critical trade vendors, considering the unique nature of Hillsboro Hospital's operation issues as a result of the fraud and malfeasants perpetuated by the Perez Ownership Group.

65. Moreover, the primary regulators for the Hillsboro Hospital are the Kansas Department of Health and Environment, acting on its own behalf and on behalf of the Center for Medicare and Medicaid Services, the Kansas Department of Revenue, and the Kansas Attorney General's Office. All these regulators are located in Kansas.

66. Finally, the only way the Hillsboro Hospital will survive is if the Hillsboro Trustee is able to quickly identify a buyer who will operate the hospital as a going concern. Bank of Hays is not willing to commit to an extended time period of funding cash shortfalls while a buyer is located. Moving this case to North Carolina will add additional expenses to an already strained creditor body, will significantly reduce the chance of finding a buyer quickly, and will likely result in the closure of the Hillsboro Hospital, to the detriment of everyone but the Perez Ownership Group.

**ii.) Proximity of the debtor.**

67. Hillsboro Hospital is located in central Kansas, more than a thousand miles from this Court. The nature of Hillsboro Hospital's operation, a critical access hospital that has managed to stay open through the efforts and cooperation of its local creditors (primarily the Hillsboro Secured Creditors), is uniquely suited to and understood by the community it serves and by its Secured Creditors.

68. Likewise, the Debtor signed loan documents that consent to jurisdiction in Kansas. It has been often held that when a Debtor agreed to jurisdiction in particular state when dealing

with its largest creditor, it is disingenuous for the same debtor to claim that a bankruptcy in that state would be inconvenient *See e.g. In re B.L. McCandless LP*, 417 B.R. 80, 83 (Bankr. N.D. Ill. 2009).

69. Moreover, Hillsboro Hospital is not the type of debtor whose operations are simple to understand or manage without the involvement of a trustee who is able to be on-sight frequently and consistently. *See In re Allegro Law LLC*, 568 B.R. 832, 834 (Bankr. M.D. Ala. 2017) (“This Court and the Trustee have spent many hundreds of hours learning about [Debtor’s] business practices. It is a tremendous waste to call upon the Judge and the Trustee in the [another District] to learn all of this.”) That is particularly true because of the way Hillsboro Hospital was allowed to spiral downward as a result of the Perez Ownership Group’s fraud, criminal conduct, mismanagement, and malfeasance.

70. The allegation that the location of the offices of the Perez Ownership Group is relevant to the operation of Hillsboro Hospital is also nonsensical and irrational in light of the findings and orders in the Marion County, Kansas District Court and the Kansas Bankruptcy Court. The Perez Ownership Group has been stripped of all its corporate authority, including any management authority. The only ties that remain are the Perez Ownership Group’s theft of the Hillsboro Hospital Records, which is an issue for the Kansas court to decide. The Perez Ownership Group should not be allowed to circumvent its violation of prior court orders entered in Kansas by obtaining a transfer of the Hillsboro Case to this venue. The Hillsboro Hospital Records are separate and distinct from the records of any other CAH Acquisition Hospital, and there is no reason that the Perez Ownership Group cannot promptly provide those records to the Hillsboro Trustee as required by the Kansas court orders.

71. Hillsboro Hospital is a wounded and fragile enterprise in the business of caring for sick people. The patients and their families who rely on Hillsboro Hospital need and deserve to know the right decisions will be made timely and by a trustee who is well positioned to possess or obtain the requisite information necessary to make the best decisions. That just cannot happen if the trustee is more than a thousand miles away from this critical access hospital in rural Kansas.

72. Additionally, the horrific conditions created by the Perez Ownership Group at the Hillsboro Hospital have significantly exacerbated the typical challenges of a Chapter 11 operating health care facility, making the work of the Chapter 11 Trustee even more demanding and requiring exceedingly close supervision, almost instantaneous decision-making, and a thorough analysis of very facility-specific issues. Tasks of this nature cannot be performed from afar.

**iii.) Proximity of Witnesses.**

73. The key witnesses in the Hillsboro Hospital Bankruptcy Case are all located in Kansas except for the Perez Ownership Group. The current management, Cohesive, is on-site. Secured Creditors, employees, professionals who performed work for Hillsboro Hospital (i.e., accountants, appraisers, and inspectors) are all located in Kansas.

74. The request by the Perez Ownership Group to move the Hillsboro Hospital Bankruptcy Case to a venue more than a thousand miles from City of Hillsboro for *the owners' convenience* is compelling evidence that the Perez Ownership Group does not have the best interest of Hillsboro Hospital, its creditors, patients, staff, or the Hillsboro community even on their radar. Indeed, courts have sided in favor of secured creditors over the owners of the entities when deciding the appropriate venue. *See In re B.L. McCandless LP*, 417 B.R. 80, 83 (Bankr. N.D. Ill. 2009) (“As [the only secured creditor] points out, while transferring venue may require Debtor’s limited partners to travel, they are the parties who chose to do business in a state different from



the state in which they reside. They chose to form an entity that holds as essentially its only asset real property in Pennsylvania. Moreover, they decided to do business with a regional bank, one that has only thirteen offices, all of which are located in two counties in Pennsylvania.”)

75. The irony of the Perez Ownership Group’s arguments regarding witnesses in this case should also not be lost on the Court. In the *Shaffer* litigation against Perez in the Western District of Missouri, Perez’s counsel argued Perez could not provide responses to written discovery based on the assertion of his Fifth Amendment rights. (See Amended Responses to Plaintiff’s First Set of Requests for Production to Defendant Health Acquisition Company, LLC by Defendants Health Acquisition Company, LLC, Empower H.I.S., LLC, Paul L. Nusbaum, Steven F. White, and Jorge A. Perez, filed March 14, 2019 in the *Shaffer* Litigation, Case No. 18-cv-00601-NKL, W.D. MO, attached hereto, incorporated herein and identified as **Exhibit F**.)

76. Upon information and belief, criminal investigations continue concerning activities related to the management of Hillsboro Hospital prior to the appointment of Cohesive as Receiver for Hillsboro Hospital.

**iv. Location of the Assets.**

77. The physical assets of Hillsboro Hospital are significant and are located in Hillsboro, Kansas. The location of the physical assets is often the deciding factor in the appropriate venue. See e.g., *In re Eleven Oak Tower Ltd. P’ship*, 59 B.R. 626, 629 (Bankr. N.D. Ill. 1986) (“This Court finds and further concludes that the factor which overwhelmingly militates in favor of transferring this cause to Missouri is that Debtor’s principal asset, the Eleven Oak Property, is located in Kansas City, Missouri. The administration of Debtor’s case, which involves a high-rise office tower, can be most efficiently and expeditiously administered in the bankruptcy court closest to the situs of Debtor’s principal asset. Courts have observed that “[M]atters concerning real

property have always been of local concern and traditionally are decided at the situs of the property.’ *First Federal Savings & Loan v. Dew Mortgage Co., Inc. (In re Dew Mortgage Co., Inc.)*, 10 B.R. 242, 244 (Bankr. M.D. Fla. 1981). *See also In the Matter of Landmark Capitol Company*, 19 B.R. 342 (Bankr. S.D.N.Y. 1982).

78. The Perez Ownership Group’s attempt to minimize Hillsboro Hospital’s physical assets is another example of the cavalier and tone-deaf approach the owners and former managers take to the needs of the patients, staff, creditors, and the Hillsboro community.

79. The contracts with Center for Medicaid and Medicare, as well those with private insurers, have no relevance to the venue of the case. Moreover, to the extent they are relevant, those contracts are subject to the oversight of the Kansas Department of Health and Environment, further supporting a denial of the Motion to Transfer.

80. Likewise, the contracts and leases utilized by Hillsboro Hospital are not tied to any of the North Carolina CAH Acquisition Hospitals. The CAH Acquisition Debtors are essentially strangers, tied together only by the alleged fraudulent billing scheme perpetrated by the Perez Ownership Group.

**v.) Economic Administration of the Estate.**

81. The Perez Ownership Group’s “system” of operating the CAH Acquisition Hospitals was a disaster and, according to the *Shaffer* Litigation, criminally fraudulent since it was conducted for the purpose of conducting a fraudulent billing scheme. Even if the criminal investigation does not result in criminal charges, the suggestion that these independent, rural critical care access hospitals should be tied together makes no sense.

82. Bank of Hays has a significant administrative expense claim in the case as a result of advances necessary to keep Hillsboro Hospital open since the Hillsboro Hospital Filing Date. If

the Hillsboro Case is transferred to North Carolina, Bank of Hays would likely no longer authorize the use of cash collateral and would likely not be willing to extend post-petition financing. The result of a transfer of venue for Hillsboro Hospital would be immediate and irreparable damage to the assets of the estate, including but not limited to, its critical access provider agreement with the Center for Medicare (“CMS”) being put in jeopardy of termination.

83. Additionally, even if Hillsboro Hospital could retain its provider agreement with CMS, a sale involving the transfer of Hillsboro Hospital’s provider agreement with CMS would be doomed if it were tied to all the other CAH Acquisition Hospitals, many of whom have received termination notices from CMS.

84. Upon information and belief, there is only one contract of the Hillsboro Hospital that involved another CAH Acquisition Hospital (Fairfax), so the allegation that Hillsboro Hospital will or has faced much higher costs is false. The crippling costs and loss of revenue that Hillsboro Hospital has experienced relates to the theft of the Hillsboro Hospital Records and the mismanagement and malfeasance of the Perez Ownership Group.

85. The allegation that drawing the CAH Acquisition Hospitals back together would benefit the individual hospitals, the creditors in each of the cases, and the patients and staff at each facility is devoid of any factual support. Hillsboro Hospital’s experience, as reflected in Cohesive’s Initial Report of Receiver (*See Exhibit C*) and the KDHHS Statement of Deficiencies (*See Exhibit D*), is illustrative of the unique issues each facility faces.

86. The engagement letter attached to the Retention Application reveals that the true motivation behind the Motion to Transfer is to give the Perez Ownership Group an opportunity to reorganize its corporate structure and allow it to re-litigate and avoid prior adverse rulings, i.e., the Second Receiver Order. The Perez Ownership Group apparently hopes this Court will ignore the

fact that as to Hillsboro Hospital, its management rights have been terminated when the Marion County, Kansas District Court terminated the owners' right to exercise any corporate authority over Hillsboro Hospital in the Second Receiver Order. This fact likely distinguishes it from many of the other CAH Acquisition Hospitals and would effectively prevent the kind of resurrection the Perez Ownership Group has in mind.

87. The Hillsboro Trustee will testify that the economic administration of Hillsboro Hospital requires that the Bankruptcy Case must remain in Kansas, that it remain separate from any of the other CAH Acquisition Hospitals, and that Perez Ownership Group be prohibited from placing any further obstacles or barriers to the prompt administration of the Hillsboro Case in Kansas.

**Failure to Serve Necessary Parties**

**Perez's Counsel Failed to Serve Necessary Parties and the Notice Perez's Counsel Did Provide was Inadequate.**

88. Despite the clear dictate of Fed. R. Bankr. Proc. 1014(b) regarding service, the Motion to Transfer was not served on all creditors and the receivers, including but not limited to, Cohesive.

89. The service of the Motion to Transfer was, therefore, insufficient to satisfy the requirements of Rule 1014(b).

90. Although schedules of creditors have not been filed in the Hillsboro Case, that is the result, in part, of the theft of the Hillsboro Hospital Records by the Perez Ownership Group. However, upon information and belief, the Perez Ownership Group has access to the historical and current records of some if not all of the CAH Acquisition Debtors. There can be no excuse for not providing all creditors in all cases with timely and adequate notice of the requested relief.

**Movants May Lack Standing**

91. The Perez Ownership Group may lack standing to bring the Motion to Transfer. The Second Receiver Order entered by the Marion County, Kansas District Court stripped HAC and HMC of all corporate authority. (*See* Exhibit A attached hereto.) Upon information and belief, similar orders were entered against HAC and HMC in other CAH Acquisition Debtors' cases.

92. The Motion to Transfer was filed simultaneously with the Retention Application seeking to employ HAC's counsel as counsel for the Debtor (apparently only in the Washington County Hospital Case).

93. The engagement letter attached to the Retention Application reveals that the relief requested is actually being sought on behalf of HAC and the Perez Ownership Group.

94. The *Shaffer* litigation demonstrates the possibility that each of the CAH Acquisition Hospital entities may have claims and causes of action against the Perez Ownership Group.

95. In addition, pre and post-petition claims may be asserted against the Perez Ownership Group based upon their theft of, and failure to turn over, the Hillsboro Hospital Records.

96. For these reasons, the CAH Acquisition Hospital Debtors need separate counsel from any firm associated with, or taking direction from, Perez or any other member of the Perez Ownership Group. If HAC and the Perez Ownership Group want to obtain relief, then they must do so directly, and they should not be allowed to avoid any questions as to their standing by trying to act in the guise of a debtor entity.

**Conclusion**

97. Based on the foregoing, the Hillsboro Hospital Trustee, Brent King, along with the Hillsboro Secured Creditors who are absolutely essential to the continued operation of the Hillsboro Hospital, submit that the relief requested by the Motion to Transfer would result in immediate and irreparable harm to the Hillsboro Hospital Bankruptcy Estate, its creditors, the staff, the patients, and the community, and should be denied without further harm to Hillsboro Hospital and its creditors.

98. Should the Court find that the Perez Ownership Group has standing to pursue the requested relief, Mr. King and the Hillsboro Secured Creditors reserve the right to supplement and/or amend this Objection as appropriate prior to the time this matter is set for evidentiary hearing on the Motion to Transfer, and further reserve the right to file a memorandum in opposition of the Motion to Transfer upon completion of any discovery in advance of any further evidentiary hearing.

WHEREFORE, Brent King, Bank of Hays, the City of Hillsboro, Kansas, the Public Building Commission of Hillsboro, and Security Bank of Kansas City, Kansas respectfully request the Court enter an order denying the relief requested in the Motion to Transfer and that the Court grant such other and further relief as the Court deems just and equitable.

Dated: April 9, 2019.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, hereby certify that on April 9, 2019, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties entitled to receive electronic service including the following:

Marjorie K. Lynch Bankruptcy Administrator 434 Fayetteville Street, Suite 640 Raleigh, NC 27601	Rayford K. Adams, III Spilman Thomas & Battle, PLLC 110 Oakwood Dr., Suite 500 Winston-Salem, NC 27103 Email: tadams@spilmanlaw.com
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DATED: April 9, 2019

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**ELECTRONICALLY FILED**  
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CLERK OF THE MARION COUNTY DISTRICT COURT  
CASE NUMBER: 2019-CV-000001

**IN THE DISTRICT COURT OF MARION COUNTY, KANSAS  
EIGHTH JUDICIAL DISTRICT**

<b>BANK OF HAYS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 2019-CV-00001</b>
	)	
<b>CAH ACQUISITION COMPANY</b>	)	<b>Title Involving Real Estate</b>
<b>#5, LLC <i>et al.</i>,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER GRANTING EMERGENCY MOTION FOR ORDER GRANTING THE  
RECEIVER ADDITIONAL POWERS PURSUANT TO KAN. STAT. ANN. § 60-1303**

NOW ON THIS 5<sup>th</sup> DAY OF MARCH, 2019, this matter comes on for hearing (the "Hearing") before the Court on the Emergency Motion for Order Granting the Receiver Additional Powers Pursuant to Kan. Stat. Ann. § 60-1303 (the "Motion") filed by Plaintiff Bank of Hays (the "Bank"). The Court finds that proper notice of the Hearing was provided to all parties in this action and that all parties had an opportunity to be heard at the Hearing. The Court further finds that it has jurisdiction over the parties, the subject matter of the Motion and the authority to grant the relief requested in the Motion. After reviewing the Motion, the pleadings and exhibits filed in this case, and the evidence presented to the Court at the Hearing, the Court finds that good cause exists to grant the relief requested in the Motion.

Therefore, it is hereby ORDERED that Cohesive Healthcare Management + Consulting, LLC (the "Receiver"), the receiver appointed by this Court's Order Granting Application for Appointment of Receiver entered on January 18, 2019 (the "Receivership Order"), shall have, in addition to the rights, powers and authority granted to the Receiver under the terms and conditions of the Receivership Order, the following rights, powers and authority:

1. Immediately upon entry of this Order, the Receiver is hereby authorized to immediately

enter upon, receive, recover, and take complete, entire and exclusive possession and control of the following property: any right, title, and interest of CAH Acquisition Company #5, LLC (the "Borrower"), whether legal or equitable, tangible or intangible, in real and personal property, wherever located, regardless of the manner by which such rights were or are acquired including, without limitation (i) all assets, facilities, and offices of the Borrower together with all records, correspondence, and books of account; (ii) all real and personal property constituting the Hillsboro Hospital;<sup>1</sup> (iii) all tangible and intangible property used or usable in connection with the operations of the Borrower including, without limitation, equipment, furniture, insurance premium refunds, insurance proceeds, condemnation awards, utility deposits and deposits of every other kind related thereto, causes of action, drawings, plans, specifications, escrow agreements, and all cash on hand, bank accounts, credit card receipts, bank deposits, security deposits and other cash collateral; (iv) all cash, cash on hand, checks, drafts, cash equivalents, credit card receipts, demand deposit accounts, bank accounts, cash management or other financial accounts, bank or other deposits, and all other cash collateral (all whether now existing or later arising) to the extent related to the Hillsboro Hospital or business operations of the Borrower; current and past-due earnings, revenues, rents, issues and profits, accounts, and accounts receivable (all whether unpaid, accrued, due, or to become due) related to the Hillsboro Hospital or business operations of the Borrower, all claims to rent, issues, profits, income, cash collateral, and all other gross income derived with respect to the Hillsboro Hospital or business operations of the Borrower regardless of whether earned before or after entry of this Order; (v) any refund or reimbursement of taxes, whether for taxes paid by the Receiver or the Borrower, and whether pertaining to any tax period before or after the entry of this Order, and the right to institute or continue any contest, protest, or appeal of

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<sup>1</sup> All capitalized, undefined terms shall have the meanings ascribed to them in the Receivership Order.

any ad valorem tax or assessment, real estate tax, personal property tax, or other tax or assessment pertaining to the Hillsboro Hospital; (vi) all fixtures, trade fixtures, and tenant improvements of every kind or nature located in or upon or attached to, or used or intended to be used in connection with the operation of the Borrower and any buildings, structures or improvements (to the full extent of the Borrower's interest in such); (vii) all permits, licenses, other contracts, and other intangible property pertaining to the Borrower; (viii) all intellectual property of the Borrower including, without limitation, all patents, trade names and trademarks owned or used by the Borrower and any trade secrets; (ix) all books, records, accounts, and documents that in any way related to the Borrower or the Hillsboro Hospital; (x) all other property, estate, right, title and interest as described in loan documents by and among the Borrower and the Bank; and (xi) for the avoidance of doubt, and without limiting any of the foregoing, Hillsboro Hospital includes any right, title, and interest of the borrower, whether legal or equitable, tangible, or intangible, in personal property located in Hillsboro, Kansas (collectively, "Receivership Property").

2. Upon demand by the Receiver, any person, including the Borrower, shall turn over Receivership Property that is within the possession or control of that person unless otherwise provided for in this Order or ordered by the Court for good cause shown. The Receiver by motion may seek to compel turnover of Receivership Property pursuant to this Order against any person over which the Court first establishes jurisdiction, unless there exists a *bona fide* dispute with respect to the existence or nature of the Receiver's possessory interest in the Receivership Property, in which case turnover shall be sought by means of a legal action. In the absence of a *bona fide* dispute with respect to the Receiver's right to possession of the Receivership Property, the failure to relinquish possession and control to the Receiver shall be punishable as contempt of the Court. Should the Court, after Notice and Hearing, order the turnover of property to the Receiver (the

"Turnover Order"), the party against which such order is made shall have the right to deliver a bond executed by such party, as principal together with one or more sufficient sureties, providing that the principal and each such surety shall each be bound to the Receiver in double the amount of the value of the property to be turned over, should the property not be turned over to the Receiver when such order becomes final. Absent such bond, the property ordered to be turned over to the Receiver shall be turned over to the Receiver within ten (10) days after entry of the Turnover Order.

3. The Receiver shall have the power:

- a. To operate the business of the Borrower and manage the Receivership Property;
- b. To incur or pay expenses incidental to the Receiver's preservation and use of Receivership Property, and otherwise in the performance of the Receiver's duties, including the power to pay obligations incurred prior to the Receiver's appointment if and to the extent that payment is determined by the Receiver to be prudent in order to preserve the value of the Receivership Property and the funds used for this purpose are not subject to any lien or right of setoff in favor of a creditor who has not consented to the payment and whose interest is not otherwise adequately protected;
- c. To pay installments of principal and interest due on existing encumbrances on the Real Property, fixtures, machinery and equipment constituting part of the fixed assets of the Receivership Property;
- d. To do all the things which the Borrower may do in the exercise of ordinary business judgment or in the ordinary course of the operation and use of the Receivership Property including, without limitation, the purchase and sale of goods or services in the ordinary course of such business and the incurring and payment of expenses of the business or property in the ordinary

course;

e. The Receiver shall be vested with, and is authorized and empowered to exercise, all the corporate powers of Borrower, its officers, directors, shareholders, and general partners or persons who exercise similar powers and perform similar duties, including without limitation the sole authority and power to file a voluntary petition under Title 11 of the United States Code;

f. To assert any rights, claims, or choses in action of the Borrower, if and to the extent that the rights, claims or choses in action are themselves property within the scope of the appointment or relate to any Receivership Property, to maintain in the Receiver's name or in the name of the borrower any action to enforce any right, claim, or chose in action, and to intervene in actions in which the Borrower is a party for the purpose of exercising the powers under this subsection;

g. To borrow and incur secured debt in the ordinary course of preserving and liquidating Receivership Property, with liens attaching to sale proceeds of Receivership Property on a super-priority basis, without further order of this Court, provided (i) such secured debt may only be advanced by the Bank, in the Bank's sole discretion, and such amounts incurred may, among other things, consist of over advances by the Bank under the Loan Documents; and (ii) to the extent such secured debt is incurred, the Receiver shall provide an account on a monthly basis of amounts incurred;

h. To intervene in any action in which a Claim is asserted against the borrower and that impacts the Receivership Property, for the purpose of prosecuting or defending the claim and requesting the transfer of venue of the action to this Court. The Court, however, shall not transfer actions in which a State agency is a party and as to which a statute expressly vests jurisdiction or venue elsewhere;

i. To assert rights, claims or choses in action of the Receiver arising out of transactions in which the Receiver is a participant;

j. To seek and obtain advice or instruction from the Court with respect to any course of action with respect to which the Receiver is uncertain in the exercise of the Receiver's powers or the discharge of the Receiver's duties;

k. To obtain appraisals and environmental reports with respect to Receivership Property;

l. To compel by subpoena any person to submit to an examination under oath, in the manner of a deposition in accordance with Kan. Stat. Ann. §60-230, with respect to Receivership Property or any other matter that may affect the administration of the Receiverships;

m. To use, sell, or lease Receivership Property other than in the ordinary course of business pursuant to provisions of this Order or subsequent orders of this Court and to execute in the Borrower's stead such documents, conveyances, and borrower consents as may be required in connection therewith;

n. To assume, reject, or assign executory contracts and unexpired leases pursuant to the provisions of this Order or subsequent orders of this Court;

o. Subject to the prior written agreement and consent of the Bank, establish and adopt bidding and auction sale procedures for the sale of Receivership Property, as the Receiver deems advisable or necessary, without further order of this Court; and

p. Subject to the prior written agreement and consent of the Bank, designate and pay critical vendors, without further order of this Court.

4. Borrower and its agents, servants, employees, representatives, attorneys, officers, directors, managers, members, partners, or other individuals exercising or having the power to

exercise control over the affairs of the Borrower are hereby enjoined from exercising any and all the powers of Borrower, its officers, directors, shareholders, and general partners or persons who exercise similar powers and perform similar duties, including without limitation the authority and power to file a voluntary petition under Title 11 of the United States Code. For the avoidance of doubt, no person or entity other than the Receiver shall have the authority and power to file a voluntary petition for the Borrower under Title 11 of the United States Code.

5. Borrower and its agents, servants, employees, representatives, attorneys, officers, directors, managers, members, partners, or other individuals exercising or having the power to exercise control over the affairs of the Borrower are hereby enjoined from:

a. Collecting or attempting to collect Income and are hereby further directed to deliver to the Receiver all income that has or may come into its possession; and

b. Interfering in any manner whatsoever with the Receiver in the performance of his responsibilities and duties under this Order.

6. Borrower shall cooperate with all reasonable requests for information from the Receiver for purposes of assisting the Receiver in providing notice required by this Order. The failure of the borrower to cooperate with any reasonable request for information may be punished as a contempt of court.

7. All rights, powers and authority set forth herein are in addition to the rights, powers and authority granted to the Receiver in the Receivership Order, which remains in full force and effect.

IT IS SO ORDERED.

Dated: 3-5-19

  
District Court Judge



SUBMITTED BY:

STINSON LEONARD STREET LLP

By: /s/ Nicholas Zluticky  
Nicholas J. Zluticky KS # 23935  
Bryce E. Langford KS # 27548  
1201 Walnut Street, Suite 2900  
Kansas City, MO 64106  
Telephone: (816) 691-2360  
Facsimile: (816) 412-1235  
nicholas.zluticky@stinson.com  
bryce.langford@stinson.com

*Attorneys for Plaintiff*

Label Matrix for local noticing  
1083-6  
Case 19-10359  
District of Kansas  
Wichita  
Fri Apr 5 21:33:34 CDT 2019

Bank of Hays  
of 6  
1000 W. 27th Street  
Hays, KS 67601-4825

CAH Acquisition Company #5, LLC  
101 Industrial Road  
Hillsboro, KS 67063-9602

City of Hillsboro, Kansas  
118 East Grand  
P. O. Box 125  
Hillsboro, KS 67063-0125

Public Building Commission of Hillsboro, Kan  
118 East Grand  
P. O. Box 125  
Hillsboro, KS 67063-0125

Security Bank Of Kansas City  
Corporate Trust Department  
701 Minnesota Ave  
Suite 206  
Kansas City, KS 66101-2703

U.S. Attorney Office  
1200 Epic Center  
301 N. Main  
Wichita, KS 67202-4800

Wichita Headquarter Office  
167 US Courthouse  
401 North Market  
Wichita, KS 67202-2089

24/SEVO ANESTHESIA LLC  
4904 BALLENTINE ST  
Shawnee KS 66203-1688

APP Group International, LLC  
85 Broad St., 17th Floor  
New York NY 10004-2783

Accurad Medical Imaging Serv  
PO Box 1128  
Mannford OK 74044-1128

Affiliated Medical Services  
PO Box 12137  
Wichita KS 67277

Air Vent Cleaning  
9710 W. Bella Vista  
Wichita KS 67212-6763

(p)AIRGAS USA LLC  
110 WEST 7TH STREET  
SUITE 1300  
TULSA OK 74119-1106

Alarm Service LLC  
1416 Old Main St.  
Newton KS 67114-8754

Alco  
6851 High Grove Blvd  
Willowbrook IL 60527-7579

American National Red Cross  
PO Box 730040  
Dallas TX 75373-0040

Ameripride  
PO Box 1010  
Bemidji MN 56619-1010

Anesthesia Service Inc.  
1821 N. Classen Blvd, Ste 100  
Oklahoma City OK 73106-6098

App Group International LLC  
c/o Jason Gang Esq  
1245 Hewlett Plaza #478  
Hewlett NY 11557-4021

Applebus  
230 E. Main St.  
PO Box 155  
Cleveland MO 64734-0155

Ark Valley Ortho and Prosth  
9727 Shannon Woods, Suite 180  
Wichita KS 67226-4102

Athena Health  
PO Box 415615  
Watertown MA 02472

Automatic Door System, LLC  
5002 Hadley Ave.  
Overland Park KS 66203-1366

BKD LLP  
Two Warren Place  
6120 S. Yale Ave., Ste 1400  
Tulsa OK 74136-4223

Bank of Hays  
1000 W. 27th  
Hays KS 67601-4825

Beekley Medical  
1 Prestige Lane  
Bristol CT 06010-7468

Bio Medical Devices Intl  
17171 Daimler Ave.  
Irvine CA 92614-5508

Bioventus  
PO Box 732823  
Dallas TX 75373-2823

Boston Scientific  
PO Box 951653  
Dallas TX 75395-1653

CPSI  
PO Box 850309  
Mobile AL 36685-0309

Cardinal Health  
PO Box 730112  
Dallas TX 75373-0112

Cardiovascular Inst of America  
1700 Swift St., Suite 200  
Kansas City MO 64116-3834

Century Link  
PO Box 2961  
Phoenix AZ 85062-2961

Christina M. Tippy  
2805 Stonebridge Ct  
Norman OK 73071-1705

City of Hillsboro  
PO Box 125  
Hillsboro KS 67063-0125

Community Foot Clinic  
316 W. 4th St.  
McPherson KS 67460-2301

Comprehensive Anesthesia PA  
4021 N. 110th St.  
Kansas City KS 66109-4489

Comtrix Solutions  
22656 Philomont Ridge Ct.  
Ashburn VA 20148-6737

Cook Medical Inc.  
22988 Network Place  
Chicago IL 60673-1229

DELTA Healthcare Providers  
PO Box 202940  
Dallas TX 75320-2940

Dalke Construction  
1879 Jade  
Hillsboro KS 67063-8062

Department of Agriculture  
Office of the General Counsel  
PO Box 419205, Mail Stop 1401  
Kansas City MO 64141-6205

Department of Health & Human  
Office of the General Counsel  
601 East 12th Street, Rm N1800  
Kansas City MO 64106-2818

Dexmedia  
PO Box 9001401  
Louisville KY 40290-1401

Direct Advertising Consultants  
1100 Stafford, Suite 200  
Washington MO 63090-6491

Discount Cardiology  
3200 Corte Malpaso, Suite 101  
Camarillo CA 93012-8071

Donald Robert Bookless  
109 N. Lincoln St.  
Hillsboro KS 67063-1609

Drager Medical  
3122 Commerce Dr.  
Telford PA 18969-1052

Ecolab Pest Elim Div.  
26252 Network Place  
Chicago IL 60673-1262

Emergency Nurses Assoc  
915 Lee Street  
Des Plaines IL 60016-6545

Empower HMS, LLC  
1700 Swift Ave., Suite 200  
Kansas City MO 64116-3834

Epimed  
141 Sal Landrio Drive  
Crossroads Business Park  
Johnstown NY 12095-3835

FEI Wichita #216  
2222 W. Harry St.  
Wichita KS 67213-2970

First Financial Corporate  
Leasing, LLC  
711 Kimberly Avenue, Suite 160  
Placentia CA 92870-6344

Fusion Medical Staffing  
PO Box 4155  
Sarasota FL 34230-4155

Gerwick & Associates, LLC  
PO Box 1870  
Richmond KY 40476-1870

GlaxoSmithKline Pharmaceutical  
PO Box 740415  
Atlanta GA 30374-0415

HMC/CAH Consolidated, Inc.  
3130 Broadway  
Kansas City MO 64111-2593

HMC/CAH Note Acquisition, LLC  
3130 Broadway  
Kansas City MO 64111-2593

HMS Health LLC  
740 Spirit 40 Park Drive  
Chesterfield MO 63005-1122

Hanger Clinic of 6  
645 E. Crawford St.  
Salina KS 67401-5122

Hart Pharmacy & Home Medical  
6217 E. 13th St. N.  
Wichita KS 67208-2697

Health Acquisition Company LLC  
1700 Swift Ave., Suite 200  
Kansas City MO 64116-3834

Health Data Solutions  
708 Hunting Brook Ct  
Burleson TX 76028-6141

Heartland Pathology Laboratory  
9300 E. 29th St N Ste 208  
Wichita KS 67226-2183

Herc  
21900 E. 96th St  
Broken Arrow OK 74014-5903

Hillsboro Clinic  
704 S. Main  
Hillsboro KS 67063-1530

INA Alert  
PO Box 96  
Ellinwood KS 67526-0096

Ice - Masters  
2569 W. Pawnee  
Wichita KS 67213-1813

Idexx Distribution, Inc.  
One Idexx Drive  
Westbrook ME 04092-2040

Interactive Business Systems  
3782 Kinsley Place, Suite 125  
Winter Park FL 32792-6233

Interactive Business Systems  
5224 West State Road 46 # 10  
Sanford, FL 32771-9230

Internal Revenue Service  
Attn Insolvency/Advisory  
2850 NE Independence Ave  
Stop 5334 LSM  
Lee Summit MO 64064-2327

Jerry Pomeroy  
2311 S Kansas Avenue  
Newton KS 67114-9032

Jorge Alberto Perez  
8770 SW 72nd St., Apt. 412  
Miami FL 33173-3512

Kansas Department of Revenue  
Civil Tax Enforcement  
PO Box 12005  
Topeka KS 66601-3005

Kansas Dept of Health and Env  
Office of Legal Services  
1000 SW Jackson, Suite 560  
Topeka KS 66612-1371

Khaos Apparel  
601 SE 36th St, Suite 121  
Newton KS 67114-8769

Konica Minolta  
13847 Collection Center Drive  
Chicago IL 60693-0001

Lab Corp of America Holdings  
PO Box 12140  
Burlington NC 27216-2140

Landauer Inc  
PO Box 809051  
Chicago IL 60680-9051

Lani Astorga  
11914 Britton St.  
Wichita KS 67205-2047

Lori L Purkey  
Purkey & Associates, PLC  
5050 Cascade Road, SE  
Suite !  
Grand Rapids, MI 49546-3707

Marion County Treasurer  
200 South 3rd Ste 102  
Marion KS 66861-1656

Matheson Tri-Gas Inc.  
909 Lake Carolyn Pkwy  
Ste 1300  
Irving TX 75039-4821

McKesson Medical Surgical  
PO Box 634404  
Cincinnati OH 45263-4404

Medassure  
902 E. County Line Rd  
Suite 102  
Lakewood NJ 08701-2096

(p)MEDLINE INDUSTRIES INC  
ATTN ANNE KISHA  
ONE MEDLINE PL  
MUNDELEIN IL 60060-4486

Medwise  
556 S. Oliver  
Wichita KS 67218-2351

Missouri Network Alliance  
2005 W. Broadway  
Building A, Suite 215  
Columbia MO 65203-1300

Mobile Cardiac Care LLC  
c o Brian Weber  
2505 Tyler St  
Hutchinson KS 67502-3337

Myra Chantel Berndt aka Myra Chantel Long, M  
2624 Aberdeen Lane  
Salina, KS 67401-7160

Myra Chantel Long  
2532 Ridgehill Dr.  
Salina KS 67401-3699

Newton Surgical Group  
800 Medical Center Drive  
Suite 230  
Newton KS 67114-7808

Nicholas J. Zluticky  
Stinson Leonard Street LLP  
1201 Walnut, Suite 2900  
Kansas City MO 64106-2178

Office Depot  
6600 N Military Trail - S416R  
Boca Raton FL 33496-2434

Office of the US Attorney  
1200 Epic Center  
301 N. Main  
Wichita KS 67202-4800

Office of the US Attorney  
Robert J Dole US Courthouse  
500 State Ave, Ste 360  
Kansas City KS 66101-2400

Office of the US Attorney  
U.S. Courthouse, Suite 290  
Topeka KS 66683

P1 Group Inc.  
PO Box 1755  
Wichita KS 67201-1755

PC Connection Sales Corp  
730 Milford Rd  
Merrimack NH 03054-4612

Passport Health Comm  
PO Box 886133  
Los Angeles CA 90088-6133

Premier Specialty Network LLC  
3610 Buttonwood Dr #200  
Columbia MO 65201-3721

Quest Diagnostics  
PO Box 772976  
Chicago IL 60677-0276

Reboot, Inc.  
PO Box 80019  
#86038  
Indianapolis IN 46280-0019

Reusser Farms LLC  
12505 E. Four Oaks  
Wichita KS 67226-8370

Ruby K. Brower  
1815 Alabama  
Manhattan KS 66502-2304

Rural Community Hospitals of America  
1100 Main Street, Suite 200  
Kansas City, MO 64105-5118

Rural Emergency Medical Prov.  
915 Glenarm  
Pratt KS 67124-1306

SHI Headquarters  
PO Box 952121  
Dallas TX 75395-2121

Sarah A. Stokes  
216 S. Glendale St.  
Wichita KS 67218-1533

Shared Medical Services Inc  
209 Limestone Pass  
Cottage Grove WI 53527-8968

Shred It  
28883 Network Place  
Chicago IL 60673-1288

Sonovision, Inc.  
292 S. Maple Dunes Ct.  
Wichita KS 67235-7510

Stryker Instruments  
PO Box 70119  
Chicago IL 60673-0119

Stryker Instruments, A Division of Stryker C  
c/o Lori L Purkey  
Purkey & Associates, PLC  
5050 Cascade Road, SE, Ste. A  
Grand Rapids, MI 49546-3707

Sysco  
1915 Kansas City Rd  
Olathe KS 66061-5858

Tabor College  
400 S. Jefferson  
Hillsboro KS 67063-1758

Trojan Booster Club  
400 East Grand  
Hillsboro KS 67063-1641

Trojan Yearbook  
400 East Grand  
Hillsboro KS 67063-1641

Tyler Heffron  
2959 N Rock Rd #300  
Wichita KS 67226-5100

Typenex Medical LLC  
303 E. Wacker Dr  
Suite 1030  
Chicago IL 60601-5216

U.S. Bancorp Equipment Finance  
1310 Madrid Street  
Marshall MN 56258-4099

U.S. Trustee  
Office of the United States Trustee  
301 North Main Suite 1150  
Wichita, KS 67202-4811

Underground Vaults & Storage  
PO Box 1723  
Hutchinson KS 67504-1723

Via Christi Health  
720 Medical Center Drive  
Newton KS 67114-8778

Via Christi Regional Med Ctr  
Billing Department  
PO Box 2912  
Wichita KS 67201-2912

Vistalab Technologies  
2 Geneva Road  
Brewster NY 10509-2340

W. Thomas Gilman  
1617 N. Waterfront Pkwy  
Wichita KS 67206-6642

WPM Pathology Laboratory  
338 North Front  
PO Box 2027  
Salina KS 67402-2027

Yellow Pages United  
PO Box 50038  
Jacksonville Beach FL 32240-0038

ZipRecruiter, Inc.  
604 Arizona Avenue  
Santa Monica, CA 90401-1610

Ziprecruiter Inc  
401 Wilshire Blvd  
11th Floor  
Santa Monica CA 90401-1496

Brent King  
GlassRatner  
2300 Main St.  
Suite 900  
Kansas City, MO 64108-2408

Bruce E. Strauss  
Merrick, Baker, & Strauss, P.C.  
1044 Main Street  
Suite 500  
Kansas City, MO 64105-2124

Victor F Weber  
Merrick Baker and Strauss PC  
1044 Main Ste 500  
Kansas City, MO 64105-2124

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g) (4).

Airgas Mid South Inc.  
PO Box 676015  
Dallas TX 75267

Medline  
Dept. 1080, PO Box 121080  
Dallas TX 75312

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(u)Health USA, Inc.

(u)Janet Klenda  
Address Unknown

(u)Med One Capital Funding, LLC  
10712 S. 1300 East  
UT 84904

End of Label Matrix	
Mailable recipients	136
Bypassed recipients	3
Total	139

**DISTRICT COURT, MARION COUNTY, KANSAS  
CIVIL DEPARTMENT**

BANK OF HAYS )  
)  
Plaintiff, )  
)  
vs. )  
)  
CAH ACQUISITION COMPANY #5, LLC, )  
HMC/CAH CONSOLIDATED INC. )  
CITY OF HILLSBORO, KANSAS )  
PUBLIC BUILDING COMMISSION OF HILLSBORO )  
KANSAS, APP GROUP INTERNATIONAL, LLC )  
SECURITY BANK OF KANSAS CITY, )  
ATHENAHEATH, INC., US BANK, )  
KANSAS DEPARTMENT OF REVENUE )  
BOARD OF COUNTY COMMISSIONERS FOR )  
MARION COUNTY, MOBILE CARDIAC CARE, LLC, )  
et al. )  
Defendants. )

CASE NO. 2019-CV-00001

**TITLE INVOLVING  
REAL ESTATE**

***Pursuant to K.S.A. Chapter 60  
(REAL ESTATE FORECLOSURE ACTION)***

**INITIAL REPORT OF RECIEVER**

State of Kansas )  
) ss:  
County of MARION )

Cohesive Healthcare Management + Consulting, LLC (“Cohesive”), the duly-sworn receiver appointed in this action, provides the following initial report to the Court of the status of CAH Acquisition Company #5, LLC a/k/a the Hillsboro Hospital upon Cohesive taking control of the same on Friday, January 18, 2019 and states as follows:

Pursuant to the Order Granting Application for Appointment of Receiver, entered January 18, 2019 (“Receivership Order”), the appointed receiver --- Cohesive Healthcare Management and Consulting (“Cohesive”) --- is to provide to the Court, with copies to the Bank of Hays, City of Hillsboro and PBC, monthly financial statements on the 15<sup>th</sup> day of each month. After having



served in its role for the first few days, Cohesive feels it is important to inform the Court of important issues identified thus far. It should be noted that it is difficult to describe with detailed certainty the financial status and obligation of the Hospital because of incomplete records and vendors that are reluctant to separate this individual hospital's liabilities and obligations from those of other hospital's associated with HMC:

**Immediate Challenges.**

- The Hospital lab was closed in December 2018 due, in part, to inadequate supplies and loss of critical staff.
  - There is an urgent need for a quality laboratory director
  - There are critical supply issues due to old A/P
  - We are working on getting the lab reopened.
- The Hospital was placed on ambulance divert because of the lab closure. We are working on getting everything in place to end the diversion.
- Vendors and suppliers have stopped providing critical supplies and services because of outstanding accounts payable. These totaled over \$230,000.00 and do not include items like unpaid real property taxes and insurance premiums. We are in the process of negotiating with the various vendors to make payment arrangements consistent with the Court's Order.
- No access to financial records other than the reports in the system. For example, there is no access to the bank reconciliations to ensure the accuracy of the balance on the balance sheet. We are trying to work through this situation and have set up new bank accounts to process payments and expenses going forward.
- Invoices have not been entered into accounts payable since October 2018 so the payables on the balance sheet are not accurate.
- Athena was a necessary vendor for medical record, claims processing, and collections. They are in the process of terminating the relationship with the hospital because of nonpayment.

- Athena informs us that the bank account where receivables are deposited has possibly been closed. This means we are not certain where the receivables for services are going.
- Central National Bank has a garnishment from Medline tied to it because of the total amount due to from the Empower hospitals even though only a small portion is related to Hillsboro.
- Cost report issues lead to uncertainty as to whether the hospital has a payable or receivable with CMS. Filed documents indicate a \$437,516 payable from the 2017 cost report.
- Revenue recording appears to be delayed when charges have to be entered manually. Lab charges have to be manually reviewed because the charges don't always go over to the billing module correctly.
- The charge master hasn't been reviewed for a couple of years.
- An employee reported that even though garnishments are being withheld from her pay check, the vendor called and said they haven't been paid.
- Access has been cut off to transcription services. They are vital for healthcare purposes and for billing.
- Benefits

### **Human Resource Issues**

HMC has created numerous employee benefit issues. Following is a statement from Olivia Robinson, Human Resources Manager.

“To whom it may concern:

My name is Olivia Robinson and I am the Human Resources Manager at Hillsboro Community Hospital. The hospital currently employs 75 employees with 29 of them being insured.

- Medical insurance was terminated 1/1/2019 and there are approximately 10 outstanding claims.
- Dental insurance was terminated 1/1/2019 and there are approximately 46 outstanding claims.
- Vision insurance was terminated 12/1/2018 and there are no outstanding claims.
- Life insurance policy was never put in place with premiums being pulled out of employees' paychecks as of 1/18/2019. Life insurance policy should have taken effect on 1/1/2018.
- The 401k contributions have been taken out of employees' paychecks as of 1/18/2019. The last contribution date is 10/18/2018.
- One employee had 2 procedures done with dates of 11/6/2018 – 11/7/2018 and 12/26/2018 – 12/27/2018. This employee has not received a bill for these stays.

- One employee was hospitalized at 2 different hospitals on 1/4/2019 and then was hospitalized again at a different location on 1/6/2019. This employee has not received a bill for these stays.
- I was notified on 12/14/2018 that prescription insurance had also been terminated while an ongoing dispute happened between CVS Caremark and Empower HMS. Approximately 5 employees paid for these out of pocket and then were reimbursed with 2 not having being reimbursed yet.
- One employee is currently being garnished for unpaid medical bills that are the insurance's responsibility. This garnishment went into effect on 10/15/2018. I received a call from the attorney for the creditor that a check dated 12/14/2018 came back as insufficient funds. I received this call on 1/17/2019.
- One employee was threatened that he would be sent to collections and paid the outstanding amount to keep that from occurring.”
- Facility/Operational insurance.
  - Workers comp insurance cancelled Oct 2018 due to non-payment. We are in the process of getting this reinstated.
  - Professional Liability has installment due Jan 30<sup>th</sup>, 2019.
  - DNO and Employment practices liability cancelled in Sep/Oct 2018 due to non-payment
- Complaint survey.
  - Awaiting report
- Surgical services.
  - General surgeon – needs pathology/lab to resume any surgeries as well as supplies. In the process of getting the lab reopened to allow these services to resume.
  - Pain Management. Owe Stryker approx. \$16,000- supplier of RFA supplies- will not release without payment. We are working on this issue unknown currently what the resolution will be.
  - Ophthalmologist –Stopped due to no payment of necessary supplies and services.
  - Urology - services terminated due to non-payment
  - Cardiovascular services contract is not in compliance

**Interference/Lack of Cooperation by CAH Acquisition Company #5, LLC or their**

**agents:**

- HMC, who is believed to be the owner of CAH Acquisition Company #5, LLC and function as the manager of this Hospital, controls the server and shut off all email accounts of the Hospital and its employees on January 20, 2019 --- two days after entry of this Court's order for the receivership and restraining order.
- CPSI served as a platform for payroll management. The Hospital's access to CPSI was terminated Sunday, January 20, 2019. Access to CPSI will be important for proper and complete payroll processing and will be critical for supplying employee W-2's.

**Report from the Chief Information Officer:**

- Need IP address, admin and/or super admin credentials to the following:
  - Network
    - Firewall
    - Switches
    - Ubiquiti Networks
      - Need Admin Login Credentials
    - Unifi Cloud Controller
      - We need to find out who owns the controller license?
      - If Hillsboro owns cloud controller license, then we need Admin Login Credentials
    - Ubiquiti Access Points
    - On-site and Off-site servers (Domain Controllers, File Servers, etc.) that are owned by Hillsboro
    - All Hillsboro hospital user profiles that include documents, files, folders, etc. and network resources that contain documents, files, folders, etc that reside off-premise on a non-Hillsboro owned device will need to be transferred back to Hillsboro
      - All network drives (O:Drive, S:Drive, T:Drive, etc.)
        - O:Drive contains all patient dictation notes that is critical function of the hospital and clinic operations.
    - Phones

- Phone Systems/Services(VOIP)
    - Copy of network schematic if available
  - Local devices – Need local admin user account and password for all devices below
    - Desktops
    - Laptops
    - Chromebooks
    - Printers
    - Copiers
- Need list of all static IPs with assigned devices
- Domain name, hchks.com
  - Who owns the domain name?
    - HMCCAH is who is the registered company for domain name through GoDaddy
    - We will need to transfer the domain name back to the Hospital
  - If unable to transfer domain name due to ownership, plan is below
    - Purchase Hillsboro.hospital domain name at \$49.00 per year
    - Hillsborohospital.com is available for \$1200 per year, so my recommendation is to purchase the Hillsboro.hospital
- Email accounts/mailboxes (ie. user@hchks.com)
  - All email access was disabled and looks to be hosted offsite at former management data center.
  - If hosted at data center for prior management group, we will need to migrate all email accounts/mailboxes back to Hillsboro
  - If hosted at a 3<sup>rd</sup> party hosting site, we will need administrator login credentials and disable all previous management login credentials to 3<sup>rd</sup> party hosting site
  - If unable to migrate all existing email accounts and manage email accounts plan is below
    - Once new domain name, Hillsboro.hospital, has been purchased new email accounts will be created with new domain name and assigned to employees
- AthenaHealth
  - Termination notice is set for Feb 4, 2019 working with them regarding continued use of their services in the interim.
- CPSI Evident
  - Where is location of legacy data (billing of patient information, payroll, HIM, all medical records of)

- Need a plan to relocate legacy data back to hospital
- Staff use CPSI Evident Clock In/Clock Out
- Call Curtis Keller and Rachel Reid (KS Account Rep)
  - Update on the Clock In/Clock Out module
  - Contact of who was involved with migration and/or transition from CPSI to AthenaHealth
  - Location of Legacy Data
  - Is there a current agreement/contract with hospital for this module
- There are still patients on a payment plan that was setup through CPSI Evident. Currently the staff do not have access to any of the business and billing functionality within CPSI.
  
- iHealthCareSystems
  - ihealthcaresystems.com
  - Need agreement/contract
  - IT support has been terminated
  
- Konica Minolta Contract
  - Currently the hospital owns 3 or 4 copiers/printers/scanner MFP devices. The original agreement was a lease to own.
  - There is a new contract that was signed by Empower to lease 3 new copiers, but because of financial circumstances a new quote to purchase 3 new copiers was submitted but not signed. Craig will reach out to Konica Minolta account rep to get a copy of new lease agreement and/or purchase agreement.
  
- Radiology PACS System
  - Use cloud based smaartnet PACS solution
  - All images are uploaded manually to smaartnet because of modalities
  - RAMSoft is the Radiology Group who reads the images
  - There is an old PC where e-film, a program that burns images to CD, at end of life. That PC will need to be replaced asap.
  
- Inventory was done of all hospital owned servers, desktops/PCs, laptops, cell phones, servers and all network devices such as firewall, switches, access points, etc.
  
- Storage vault of paper records that include patient information and billing
  - Underground Vaults & Storage is vendor in Hutchinson, KS that stores all patient information and billing that is paper
  - Jennifer Miller will find out if agreement is between Hillsboro and vendor
  
- Personal devices used for Hospital Operations
  
- Microsoft Office licenses

- We need to find out who owns the licenses of Microsoft Office licenses that are installed on all desktops, PCs, and laptops.
- If licenses are not owned by Hillsboro, we will need to purchase new Microsoft Office licenses for Hillsboro

The above is true and accurate as to the status of the Hillsboro Hospital based upon Cohesive's review of the same after taking possession on January 18, 2019 through the date of this report.



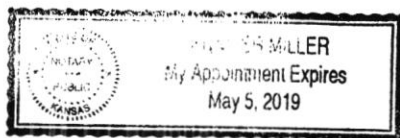
Margaret Grismer  
Authorized Representative of  
Cohesive Healthcare Management +  
Consulting, LLC

SUBSCRIBED AND SWORN TO before me this 15<sup>th</sup> day of January, 2019.



Notary Public

My Appointment expires



DEPARTMENT OF HEALTH AND HUMAN SERVICES  
CENTERS FOR MEDICARE & MEDICAID SERVICES

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STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION		(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:  <b>171357</b>	(X2) MULTIPLE CONSTRUCTION A. BUILDING _____  B. WING _____	(X3) DATE SURVEY COMPLETED  <b>C</b> <b>01/09/2019</b>
NAME OF PROVIDER OR SUPPLIER  <b>HILLSBORO COMMUNITY HOSPITAL</b>			STREET ADDRESS, CITY, STATE, ZIP CODE <b>101 INDUSTRIAL ROAD</b> <b>HILLSBORO, KS 67063</b>	
(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETION DATE
C 000	INITIAL COMMENTS	C 000		
C 200	<p>EMERGENCY SERVICES CFR(s): 485.618</p> <p>The CAH provides emergency care necessary to meet the needs of its inpatients and outpatients.</p> <p>This CONDITION is not met as evidenced by: Based on observation, interview and document review the Critical Access Hospital (CAH) failed to ensure they provided laboratory services by agreement or arrangement for medical management of emergency medical conditions. The CAH failed to follow their chest pain policy and procedure for three of three patients (Patients 2, 3, and 5) with cardiac complaints, and two of three patients (Patients 1 and 6) with suicidal thoughts. The CAH has a decreased ability to provide hemodynamic monitoring and a decreased ability to identify patient perfusion problems.</p> <p>The CAH's failure to ensure to provide emergency services as directed by their policies, procedures, and protocols for medical management of emergency medical conditions has the potential for loss of continuity of care and poor patient outcomes.</p>	C 200		

LABORATORY DIRECTOR'S OR PROVIDER/SUPPLIER REPRESENTATIVE'S SIGNATURE

TITLE

(X6) DATE

Any deficiency statement ending with an asterisk (\*) denotes a deficiency which the institution may be excused from correcting providing it is determined that other safeguards provide sufficient protection to the patients. (See instructions.) Except for nursing homes, the findings stated above are disclosable 90 days following the date of survey whether or not a plan of correction is provided. For nursing homes, the above findings and plans of correction are disclosable 14 days following the date these documents are made available to the facility. If deficiencies are cited, an approved plan of correction is requisite to continued program participation.



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C 200	Continued From page 1  Findings Include:  Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03, showed the CAH was organized for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.  Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year and Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.  Document review of the CAH Emergency Department Policy and Procedure titled, "Chest Pain" dated 10/2013 showed, staff are to draw lab for a Cardiac Profile which includes the following: Complete Blood Count with differential (CBC) blood test used to evaluate your overall health and detect a wide range of disorders, including anemia, infection and leukemia), comprehensive metabolic panel (CMP) is a blood test that gives doctors information about the body's fluid balance, levels of electrolytes like sodium and potassium, and how well the kidneys and liver are	C 200			

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C 200	<p>Continued From page 2</p> <p>working), Cardiac Enzymes (measure the levels of enzymes and proteins that are linked with injury of the heart muscle. These include the enzymes creatine phosphokinase (CPK) and creatine kinase (CK), and the proteins troponin I (TnI) and troponin T (TnT), A prothrombin time (PT) is a test used to help detect and diagnose a bleeding disorder or excessive clotting disorder; the international normalized ratio (INR) is calculated from a PT result and is used to monitor how well the blood-thinning medication (anticoagulant) warfarin (Coumadin®) is working to prevent blood clotting (PT/INR), and A partial thromboplastin time (PTT) test is a blood test that helps doctors assess your body's ability to form blood clots.</p> <p>Review of Patient 2's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 11:55 AM with the following complaints: dizziness, clammy, and hypertension. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the patient to be transferred to another hospital to complete the laboratory studies for further diagnosis and treatment.</p> <p>Review of Patient 3's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 6:30 AM with a complaint of chest pain. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete</p>	C 200			

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C 200	<p>Continued From page 3</p> <p>the laboratory studies for further diagnosis and treatment. The patient ultimately refused transfer stating she did not have insurance and left the CAH Against Medical Advice (AMA).</p> <p>Review of Patient 5's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 6:09 PM with a complaint of hypertension (high blood pressure) and tachycardia (a heartrate above 100 beats per minute for an adult). The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol.</p> <p>During an interview on 01/09/19 at 4:30 PM Staff K, Advanced Practice Registered Nurse (APRN) stated, "I felt Patients 2, 3, and 5 were stable for transfer based on their electrocardiogram (EKG) a test that is used to determine heart rate, heart rhythm and other information regarding the heart's condition), physical presentation, and vital signs. I felt that they needed the cardiac enzyme tests for additional care and treatment." Staff K, APRN, confirmed that she was not able to follow the chest pain protocols due to the CAH's lack of laboratory services.</p> <p>Document review of the CAH Emergency Department Policy and Procedure titled, "Attempted Suicide" dated 10/2013 showed staff are required to obtain the following laboratory tests in order to have psychiatric facilities accept them for transfer: Urine Drug Screen (UDS), Tylenol level, Aspirin level, and CBC (complete blood count).</p>	C 200			

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C 200	Continued From page 4  Review of Patient 1's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 8:30 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the patient to be transferred to another hospital to complete the mental health screening exam for admission and treatment.  Review of Patient 6's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 12:25 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment.  During an interview on 01/09/19 at 4:30 PM Staff K, Advanced Practice Registered Nurse (APRN) stated, "I was unable to complete a mental health exam due to our inability to perform laboratory tests as directed by our policies. Our mental health screeners will not provide a mental health exam without the labs." Staff K, APRN stated she felt the patients were stable for transport based on her physical exam and the SBQ-R suicide screen (a suicide risk assessment tool. A score of seven or above indicates a suicide risk), but confirmed she could not rule out underlying conditions without laboratory services.	C 200			

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C 200	<p>Continued From page 5</p> <p>Document review of the CAH Emergency Department Protocol titled, "Acute Pulmonary Edema" dated 10/2013 showed staff are to obtain the following laboratory studies: CBC with diff, CMP (comprehensive metabolic profile), Urinalysis, if female 12-65 years old obtain a Urine HCG (pregnancy test), D-dimer (used to help rule out the presence of an inappropriate blood clot), and cardiac enzymes.</p> <p>Document review of the CAH Emergency Department Policy and Procedure titled, "Hyperglycemic Crisis Protocol" dated 01/2018, showed staff are to obtain the following laboratory studies: Arterial Blood Gas (ABG) test measures oxygen and carbon dioxide levels in your blood. It also measures your body's acid-base (pH) level) or Venous Blood Gas (VBG) blood sample taken from either peripheral or central veins -can serve as an alternative to an ABG when evaluating patients with metabolic and respiratory disturbances), CBC, CMP, Basic Metabolic Panel (BMP) is a blood test that gives doctors information about the body's fluid balance, levels of electrolytes like sodium and potassium, and how well the kidneys are working), and Urinalysis. For continued treatment repeat the VBG or ABG and the BMP every two hours. The facility providers are unable to follow their Hyperglycemic Crisis Protocol without laboratory services.</p> <p>During an interview on 01/09/19 at 11:15 AM, Staff I, Physician, stated, "Without labs we cannot follow all the emergency departments policies and procedures for emergency care." Staff I stated that he would not admit patients to the CAH's inpatient unit for care if they would require monitoring with laboratory studies.</p>	C 200			

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C 241	<p>GOVERNING BODY OR RESPONSIBLE INDIVIDUAL CFR(s): 485.627(a)</p> <p>The CAH has a governing body or an individual that assumes full legal responsibility for determining, implementing, and monitoring policies governing the CAH's total operation and for ensuring that those policies are administered so as to provide quality health care in a safe environment.</p> <p>This STANDARD is not met as evidenced by: Based on observation, interview and document review the Critical Access Hospital (CAH) lacked evidence the Governing Body ensured the CAH followed the Medical Staff Bylaws requiring provision of stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients and failed to ensure they provided laboratory services by agreement or arrangement for medical management of emergency medical conditions. This failure has the potential to cause poor patient outcomes.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03 showed, the CAH was organized for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services</p>	C 241			

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C 241	<p>Continued From page 7</p> <p>provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year' and 'Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.</p> <p>During observation on 01/07/19, 01/08/19 and 01/09/19 Staff N, phlebotomist was available for outpatient blood draws and specimen collection. No other laboratory staff was available.</p> <p>During an interview on 01/07/19 at 9:30 AM Staff B, Chief Nursing Officer (CNO), stated that the hospital currently had "no lab services" in the building. The hospital has a phlebotomist and can draw blood and sends it by courier to an outside Lab in Lenexa, KS (~150 miles away). She stated that the staff was trained and able to do point of care testing to include; flu swabs, urine dipsticks, urine pregnancy, mono spot, and blood glucose with a glucometer.</p> <p>During an interview on 01/07/19 at 4:30 PM, Staff H, Corporate Laboratory Staff, stated, "The CAH has a contract for a laboratory director and pathology services, but they are currently refusing to provide services because they have not been paid for a month." Staff H stated that the Corporation's Governing Body has not offered a solution for the CAH's lack of laboratory services which began on 12/28/18.</p>	C 241			

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C 241	<p>Continued From page 8</p> <p>Document review of the CAH Emergency Department Policy and Procedure titled, "Chest Pain" dated 10/2013 showed, staff are to draw lab for a Cardiac Profile which includes the following: Complete Blood Count with differential (CBC) blood test used to evaluate your overall health and detect a wide range of disorders, including anemia, infection and leukemia), comprehensive metabolic panel (CMP) is a blood test that gives doctors information about the body's fluid balance, levels of electrolytes like sodium and potassium, and how well the kidneys and liver are working), Cardiac Enzymes (measure the levels of enzymes and proteins that are linked with injury of the heart muscle. These include the enzymes creatine phosphokinase (CPK) and creatine kinase (CK), and the proteins troponin I (TnI) and troponin T (TnT), A prothrombin time (PT) is a test used to help detect and diagnose a bleeding disorder or excessive clotting disorder; the international normalized ratio (INR) is calculated from a PT result and is used to monitor how well the blood-thinning medication (anticoagulant) warfarin (Coumadin®) is working to prevent blood clotting (PT/INR), and A partial thromboplastin time (PTT) test is a blood test that helps doctors assess your body's ability to form blood clots.</p> <p>During an interview on 01/09/19 at 4:30 PM Staff K, Advanced Practice Registered Nurse (APRN) stated, "I felt that they (patients) needed the cardiac enzyme tests for additional care and treatment." Staff K, APRN, confirmed that she was not able to follow the chest pain protocols due to the CAH's lack of laboratory services.</p> <p>Document review of the CAH Emergency Department Policy and Procedure titled,</p>	C 241			



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C 241	<p>Continued From page 9</p> <p>"Attempted Suicide" dated 10/2013 showed staff are required to obtain the following laboratory tests in order to have psychiatric facilities accept them for transfer: Urine Drug Screen (UDS), Tylenol level, Aspirin level, and CBC (complete blood count).</p> <p>During an interview on 01/09/19 at 4:30 PM Staff K, Advanced Practice Registered Nurse (APRN) stated, "I was unable to complete a mental health exam due to our inability to perform laboratory tests as directed by our policies. Our mental health screeners will not provide a mental health exam without the labs." Staff K, APRN stated she felt the patients were stable for transport based on her physical exam and the SBQ-R suicide screen (a suicide risk assessment tool. A score of seven or above indicates a suicide risk), but confirmed she could not rule out underlying conditions without laboratory services.</p> <p>Document review of the CAH Emergency Department Protocol titled, "Acute Pulmonary Edema" dated 10/2013 showed staff are to obtain the following laboratory studies: CBC with diff, CMP (comprehensive metabolic profile), Urinalysis, if female 12-65 years old obtain a Urine HCG (pregnancy test), D-dimer (used to help rule out the presence of an inappropriate blood clot), and cardiac enzymes.</p> <p>Document review of the CAH Emergency Department Policy and Procedure titled, "Hyperglycemic Crisis Protocol" dated 01/2018, showed staff are to obtain the following laboratory studies: Arterial Blood Gas (ABG) test measures oxygen and carbon dioxide levels in your blood. It also measures your body's acid-base (pH) level) or Venous Blood Gas (VBG) blood sample taken</p>	C 241			

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C 241	Continued From page 10 from either peripheral or central veins -can serve as an alternative to an ABG when evaluating patients with metabolic and respiratory disturbances), CBC, CMP, Basic Metabolic Panel (BMP) is a blood test that gives doctors information about the body's fluid balance, levels of electrolytes like sodium and potassium, and how well the kidneys are working), and Urinalysis. For continued treatment repeat the VBG or ABG and the BMP every two hours. The facility providers are unable to follow their Hyperglycemic Crisis Protocol without laboratory services.  During an interview on 01/09/19 at 11:15 AM, Staff I, Physician, stated, "Without labs we cannot follow all the emergency departments policies and procedures for emergency care." Staff I stated that he would not admit patients to the CAH's inpatient unit for care if they would require monitoring with laboratory studies.  The CAH's CEO and governing body failed to ensure the staff could provide emergency services as directed by their policies, procedures, and protocols for medical management of emergency medical conditions.	C 241			
C 243	DISCLOSURE CFR(s): 485.627(b)(2)  [The CAH discloses the name and addresses of--]  the person principally responsible for the operation of the CAH; and  This STANDARD is not met as evidenced by:	C 243			

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
CENTERS FOR MEDICARE & MEDICAID SERVICES

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION		(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:  <b>171357</b>	(X2) MULTIPLE CONSTRUCTION A. BUILDING _____  B. WING _____		(X3) DATE SURVEY COMPLETED  <b>C</b> <b>01/09/2019</b>
NAME OF PROVIDER OR SUPPLIER  <b>HILLSBORO COMMUNITY HOSPITAL</b>			STREET ADDRESS, CITY, STATE, ZIP CODE <b>101 INDUSTRIAL ROAD</b> <b>HILLSBORO, KS 67063</b>		
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C 243	Continued From page 11 Based on interview, the Critical Access Hospital (CAH) failed to notify the State Agency of the name of the person responsible for the operation of the CAH. This deficient practice has the potential to cause ineffective communications between the CAH and the State Agency.  Findings Include:  During an interview on 01/07/19 at 9:45 AM, Staff B, Chief Nursing Officer, stated that the CAH's current interim Chief Executive Officer (CEO) was Staff A who was also the CEO at a facility in Fairfax Oklahoma. Staff B indicated that the former CEO retired in November 2018. Staff B indicated she had directed staff to notify the State Agency but acknowledged it was not done as required.  Review of State Agency Database on 01/07/19 showed the name and contact information of the former CEO as still current.  The CAH failed to notify the State Agency the CEO retired in November and to provide the name of the current CEO.	C 243			
C 270	PROVISION OF SERVICES CFR(s): 485.635  Provision of Services This CONDITION is not met as evidenced by: Based on observation, interview, documents, medical records and policy review the Critical Access Hospital (CAH) failed to provide laboratory services by agreement or arrangement for scientific oversight and pathology services for all patients; failed to provide laboratory services in compliance with their policies for medical	C 270			

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PRINTED: 02/01/2019  
FORM APPROVED  
OMB NO. 0938-0391

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C 270	<p>Continued From page 12</p> <p>management of conditions requiring consultation or patient referral; failed to provide basic laboratory services essential to immediate diagnosis and treatment of patient to meet standards of care for all patients who require a Hemoglobin and Hematocrit (H&amp;H); and failed to hold the Chief Executive Officer (CEO )and governing body responsible for laboratory services by agreement.</p> <p>The CAH's failure to ensure to provide laboratory services by agreement, to provide laboratory services for medical management of conditions requiring consultation or referral to provide basic laboratory and to provide a responsible person for services by agreement has the potential for deficient leadership, inaccuracy and safety concerns, the loss of continuity of care and poor patient outcomes, decreases hemodynamic monitoring and fails to accurately identify patient perfusion problems.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03, showed, the CAH was organized for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other</p>	C 270			

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C 270	Continued From page 13 non-hospital patients, and non-HCH healthcare providers.' And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year and Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.  1. The CAH failed to provide laboratory services by agreement or arrangement for scientific oversight and pathology services for all patients. (Refer to C-0273).  2. The CAH failed to provide laboratory services in compliance with their policies for medical management of conditions requiring consultation or patient referral. (Refer to C-0275).  3. The CAH failed to provide basic laboratory services essential to immediate diagnosis and treatment of patients to meet standards of care for all patient who require a Hemoglobin and Hematocrit (H&H). (Refer to C-0282).  4. The CEO and the governing body failed to provide laboratory services by agreement or arrangement for scientific oversight and pathology services for all patients. (Refer to C-0292).	C 270			
C 273	PATIENT CARE POLICIES CFR(s): 485.635(a)(3)(i)  [The policies include the following:]  (i) A description of the services the CAH furnishes, including those furnished through	C 273			

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C 273	<p>Continued From page 14 agreement or arrangement.</p> <p>This STANDARD is not met as evidenced by:                      Based on interview, document and policy review the Critical Access Hospital (CAH) failed to provide laboratory services by agreement or arrangement for scientific oversight and pathology services for all patients. The CAH's failure to ensure to provide laboratory services by agreement has the potential for inaccuracy and safety concerns with laboratory testing and the handling and preparation of specimens.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) titled, "Medical Staff Bylaws," dated 04/14/03, showed the CAH was organized 'for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.'</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year and Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.</p> <p>During observation on 01/07/19, 01/08/19 and</p>	C 273			

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C 273	<p>Continued From page 15</p> <p>01/09/19 Staff N, phlebotomist was available for outpatient blood draws and specimen collection. No other laboratory staff was available.</p> <p>During an interview on 01/07/19 at 9:30 AM Staff B, Chief Nursing Officer (CNO), stated that the hospital currently had "no lab services" in the building. The hospital has a phlebotomist and is able to draw blood and sends it by courier to an outside Lab in Lenexa, KS (~150 miles away). She stated that the staff was trained and able to do point of care testing to include; flu swabs, urine dipsticks, urine pregnancy, mono spot, and blood glucose with a glucometer.</p> <p>During an interview on 01/07/19 at 2:00 PM Staff H, corporate laboratory representative, stated that he has worked with the governing body corporation for 14 years. He stated that he had a conversation with the executive team on December 28, 2018 when the laboratory manager "walked out". The hospital notified ambulance services and placed the hospital on laboratory diversion. Staff H stated that they are looking at other facilities within the corporation for laboratory staff and support; there is a terrible shortage of laboratory staff other places too. He stated that another option they're looking at is to "get the contracted lab staff back in here; they have two laboratory staff that are trained on our laboratory equipment." Staff H stated that the point of care testing the hospital staff could do now was fecal occult, urine dipstick, urine pregnancy, Influenza A and B swab, strep screening and blood glucose by glucometer. He stated that the hospital staff could not perform a Hemoglobin and Hematocrit (H&amp;H).</p> <p>During an interview on 01/07/19 at 4:30 PM Staff</p>	C 273			

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C 273	Continued From page 16 H, stated that "We have a contract with Heartland Pathology for Pathology services, lab director, and education. However, they have not been paid in a month and are currently refusing to take our calls until they receive payment."  During an interview on 01/07/19 at 1030 Staff N, phlebotomist stated that she was hired to draw blood and wasn't trained on any of the laboratory equipment. Staff N stated that she draws blood for the outpatients. She stated that she was to "draw, process and ship." She stated that the lab specimens are picked up by a carrier every day, Monday through Friday and taken to Lenexa. Results may be available by 8:00 or 10:00 PM. The carrier may pick up on a Saturday if he was called in.	C 273			
C 275	PATIENT CARE POLICIES CFR(s): 485.635(a)(3)(iii)  [The policies include the following:]  Guidelines for the medical management of health problems that include the conditions requiring medical consultation and/or patient referral, the maintenance of health care records, and procedures for the periodic review and evaluation of the services furnished by the CAH. This STANDARD is not met as evidenced by: Based on interview, medical record and policy review the Critical Access Hospital (CAH) failed to provide laboratory services in compliance with their policies for medical management of conditions requiring consultation or patient referral. These patient conditions include; chest pain, suicide ideation, hyperglycemia and pulmonary edema.	C 275			



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C 275	<p>Continued From page 17</p> <p>The CAH's failure to ensure to provide laboratory services for medical management of conditions which require consultation or referral has the potential for loss of continuity of care and poor patient outcomes.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03, showed the CAH was organized for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year' and 'Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.</p> <p>During observation on 01/07/19, 01/08/19 and 01/09/19 Staff N, phlebotomist was available for outpatient blood draws and specimen collection. No other laboratory staff was available.</p> <p>During an interview on 01/07/19 at 9:30 AM Staff B, Chief Nursing Officer (CNO), stated that the hospital currently had "no lab services" in the</p>	C 275			

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C 275	<p>Continued From page 18</p> <p>building. The hospital has a phlebotomist and is able to draw blood and sends it by courier to an outside Lab in Lenexa, KS (~150 miles away). She stated that the staff was trained and able to do point of care testing to include; flu swabs, urine dipsticks, urine pregnancy, mono spot, and blood glucose with a glucometer.</p> <p>During an interview on 01/07/19 at 2:00 PM Staff H, corporate laboratory representative, stated that he has worked with the governing body corporation for 14 years. He stated that he had a conversation with the executive team on December 28, 2018 when the laboratory manager "walked out". The hospital notified ambulance services and placed the hospital on laboratory diversion. Staff H stated that they are looking at other facilities within the corporation for laboratory staff and support; there is a terrible shortage of laboratory staff other places too. He stated that another option they're looking at is to "get the contracted lab staff back in here; they have two laboratory staff that are trained on our laboratory equipment." Staff H stated that the point of care the hospital staff could do was fecal occult, urine dipstick, urine pregnancy, Influenza A and B swab, strep screening and blood glucose by glucometer. He stated that the hospital staff could not perform a Hemoglobin and Hematocrit (H&amp;H).</p> <p>During an interview on 01/07/19 at 1030 Staff N, phlebotomist stated that she was hired to draw blood and wasn't trained on any of the laboratory equipment. Staff N stated that she draws blood for the outpatients. She stated that she was to "draw, process and ship." She stated that the lab specimens are picked up by a currier every day, Monday through Friday and taken to Lenexa. Results may be available by 8:00 or 10:00 PM.</p>	C 275			

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C 275	<p>Continued From page 19</p> <p>The courier may pick up on a Saturday if he was called in.</p> <p>Review of Patient 1's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 8:30 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the patient to be transferred to another hospital to complete the mental health screening exam for admission and treatment.</p> <p>Review of Patient 2's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 11:55 AM with the following complaints: dizziness, clammy, and hypertension. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the patient to be transferred to another hospital to complete the laboratory studies for further diagnosis and treatment.</p> <p>Review of Patient 3's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 6:30 AM with a complaint of chest pain. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment. The patient ultimately refused transfer</p>	C 275			

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C 275	Continued From page 20 stating she did not have insurance and left the CAH Against Medical Advice (AMA).  Review of Patient 5's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 6:09 PM with a complaint of hypertension (high blood pressure) and tachycardia (a heartrate above 100 beats per minute for an adult). The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment.  Review of Patient 6's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 12:25 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment.	C 275			
C 282	PATIENT SERVICES CFR(s): 485.635(b)(2)  The CAH provides basic laboratory services essential to the immediate diagnosis and treatment of the patient that meet the standards imposed under section 353 of the Public Health Service Act (42 U.S.C. 236a). (See the laboratory requirements specified in part 493 of this	C 282			

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C 282	<p>Continued From page 21 chapter.) The services provided include the following:</p> <ul style="list-style-type: none"> <li>(i) Chemical examination of urine by stick or tablet method or both (including urine ketones).</li> <li>(ii) Hemoglobin or hematocrit.</li> <li>(iii) Blood glucose.</li> <li>(iv) Examination of stool specimens for occult blood.</li> <li>(v) Pregnancy tests.</li> <li>(vi) Primary culturing for transmittal to a certified laboratory.</li> </ul> <p>This STANDARD is not met as evidenced by: Based on observation and interview the Critical Access Hospital (CAH) failed to provide basic laboratory services essential to immediate diagnosis and treatment of patients to meet standards of care for all patient who require a Hemoglobin and Hematocrit (H&amp;H). The CAH's failure to ensure the basic laboratory services include an H&amp;H has the potential for: decreased hemodynamic monitoring; failure to accurately identify a decrease in patient perfusion; and inability to correctly monitor the patient's ability for oxygen carrying capacity of their blood.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03 showed, the CAH was organized 'for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the</p>	C 282			

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C 282	<p>Continued From page 22 surrounding area.'</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year and Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.</p> <p>During observation on 01/07/19, 01/08/19 and 01/09/19 Staff N, phlebotomist was available for outpatient blood draws and specimen collection. No other laboratory staff was available.</p> <p>During an interview on 01/07/19 at 9:30 AM Staff B, Chief Nursing Officer (CNO), stated that the hospital currently had "no lab services" in the building. The hospital has a phlebotomist and is able to draw blood and sends it by courier to an outside Lab in Lenexa, KS (~150 miles away). She stated that the staff was trained and able to do point of care testing to include; flu swabs, urine dipsticks, urine pregnancy, mono spot, and blood glucose with a glucometer.</p> <p>During an interview on 01/07/19 at 2:00 PM, Staff H, corporate laboratory representative, stated that he has worked with the governing body corporation for 14 years. He stated that he had a conversation with the executive team on December 28, 2018 when the laboratory manager</p>	C 282			

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STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION		(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:  <b>171357</b>	(X2) MULTIPLE CONSTRUCTION A. BUILDING _____  B. WING _____		(X3) DATE SURVEY COMPLETED  <b>C</b>  <b>01/09/2019</b>
NAME OF PROVIDER OR SUPPLIER  <b>HILLSBORO COMMUNITY HOSPITAL</b>			STREET ADDRESS, CITY, STATE, ZIP CODE <b>101 INDUSTRIAL ROAD</b> <b>HILLSBORO, KS 67063</b>		
(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETION DATE	
C 282	<p>Continued From page 23</p> <p>"walked out". The hospital notified ambulance services and placed the hospital on laboratory diversion. Staff H stated that they are looking at other facilities within the corporation for laboratory staff and support; there is a terrible shortage of laboratory staff other places too. He stated that another option they're looking at is to "get the contracted lab staff back in here; they have two laboratory staff that are trained on our laboratory equipment." Staff H stated that the point of care the hospital staff could do was fecal occult, urine dipstick, urine pregnancy, Influenza A and B swab, strep screening and blood glucose by glucometer. He stated that the hospital staff could not perform a Hemoglobin and Hematocrit (H&amp;H).</p> <p>During an interview on 01/07/19 at 1030 Staff N, phlebotomist stated that she was hired to draw blood and wasn't trained on any of the laboratory equipment. Staff N stated that she draws blood for the outpatients. She stated that she was to "draw, process and ship." She stated that the lab specimens are picked up by a courier every day, Monday through Friday and taken to Lenexa. Results may be available by 8:00 or 10:00 PM. The courier may pick up on a Saturday if he was called in.</p> <p>Review of Patient 1's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 8:30 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the patient to be transferred to another hospital to complete the mental health screening exam for admission and treatment.</p>	C 282			

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C 282	Continued From page 24  Review of Patient 2's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 11:55 AM with the following complaints: dizziness, clammy, and hypertension. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the patient to be transferred to another hospital to complete the laboratory studies for further diagnosis and treatment.  Review of Patient 3's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 01/03/19 at 6:30 AM with a complaint of chest pain. The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment. The patient ultimately refused transfer stating she did not have insurance and left the CAH Against Medical Advice (AMA).  Review of Patient 5's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 6:09 PM with a complaint of hypertension (high blood pressure) and tachycardia (a heartrate above 100 beats per minute for an adult). The provider failed to perform a cardiac profile laboratory study as required by the CAH's chest pain protocol. The inability to perform these studies caused the provider to arrange a transfer to another hospital	C 282			



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C 282	Continued From page 25 to complete the laboratory studies for further diagnosis and treatment.	C 282			
C 292	<p>Review of Patient 6's discharged medical record on 01/08/19 at 10:00 AM, showed they were admitted on 12/30/18 at 12:25 PM with a complaint of Suicidal Ideation (thoughts of suicide). The provider failed to perform laboratory studies required by the CAH's policy and procedure for Suicidal patients. The inability to perform these studies caused the provider to arrange a transfer to another hospital to complete the laboratory studies for further diagnosis and treatment.</p> <p>SERVICES PROVIDED THRU AGREEMENT/ARRANGEMENT CFR(s): 485.635(c)(4)</p> <p>The person principally responsible for the operation of the CAH under §485.627(b)(2) of this chapter is also responsible for the following:</p> <p>(i) Services furnished in the CAH whether or not they are furnished under arrangements or agreements.</p> <p>(ii) Ensuring that a contractor of services (including one for shared services and joint ventures) furnishes services that enable the CAH to comply with all applicable conditions of participation and standards for the contracted services.</p> <p>This STANDARD is not met as evidenced by: Based on observation, interview and document review the Chief Executive Officer (CEO) and the governing body failed to provide laboratory</p>	C 292			

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C 292	<p>Continued From page 26</p> <p>services by agreement or arrangement for scientific oversight and pathology services for all patients. The CEO and governing body's failure to ensure to provide laboratory services by agreement or arrangement for oversight and pathology services has the potential for inaccuracy and safety concerns with laboratory testing and the handling and preparation of specimens.</p> <p>Findings Include:</p> <p>Document review of the Critical Access Hospital (CAH) "Medical Staff Bylaws," dated 04/14/03, showed the CAH was organized 'for the purpose of providing health care and medical services for inpatients and outpatients and promoting the well-being of the citizens of the town and the surrounding area.'</p> <p>Document review of the CAH policy titled, "Laboratory; Scope of Services," dated 07/2014, showed, The Department of Laboratory Services provides stat and routine clinical laboratory and anatomic pathology services for hospital inpatients and outpatients, clinic and other non-hospital patients, and non-HCH healthcare providers. And also showed, Hours of Operation; Inpatient, Swing Bed, observation, and ER Patients: 24 hours per day, 7 days per week, and 365 days per year and Scope of Services provided; clinical laboratory services, clinical laboratory reference lab services, and anatomical pathology services.</p> <p>During observation on 01/07/19, 01/08/19 and 01/09/19 Staff N, phlebotomist was available for outpatient blood draws and specimen collection. No other laboratory staff was available.</p>	C 292			

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C 292	Continued From page 27  During an interview on 01/07/19 at 9:30 AM Staff B, Chief Nursing Officer (CNO), stated that the hospital currently had "no lab services" in the building. The hospital has a phlebotomist and is able to draw blood and sends it by currier to an outside Lab in Lenexa, KS (~150 miles away). She stated that the staff was trained and able to do point of care testing to include; flu swabs, urine dipsticks, urine pregnancy, mono spot, and blood glucose with a glucometer.  During an interview on 01/07/19 at 2:00 PM Staff H, corporate laboratory representative, stated that he has worked with the governing body corporation for 14 years. He stated that he had a conversation with the executive team on December 28, 2018 when the laboratory manager "walked out". The hospital notified ambulance services and placed the hospital on laboratory diversion. Staff H stated that they are looking at other facilities within the corporation for laboratory staff and support; there is a terrible shortage of laboratory staff other places too. He stated that another option they're looking at is to "get the contracted lab staff back in here; they have two laboratory staff that are trained on our laboratory equipment." Staff H stated that the point of care the hospital staff could do was fecal occult, urine dipstick, urine pregnancy, Influenza A and B swab, strep screening and blood glucose by glucometer. He stated that the hospital staff could not perform a Hemoglobin and Hematocrit (H&H).  During an interview on 01/07/19 at 4:30 PM Staff H, stated, "We have a contract with Heartland Pathology for Pathology services, lab director, and education. However, they have not been paid in a month and are currently refusing to take our	C 292			

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C 292	Continued From page 28 calls until they receive payment."  During an interview on 01/07/19 at 1030 Staff N, phlebotomist stated that she was hired to draw blood and wasn't trained on any of the laboratory equipment. Staff N stated that she draws blood for the outpatients. She stated that she was to "draw, process and ship." She stated that the lab specimens are picked up by a currier every day, Monday through Friday and taken to Lenexa. Results may be available by 8:00 or 10:00 PM. The currier may pick up on a Saturday if he was called in.	C 292		

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

JAMES SHAFFER, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:18-cv-00601-NKL
	)	
HEALTH ACQUISITION COMPANY,	)	
LLC, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**ORDER**

Before the Court are defendants Health Acquisition Company, LLC (“HAC”), Empower H.I.S., LLC, Paul L. Nusbaum, Steven F. White, and Jorge A. Perez’s motion to dismiss, Doc. 29, and plaintiffs James and Phyllis Shaffer’s motion for leave to amend the First-Amended Complaint, Doc. 36. For the following reasons, Defendants’ motion to dismiss is granted in part and denied in part. The Court defers ruling on Plaintiffs’ motion to amend.

**I. Background**

Plaintiff shareholders James and Phyllis Shaffer bring this suit derivatively on behalf of HMC/CAH Consolidated, Inc. (“HMC”), a Delaware corporation. Prior to filing suit, Plaintiffs made demand on HMC, and the Board of Directors declined to pursue claims against the Defendants. Doc. 21 (First-Amended Complaint), ¶ 4; Doc. 21-1 (April 26, 2018 Response to Demand).

Until March 29, 2017, HMC was the owner of 100% of the member and shareholder interests in ten acute care rural community hospitals, collectively referred to by the parties as the “HMC Hospitals.” Plaintiffs allege that Defendants formed a conspiracy to deprive HMC of its

majority interest in the HMC Hospitals and to use the HMC Hospitals in an illegal billing scheme, thereby decreasing the value of HMC's ownership interest in the HMC Hospitals. Plaintiffs allege that defendants Nusbaum and White, individually and on behalf of HAC, as well as defendant Perez, individually and on behalf of Empower H.I.S., made certain false representations and intentionally concealed or suppressed material facts during a March 2017 presentation to the HMC Board, which led to HMC's execution of a Conversion Agreement, by which HAC assumed an 80% controlling interest in the HMC Hospitals. Plaintiffs also allege breaches of fiduciary duties of care and loyalty by defendants Nusbaum, White, Perez, and HAC, conversion of HMC bank accounts by all Defendants, and breach of contract by defendant HAC. Lastly, Plaintiffs seek accounting from each of the HMC Hospitals.

## **II. Motion to Dismiss**

Defendants advance a number of arguments in their motion to dismiss, including that (a) Plaintiffs lack standing to assert claims on behalf of the HMC Hospitals and/or that the HMC Hospitals are indispensable parties; (b) the Court lacks personal jurisdiction over Defendants; (c) venue is improper; (d) the economic loss doctrine bars Plaintiffs' tort claims; and (e) Plaintiffs fail to plead fraud with sufficient particularity.

### **A. Standing**

Defendants assert that the First-Amended Complaint "appears to be a 'double' or 'triple' derivative action, for which the Plaintiffs have no standing." Doc. 30 (Suggestions in Support of Motion to Dismiss), p. 11.<sup>1</sup> In other words, Defendants argue that Plaintiffs' claims are for a cause

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<sup>1</sup> On January 11, 2019, the Court held oral argument on Defendants' motion to dismiss and permitted the parties to file supplemental briefing to address Plaintiffs' standing. Doc. 43. The Court now considers the arguments and authorities included in the supplemental briefing provided by the parties, in deciding Defendants' motion, Docs. 46 (Plaintiffs' Supplemental Memorandum) and 47 (Defendants' Supplemental Memorandum). However, the Court will not consider

of action belonging to one or more of HMC’s subsidiaries—the HMC Hospitals—and that Plaintiffs were divested of standing to seek derivative action on behalf of the HMC Hospitals when HAC assumed an 80 percent interest in the HMC Hospitals.<sup>2</sup> In a derivative action, a stockholder asserts a cause of action belonging to the corporation; in a double derivative suit, a stockholder of a parent corporation seeks to recover for a cause of action belonging to a subsidiary. *Lambrecht v. O’Neal*, 3 A.3d 277, 281–82 (Del. 2010). In a triple derivative action a stockholder of a parent corporation seeks to “enforce a cause of action of a subsidiary of a subsidiary.” *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1079 n.7 (Del. 2011) (quoting 13 Fletcher Cyc. Corp. § 5977). The underlying basis for this multi-tier derivative standing “is the parent’s ability to ‘enforce [the subsidiary’s] claim by the direct exercise of [the parent’s] 100 percent control’ of the subsidiary.” *Id.* at 1080 (quoting *Lambrecht*, 3 A.3d at 288).

Plaintiffs assert eight separate claims against the Defendants. Plaintiffs’ standing to sue derivatively must derive from their ownership of shares of HMC, because HMC is the only corporation in which Plaintiffs own shares. *Lambrecht*, 3 A.3d at 282. Thus, the question is whether Plaintiffs’ claims are for a cause of action belonging to HMC or to its subsidiaries, the HMC Hospitals. The Court must ask—“[w]ho suffered the alleged harm” and “who would receive

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Defendants’ argument, raised for the first time in the supplemental briefing, that Plaintiffs have “an actual, disqualifying conflict of interest,” Doc. 47, pp. 8–9, prohibiting them from serving as derivative representatives for HMC. *See Martin v. Am. Airlines, Inc.*, 390 F.3d 601, 608, n.4 (8th Cir. 2004) (“We will not consider an issue first raised in a reply brief, absent some reason given by the appellant for failing to raise and brief the issue in his opening brief.”).

<sup>2</sup> Defendants similarly argue that the HMC Hospitals, are all indispensable parties under Federal Rule of Civil Procedure 19 because “a derivative claim requires the entity to be named as a party.” Doc. 30, p. 9. Defendants assert that “[w]ithout naming the HMC Hospitals, any activity derivative to such entities is not properly alleged in the Complaint.” *Id.* The Court addresses this argument by turning to the question of whether Plaintiffs have standing to assert the claims in the First-Amended Complaint.

the benefit of the recovery or other remedy?” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004).

### **1. Conspiracy, Fraud, and Breach of Contract (Counts I–III and VII)**

Plaintiffs seek to recover for “the decrease in the value of [HMC’s] ownership interest in the HMC Hospitals” as a result of Defendants’ alleged conspiracy to “deprive HMC of its ownership and control of the HMC Hospitals” and “to use the HMC Hospitals as instrumentalities in [an] illegal billing scheme” (Count I). Doc. 21, ¶¶ 98, 103. Additionally, Plaintiffs allege that Defendants made fraudulent misrepresentations and/or omissions to the HMC Board (Counts II and III), and that HAC breached the Conversion and Transition Agreements and Amended Operating Agreements between HMC and HAC (Count VII).

Each of these claims is a cause of action belonging to HMC. This is true, notwithstanding the fact that some of Plaintiffs’ claims could be characterized as claims for loss derived indirectly from the loss suffered by the HMC Hospitals. *See NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 176 (Del. 2015) (concluding plaintiff who was party to a contract could sue to enforce its contractual rights, notwithstanding the fact that plaintiff’s injury derived indirectly from loss suffered by plaintiff’s subsidiaries). Plaintiffs have alleged that HMC suffered harm as a result of Defendants’ false statements and breach of contract and seek to recover damages to compensate HMC for “the decrease in value of [HMC’s] ownership interest in the HMC Hospitals” and “damage to [HMC’s] business reputation” as a result of Defendants’ conduct. Doc. 21, ¶ 103. Defendants do not contest that Plaintiffs have been and continue to be shareholders of HMC, nor do they contest that Plaintiffs have satisfied their demand requirements in order to institute suit on behalf of HMC. Doc. 21, ¶ 4. Thus, Plaintiffs have standing to assert their claims in Counts I, II, III, and VII.



## 2. Breach of Fiduciary Duty (Counts IV and V)

Plaintiffs also allege that defendants Nusbaum, White, and Perez, as Managing Directors of the HMC Hospitals, and HAC, as majority member/shareholder of the HMC Hospitals, breached their fiduciary duties of care and loyalty to the HMC Hospitals and to HMC (Counts IV and V). To assert a claim for breach of fiduciary duty, Plaintiffs must first show that Defendants owed a duty to HMC. *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 297 (Del. Ch.), *aff'd*, 126 A.3d 1115 (Del. 2015). Plaintiffs assert that the source of Defendants' fiduciary duties is two-fold—statutory, derived from the Delaware Limited Liability Company Act (“LLC Act”), and contractual, memorialized by the various Amended Operating Agreements for each of the HMC Hospitals.<sup>3</sup>

The LLC Act provides that “[i]n any case not provided for in this chapter, the rules of law and equity relating to fiduciary duties . . . shall govern.” Del. Code tit. 6, § 18-1104. Section 18-1101(c) “permits LLC contracting parties to expand, restrict, or eliminate duties, including fiduciary duties, owed by members and managers to each other and to the LLC.” *Kelly v. Blum*, No. CIV.A. 4516-VCP, 2010 WL 629850, at \*10 (Del. Ch. Feb. 24, 2010). However, “[d]rafters

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<sup>3</sup> Plaintiffs assert that HMC and HAC executed Amended Operating Agreements that are “substantively the same” for each of the HMC Hospitals. Doc. 21, ¶ 27. Plaintiffs attached to the First-Amended Complaint the Amended Operating Agreement executed by HMC and HAC for CAH Acquisition Company #1, LLC (one of the HMC Hospitals) to act as an exemplar. Doc. 21-4 (Amended Operating Agreement), p. 1. In relevant part, the Amended Operating Agreements provide:

Each Managing Director shall exercise their responsibility and duties to the Company with the highest level of fiduciary duty of care and loyalty to the Company, in a prudent business manner, and will take all actions and make all votes in good faith consistent with such duties. Each Managing Director must discharge his duties in good faith, and in a manner that the Managing Director reasonably believes to be in the best interest of the Company.

*Id.* at p. 5, § 4.1(b).

of an LLC agreement must make their intent to eliminate fiduciary duties plain and unambiguous.” *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012) (quotations omitted). Delaware courts interpreting these provisions have concluded that “in the absence of a contrary provision in the LLC agreement, LLC managers and members owe traditional fiduciary duties of loyalty and care to each other and to the company.” *Kelly*, 2010 WL 629850, at \*10. (quotations omitted); *see also Feeley*, 62 A.3d 649, 661 (“[T]he Delaware [LLC Act] contemplates that equitable fiduciary duties will apply by default to a manager or managing member of a Delaware LLC.”). “Thus, unless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members.” *Kelly*, 2010 WL 629850, at \*10.

Because Defendants point to no provision of the Amended Operating Agreements that restricts or eliminates these default duties, the Court finds that Plaintiffs have standing to assert their claims for breach of fiduciary duties owed to HMC (the minority member of the HMC Hospitals) by HAC (the controlling member) and Nusbaum, White, and Perez (the managers).<sup>4</sup> To the extent, however, that Plaintiffs seek to recover for breaches of “fiduciary duties to the HMC Hospitals,” Doc. 21, ¶ 120, they lack standing. *See NAF Holdings, LLC*, 118 A.3d at 180 (concluding a corporation could not bring claims belonging only to its subsidiaries without first proving demand futility).

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<sup>4</sup> The parties do not address what fiduciary duties are owed by majority shareholders and managers under Oklahoma corporate law. Regardless, Plaintiffs’ claims are sufficient to state a claim for breach of fiduciary duties, owed to HMC under Delaware law due to the nature of HMC’s relationship to Defendants as the minority member in nine Delaware HMC Hospital LLCs.

### 3. Conversion (Count VI)

Plaintiffs assert that “HMC owned or had the right to the use and possession of its business accounts at US Bank,” Doc. 21, ¶ 128, and “owned an interest in the cash assets of the HMC Hospitals,” *id.* at ¶ 129, and that Defendants “intentionally interfered with and exercised dominion and control over the accounts and misappropriated the funds of the HMC Hospitals . . . depriv[ing] HMC of its possession or use of the accounts and its ownership interest in the funds,” *id.* at ¶ 130.

To state a claim for conversion, a plaintiff must allege that “[it] had the right to possession of the converted property at the time of the alleged conversion.” *Kingfisher Hosp., Inc. v. Behmani*, 335 S.W.3d 486, 498 (Mo. Ct. App. 2011) (quotations omitted). Here, Plaintiffs have alleged a right to possess both the “business accounts at US Bank” and “cash assets of the HMC Hospitals.” Doc. 21, ¶¶ 128, 129. Money may be subject to conversion when it can be “described or identified as a specific chattel,” such as the business accounts at US Bank here. *Asbury Carbons, Inc. v. Sw. Bank, an M & I Bank*, No. 4:10-CV-878 CEJ, 2011 WL 1086067, at \*4 (E.D. Mo. Mar. 22, 2011) (citing *Moore Equip. Co. v. Callen Const. Co., Inc.*, 299 S.W.3d 678, 681 (Mo. Ct. App. 2009)). Accepting Plaintiffs’ allegations as true, Plaintiffs have standing, and have adequately stated, a claim for conversion.

### 4. Accounting (Count VIII)

Plaintiffs request “an accounting of all financial and monetary transactions involving the HMC Hospitals” since HAC acquired its 80% interest in the HMC Hospitals against all Defendants (Count VIII). Doc. 21, ¶¶ 134–43; *see also* Doc. 21-7 (January 29, 2018 Letter to HAC for Accounting). According to the First-Amended Complaint, the HMC Hospitals are comprised of nine Delaware LLC’s and one Oklahoma corporation. Doc. 21, ¶ 2.

As a preliminary matter, Plaintiffs acknowledge that courts applying Oklahoma law have considered an action for accounting to be derivative. Doc. 46, p. 11 (“[I]n Oklahoma a court held that an action for accounting was derivative.”). In other words, a claim for accounting for the HMC Hospital incorporated in Oklahoma (CAH Acquisition Company #4, Inc.) is a cause of action belonging to the HMC Hospital, and which can only be asserted by its shareholders derivatively. See *Weston v. Acme Tool, Inc.*, 441 P.2d 959, 962 (Okla. 1968) (concluding accounting action was derivative). Thus, any claim asserted by Plaintiffs here for accounting from the Oklahoma HMC Hospital, is double derivative—Plaintiff shareholders of the parent corporation (HMC) seeking to recover for a cause of action belonging to a subsidiary corporation (the Oklahoma HMC Hospital). Because Plaintiffs are not controlling shareholders of the Oklahoma HMC Hospital, they lack standing to assert this claim as it pertains to the Oklahoma HMC Hospital.

With respect to the Delaware HMC Hospital LLCs, Plaintiffs assert that HMC has a claim for accounting under Delaware law, Del. Code tit. 6, § 18-305. Doc. 46, p. 10.<sup>5</sup> However, Section 18-305 is explicit that any action under section 18-305 must be brought in the Delaware Court of Chancery, which is “vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought.” Del. Code tit. 6, § 18-305(f) (“Any action to enforce any right arising under this section shall be brought in the Court of Chancery.”).

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<sup>5</sup> Plaintiffs also assert that their claim for accounting is supported by the Amended Operating Agreements, which grant a right to inspect and copy “all books and records of the Company.” Doc. 21-4, p. 9, § 5.2. However, the Agreement is explicitly governed by Delaware law. *Id.* at p. 13, § 8.11 (“This agreement shall be govern [sic] by, and construed in accordance with, the laws of the state of Delaware.”). Plaintiffs point to no such corresponding agreement for the HMC Hospital incorporated in Oklahoma. Doc. 46, p. 13 (“Plaintiff’s [sic] do not have copies of any bylaws of the Oklahoma corporate hospital entities that presumably were amended (like the amended operating agreements) when HAC took over control and accordingly cannot comment on any duties imposed on management under them.”).

Thus, the Court finds that dismissal of Plaintiffs' accounting claim, as it pertains to the Delaware HMC Hospital LLCs, is appropriate in the interest of comity. *See, e.g., Hadeed v. Advanced Vascular Res. of Johnstown, LLC*, No. 3:15-CV-22, 2017 WL 4998663, at \*19 (W.D. Pa. Oct. 30, 2017) (declining to exercise jurisdiction over action pursuant to § 18-302 based "on principles of comity and non-interference in the fundamental internal affairs of a business entity created under the laws of another state"); *Camacho v. McCallum*, No. 16 CVS 602, 2016 WL 6237825, at \*4 (N.C. Super. Oct. 25, 2016) (dismissing accounting/inspection claim under Del. Code tit. 6, § 18-305 and LLC operating agreement for lack of subject matter jurisdiction).

### **B. Personal Jurisdiction**

Next, Defendants argue that Plaintiffs' First-Amended Complaint must be dismissed because the Court lacks personal jurisdiction over them. However, Plaintiffs argue that Defendants are each subject to general and specific personal jurisdiction related to their actions within the state of Missouri. Doc. 21, ¶ 14 ("[E]ach Defendant is either a legal entity that conducts business in and maintains operations within the State of Missouri and this District . . . or is an entity or individual who has committed acts within the State of Missouri pursuant to Mo. Supreme Court Rule 54.06 out of which these causes of action arise and has sufficient minimum contacts[.]").

A court has general personal jurisdiction over a defendant who has "continuous and systematic" business contacts with the forum state. *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008). "[I]n such circumstances the alleged injury need not have any connection with the forum state." *Id.* Plaintiffs allege that defendant HAC has done business in Missouri "beginning in December, 2013 when it extended the loan to HMC, through the present based on its ownership of the I-70 hospital," Doc. 34 (Suggestions in Opposition to Motion to Dismiss), p. 12, and has used a Kansas City business address, *id.*; Doc. 21, ¶ 16; Doc. 21-4, p. 13 (listing Kansas City

business address for HAC). Additionally, Plaintiffs allege that defendant “Empower H.I.S. has done business [in Missouri and this District] systematically through its continuous provision of back office/billing services to the I-70 hospital since mid-2017,” Doc. 34, p. 12; Doc. 21, ¶ 17, and that defendants Nusbaum, White, and Perez have done business in Missouri for many years through “their continued management of the I-70 hospital” and “attendance at HMC board and shareholder meetings,” Doc. 34, p. 13; Doc. 21, ¶ 15.

However, even if these alleged business contacts are insufficient to establish general jurisdiction, Plaintiffs have alleged “sufficient minimum contacts” related to the conduct giving rise to this suit to establish specific jurisdiction. For the Court to exercise specific personal jurisdiction over defendants, jurisdiction must be appropriate under both the Missouri long-arm statute and the Due Process Clause of the Fourteenth Amendment. *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co.*, 646 F.3d 589, 593 (8th Cir. 2011). The Missouri long-arm statute provides for personal jurisdiction over “[a]ny person or firm . . . who in person or through an agent . . . commi[ts] a tortious act within this state[.]” Mo. Rev. Stat. § 506.500.1.

Because the Missouri long-arm statute authorizes the exercise of jurisdiction over non-residents to the extent permissible under the due process clause, the Court turns directly to the question of whether the assertion of personal jurisdiction over Defendants would violate the due process clause. *Romak USA, Inc. v. Rich*, 384 F.3d 979, 984 (8th Cir. 2004). To satisfy due process a defendant must have “sufficient minimum contacts” with the forum state so as not to “offend traditional notions of fair play and substantial justice.” *Id.* (quotations omitted). Due process is satisfied if the out-of-state defendant “purposefully directed [its] activities at [Missouri] residents’ in a suit that ‘arises out of’ or ‘relates to’ these activities.” *Johnson v. Arden*, 614 F.3d 785, 794 (8th Cir. 2010) (quotations omitted). The Court considers: (1) the “nature and quality” of

Defendants’ contacts with Missouri; (2) the “quantity of such contacts”; (3) the “relation of the cause of action to the contacts”; (4) the interest of Missouri in providing a forum for its residents; and (5) the “convenience of the parties[,]” giving “significant weight . . . to the first three factors.” *Romak USA, Inc.*, 384 F.3d at 984 (quotations omitted).

Plaintiffs allege that Defendants engaged in a conspiracy to “deprive HMC of its ownership and control of the HMC Hospitals,” including one in Missouri, and made affirmative misrepresentations to HMC, a Missouri-based company, while physically present in Missouri. Doc. 21, ¶ 98. Specifically, Plaintiffs allege that defendants Nusbaum, White, and Perez, individually and on behalf of defendants HAC and Empower H.I.S., “attended a meeting of the HMC Board in Kansas City, Missouri on March 6, 2017 . . . at which they made the false representations” alleged in the First-Amended Complaint. *Id.* at ¶¶ 15, 34, 98. These false representations not only form the basis of Plaintiffs’ fraudulent misrepresentation and concealment claims (Counts II and III) but were allegedly made in furtherance of Defendants’ conspiracy (Count I). *Id.* at ¶ 98. Defendant HAC also exercised an option to convert the loan to an eighty percent equity interest in the HMC Hospitals at the same March 6, 2017 HMC Board meeting in Kansas City, Missouri. *Id.* at ¶ 16. HAC also allegedly entered into the Transition and Conversion Agreements and Amended Operating Agreements, both of which were to be performed at least in part in Missouri, forming the basis of Plaintiffs’ breach of contract claim against HAC (Count VII). *Id.* Thus, Plaintiffs have made a prima facie showing that the Court has personal jurisdiction over Defendants.<sup>6</sup>

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<sup>6</sup> Plaintiffs submit two affidavits in response to Defendants’ motion to dismiss in support of their personal jurisdiction argument. Docs. 34-1 (Davis Affidavit) and 34-2 (Morris Affidavit). However, because the Court finds that the allegations made in Plaintiffs’ First-Amended Complaint are sufficient, and Defendants do not provide affidavits to counteract Plaintiffs’ claims, the Court need not address these additional materials. *See Cantrell v. Extradition Corp. of Am.*,

### C. Venue

Defendants also argue that venue is improper, asserting that the case instead belongs in either West Virginia, where there are two prior pending actions “concerning the acquisition of HMC by HAC”—*Rural Community Hospitals of America, LLC v. Rural Hospital Group, LLC, et al.*, No. 18-C-225 and *Health Acquisition Company, LLC v. HMC/CAH Consolidated, Inc.*, No. 17-C-371, or Delaware. Doc. 30, pp. 9–10.

However, venue is proper in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). In the Eighth Circuit, the defendant has the burden of establishing that venue is improper. *RightCHOICE Managed Care, Inc. v. Hosp. Partners, Inc.*, No. 5:18-CV-06037-DGK, 2019 WL 302515, at \*4 (W.D. Mo. Jan. 23, 2019) (citing *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947)). Venue is proper here because a substantial part of the relevant events or omissions alleged in the First-Amended Complaint occurred in this district, including Defendants’ alleged misrepresentations to HMC at an HMC Board meeting in Kansas City, Missouri.

Moreover, beyond Defendants’ conclusory assertion that the case belongs in West Virginia, Defendants fail to show that the West Virginia actions are in any way similar to this action. In contrast, Plaintiffs assert that neither cited case involves the conspiracy alleged in the First-Amended Complaint nor do they involve the same defendants. Plaintiffs assert that HMC is not a party in the Rural Community Hospitals case, and that the HAC case was settled and dismissed with prejudice over a year ago and did not involve the individual defendants or Empower H.I.S.

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789 F. Supp. 306, 308 (W.D. Mo. 1992) (“The allegations in the Complaint must be taken as true to the extent they are uncontroverted by the defendant’s affidavits.”).



Defendants further assert that Missouri is not a proper forum for this derivative action. Defendants argue that the “only proper venue” is Delaware, citing *In re Topps Co. S’holders Litig.*, 924 A.2d 951, 961 (Del. Ch. 2007) (“Representative plaintiffs seeking to wield the cudgel for all stockholders of a Delaware corporation have no legitimate interest in obtaining a ruling from a non-Delaware court.”). Doc. 30, p. 11. However, the *Topps* decision was based, among other things, on the “internal affairs” doctrine: matters having to do with the internal regulation of a corporation should be decided by the state of incorporation. *Id.* at 951, 953–54. This case does not involve regulation of the internal affairs of HMC. This is an action by shareholders, the Shaffers, on behalf of a corporation, HMC, seeking to vindicate its rights against third parties for damage to HMC’s financial interests. Thus, Defendants have failed to show that venue in this district is improper.

#### **D. Economic Loss**

Defendants argue that Plaintiffs’ claims are barred to the extent that they arise from a breach of contract. Doc. 30, p. 17 (“If the alleged tortious conduct [in the First-Amended Complaint] was governed under any contract, then such conduct is relegated to an action in contract, and the tort claim fails.”). The economic loss doctrine “denies a remedy in tort to a party whose complaint is rooted in disappointed contractual or commercial expectations.” *Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 906 (8th Cir. 2013) (quotations omitted).

However, the doctrine is inapplicable here. Plaintiffs’ claims are based on conduct independent from the elements of Plaintiffs’ breach of contract claim against HAC. *See Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2017 WL 1498073, at \*2 (W.D. Mo. Apr. 26, 2017) (“[I]f the act done independently of the contract would result in a tort, and is not dependent on the elements of the contract claim, a tort claim may be asserted alongside a claim for breach of

contract.”). Additionally, Defendants do not identify a contract governing Plaintiffs’ tort claims, and the case involves fraud, not disappointed commercial expectations. *See RightCHOICE*, 2019 WL 302515, at \*10 (finding economic loss doctrine inapplicable to plaintiffs’ fraud and conspiracy claims); *MEA Financial Enters., LLC v. Fiserv Sols., Inc.*, No. 3:13-cv-05041-BP, 2013 WL 12155467, at \*3 (W.D. Mo. Oct. 16, 2013) (finding that “the Missouri Supreme Court would not apply the economic loss doctrine to [plaintiff’s] tortious interference or fraudulent misrepresentation claims”).

### **E. Pleading Fraud**

Finally, Defendants argue that Plaintiffs have failed to plead fraud with the particularity required by Federal Rule of Civil Procedure 9.<sup>7</sup> Rule 9(b) requires parties to “state with particularity the circumstances constituting fraud or mistake.” This typically includes “the time, place, and contents of the alleged fraud [and] the identity of the person allegedly committing fraud.” *Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997). While conclusory allegations are insufficient, Rule 9(b)’s requirement must be read “in harmony with the principles of notice pleading.” *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 746 (8th Cir. 2002) (quotations omitted). Thus, “[t]he special nature of fraud does not necessitate anything other than notice of the claim; it simply necessitates a higher degree of notice, enabling the defendant to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct.” *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001).

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<sup>7</sup> Defendants also argue that Plaintiffs’ claims lump them together without distinguishing their conduct, in violation of Rule 8(a)’s fair-notice requirement. The Court rejects this argument for the same reasons it rejects Defendants’ argument that Plaintiffs failed to plead fraud with particularity as to each Defendant.

Plaintiffs have satisfied this burden. The First-Amended Complaint alleges the role each defendant played in and the contents of the alleged misrepresentations and omissions to the HMC Board as well as when and where those misrepresentations/omissions occurred. Plaintiffs allege that on March 5, 2017, defendant White “acting in concert with and on behalf of the other Defendants” sent an email to representatives of HMC regarding a proposed laboratory testing program for the HMC Hospitals. Doc. 21, ¶ 32. Plaintiffs allege that several false representations were made in that email and that other material facts, included Defendants’ intent to operate an illegal billing scheme, were omitted. *Id.* at ¶ 33 (listing alleged false representations). Plaintiffs further allege that, on March 6, 2017, defendants Nusbaum, White, and Perez reiterated to the HMC Board the representations made in the March 5th Email. *Id.* at ¶ 34. Plaintiffs allege that defendants White and Nusbaum acted individually and on behalf of HAC, while defendant Perez’s statements were made individually and on behalf of defendant Empower H.I.S. Doc. 34, p. 17; Doc. 21, ¶¶ 10–11 (identifying defendants Nusbaum and White as managers of defendant HAC), 12 (identifying defendant Perez as Chief Executive Officer of defendant Empower H.I.S). This information is sufficient to put Defendants on notice of Plaintiffs’ allegations of fraudulent misrepresentation (Count II) and fraudulent concealment (Count III) and to permit them to prepare a response.

### **III. Motion for Leave to Amend**

Plaintiffs’ motion for leave to amend seeks to realign HMC, the corporate defendant on whose behalf this action is brought, as a plaintiff and to add FLEMCo, LLC, “a Missouri [LLC] with its principal place of business in Kansas City, Missouri,” as a party plaintiff. Doc. 36-2 (Proposed Second Amended Complaint), ¶ 6. Plaintiffs allege diversity jurisdiction as the sole basis for the Court’s subject matter jurisdiction. However, on the face of the proposed Second-

Amended Complaint, the Court cannot determine whether diversity jurisdiction is proper. Plaintiffs' allegation regarding the citizenship of proposed plaintiff FLEMCo, LLC is insufficient because an "LLC's citizenship, for purposes of diversity jurisdiction, is the citizenship of each of its members." *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007). Thus, the Court defers ruling on Plaintiffs' motion to amend and orders Plaintiffs to show cause, within seven days, why the proposed addition of FLEMCo, LLC as a party plaintiff does not destroy diversity.

#### **IV. Conclusion**

For the foregoing reasons, Defendants' motion to dismiss, Doc. 29, is granted in part and denied in part. Plaintiffs' accounting claim (Count VIII) is dismissed.

Plaintiffs are order to show cause, within seven days of the date of this order, why the proposed addition of FLEMCo, LLC as a party plaintiff does not destroy diversity.

s/ Nanette K. Laughrey  
NANETTE K. LAUGHREY  
United States District Judge

Dated: March 5, 2019  
Jefferson City, Missouri

#4

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
(WESTERN DIVISION)

JAMES AND PHYLLIS SHAFFER,	)	
	)	CIVIL ACTION NO.:
Plaintiffs,	)	
	)	4:18-cv-00601-NKL
v.	)	
	)	
HEALTH ACQUISITION COMPANY, LLC,	)	
EMPOWER H.I.S., LLC, PAUL L. NUSBAUM,	)	
STEVEN F. WHITE and JORGE A. PEREZ	)	
	)	
Defendants,	)	
	)	
HMC/CAH CONSOLIDATED, INC,	)	
	)	
Nominal-Defendant.	)	
_____	)	

**AMENDED RESPONSES TO PLAINTIFF’S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT HEALTH ACQUISITION COMPANY, LLC BY DEFENDANTS HEALTH ACQUISITION COMPANY, LLC, EMPOWER H.I.S., LLC, PAUL L. NUSBAUM, STEVEN F. WHITE, AND JORGE A. PEREZ**

In accordance with Fed. R. Civ. P. 26(b)(1), 33, 34 and 36, and the Local Rules for the Western District of Missouri, Defendants HEALTH ACQUISITION COMPANY, LLC, EMPOWER H.I.S., LLC, PAUL L. NUSBAUM, STEVEN F. WHITE, AND JORGE A. PEREZ (“Defendants”), by and through their undersigned counsel, hereby amend their prior responses to Plaintiff’s First Request for Production to Defendant Health Acquisition Company, LLC, in accordance with the above-mentioned Rules, as follows:

**RELEVANT HISTORY**

1. On December 24, 2018, Defendants provided their responses to Plaintiff’s First Request for Production to Defendant Health Acquisition Company, LLC (the “Responses”).
2. Counsel for Defendants has informed counsel for Plaintiffs that they have recently

been contacted by the United States Department of Justice (“DOJ”) (on January 4, 2019 and January 7, 2019) as to the existence of a criminal investigation, which potentially involves parties in the within litigation. Counsel for Defendants further noted that at this time it is unclear as to the nature of the investigation, but that it appears that most, if not all, of the parties in the within litigation are the subject of the investigation.

3. For that reason, and until the scope and targets of the DOJ investigation become clear, Defendants must at this time, at least on a temporary basis, assert their Fifth Amendment rights, primarily at this point related to the “Act of Production,” as well as reserving their other rights related to Self-Incrimination, to the extent that same becomes necessary, advisable or desirable.

4. Once the scope and targets of the DOJ investigation become clear, Defendants will commit to a final position on exercising their Fifth Amendment rights, vis-à-vis the within litigation.

5. Other than as modified and amended herein, the Responses remain in full-force and effect.

CHAPMAN AND COWHERD, P.C.

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JORGE A. PEREZ  
*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served electronically to:

*COUNSEL OF RECORD FOR PLAINTIFFS*

This 23<sup>rd</sup> day of January, 2019.

FMS LAWYER PL

By: /s/ Frank Smith

Frank Smith