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DIVISION OF ADMINISTRATIVE HEARINGS

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; LEE MEMORIAL REHABILITATION HOSPITAL; and CYPRESS COVE AT HEALTHPARK FLORIDA, INC.,

Petitioners,

v.

CASE NO. 03-2487

WRP
CWS

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION; and SELECT SPECIALTY HOSPITAL - LEE, INC.,

Respondents.

______________________________/

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI

Pursuant to Rule 9.100, Florida Rules of Appellate Procedure, LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; LEE MEMORIAL REHABILITATION HOSPITAL; and CYPRESS COVE AT HEALTHPARK FLORIDA, INC. respectfully petition this Court for (1) a writ of prohibition to remove Administrative Law Judge William R. Pfeiffer from any further proceedings in the matter of Select Specialty Hospital - Lee, Inc. v. Agency for Health Care Administration and Cypress

Cove at HealthPark Florida, Inc.; Lee Memorial Health System; Cape Memorial Hospital, Inc.; Healthpark Care Center, Inc.; and Lee Memorial Rehabilitation Hospital, DOAH Case No. 03-2487; and (2) a writ of certiorari vacating the Recommended Order entered by Administrative Law Judge William R. Pfeiffer in DOAH Case No. 03-2487.

PRELIMINARY STATEMENT

The following abbreviations will be used in this petition:

LMHS	–	Petitioners - Lee Memorial Health System; Cape Memorial Hospital, Inc.; Healthpark Care Center, Inc.; and Lee Memorial Rehabilitation Hospital
Cypress Cove	–	Petitioner - Cypress Cove at HealthPark Florida, Inc.
AHCA	–	Respondent - State of Florida, Agency for Health Care Administration
Select	–	Respondent - Select Specialty Hospital - Lee, Inc.
ALJ Pfeiffer	–	Administrative Law Judge William R. Pfeiffer
DOAH	–	Division of Administrative Hearings
Tenet	–	Tenet Healthcare Corporation
App. _, p. _	–	Appendix (App.) followed by the documents number and page number

Unless otherwise indicated, references to Florida Statutes will be to Florida Statutes (2004).

I.

BASIS FOR INVOKING JURISDICTION

The writ of prohibition and the writ of certiorari are common law writs. The power to employ writs is a fundamental and inherent power of the judiciary, expressly vested in this Court by Article V, Section 4(b)(3) of the Florida Constitution. See, Fla. R. App. P. 9.030(b)(3); Hoboken Drywall v. Telfair, 417 So. 2d 1169 (Fla. 1st DCA 1982).

A writ of prohibition is the proper remedy when a motion for disqualification has been denied. Rollins v. Baker, 683 So. 2d 1138 (Fla. 5th DCA 1996); State v. Shaw, 643 So. 2d 1163 (Fla. 4th DCA 1994).

Certiorari is available when a lower court or tribunal has acted in excess of its jurisdiction or has departed from the essential requirements of law and no remedy by appeal exists. State ex rel Boyles v. Florida Parole & Probation Commission, 436 So. 2d 207 (Fla. 1st DCA 1983).

II.

STATEMENT OF FACTS

On May 20, 2005, ALJ Pfeiffer entered an order denying LMHS' motion to disqualify him and to vacate the recommended order he entered in Select Specialty Hospital-Lee, Inc. v. AHCA and LMHS, DOAH Case No. 03-2487. (App. 1; App. 8.) ALJ Pfeiffer's order denying disqualification included statements challenging the allegations of fact made in the motion to disqualify, and asserting that the ALJ had remained coldly neutral. (App. 1, p. 2.) The statements include that he was retained by Tenet in March 2005. (App. 1, p. 2.) ALJ Pfeiffer's order denying the motion to disqualify challenges and takes issue with the facts alleged in the motion to disqualify. (App. 1, p. 2; App. 8, pp. 2-3.)

AHCA remanded this case to DOAH for ruling on the motion to disqualify and vacate on May 2, 2005. (App. 5.)

The motion to disqualify ALJ Pfeiffer was filed within ten days of the grounds becoming known. (App. 8, p. 3.) The grounds for the motion were that after the DOAH formal hearing, but before the entry of the recommended order, ALJ Pfeiffer had been retained to act as a lobbyist for Tenet. (App. 8, p. 2.) LMHS had a reasonable fear that ALJ Pfeiffer was not impartial and in fact was biased against it when his recommended order was entered. (App. 8, pp. 2-3.) Roughly two months prior to the entry of the recommended order ALJ Pfeiffer was retained as a lobbyist by Tenet. (App. 8, p. 2.)

Tenet is the defendant in a multi-million dollar racketeer influenced and corrupt organizations (RICO) suit in federal court which was filed during the pendency of this action at DOAH. LMHS is one of the plaintiffs in that federal suit. (App. 8, p. 2.)

ALJ Pfeiffer was engaged as a lobbyist by Tenet months before he entered the recommended order. (App. 8, p. 2.) ALJ Pfeiffer's notarized lobbyist registration form for Tenet reflects an execution date of February 9, 2005, and a filing date of April 4, 2005. (App. 8, p. 11.)

ALJ Pfeiffer never apprised the parties of his employment by Tenet. LMHS filed two motions requesting status conferences. The first motion for a status conference was filed on February 10 (App. 12) and the second on March 8, 2005 (App. 11). Neither motion was granted and no status conference was held.

The final hearing in the administrative action was held from April 4-19, 2004, before ALJ Pfeiffer. The hearing included the submission of evidence, expert testimony, and argument on many disputed facts, and interpretations of AHCA's policies and rules, as well as state statutes. (App. 2, p. 5; App. 3, p. 2.) After an unforeseen delay in the preparation of the transcript, the parties filed proposed recommended orders on August 20, 2004. ALJ Pfeiffer entered a Recommended Order on April 8, 2005. Nearly a year elapsed between the conclusion of the final hearing and issuance of the Recommended Order. (App. 8, p. 2.)

III.

NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by Petitioner is for the entry of a writ of prohibition because ALJ Pfeiffer improperly denied the motion to disqualify and to vacate, and for a writ of certiorari because his order departed from the essential requirements of law and no remedy exists by appeal.

IV.

ARGUMENT

A. Florida Rule of Judicial Administration 2.160 Applies

Disqualification of the ALJ and vacation of the recommended order are well recognized rights flowing from the common law and from Section 38.10, Florida Statutes, Rule 2.160, Florida Rules of Judicial Administration, and Florida case law. See e.g., Rucks v. State, 692 So. 2d 976 (Fla. 2nd DCA 1997). "The same principles apply if the motion to disqualify the trial judge is filed after judgment; the protections of section 38.10 are not confined to fair treatment in the context of a trial." Rucks (citing Lages v. State, 685 So. 2d 968 (Fla. 2d DCA 1996)).

ALJs are subject to the provisions of Rule 2.160, Florida Rules of Judicial Administration. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1st DCA 2002). A party has the right to have a judge who is free from any obvious source of possible unconscious bias. Aetna Life & Cas. Co. v. Thorn, 319 So. 2d 82 (Fla. 3rd DCA 1975). In determining a motion to disqualify, the judge cannot rationalize that he believes that he can or did act with impartiality once the basis for disqualification is known. J&J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc., 723 So. 2d 281, 283 (Fla. 2nd DCA 1998). However, ALJ Pfeiffer did attempt such a rationalization. (App. 1, p. 2.)

Disqualifying the ALJ and vacating the recommended order pursuant to Rule 2.160, Florida Rules of Judicial Administration, are important substantive and procedural safeguards:

> Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as would raise no suspicion of the fairness and integrity of the judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. The law intends that no judge will preside in a case in which he or she is not wholly free, disinterested, impartial, and independent.

13 Fla. Jur. 2d, *Courts and Judges* § 313 (footnotes omitted).

"[T]he principal issue presented in a motion for disqualification is that of legal sufficiency." Breakstone v. MacKenzie, 561 So. 2d 1164, 1167 (Fla. 3d DCA 1989), *approved in part and quashed in part*, 565 So. 2d 1332 (Fla.1990). Legal sufficiency is governed by a reasonable person standard: the sole consideration is whether the litigant requesting disqualification can reasonably fear he will not receive an impartial or fair trial. Breakstone v. MacKenzie, 565 So. 2d 1332 (Fla.1990); Fischer v. Knuck, 497 So. 2d 240 (Fla.1986); Livingston v. State, 441 So. 2d 1083 (Fla.1983); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); Hayslip, 400 So. 2d 553. The reasonableness of LMHS' fears are demonstrated by the ALJ's efforts to refute the motion by challenging the facts alleged and his assertions of additional countervailing facts. (App. 1, p. 2; App. 8, pp. 2-3.) LMHS' motion to disqualify ALJ Pfeiffer was legally sufficient and should have been granted.

In ruling upon a motion to disqualify the judge must take as true all facts and reasons for the belief of the existence of bias or prejudice contained in the affidavit. Brown v. St. George Island, Ltd., 561 So. 2d 253, 255 (Fla. 1990). There can be no testing, challenge or attempt to refine or revise the alleged facts by any other party nor by the ALJ. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056, 1059 (Fla. 1st DCA 2002) (**"We reject the suggestion that a meaningful distinction can be made and consistently applied between clarification and refutation of the facts underlying a motion for disqualification."**) Neither may any contrary evidence be considered. Id.; Cave v. State, 660 So. 2d 705 (Fla.1995). If the scope of the inquiry exceeds the legal sufficiency of the motion, then recusal is mandated - even if the motion was legally insufficient. Fla. R. Jud. Admin. 2.160(f); Newman v. Eade, 627 So. 2d 116 (Fla. 4th DCA 1993); Mangina v. Cornelieus, 462 So. 2d 602 (Fla. 5th DCA 1985). As the Supreme Court stated in Bundy v. Rudd, 366 So. 2d 440, 442 (Fla.1978):

> Regardless of whether respondent ruled correctly in denying the motion for disqualification as legally insufficient, our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification.

(Citations omitted.) ALJ Pfeiffer's order denying the motion to disqualify departs from the essential requirements of law because it violates these requirements.

ALJ Pfeiffer challenged the allegations and introduced countervailing facts in his order denying the motion to disqualify. He stated that he was not engaged by Tenet until March 2005 (App. 1, p. 2) despite the fact that his notarized lobbyist registration form was executed on February 9, 2005. (App. 8, p. 11.) He stated that he was ignorant of LMHS' suit against Tenet and claimed that he was coldly impartial in his decision. (App. 1, p. 2.) Such findings in a ruling on a motion to disqualify are in themselves error and require disqualification. Bundy, 364 So. 2d 440; Newman, 627 So. 2d 116; Mangina, 462 So. 2d 602.

A motion to disqualify is sufficient if it alleges facts which are sufficient to "prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). If the facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the judge to say that the fear does not exist or is unreasonable. Livingston, 441 So. 2d 1083, 1087 (Fla.1983). This is precisely what ALJ Pfeiffer has done in his order denying the motion to disqualify.

B. ALJ Pfeiffer Had An Affirmative Duty to Disclose His Employment By Tenet

Canon 3E(1) of the Rules of Judicial Conduct requires disqualification whenever a judge's impartiality might be reasonably questioned. The Commentary to Canon 3E is very clear:

> Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. .... A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification.

The policy of the Florida Supreme Court favors a broad rule of disclosure. See, *"But I'm a Friend of the Court" and Other Predicaments: What Every Lawyer Should*

Know About the Florida Code of Judicial Conduct, Judge Charles J. Kahn, 76 Mar. Fla. B.J. 10 (March 2002). The requirement for a judge to disclose any possible basis for disqualification or potential conflict is far broader than the obligation to disqualify. Id.; W.I. v. State, 696 So. 2d 457 (Fla. 4th DCA 1997) (disclosure required even if judge believes no basis for disqualification); Fla. JEAC op. 99-2.

ALJ Pfeiffer had an affirmative duty to disclose his lobbyist engagement by Tenet. Id.; W.I., 696 So. 2d 457; Fla. JEAC op. 99-2. Petitioners twice requested that ALJ Pfeiffer hold a status conference (motions filed on February 10, 2005 (App.12) and March 8, 2005 (App. 11)) and the ALJ could have easily taken those opportunities to disclose his employment by Tenet. He did not make that disclosure. Judges occupy positions of power over the affairs of others; therefore, for the integrity of the judicial system to be preserved, judges must not only act with cold neutrality but they must also avoid any appearance of partiality. Aetna Life & Cas. Co. v. Thorn, 319 So. 2d 82, 84 (Fla. 3rd DCA 1975) (again if disqualification warranted then prior judgment may be reconsidered); Anderson v. State, 287 So. 2d 322, 324-325 (Fla. 1st DCA 1973) ("The appearance of and absolute impartiality is essential. There must be no taint of any lack of objectiveness in all acts of a judge.").

C. Vacating the Recommended Order Is Warranted and Necessary

The matter decided by ALJ Pfeiffer involved conflicting testimony from recognized experts. Any partiality, bias or prejudice in determining the reliability of expert testimony, or in the final determination itself, would have a tangible effect. When judging more complex issues of advanced expertise, and when experts in those fields had substantial differences of opinion, then the determinations made by a biased or prejudiced ALJ cannot be allowed to stand. "Since the fact-finding function is critical to the resolution of administrative cases, and is subject only to limited judicial review, it is imperative that this function be afforded the broadest dimensions of constitutional protection." 2 Fla. Jur. 2d § 230, p. 218 (citing State, Dept. of Administration v. Stevens, 344 So. 2d 290 (Fla. 1st DCA 1977); Deel Motors, Inc. v. Dept. of Commerce, 252 So. 2d 389 (Fla. 1st DCA 1971)). Disqualification of the ALJ without vacation of the recommended order is an inadequate remedy, particularly given the legal constraints on disturbing the findings of fact made in the recommended order. § 120.57(1)(l), Fla. Stat. (2004).

The findings of fact in the recommended order cannot be disturbed by AHCA in response to any exceptions if the finding is supported by any competent substantial evidence in the record. § 120.57(1)(l), Fla. Stat. Neither may the findings of fact be disturbed by the appellate court if any competent substantial evidence in the record supports the finding. § 120.68(10), Fla. Stat. Effectively there will be no challenge to the ALJ's biased fact finding absent the vacation of the recommended order. The parties introduced into the record the testimony and exhibits of numerous witnesses, including by deposition, and other factual and demonstrative exhibits. Considering the broad standard of admissibility in APA proceedings under Section 120.569(2)(g), Florida Statutes, one could arguably find competent substantial evidence to support any proposition or its diametric opposite. This is especially the case when the decision turns on matters of opinion from experts in the fields of health care economics and health care planning as in this action.

Once a judge has been disqualified, it is the party's right to seek a reconsideration of any factual or legal determination made by the disqualified judge. Blackpool Associates Ltd. v. SM-106 Ltd., 839 So. 2d 837, 838 (Fla. 4th DCA 2003); Warner v. Holmes Co., 717 So. 2d 612 (Fla. 1st DCA 1998); Sunrise Gift & Souvenir, Inc. v. Marcotte, 698 So. 2d 345 (Fla. 5th DCA 1997). This right is rooted in the common law, and codified by Rule 2.160(h), Florida Rules of Judicial Administration. Barber v. Mackenzie, 562 So. 2d 755 (Fla. 3rd DCA 1990) (decided prior to adoption of Fla. R. Jud. Admin. 2.160); Blackpool, 839 So. 2d 837; Mutual of Omaha Ins. Co. v. Gold, 681 So. 2d 1204 (Fla. 5th DCA 1996). To allow an order by a disqualified ALJ to stand is to deprive a party of minimum substantive due process.[1]

It is appropriate for this Court to issue a writ of certiorari vacating the recommended order. When reconsideration or vacation is requested pursuant to Rule 2.160(h), Florida Rules of Judicial Administration, the successor judge must make an "independent determination" of the matters of fact and issues of law in the case and should not rely upon the challenged order. Mutual of Omaha, 681 So. 2d at 1205. The ability to revisit or vacate a disqualified judge's rulings is far broader than the ordinary motion for reconsideration. As explained in Sunrise Gift & Souvenir, Inc. v. Marcotte, 698 So. 2d 345 (Fla. 5th DCA 1997):

> Petitioners also argue that the successor judge departed from the essential requirements of law in reconsidering the order granting summary judgment when no factual or legal argument was asserted. However, Rule 2.160(h) does not limit the scope of a successor judge's review to new matters and so a motion for reconsideration is not analogous to a motion for rehearing.

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[1] Even parties to a quasi-judicial administrative proceeding are entitled to minimum due process. Cherry Communications, Inc. v. Deason, 652 So.2d 803, 804 (Fla.1995)(citing Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So.2d 322, 323 (Fla.1990) (quoting Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir.1976))); Charlotte County v. IMC-Phosphates Co., 824 So.2d 298, 300-301 (Fla. 1st DCA 2002).

Petitioners have not requested a new hearing. At the time of the hearing there were no known disqualifying grounds. However when reviewing the record and creating his findings the ALJ did have employment which should have disqualified him from continuing to consider this case. Pursuant to Rule 2.160, Florida Rules of Judicial Administration, and the aforementioned precedents, the Petitioners requested the vacation of the recommended order entered by ALJ Pfeiffer and a new (de novo) and independent review of the record in this action by a new ALJ. The requested *de novo* determination by a new ALJ based upon the existing record is in keeping with Section 120.57(1), Florida Statutes, and with the Court's opinion in University Community Hospital v. DHRS, 555 So. 2d 922 (Fla. 1st DCA 1990) (citing predecessor version of Chapter 120). Vacation of the recommended order by this Court would expedite the proceedings at DOAH and ensure that this action is decided by an impartial decision maker.

CONCLUSION

ALJ Pfeiffer departed from the essential requirements of law by denying the motion to disqualify on the basis of facts not found in the motion and by attempting to controvert the facts alleged in the motion. Such action is not within the scope of permissible inquiry when presented with a motion to disqualify. Bundy, 366 So. 2d 440; Brown, 561 So. 2d 253; Dept of Agriculture, 810 So. 2d 1056; Cave, 660 So. 2d

705; Newman, 627 So. 2d 116; Mangina, 462 So. 2d 602. ALJ Pfeiffer further asserted that despite his employment by Tenet he was coldly neutral. This assertion too was not permissible in this context. Bundy, 366 So. 2d 440; Livingston, 441 So. 2d 1083. The sole issue presented to him was whether the motion was legally sufficient and whether it presented a reasonable basis for a party to fear bias. Breakstone, 565 So. 2d 1332; Livingston, 441 So. 2d 1083. The motion to disqualify was well grounded in facts which would create a reasonable fear of the decision maker's bias. Had the ALJ restricted his deliberation to the question of sufficiency, as required by the rules and case law, then the motion would have been granted. Because he did not restrict his inquiry as required by law his disqualification is required. Bundy, 366 So. 2d 440; Newman, 627 So. 2d 116; Mangina, 462 So. 2d 602. By exceeding the bounds of the permissible inquiry, he now must be disqualified regardless of the sufficiency of the motion. The writ of prohibition should issue.

Because the Recommended Order was issued after ALJ Pfeiffer's disqualifying employment commenced, the Recommended Order he issued should not stand. The reconsideration of a order entered by a disqualified ALJ is a matter of right. Blackpool Associates, 839 So. 2d 837; Leslie, 840 So. 2d 1097; Barber, 562 So. 2d 755; Mutual of Omaha, 681 So. 2d 1204 . Similar to Mutual of Omaha v. Gold, while an order entered by a disqualified ALJ may only be voidable and not automatically void, under certain circumstances the interests of justice dictate that the appellate court declare such an order void. These circumstances present such an instance and a writ of certiorari should issue vacating the recommended order.

DATED this 25th day of May, 2005.

Respectfully submitted,

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Attorneys for Petitioners, Lee Memorial Health System; Cape Memorial Hospital, Inc.; HealthPark Care Center, Inc.; Lee Memorial Rehabilitation Hospital; and Cypress Cove at HealthPark Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition was furnished by U.S. Mail to: Kenneth W. Gieseking, Esq., Assistant General Counsel, Agency for Health Care Administration, Fort Knox Building 3, 2727 Mahan Drive, Tallahassee, FL 32308-5403; Mark A. Emanuele, Esq., Panza, Maurer & Maynard, P.A., Bank of America Bldg.- 3rd Floor, 3600 North Federal Highway, Fort Lauderdale, FL 33308; William R. Pfeiffer, Esq., Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060; and to Robert S. Cohen, Esq., Director and Chief Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060, this 25th day of May, 2005.

W. David Watkins, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

W. David Watkins, Esq.

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; LEE MEMORIAL REHABILITATION HOSPITAL; and CYPRESS COVE AT HEALTHPARK FLORIDA, INC.,

Petitioners,

v. **CASE NO.**

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION; and SELECT SPECIALTY HOSPITAL - LEE, INC.,

Respondents.

_______________________________________/

APPENDIX TO
PETITION FOR WRITS OF PROHIBITION AND CERTIORARI

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INDEX TO APPENDIX

1 Order Denying Intervenors' Motion to Disqualify the Administrative Law Judge and Vacate Recommended Order. Issued by ALJ Pfeiffer on May 20, 2005.

2 Intervenors' Memorandum of Law in Support of the Motion to Vacate the Recommended Order. Filed by Petitioners on May 13, 2005.

3 Petitioner Select Specialty Hospital-Lee, Inc.;s Response to Intervenors' Motion to Vacate the Recommended Order. Filed by Respondant Select on May 9, 2005.

4 Notice of Referral. Filed by AHCA on May 6, 2005.

5 Order on Motion for Stay (remand). Issued by AHCA on May 2, 2005.

6 Petitioner Select Specialty Hospital-Lee, Inc.'s Memorandum of Law in Opposition to Intervenors' Motion to Remand. Filed by Respondant Select on April 22, 2005.

7 Intervenors' Emergency Motion to Remand this Case for Ruling on the Motion to Disqualify the ALJ. Filed by Petitioners on April 19, 2005.

8 Intervenors' Motion to Disqualify the Administrative Law Judge and Vacate Recommended Order. Filed by Petitioners on April 19, 2005.

9 Certificate of Counsel that Motion to Disqualify is filed in Good Faith. Filed by Petitioners on April 19, 2005.

10 Intervenors' Memorandum of Law in Support of the Motion to Disqualify the Administrative Law Judge and Vacate Recommended Order. Filed by Petitioners on April 19, 2005.

11. Renewed Unopposed Motion Requesting a Status Conference. Filed by Petitioners on March 8, 2005.

12. Unopposed Motion Requesting a Status Conference. Filed by Petitioners on February 10, 2005.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL-LEE, INC.,

Petitioner,

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL, INC.; HEALTHPARK CARE CENTER, INC.; AND LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.

Case No. 03-2487CON

ORDER DENYING INTERVENORS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE AND VACATE RECOMMENDED ORDER

Pursuant to REMAND by Respondent, the undersigned has jurisdiction over this matter and advises the parties of the following:

1. The undersigned has been the duly-designated Administrative Law Judge (ALJ) over this matter since the Petition was filed at the Division of Administrative Hearings (DOAH) in 2003. In essence, Petitioner sought to establish a new, freestanding 60-bed long-term acute care hospital in Lee County, Florida, which is located in District 8 and consists of Sarasota, Charlotte, Desoto, Glades, Hendry, Lee, and Collier counties. Respondent and Intervenors opposed Petitioner's proposal.

2. The undersigned carefully considered voluminous testimonial and illustrative evidence provided by each of the parties over nearly nine days of hearing in Tallahassee, Florida, in April 2004.

3. The undersigned carefully considered each party's Proposed Recommended Order, which was received in August 2004.

4. The undersigned further examined and considered each party's admitted exhibits during November and December 2004 and began drafting the Recommended Order in January 2005 and completed the substance of the Recommended Order in February 2005.

5. The undersigned resigned from DOAH in early January 2005, to be effective later that month.

6. The undersigned agreed to complete the balance of any outstanding case-related work on an OPS status.

7. The undersigned was retained by Tenet in March 2005 to monitor proposed legislation during the 2005 Legislative Session in Tallahassee, and did not serve as legal counsel.

8. The undersigned is not and has never been affiliated with any firm involved in the Attorney General's federal lawsuit filed against Tenet, has not read the complaint and was not even aware that Intervenors were parties to the federal case at the time the Recommended Order was issued.

9. The undersigned, consistent with all cases, provided each party with cold neutrality and a fair and impartial determination.

Wherefore, Intervenors' Motion to Disqualify the Administrative Law Judge and Vacate Recommended Order lacks merit and is DENIED.

Furthermore, given the circumstances and equitable demands, all parties have the right to submit written exceptions to the Recommended Order within 15 days from the date of this Order.

DONE AND ORDERED this 20th day of May, 2005, in Tallahassee, Leon County, Florida.

WRP

WILLIAM R. PFEIFFER
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2005.

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL - LEE, INC.,

Petitioner,

v.

DOAH NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC., LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
______________________________________/

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO VACATE THE RECOMMENDED ORDER

Intervenors, LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL (collectively referred to herein as "LMHS"), by and through their undersigned counsel file this memorandum of law in support of the motion to vacate the recommended order (attached hereto and incorporated by reference herein as Exhibit 1), and in support would show:

I. BRIEF BACKGROUND TO THE MOTION TO DISQUALIFY AND VACATE

1. This action was heard from April 4-19, 2004, by Administrative Law Judge William R. Pfeiffer ("ALJ Pfeiffer"). After an unforeseen delay in the preparation of the transcript, the

parties filed proposed recommended orders on August 20, 2004. ALJ Pfeiffer entered a Recommended Order on April 8, 2005.

2. ALJ Pfeiffer was engaged as a lobbyist by Tenet Healthcare Corporation ("Tenet") months before he entered the Recommended Order. (See, Exhibit B (Lobbyist Registration Form) to Affidavit of Karl David Acuff, attached as Exhibit 2 to Motion to Disqualify.)

3. Tenet is the defendant in a multi-million dollar racketeer influenced and corrupt organizations (RICO) suit in federal court which was filed during the pendency of this action at DOAH. LMHS is one of the plaintiffs in that federal suit. (See, Motion to Disqualify and Exhibit B to the Affidavit of John Kevin Wiest, attached as Exhibit 1 to the Motion to Disqualify.)

4. LMHS could not receive a fair and impartial determination because ALJ Pfeiffer had a conflict of interest creating a reasonable inference of bias and prejudice against LMHS. (See, the attached Motion to Disqualify and the Affidavit of John Kevin Wiest, attached as Exhibit 1 to the Motion to Disqualify.)

5. Within ten days of its discovery of these facts regarding ALJ Pfeiffer, LMHS filed a motion to disqualify him and to vacate his recommended order. Also filed at that time was a motion for the remand of this action to DOAH for ruling on the motion to disqualify and vacate.

6. This action was remanded to DOAH by the Agency for Health Care Administration by its May 2, 2005, order. The order and notice of referral were docketed on May 6, 2005.

7. No ruling has yet been issued on the motion to disqualify ALJ Pfeiffer.

8. Select has filed a memorandum of law in opposition to the motion to vacate.

II. <u>ALJ PFEIFFER HAD AN AFFIRMATIVE DUTY TO DISCLOSE HIS EMPLOYMENT BY TENET</u>

9. Rules of Judicial Conduct, Canon 3E(1) requires disqualification whenever a judge's impartiality might be reasonably questioned. The Commentary to Canon 3E of the Code of Judicial Conduct is very clear:

> Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. ... ... A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification.

10. The policy of the Florida Supreme Court favors a broad rule of disclosure. See *"But I'm a Friend of the Court" and Other Predicaments: What Every Lawyer Should Know About the Florida Code of Judicial Conduct*, Judge Charles J. Kahn, 76 Mar. Fla. B.J. 10 (March 2002). The requirement for a judge to disclose any possible basis for disqualification or potential conflict is far broader than the obligation to disqualify. <u>Id</u>.; <u>W.I. v. State</u>, 696 So. 2d 457 (Fla. 4th DCA 1997)(disclosure required even if judge believes no basis for disqualification); Fla. JEAC op. 99-2;

11. ALJ Pfeiffer had an affirmative duty to disclose his engagement by Tenet. <u>Id</u>.; <u>W.I. v. State</u>; Fla. JEAC op. 99-2. The Intervenors twice requested that ALJ Pfeiffer hold a status conference (motions filed on February 10, 2005 and March 8, 2005) and the ALJ could have easily taken those opportunities to disclose his employment by Tenet. He did not make that disclosure.[1] "A judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil. Cf. the rule stated in <u>Anderson v. State</u>,

[1] The delay between the ALJ's engagement by Tenet, as evidenced by the executed Lobbyist Registration Form, and the substantially delayed filing of this registration form lends itself to a reasonable inference of concealment.

Fla. App. 1973, 287 So. 2d 322." Aetna Life & Cas. Co. v. Thorn, 319 So. 2d 82, 84 (Fla. 3rd DCA 1975) (again if disqualification warranted then prior judgment may be reconsidered).

III. FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.160 APPLIES

12. ALJs are subject to the provisions of Florida Rule of Judicial Administration 2.160. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1st DCA 2002). In determining the motion to disqualify, the judge cannot rationalize that he believes that he can or did act with impartiality once the basis for disqualification is known. A party has the right to have a judge who is free from any obvious source of possible unconscious bias. Aetna Life & Cas. Co. v. Thorn, 319 So. 2d 82 (Fla. 3rd DCA 1975).

13. Disqualification of the ALJ and vacation of the recommended order are well recognized rights flowing from the common-law and from Section 38.10, Florida Statutes, Fla. R. Jud. Admin. 2.160, and Florida precedents.[2] See e.g., Rucks v. State, 692 So. 2d 976 (Fla. 2nd DCA 1997). "The same principles apply if the motion to disqualify the trial judge is filed after judgment; the protections of section 38.10 are not confined to fair treatment in the context of a trial." Rucks (citing Lages v. State, 685 So.2d 968 (Fla. 2d DCA 1996)).

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[2] The courts in every district of Florida uniformly recognize the right under Rule 2.160(h) to have prior rulings by a disqualified judge reconsidered and vacated by the filing of a timely motion. Warner v. Holmes Co., 717 So. 2d 612 (Fla. 1st DCA 1998); Doe v. Publix Super Markets, Inc., 814 So. 2d 1249 (Fla. 2nd DCA 2002); Tyler v. State, Governor Chiles, 718 So. 2d 811 (Fla. 2nd DCA 1997); Robbins v. Robbins, 742 So. 2d 395 (Fla. 2nd DCA 1999); Rucks v. State, 692 So. 2d 976 (Fla. 2nd DCA 1997); Weiss v. Berkett, 2005 WL 764989 (Fla. 3rd DCA 2005); Wehebe v. Uejebe, 744 So. 2d 572 (Fla. 3rd DCA 1999); Murphy v. State, 627 So. 2d 51 (Fla. 3rd DCA 1993); Chillingworth v. State, 846 So. 2d 674 (Fla. 4th DCA 2003); Blackpool Associates, Ltd. v. SM-106, Ltd., 839 So. 2d 837 (Fla. 4th DCA 2003); Schlesinger v. Chemical Bank, 707 So. 2d 868 (Fla. 4th DCA 1998); Singer v. Singer, 706 So. 2d 914 (Fla. 4th DCA 1998); Nathanson v. Nathanson, 693 So. 2d 1061 (Fla. 4th DCA 1997); Nunez v. Backman, 645 So. 2d 1063 (Fla. 4th DCA 1994); Perez v. Rosie, 815 So. 2d 730 (Fla. 5th DCA 2002); Berry v. Berry, 765 So. 2d 855 (Fla. 5th DCA 2000); Shooster v. BT Orlando Ltd. Partnership, 766 So. 2d 1114 (Fla. 5th DCA 2000); Sunrise Gift & Souvenir, Inc. v. Marcotte, 698 So. 2d 345 (Fla. 5th DCA 1997); Dream Inn, Inc. v. Hester, 691 So. 2d 555 (Fla. 5th DCA 1997); Mutual of Omaha Ins. Co. v. Gold, 681 So. 2d 1204 (Fla. 5th DCA 1996).

14. Disqualifying the ALJ and vacating the recommended order pursuant to Fla. R. Jud. Admin. 2.160 are important substantive and procedural safeguards, as summarized in Florida Jurisprudence, 2nd:

> Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as would raise no suspicion of the fairness and integrity of the judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. The law intends that no judge will preside in a case in which he or she is not wholly free, disinterested, impartial, and independent.

13 Fla. Jur 2d, *Courts and Judges* § 313 (footnotes omitted).

IV. THE RECOMMENDED ORDER SHOULD BE VACATED

15. The matter decided involved conflicting testimony from recognized experts. Any partiality, bias or prejudice in determining the reliability of expert testimony, or in the final determination itself, would have a tangible effect. When judging more complex issues of advanced expertise, and when experts in those fields had substantial differences of opinion, then the determinations made by a biased or prejudiced ALJ cannot be allowed to stand. As Florida Jurisprudence summarizes: "Since the fact-finding function is critical to the resolution of administrative cases, and is subject only to limited judicial review, it is imperative that this function be afforded the broadest dimensions of constitutional protection." 2 Fla. Jur. 2d § 230, p. 218 (citing State, Dept. of Administration v. Stevens, 344 So. 2d 290 (Fla. 1st DCA 1977); Deel Motors, Inc. v. Dept. of Commerce, 252 So. 2d 389 (Fla. 1st DCA 1971)). Disqualification of the ALJ without vacation of the recommended order is a non-remedy, particularly given the legal constraints AHCA is under to not disturb the findings of fact made in the recommended order. Section 120.57(1)(l), F.S. (2004).

16. Once a judge has been disqualified, it is the party's right to seek a reconsideration of any factual or legal determination made by the disqualified judge. Blackpool Associates Ltd. v.

SM-106 Ltd., 839 So. 2d 837, 838 (Fla. 4th DCA 2003); Leslie v. Leslie, 840 So. 2d 1097, 1098 (Fla. 4th DCA 2003). This right is well entrenched in the common law, and by the provisions of Fla. R. Jud. Admin. 2.160(h). Barber v. Mackenzie, 562 So. 2d 755 (Fla. 3rd DCA 1990) (decided prior to adoption of Fla. R. Jud. Admin. 2.160); Blackpool; Mutual of Omaha. To allow an order by a disqualified ALJ to stand is to deprive a party of minimum substantive due process.

17. When, as now, a request for reconsideration or to vacate pursuant to Fla. R. Jud. Admin. 2.160(h) is made, the successor judge must make an "independent determination" of the matters of fact and issues of law and should not rely upon the challenged order. Mutual of Omaha Ins. Co. v. Gold, 681 So. 2d 1204, 1205 (Fla. 5th DCA 1996). The ability to revisit or vacate a disqualified judge's rulings is far broader than the ordinary motion for reconsideration. As explained in Sunrise Gift & Souvenir, Inc. v. Marcotte, 698 So. 2d 345 (Fla. 5th DCA 1997):

> Petitioners also argue that the successor judge departed from the essential requirements of law in reconsidering the order granting summary judgment when no factual or legal argument was asserted. However, Rule 2.160(h) does not limit the scope of a successor judge's review to new matters and so a motion for reconsideration is not analogous to a motion for rehearing.

18. Even parties to a quasi-judicial administrative proceeding are entitled to minimum due process. Cherry Communications, Inc. v. Deason, 652 So.2d 803, 804 (Fla.1995)(citing Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So.2d 322, 323 (Fla.1990) (quoting Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir.1976))); Charlotte County v. IMC-Phosphates Co., 824 So.2d 298, 300-301 (Fla. 1st DCA 2002).

19. The Sunrise Gift court held that once a judge is disqualified for alleged bias, interest or prejudice, that any order entered by that judge may be vacated or reconsidered without the party having to argue anything more. 698 So. 2d 345.

V. SELECT's MEMORANDUM OF LAW IS INCORRECT

20. Select's memorandum in opposition to the motion to vacate is materially incorrect as to the law and standards to be applied. Only in a few places does Select recognize the correct law to be applied, e.g. Sunrise Gift (¶ 8 of Select's filing), Schlesinger (¶ 10), and Doe v. Publix (¶ 13). Select's insistence that Rule 2.160(h) reconsideration is somehow tied to the appellate review standard is in error and completely lacks any supporting authority or precedent.

21. With the exceptions noted in the prior paragraph, all the cases on "successor judges" cited by Select come from ordinary replacements when circuit judges rotate, or judges retire etc., and not where the previous judge was disqualified. The other cases cited by Select have no application to this case.[3] A different set of rules apply where a judge is disqualified. See, Rule 2.160(h) and discussion above.

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[3] Notes to Select's cited cases:

Dept. Revenue v. Riley: that all prior orders were vacated after the case was transferred to another division was error. No disqualification was involved and Riley was not a 2.160(h) case.

Elmowitz: attempt was made to to reopen an estate to change a homestead determination after three years after estate closed. No disqualification was involved and Elmowitz was not a 2.160(h) case.

Long Term Management: while this case does involve disqualification, the referenced exclusion does not apply here because in this case there was no oral ruling by ALJ Pfeiffer to reduce to writing.

Paragon Group: if the parties could not stipulate to cold record review by a circuit court judge that it would have to be assigned to a new judge for a new trial after remand from appellate court. Paragon Group is not applicable to this action because 150.57(1) explicitly allows this procedure of a cold record review.

Tingle: a successor judge can hold additional hearings and alter findings of any non-final ruling. A recommended order is a non-final order. Further no disqualification was involved. Tingle was not a 2.160(h) case.

Boeing Co.: dismissal for lack of prosecution where no alleged activity would relieve them from dismissal -- effective holding is that the courts prefer that one trial judge will not ordinarily review the order of another trial judge. Rule 2.160(h) is not a review of an order as in an appellate context, instead it requires a new determination. See Sunrise Gift; Mutual of Omaha..

Flynn v. DEP: also found as DOAH Case No. 96-4737, 1997 WL 1052734 (Fla. Div. Admin. Hrgs.). Flynn involved the Department's role, not that of a successor judge or ALJ. While Flynn did involve a remanded case from an agency back to an ALJ, no disqualification was involved and it was not a 2.160(h) case.

CONCLUSION

Wherefore, in consideration of the above, the motion to disqualify and its attachments, and Select's response, the successor ALJ should enter an order vacating the Recommended Order entered by ALJ William R. Pfeiffer and conduct a new (*de novo*) review of the record in an independent determination and issue an independent recommended order.

Respectfully submitted this 13TH day of May, 2005.

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Lee Memorial Health System,
Cape Memorial Hospital, Inc.,
HealthPark Care Center, Inc.,
Lee Memorial Rehabilitation Hospital,
and
Cypress Cove at HealthPark Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been provided as indicated the following addressees, this 13TH day of May, 2005:

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Deborah S. Platz, Esq.
Panza, Maurer & Maynard, P.A.
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Via Facsimile & U.S. Mail

Kenneth W. Gieseking, Esq.
Agency for Health Care Administration
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2727 Mahan Drive
Tallahassee, FL 32308

Via Facsimile & U.S. Mail

W. DAVID WATKINS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL – LEE, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

CASE NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

PETITIONER SELECT SPECIALTY HOSPITAL-LEE, INC.'S RESPONSE TO INTERVENORS' MOTION TO VACATE THE RECOMMENDED ORDER

Petitioner, SELECT SPECIALTY HOSPITAL – LEE, INC. ("Select-Lee"), hereby files this Response to Intervenors, CYPRESS COVE AT HEALTHPARK FLROIDA, INC., LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL REHABILITATION HOSPITAL'S Motion to Vacate the Recommended Order and Memorandum of Law, and as grounds states the following:

BACKGROUND INFORMATION:

1. The Division of Administration Hearings held the trial in the above referenced matter on April 6, 2004 to April 9, 2004 and April 13, 2004 to April 16, 2004.

2. The extensive trial lasted for eight (8) days. Select-Lee and the Intervenors conducted extensive discovery, entered numerous exhibits into evidence, called witnesses to testify, and presented opening and closing remarks at this trial.
3. Select-Lee and the Intervenors submitted Proposed Recommended Orders to the Administrative Law Judge ("ALJ") on August 20, 2004. Select-Lee and the Intervenors had a substantial amount of time to review discovery, deposition transcripts, exhibits submitted as evidence a trial, and the trial transcript. As a result, parties at the trial were able to submit to the ALJ a carefully thought out proposed recommended order based upon the above-stated resources.
4. The ALJ submitted a recommended order on April 8, 2005. The ALJ had time to issue a Recommended Order affirmed by competent substantial evidence based from a legal proceeding that complied with the requirements of law.
5. Subsequent to issuance of the Recommended Order, Intervenors have filed a motion to now Disqualify the ALJ and a Motion to Vacate the Recommended Order. Although Petitioner does not concede that disqualification is appropriate, Petitioner, Select-Lee hereby files this its Response to Intervenors' Motion to Vacate the Recommended Order and Memorandum of Law in opposition and assumes for purposes of this argument, that the ALJ assigned to the above captioned matter, is disqualified pursuant to Florida Statute 38.10 (2004) and Florida Rule of Judicial Administration 2.160 and that a successor ALJ is assigned to the matter. In responding to Intervenors' Motion to Vacate Recommended Order, Petitioner Select-Lee does not concede or believe that Intervenors' Motion to Disqualify the Administrative Law Judge is legally sufficient on its face.

MEMORANDUM OF LAW

6. Florida Rules of Judicial Administration 2.160(h) provides in pertinent that prior factual or legal rulings by a disqualified judge **"may"** be reconsidered and vacated or amended by a successor judge based upon filing a motion for reconsideration.

7. **Generally, a successor judge does not have authority to reverse a decision of a predecessor judge on a point of law once a final order has been entered on the merits**. *Department of Revenue v. Riley*, 684 So.2d 905 (Fla. 3d DCA 1996); Elmowitz v. State of Zimmerman, 647 So.2d 1064 (Fla. 3d DCA 1994). A successor judge cannot correct errors of law committed by a predecessor judge and cannot review and reverse, on the merits and the same facts, the final orders and decrees of a predecessor judge. Department of Revenue v. Riley, 684 So.2d 905 (Fla. 3d DCA 1996).

8. If no petition for reconsideration is filed, all orders entered by a disqualified judge prior to the entry of the order of disqualification are binding and valid as if they had been duly entered by a qualified judge authorized to act in the legal procedure. Sunrise Gift & Souvenir, Inc. v. Marcotte, 698 So.2d 345 (Fla. 5th DCA 1997). The fact that an order was entered by a judge who is subsequently disqualified is not assignable as error or subject to review by the appropriate appellate court unless a petition for reconsideration was filed by the party urging the matter as error, and the judge before whom the cause was then pending refused to vacate or modify the order. *Id.*

9. For example, when a judge has heard testimony and arguments and rendered an oral ruling in a proceeding, the judge still retains authority to perform the ministerial act of reducing that ruling to writing. *FS § 38.10;* Long Term Management, Inc. v. University Nursing Care Center, Inc., 704 So.2d 669 (Fla. 1st DCA 1997).

10. The successor judge can enter a judgment only on the filed motion or on the record of the prior proceeding. Paragon Group, Inc. v. Hoeksema, 475 So.2d 244 (Fla. 2d DCA 1985). In Schlesinger v. Chemical Bank, 707 So. 2d 868, 869 (Fla. 4th DCA 1998), the Fourth District Court of Appeals held that **a final judgment that is entered by a judge who is later disqualified is subject to being reconsidered by a successor judge, but a party may not have the have the judgment vacated as a matter of right**.

11. A successor judge may reconsider a predecessor's final judgment to determine its legal sufficiency upon a motion for relief from judgment. Tingle v. Dade County Board of County Commissioners, 245 So.2d 76 (Fla. 1971). In the event that subsequent events may defeat the prior judgment, the successor judge does have authority even after final judgment to make such further order as may be necessary to effectuate the judgment. *Id.* The successor judge may supply the element, which may have been omitted from a final judgment or incomplete order. *Id.*

12. It has long been the rule in Florida that a successor judge "cannot review and reverse on the merits and on the same facts the final orders and decrees of his predecessor." Boeing Co. v. Merchant, 397 So.2d 399 (Fla. 5th DCA 1981). For this reason a final order that has been rendered may not be re-decided by a second judge on the same action at law. *Id.*

13. Clearly, the ultimate legal conclusions if reasonably interpreting the law as applied by the finder of fact will be allowed if based on competent substantial evidence of the record. Flynn v. Dept. of Environmental Protection, 1998 Fla. E.N.V. LEXIS 348, 2 ER FALR (Feb. 13, 1998). A final order entered by a disqualified judge is voidable, not void. Doe v. Public Super Mkts., Inc., 814 So. 2d 1249 (Fla. 2nd DCA 2002). This is the standard that this Court must apply in deciding Intervenors' Motion to Vacate the Recommended Order.

14. Thus, Intervenor is not automatically entitled to an order vacating the Recommended Order issued by the ALJ on April 8, 2005, even if the motion to disqualify were granted.

15. Additionally, Intervenors are not entitled to a trial "de novo" or a review of the record "de novo" even if the motion to disqualify were granted. If after disqualification, a successor ALJ in reviewing the record finds that there is competent and substantial evidence in the record to support the findings of fact as made by the predecessor ALJ (regardless of whether he agrees or disagrees with them) then the Recommended Order must be affirmed.

16. Similarly, if in reviewing the record, the successor judge determines that the conclusions of law as made by the predecessor judge are a reasonable and correct application of the law to the facts, then the Recommended Order must be affirmed.

17. Any review of the Recommended order, which was issued prior to disqualification is limited, a determination of whether it is support by competent and substantial evidence in the record and not a reweighing of the evidence.

18. There is competent and substantial evidence in the record to support the findings of fact made by the ALJ and as contained in the recommended order of April 8, 2005. Intervenors fail to identify in its response any findings of fact which are not supported by competent and substantial evidence in the record nor do Intervenors identify any legal errors or erroneous conclusions of law as made by the ALJ.

WHEREFORE, Select-Lee requests the denial of Intervenors' Motion to Vacate the Recommended Order and that upon a ruling on Intervenors' Motion to Disqualify that the Recommended Order be affirmed.

RESPECTFULLY SUBMITTED this 9th day of May, 2005.

PANZA, MAURER & MAYNARD, P.A.
Attorneys for Select Specialty Hospital-Lee, Inc.
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Telephone: (954) 390-0100
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By: ______________________
MARK A. EMANUELE
Florida Bar No.: 0541834
BRETT R. FRANKEL
Florida Bar No. 0797731

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been fax filed with the Hon. Harry L. Hooper, Administrative Law Judge, 850-921-6847, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060 and a copy has been furnished via facsimile and First Class Mail to the following on this 9th day of May, 2005:

Kenneth W. Gieseking, Esq.
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 3
2727 Mahan Drive
Tallahassee, FL 32308
850-921-0158

W. David Watkins, Esq.
Karl David Acuff, Esq.
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850-671-2732

By: ______________________
MARK A. EMANUELE

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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL – LEE, INC.,

Petitioner,

FRAES No. 2003004426
DOAH No. 03-2487CON

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

And

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC. and LEE MEMORIAL REHABILITATION HOSPITAL

Intervenors.

______________________________________/

NOTICE

TO: Robert Cohen, Director
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Please be advised that the Agency for Health Care Administration (AHCA) has received a Motion To Disqualify the Administrative Law Judge from the Interveners. AHCA requests the Division of Administrative Hearings (DOAH) to assign this matter to an Administrative Law Judge, to conduct all necessary proceedings required under the law, and to enter an Order in this matter.

APPEARANCES

FOR AHCA:

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State of Florida, Agency for
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Tallahassee, Florida 32308
(850) 922-5873

FOR PARTY REQUESTING HEARING:

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Deborah S. Platz, Esquire
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FOR INTERVENERS:

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As part of this referral, AHCA reserves the right to file any and all appropriate motions. No waiver is made of any rights or entitlements arising out of or during the course of this proceeding. No determination is made in respect to any procedural or substantive matter as a result of this referral.

Henceforth, any communication between the parties should be through their respective legal counsel or qualified/authorized representative.

DONE this 6th day of May, 2005, in Tallahassee, Florida.

Richard J. Shoop, Agency Clerk
State of Florida, Agency for
Health Care Administration
2727 Mahan Drive, MS 3
Fort Knox Building III, Suite 3431
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(850) 922-5873

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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL – LEE, INC.,

Petitioner,

vs.

DOAH CASE NO. 03-2487CON
AHCA NO. 2003004426
CON NO. 9656

STATE OF FLORIDA, AGENCY FOR HEALTHCARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEEMEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

ORDER ON MOTION FOR STAY

THIS CAUSE came before the office of the Agency Clerk on the Intervenor's Motion for Remand. Upon review of the Motion and Petitioner's Response,

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

The Intervenor's Motion for Remand is granted. The above-styled case shall be remanded back to the Division of Administrative Hearings for the purpose of ruling on the Intervenor's Motion to Disqualify the Administrative Law Judge and Vacate Recommended Order.

DONE and ORDERED on this 2nd day of May, 2005, in Tallahassee, Florida.

RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by U.S. or interoffice mail to the persons named below on this 2nd day of May, 2005.

RICHARD J. SHOOP, Agency Clerk
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL – LEE, INC.,
Petitioner,

v.

CASE NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

PETITIONER SELECT SPECIALTY HOSPITAL-LEE INC.'S MEMORANDUM OF LAW IN OPPOSITION TO INTERVENORS' MOTION TO REMAND

Petitioner SELECT SPECIALTY HOSPITAL – LEE, INC., (Select-Lee) hereby files this, its Response and Memorandum of Law in opposition to Intervenors Lee Memorial Health System, et al's (LMHS) Emergency Motion to Remand and as grounds states the following:

1. There are no valid grounds set forth by Intervenors to grant such an extraordinary Motion to Remand. The four corners of the pleadings before AHCA fail completely to state sufficient grounds on its face for remand.

2. In its Motion to Remand, Intervenors Lee Memorial Health System, et al, make irrelevant reference to Florida Statute 38.10(2004) without quoting or citing any pertinent

language contained within said statute that could support a remand. Section 38.10 provides in pertinent part as follows:

> "Every judge of this state who appears of record as a party to an cause before him or her shall be disqualified to act therein, and shall forthwith enter an order declaring himself or herself to be disqualified in said cause..."

3. In the instant matter, Intervenors assert in part as the basis for remand the application of Florida Statute 38.10(2004). It should be noted, however, by the express language of Section 38.10 it only applies where the judge of record appears as a party to any cause before him or her. In the instant matter Intervenors do not allege nor do they contend that Judge Pfeiffer, the Administrative Law Judge who tried this matter over a year ago, was a party to the cause before him. Indeed, the alleged basis for Judge Pfeiffer's disqualification arises approximately ten months after the case was tried, the evidence was received, the record was closed and proposed recommended orders were submitted by the parties. Clearly on its face, Section 38.10 is not applicable to these proceedings.

4. Intervenors next rely upon Rule 2.160(c) of the Florida Rules of Judicial Administration. Thus, once again, Intervenors fail to cite any specific language as contained in the Rule which could support their Motion for Remand, which again on its face is wholly lacking in any factual basis to support a remand by AHCA to DOAH. Rule 2.160(a) provides in pertinent part as follows:

> "This rule applies only to County and Circuit Judges in all matters in all divisions of court."

5. The Rule further provides under Rule 2.160(j) as follows

> "The Judge shall rule on a motion to disqualify immediately, but no later than thirty days after the service of the motion as set forth in subdivision (c). If not ruled on within thirty days of services, the motion shall be deemed granted and the moving party shall

seek an order from the Court directing the Clerk to reassign the case."

6. It is clear from the language of Rule 2.160, that it does not apply to these proceedings, as this proceeding is not and has not been before any county court or circuit court judge or divisions of the courts of Leon County, Florida.

7. Contrary to the express language of Rule 2.160, Intervenors erroneously cite Department of Agriculture and Consumer Services v. Broward County, 810 So.2d 1056 (Fla. 1st DCA 2002) for the proposition that ALJs are subject to the provisions of the Florida Rules of Judicial Administration.

8. While Petitioner vigorously argues that the provisions of Rule 2.160 do not specifically apply to ALJs, Petitioner does concede that were this matter before an ALJ, the standard of review for a Motion to Disqualify filed before DOAH, would be whether on its fact the facts alleged are sufficient to prompt a reasonable prudent person to fear that he or she could not get a fair and impartial trial. Brofman v. Florida Hearing Care Center, 703 So.2d 1191 (Fla. 1st DCA 1997) and Department of Agriculture and Consumer Services, id.

9. The Department of Agriculture and Consumer Services is distinguishable as the Division of Administrative Hearings has no continuing jurisdiction in this matter.

10. In the instant case, the alleged facts which now form the basis of Intervenors' Motion for Remand have occurred after the DOAH proceedings were concluded. Upon issuance of the Recommended Order, jurisdiction in this matter was transferred to the Agency for Health Care Administration and thus, DOAH does not have jurisdiction to rule on the issue.

11. Further, all of the grounds asserted by Intervenors lack the substance necessary to support disqualification under any standard cited by the Intervenors. According to the

documents filed by Intervenors, the ALJ in this matter was retained as a legislative lobbyist on behalf of Tenet Healthcare Corporation on February 9, 2005, approximately eight months after the final hearing in this matter and two months before issuance of the Recommended Order. This fact in and of itself on its face would be insufficient to support a motion to disqualify the ALJ in this matter.

12. Tenet was not a party to these proceedings, Tenet had no connection whatsoever to these proceedings, nor has it been alleged that Tenet had "any interest whatsoever" in the outcome of these proceedings. No reasonable or prudent person could believe that they would not receive a fair and impartial decision in this matter[1] simply based on the fact that the ALJ had been retained by Tenet as a legislative lobbyist.

13. Intervenors attached to their Motion for Remand, a copy of a complaint filed by the Florida Attorney General's office in the United States District Court for the Southern District of Miami, in which Intervenors are a party. The ALJ in this matter was retained, in Tallahassee, as a lobbyist. Nowhere within the Motion for Disqualification or the Affidavit of Lee Memorial Health System attached to the Motion for Disqualification does Intervenor suggest the ALJ while acting as a legislative lobbyist for Tenet knew, should have known or was even aware of the litigation in Miami filed approximately one month after he was retained as a legislative lobbyist. The acting ALJ is not a party to the Miami litigation, is not a litigator, nor is the ALJ identified in the Certificate of Service as counsel of record on behalf of "any of the parties to the litigation." Significantly, Intervenor fails to allege any indication that the ALJ in this matter is

[1] It should be noted that the majority of the cases addressing this issue arise in the context of a motion to disqualify filed prior to trial, during the course of the proceedings, and before the judge which one party or the other has sought to disqualify. In the instant matter, the trial was complete, all evidence had been received, and proposed recommended orders had been submitted.

affiliated with or has any relationship with any firm identified as a party to the Miami proceedings.

14. In fact, neither in the Motion to Disqualify, nor in the Affidavit of LMHS, do Intervenors allege any facts which would support the inference that the ALJ in this matter knew of the litigation between the Attorney General's Office (brought on behalf of various public health care providers in the State of Florida including LMHS) against Tenet or that Tenet's interest were adverse to Lee Memorial Health System. "No facts have been alleged" either within the motion to remand, the motion to disqualify or the underlying affidavits, which support the inference that the ALJ in this matter was aware Intervenors were a party to the Attorney General's suit and that Intervenors' interest arguably were adverse to Tenet. The litigation was filed in Miami, Florida some 500 miles away from Tallahassee, in another court, and by another governmental entity. Not a single fact is alleged which would support even the slightest inference that the ALJ in this matter was aware of Lee Memorial Health System's participation in the litigation, such that a reasonable and prudent person would believe that they could not receive a fair trial. It is this crucial nexus which is lacking in Intervenors' Motion to Remand and incorporated Motion for Disqualification which renders it legally insufficient on its face.

15. Intervenors attached an article from the Tallahassee Democrat published March 3, 2005 which references litigation filed by the State of Florida, Attorney General's Office against Tenet. The article makes no reference to the fact that there are any other parties. The article does not indicate or imply in any way that any health care providers either generally, or that Lee Memorial Health System specifically, were involved in the litigation or had any interest in the litigation.

16. A party seeking disqualification must allege sufficient underlying facts to show "a well grounded fear that he or she will not receive a fair trial at the hands of the judge". Caleffe v. Vitale, 488 So.2d at 628. No such facts are alleged by Intervenor. The judicial inquiry must focus on the reasonableness of an affiant's belief that the judge is prejudiced and the sufficiency of the "attested facts" supporting the suggestion of prejudice. See Livingstone v. State, 441 So.2d at 1087. [emphasis added]. AHCA's close review of the Affidavit of LMHS will highlight the complete lack of any reference to facts which would support bias or prejudice by the ALJ who was registered as legislative lobbyist not as litigation counsel for Tenet in unrelated litigation.

17. The false premise relied upon by Intervenors' in their Motion to Remand is that Judge Pfeiffer who was registered as a legislative lobbyist for Tenet Healthcare Corporation at the time he issued the Recommended Order, was somehow aware of the fact that LMHS was a party to Federal litigation filed by the Attorney General's Office for the State of Florida, in the United States District Court, Miami Division, on an unrelated matter and that Intervenors' interests were somehow adverse to Tenet's, thereby creating the fear that Intervenors would not receive a fair trial.

18. For this leap of faith, Interevenors point to an article published in the Tallahassee Democrat on or about March 3, 2005, a copy of which is attached hereto as Exhibit "A", which indicates that the Attorney General's Office is suing Tenet Healthcare Corporation regarding a dispute with respect to Medicare reimbursements received by Tenet. The article published in the Tallahassee Democrat does not even mention the fact that hospital providers in general, much less Intervenor, Lee Memorial Health System specifically, were a party to the suit. Even taking all of the facts as alleged by Intervenors into its Motion for Remand as true, the facts alleged

would not prompt a reasonable prudent person to fear that they could not get a fair and impartial trial on a CON licensure matter.

19. Absent Intervenors establishing a nexus or knowledge on the part of the ALJ, that Lee Memorial Health System was a party in the litigation filed by the Attorney General's Office in Miami, Florida, his general registration as a legislative lobbyist on behalf of Tenet Healthcare, is legally insufficient on its face to support the conclusory allegations made by the Intervenors, "that they fear that the ALJ was biased against their interest and that therefore they could not receive a fair determination of the issues in this matter".

20. Intervenors cite several cases as authority for remanding this matter. None of the cases cited by Intervenors are applicable, either factually or procedurally. Intervenors rely upon Miller v. Department of Environmental Regulation. However, that case does not support Intervenors' position here. In Miller v. Department of Environmental Regulation, 504 So.2d 1325, 1307 (Fla. 1st DCA 1987), citing Department of Environmental Regulation v. Falls Chase Taxing District , 424 So.2d 787 (Fla. 1st DCA 1982), rev. denied, 436 So.2d 98 (Fla. 1983) the Department of Environment Regulation (DER) upon receipt of the recommended order, determined that the Recommended Order was mistaken as a matter of law with respect to interpretation of certain DER regulations. As such, having reached an erroneous legal conclusion, the hearing officer made no findings of fact on the issue, which the hearing officer had mistakenly disregarded as irrelevant. Thus, in taking exception to the legal conclusion, the DER remanded the proceeding to the hearing officer to make factual findings with respect to the issue. Intervenors do not assert in this case, that there are any errors either in the findings of fact or conclusions of law with respect to the ALJ's Recommended Order which would require

remand. Indeed, in separate motions, Intervenors have been seeking to delay filing their exceptions to the Recommended Order.

21. Upon information and belief, this is because Intervenors are well aware of the fact that there is competent and substantial evidence in the record to support the findings of fact made by the ALJ in this matter, and that the conclusions of law as rendered by the ALJ in this matter, are reasonable, appropriate, and consistent with prior DOAH decisions as well as Agency actions and interpretations of the applicable rules, regulations, and statutory criteria governing LTACHs. Since, Intervenors cannot find any substantive flaw in the Recommended Order, they are now seeking to delay having to file exceptions to the Recommended Order in the hope that they can somehow procedurally derail the process.

22. Neither Miller or Department of Environmental Regulations v. Falls Chase Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982), support remand in this matter. Falls Chase did not involve litigation under Chapter 120 or proceedings before an administrative body. In Falls Chase the property owner filed a Petition for a Writ of Prohibition against the DER which was asserting jurisdiction over certain lands. The writ was denied by unpublished order without opinion. Subsequently, the property owner filed a complaint in Circuit Court for declaratory relief and injunctive relief as against the DER seeking to prohibit it from exercising jurisdiction over the property. The Circuit Court granted the property owner's motion for judgment on the pleadings and the DER appealed. On appeal, the DER raised two issues: the property owner's failure to exhaustive administrative remedies and that prior to seeking a judicial determination, the property owner should have first applied to DER for permits raising the jurisdictional issue in that proceeding, followed by, if necessary, an administrative appeal and then a Circuit Court

appeal. Remand was not an issue in Falls Chase as such, the case does not support Intervenors request for a remand here.

23. In a footnote, Intervenors cite several other cases for the proposition that remand is appropriate in this matter. However, a close reading of those cases shows that they are procedurally and factually in opposite to this case and do not support remand. As an example, in Schrimsher v. School Board of Palm Beach Co., 694 So.2d 856, (Fla. 4th DCA 1997) the Court held remand was appropriate because pursuant to the parties' pre-trial stipulations, it was agreed that an evidentiary hearing with regard to attorney's fees and costs would be held after the substantive issues had been decided. In issuing his Recommended Order, notwithstanding the stipulation of the parties, the hearing officer addressed the issue of attorney's fees and costs. In that case, the Court held that in light of the parties' stipulation, the hearing officer had incorrectly failed to conduct an evidentiary hearing to consider the claim for attorney's fees and costs and remanded the matter on that issue. Neither Schrimsher nor any of the other cases cited by Intervenors support remand based on the facts in this case.

WHERFORE, the Agency should simply deny Intervenors Motion for Remand, and require that the parties timely file their exceptions to the Recommended Order so that the Agency can proceed with entry of a Final Order.

Respectfully submitted this 22nd day of April, 2005.

PANZA, MAURER & MAYNARD, P.A.
Attorneys for Select Specialty Hospital-Lee, Inc.
3600 N. Federal Highway, Third Floor
Fort Lauderdale, Florida 33308
Telephone: (954) 390-0100
Facsimile: (954) 390-7991

By: ______________________
MARK A. EMANUELE
Florida Bar No.: 0541834

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed via facsimile and First Class Mail to the Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308 and a copy has been furnished to the following on this 22nd day of April, 2005.

Kenneth W. Gieseking, Esq. Agency for Health Care Administration 2727 Mahan Drive Fort Knox Building III, Mail Stop 3 Tallahassee, FL 32308 Facsimile: (850) 921-0158	Via fax & mail
W. David Watkins, Esq. Karl David Acuff, Esq. Watkins & Caleen, P.A. 1725 Mahan Drive, Suite 201 P. O. Box 15828 Tallahassee, FL 32317-5828 Facsimile: (850) 671-2732	Via Fax & mail
Clerk DOAH The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-3060	Via Facsimile Only
The Honorable Robert S. Cohen Director and Chief Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-3060	Via Facsimile Only
Honorable William R. Pfeiffer Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-3060	Via Facsimile Only

By: ______________________

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL — LEE, INC.,

Petitioner,

v.

DOAH NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

INTERVENORS' EMERGENCY MOTION TO REMAND THIS CASE FOR RULING ON THE MOTION TO DISQUALIFY THE ALJ

Intervenors, LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL (collectively referred to herein as "LMHS"), by and through their undersigned counsel file this motion to remand this case for ruling on the motion to disqualify the Administrative Law Judge (attached hereto and incorporated by reference herein as Exhibit 1), and in support would show:

1. This action was heard from April 4 -19, 2004. The recommended order was entered on April 8, 2005.

2. The administrative law judge ("ALJ") assigned to this case was engaged as a lobbyist by Tenet Healthcare Corporation ("Tenet") during the pendency of this action at DOAH. See the

copy of the lobbyist registration form labeled as Exhibit B to the Affidavit of Karl David Acuff, attached as Exhibit 2 to the Motion to Disqualify.

3. Tenet Healthcare Corporation is the defendant in a multi-million dollar RICO suit in federal court which was filed during the pendency of this action at DOAH. LMHS is a plaintiff in that federal suit. See the attached Motion to Disqualify and Exhibit B to the Affidavit of John Kevin Wiest, attached as Exhibit 1 to the Motion to Disqualify.

4. LMHS could not receive a fair and impartial determination because the ALJ had a conflict of interest creating bias and prejudice against LMHS. See the attached Motion to Disqualify and the Affidavit of John Kevin Wiest, attached as Exhibit 1 to the Motion to Disqualify.

5. ALJs are subject to the provisions of Florida Rule of Judicial Administration 2.160 regarding the disqualification of judges. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1st DCA 2002).

6. Disqualification of a judge or ALJ is an important procedural safeguard, as summarized in *Florida Jurisprudence*:

> Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as would raise no suspicion of the fairness and integrity of the judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. The law intends that no judge will preside in a case in which he or she is not wholly free, disinterested, impartial, and independent. Accordingly, the conditions requiring the disqualification of the judge to act in that particular case are prescribed by statute.

13 Fla. Jur 2d, *Courts and Judges* Section 313 (footnotes omitted).

7. Fla. R. Jud. Admin. 2.160(e) provides that a motion to disqualify shall be filed within 10 days after discovery of the facts constituting the grounds for disqualification. The grounds for

his motion were discovered less than ten days ago. See the Affidavit of Karl David Acuff and the attachments to the affidavit labeled as Exhibit 2 to the Motion to Disqualify.

8. With the filing of this motion LMHS contemporaneously filed a motion to disqualify the ALJ, pursuant to Florida Statutes Section 38.10 (2004), and Florida Rule of Judicial Administration 2.160. A copy of the motion and supporting affidavits is attached hereto and incorporated by reference herein as Exhibit 1. That motion also requests that the recommended order in this action be vacated and the evidence in the record considered de novo by a successor ALJ pursuant to Fla. R. Jud. Admin. 2.160(h) and Florida Statutes Section 120.57(1)(a) (2004).

9. Fla. R. Jud. Admin. 2.160(j) requires that the motion for disqualification must be ruled upon within 30 days of service, otherwise the motion is deemed automatically granted. Therefore an expedited remand of this action to DOAH is warranted.

10. Because AHCA does not have delegated to it substantive authority over Florida Statute Section 38.10 and the implementing Fla. R. Jud. Admin. 2.160, this action must be remanded to DOAH for ruling on the motion. Miller v. Department of Environmental Regulation, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987), citing Department of Environmental Regulation v. Falls Chase Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982), rev. denied, 436 So.2d 98 (Fla.1983)(agencies ordinarily do not have jurisdiction to decide issues of law.)

11. AHCA has the authority to remand an action to DOAH as in this instance when a proceeding at DOAH fails to comply with the essential requirements of law required by Florida Statutes Section 120.57(1)(l) (2004).[1]

---

[1] The propriety of remand back to the hearing officer or DOAH for further administrative proceedings has been recognized by Florida's appellate courts and regularly exercised by state agencies. Schrimsher v. School Bd. of Palm Beach Co., 694 So. 2d 856, 863 (Fla. 4th DCA 1997); Debose v. Columbia North Florida Regional Medical

12. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), is most often cited in opposition to any request for a remand from an agency to DOAH; however, J.W.C. clearly states that an agency has the authority to remand a case to DOAH. J.W.C. holds that the authority for an agency to remand for further hearings exists by "reason of the nature of the agency and the functions it is empowered to perform." J.W.C. at 785; Venetian Shores Home and Property Owners v. Ruzakawski, 336 So. 2d 399, 401 (Fla. 3rd DCA 1976) ("Extensive provisions are made for remand or correction ....") Further, the First District in Upjohn Healthcare Services, Inc. v. DHRS, 496 So. 2d 147 (Fla. 1st DCA 1986), held that a refusal to remand for further proceedings can be an abuse of discretion. Upjohn at 149.

13. LMHS' counsel conferred with counsel for AHCA, who stated that the Agency takes no position on this motion. LMHS' counsel also conferred with counsel for Select-Lee, who stated that Select-Lee will file a separate response to this motion.

WHEREFORE, AHCA should remand this action to the Division of Administrative Hearings for ruling on Intervenors' motion to disqualify the ALJ.

Center, FCHR Order No. 01-007 (Order of Remand in DOAH Case No. 00-3426), writ of prohibition denied, 793 So. 2d 931 (Fla. 1st DCA 2001) (table); Carter v. I-Drive GC, Inc., Case No. 98-2228 (Order of Remand in DOAH Case No. 01-2408, dated April 17, 2002); Environmental Confederation of Southwest Florida, Inc. v. Dept. of Community Affairs, DCA Case No. 97-266-FOF-GM, 1997 WL 1053447 (Order of Remand in DOAH Case No. 96-4752GM, dated November 5, 1997); Wallace Corp. v. City of Miami Beach, OGC Case No. 98-1155, 1999 WL 1483698 (Order of Remand in DOAH Case No. 98-2031 dated January 22, 1999); Vencor Hospitals South, Inc. v. AHCA, DOAH Case No. 97-1181 (Order dated August 28, 1998).

Respectfully submitted this 19th day of April, 2005.

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Florida Bar No. 437190
KARL DAVID ACUFF, ESQ.
Florida Bar No. 0587044

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Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were provided by as indicated below to the following addressees, this 19th day of April, 2005:

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The Honorable Robert S. Cohen
Director and Chief Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060
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Clerk
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W. DAVID WATKINS

Exhibit 1 - See APPENDIX 8

RECEIVED
GENERAL COUNSEL
APR 19 2005
Agency for Health
Care Administration

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL — LEE, INC.,

Petitioner,

v.

DOAH NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

INTERVENORS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE AND VACATE RECOMMENDED ORDER

Come now Intervenors, LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL (collectively referred to herein as "LMHS"), by and through their undersigned counsel file this motion pursuant to Florida Statute Section 38.10 (2004) and Florida Rule of Judicial Administration 2.160, to disqualify and recuse the Administrative Law Judge ("ALJ") from this action and to vacate the recommended order in this action, and in support would show:

1. This action was heard from April 4 -19, 2004. The parties submitted proposed recommended orders to the ALJ on August 20, 2004. The recommended order was entered on April 8, 2005.

2. The ALJ assigned to this case, William R. Pfeiffer, was engaged as a lobbyist by Tenet Healthcare Corporation during the pendency of this action at DOAH. See Exhibit "1," the attached Affidavit of John K. Wiest and its exhibits, and Exhibit "2," the Affidavit of Karl David Acuff and its exhibit.

3. Tenet Healthcare Corporation ("Tenet") is the defendant in a multi-million dollar RICO suit in federal court which was filed during the pendency of this action at DOAH. LMHS is a plaintiff in that federal suit. See Exhibit "1," the Affidavit of John K. Wiest and its exhibits. That action seeks the disgorgement of millions of dollars by Tenet.

4. LMHS could not receive a fair and impartial determination because the ALJ had a conflict of interest creating bias and prejudice against LMHS. See Exhibit "1," the attached Affidavit of John K. Wiest and its exhibits.

5. The delay between the execution of Mr. Pfeiffer's lobbyist registration form in early February and its filing in early April made it impossible for LMHS to know the ALJ should have been disqualified until the discovery of the facts on April 12, 2005.

6. LMHS, and its related entities, have a substantial fear and apprehension that a decision maker who is in the employment of Tenet can not reasonably be impartial and unbiased. LMHS reasonably fears that the ALJ was improperly biased against its interests and that LMHS did not, and could not, receive a fair determination in this matter before Mr. Pfeiffer. The ALJ's employment by a defendant to a multi-million dollar suit brought by and for LMHS ensures that

LMHS cannot and could not receive a fair and impartial determination by this ALJ. See Exhibit "1," the attached Affidavit of John K. Wiest and its exhibits.

7. ALJs are subject to the provisions of Florida Rule of Judicial Administration 2.160 regarding the disqualification of judges. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1st DCA 2002).

8. Fla. R. Jud. Admin. 2.160(e) provides that a motion to disqualify shall be filed within 10 days after discovery of the facts constituting the grounds for disqualification. The grounds for this motion were discovered less than ten days ago. See Exhibit "2," the Affidavit of Karl David Acuff and the attachment to the Affidavit labeled as Exhibit "A."

9. LMHS requests that the recommended order in this action be vacated and the evidence in the record considered de novo by a successor ALJ pursuant to Fla. R. Jud. Admin. 2.160(h) and Florida Statutes Section 120.57(1)(a) (2004).

10. Fla. R. Jud. Admin. 2.160(j) requires that the motion for disqualification must be ruled upon within 30 days of service, otherwise the motion is deemed automatically granted.

11. LMHS has contemporaneously filed a memorandum of law in support of this motion, and a motion to remand this action to the Division of Administrative Hearings for ruling on this motion.

12. LMHS' counsel conferred with counsel for AHCA, who stated that the Agency takes no position on this motion. LMHS' counsel also conferred with counsel for Select-Lee, who stated that Select-Lee will file a separate response to this motion.

WHEREFORE, LMHS requests the entry of an order:

(1) Disqualifying the ALJ pursuant to Florida Statute Section 38.10 (2004) and Florida Rule of Judicial Administration 2.160;

(2) Vacating the recommended order pursuant to Fla. R. Jud. Admin. 2.160(h); and

(3) Assigning a successor ALJ pursuant to Florida Statutes Section 120.57(1)(a) (2004).

Respectfully submitted this 19th day of April, 2005.

Respectfully submitted,

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KARL DAVID ACUFF
Florida Bar No. 587044
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Attorneys for Intervenors

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W. DAVID WATKINS

Exhibit 1

EXHIBIT 1

Exhibit 1

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL B LEE, INC.,

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STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

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CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH CARE SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
___________________________________/

CASE NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

AFFIDAVIT OF JOHN KEVIN WIEST

STATE OF FLORIDA

COUNTY OF LEE

I, John Kevin Wiest, being duly sworn on oath, affirm under penalty of perjury that the following representations are true and correct to the best of my information, knowledge and belief, and that if called upon to testify, I would state:

1. My name is John Kevin Wiest, I am the Chief Financial Officer for and employed by Lee Memorial Health System ("LMHS"). I have been employed in this capacity for over five years. LMHS operates Lee Memorial Hospital and Health Park

Medical Center. LMHS is also responsible for and operates Cape Memorial Hospital, Inc., HealthPark Care Center, Inc., and the Lee Memorial Rehabilitation Hospital.

2. The above-captioned case involves a proceeding for a certificate of need for health care services in Lee County, Florida.

3. On April 14, 2005, I was informed by LMHS' outside legal counsel in the above captioned action that the administrative law judge ("ALJ") who had issued the recommended order in this action, William R. Pfeiffer, was a registered lobbyist for Tenet Healthcare Corporation ("Tenet").

4. Mr. Pfeiffer's legislative lobbyist registration form shows that he was retained by Tenet in early February 2005. A copy of the lobbyist registration form is attached as exhibit "A". From reviewing Mr. Pfeiffer's lobbyist registration form, it appears he did not file the form disclosing this employment by Tenet until four days prior to entering his recommended order. See the date-stamp on exhibit "A."

5. Tenet is a health care provider in the state of Florida operating general hospitals, various tertiary and specialty services, and rehabilitation services.

6. Tenet is the defendant in a federal civil suit filed by the Florida Attorney General in cooperation with and on behalf of Lee Memorial Health System and other public hospitals in Florida. A copy of the complaint in that action is attached hereto as exhibit "B," and a copy of the article which appeared in the Tallahassee Democrat on March 3, 2005, is attached hereto as exhibit "C." That action seeks the payment of millions of dollars in damages and penalties by Tenet.

7. LMHS, and its related entities, have a substantial fear and apprehension that a decision maker who is in the employment of Tenet can not reasonably be impartial

and unbiased. LMHS reasonably fears that the ALJ was improperly biased against its interests and that LMHS did not, and could not, receive a fair determination in this matter before Mr. Pfeiffer. The ALJ's employment by a defendant to a multi-million dollar suit brought by and for LMHS ensures that LMHS cannot and could not receive a fair and impartial determination by this ALJ.

8. I have reviewed the Motion for Disqualification filed with this affidavit and state that the motion is true and correct to the best of my information, knowledge and belief.

9. I have discussed the facts set forth above with James Nathan, President and C.E.O. for Lee Memorial Health Systems and I am fully authorized to make these statements in this affidavit on behalf of the Lee Memorial Health System.

Further affiant sayeth naught.

J Kevin Wiest

John Kevin Wiest

SWORN AND SUBSCRIBED before me this 18TH day of April, 2005.

Personally known ✓
Identification ______
Type ______

Catherine R. Adorno

NOTARY PUBLIC
My Commission Expires: 09/10/2008

NOTARY PUBLIC STATE OF FLORIDA
Catherine R. Adorno
Commission # DD353389
Expires: SEP. 10, 2008
Bonded Thru
Atlantic Bonding Co., Inc.

Exhibit A

EXHIBIT A

Exhibit A

2005 RA

LOBBYIST REGISTRATION FORM FOR THE FLORIDA LEGISLATURE CALENDAR YEAR ~~2004~~

Read the registration instructions on the reverse side of form to ensure your timely and accurate registration.

(1) Lobbyist's Full, Legal Name:

PFEIFFER WILLIAM R.

Last Name First Name MI

(2) Lobbyist's Business Address:

P.O. BOX 10528

TALLAHASSEE, FL 32302

City, State, Zip

(3) Lobbyist's Phone Number:

850-212-5941

(4) Lobbyist's Area of Legislative Interest:

GENERAL Health Care RA

(5) Lobbyist's Driver's License Number and Issuing State:

P160-936-66-388-0 FLORIDA

(6) Principal Represented. State *one* principal per form:

TENET HEALTH CARE

(7) Principal's Business Address:

3350 RIVERWOOD PKWY

SUITE 1800

ATLANTA, GA 30339

City, State, Zip

2005 APR -4 PM 4:34

RECEIVED BY LEGISLATIVE INFORMATION DIV.

Complete this section only if applicable:

State the name and the extent of any direct business association or partnership you have with any member of the Legislature:

NONE

If this is *not* a "Joint" Senate and House registration, check one and pay the fee accordingly: The Senate [ ] *OR* The House [ ]

I do solemnly swear that all the foregoing facts are true and correct.

WRPfeiff

ORIGINAL Signature of Lobbyist

STATE OF FLORIDA, COUNTY OF Leon

Sworn to (or affirmed) and subscribed before me this 4 day of February 2005, by William Pfeiffer.

Shari Hickey

Notary Signature

Print, Type or Stamp Name of Notary

SHARI HICKEY MY COMMISSION # DD 304388 EXPIRES: October 20, 2008 Bonded Thru Notary Public Underwriters

Personally Known ✓ OR

Produced Identification ______ Type of Identification Produced ______

Acknowledged by ______ (For use only when registering in person before Lobbyist Registration Office staff.)

2510

Apr 14 05 02:17p LOBBY REGISTRATION

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. ______-Civ-(______/_____)

STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, BERT FISH MEDICAL CENTER, INC., CAPE MEMORIAL HOSPITAL, INC., HALIFAX HOSPITAL MEDICAL CENTER, HENDRY COUNTY HOSPITAL AUTHORITY, HOLMES COUNTY HOSPITAL CORPORATION, JACKSON COUNTY HOSPITAL DISTRICT, LEE MEMORIAL HEALTH SYSTEM, NORTH BREVARD COUNTY HOSPITAL DISTRICT, NORTH BROWARD HOSPITAL DISTRICT, PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, FLORIDA, SARASOTA COUNTY PUBLIC HOSPITAL DISTRICT, SOUTH BROWARD HOSPITAL DISTRICT, and WEST ORANGE HEALTHCARE DISTRICT,

Plaintiffs,

vs.

TENET HEALTHCARE CORPORATION,

Defendant.

COMPLAINT

Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, along with Plaintiffs, Bert Fish Medical Center, Inc., Cape Memorial Hospital, Inc., Halifax Hospital Medical Center, Hendry County Hospital Authority, Holmes County Hospital Corporation, Jackson County Hospital District, Lee Memorial Health System, North Brevard County Hospital District, North Broward Hospital District, Public Health Trust of Miami-Dade County, Florida, Sarasota County Public Hospital District, South Broward Hospital District, and

West Orange Healthcare District (collectively the "Hospital Plaintiffs"), sue Tenet Healthcare Corporation ("Tenet") and allege as follows:

I.

Introduction

1. This action involves the operation of the Medicare outlier trust fund or pool for inpatient hospital services. Medicare, established at title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq*., is the federal program that provides health care insurance to the Nation's aged and disabled. Medicare is administered by the Centers for Medicare & Medicaid Services ("CMS"), a non-independent agency within the United States Department of Health and Human Services ("HHS"), and has over 40 million beneficiaries.

2. Traditional Medicare consists of two parts—Parts A and B. The hospital insurance program, known as Part A, provides certain benefits covering inpatient hospital services, nursing facility services, home health services, and hospice services. Payments for Part A services are made from the Federal Hospital Insurance Trust Fund. *See* 42 U.S.C. § 1395i.

3. Hospitals that wish to participate in the Medicare program must execute a contract, known as a provider agreement, with CMS. Each Tenet hospital has executed at least one provider agreement with CMS. Provider agreements are executed upon a provider's initial enrollment into the Medicare program, renewal, and upon any change in its business structure. In these provider agreements, each Tenet hospital certified that it would adhere to the Medicare laws, regulations, and program instructions. *See, e.g.*, CMS Form 855A at 51. The program instructions include the provisions of the Provider Reimbursement Manual issued by CMS.

4. The provider agreement also requires each hospital, including each Tenet hospital, to acknowledge that any deliberate omission, misrepresentation or falsification of any communication supplying information to CMS may be punished by criminal, civil or administrative penalties, including fines, civil damages and/or imprisonment. *See id.*

5. The Hospital Plaintiffs each executed provider agreements with CMS.

6. CMS withholds 5.1% from the payments each hospital should have received for treating hospitalized Medicare patients to fund a common pool or trust account (the "Outlier Pool"). Each time a hospital incurs costs to treat a severely ill Medicare patient that far exceed the amount the hospital would be paid under normal Medicare reimbursement guidelines, it may be eligible to receive special compensation from that Outlier Pool. Like an excess insurance program, this Outlier Pool only pays if the losses exceed a deductible (or threshold). Each year the threshold is adjusted by CMS through the use of a computer program based on prior experience. If the amount paid out to hospitals by the Outlier Pool exceeds the amount withheld by CMS for the year, then the threshold is raised for all participating hospitals in subsequent years.

7. In this case, Tenet developed and implemented a scheme to take more out of this Outlier Pool than it was entitled to claim, causing the threshold to be raised the following years and thereby directly injuring the Hospital Plaintiffs. The amount that Tenet improperly took from the Outlier Pool exceeds $1 billion. This action seeks damages for the injury caused by Tenet's improper scheme.

II.

Jurisdiction and Venue

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, 18 U.S.C. § 1964(c), and because this action alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because complete diversity of citizenship exists and the matter in controversy exceeds $75,000, exclusive of interest and costs. This Court has jurisdiction, pursuant to the principles of supplemental jurisdiction and 28 U.S.C. § 1367, over the state law claims.

9. This Court has personal jurisdiction over Tenet. Venue is proper pursuant to 18 U.S.C. § 1965(a) and 28 U.S.C. § 1391(b) because Tenet resides in, has agents within or transacts its affairs in this District. Tenet's registered agent is located in this District.

III.

Parties

A. The Hospital Plaintiffs

10. Bert Fish Medical Center, Inc. is a Florida non-profit corporation with its principal place of business in New Smyrna Beach, Florida. Bert Fish Medical Center, Inc. is a direct support organization for Southeast Volusia Hospital District, an independent special district. The governing board of Bert Fish Medical Center, Inc. consists of the same individuals who serve as the governing board of Southeast Volusia Hospital District.

11. Cape Memorial Hospital, Inc. is a Florida non-profit corporation with its principal place of business in Cape Coral, Florida. Cape Memorial Hospital, Inc. is a direct support

organization for Lee Memorial Health System, an independent special district. The governing board of Cape Memorial Hospital, Inc. consists of the same individuals who serve as the governing board of Lee Memorial Health System.

12. Halifax Hospital Medical Center is an independent special district with its principal place of business in Daytona Beach, Florida.

13. Hendry County Hospital Authority is an independent special district with its principal place of business in Clewiston, Florida.

14. Holmes County Hospital Corporation is an independent special district with its principal place of business in Bonifay, Florida.

15. Jackson County Hospital District is an independent special district with its principal place of business in Marianna, Florida.

16. Lee Memorial Health System is an independent special district with its principal place of business in Fort Myers, Florida.

17. North Brevard County Hospital District is an independent special district with its principal place of business in Titusville, Florida.

18. North Broward Hospital District is an independent special district with its principal place of business in Hollywood, Florida.

19. Public Health Trust of Miami-Dade County, Florida is a public health trust with its principal place of business in Miami, Florida.

20. Sarasota County Public Hospital District is an independent special district with its principal place of business in Sarasota, Florida.

21. South Broward Hospital District is an independent special district with its principal place of business in Hollywood, Florida.

22. West Orange Healthcare District is an independent special district with its principal place of business in Ocoee, Florida.

B. Tenet

23. Tenet is a Nevada corporation with its principal place of business in Dallas, Texas.

24. Tenet is the nation's second-largest for-profit hospital chain. Tenet, through its subsidiaries and affiliates, owns or operates 78 acute care hospitals with 19,668 licensed beds. At all times relevant hereto, Tenet owned or operated approximately 100 hospitals. Tenet owns or operates hospitals in 13 states, including Florida. Tenet owns or operates 15 hospitals in Florida, all of which are in this District.

25. The Tenet hospitals that were part of the inflated charging scheme described in this Complaint include: Atlanta Medical Center, Alvarado Community Hospital, Brookwood Medical Center, Brotman Medical Center, Brownsville Medical Center, Centinela Hospital Medical Center, Century City Hospital, Desert Regional Medical Center, Doctors Hospital of Manteca, Doctors Medical Center of Modesto, Doctors Medical Center of San Pablo, Encino-Tarzana Regional Medical Center, Fountain Valley Regional Medical Center, Garfield Medical Center, Greater El Monte Community Hospital, Houston Northwest Medical Center, John F.

Kennedy Memorial Hospital, Kenner Regional Medical Center, Los Alamitos Medical Center, Midway Hospital Medical Center, Monterey Park Hospital, Park Plaza Hospital, Piedmont Medical Center, Queen of Angels – Hollywood Presbyterian Medical Center, Sierra Vista Regional Medical Center, St. Louis University Hospital, Twin Cities Community Hospital, USC University Hospital, Western Medical Center – Santa Ana, and Whittier Hospital Medical Center. These hospitals will be referred to hereafter as the "Tenet Hospitals."

IV.

Factual Background

A. The Prospective Payment System

26. In 1983, CMS implemented an Inpatient Prospective Payment System ("IPPS") for virtually all acute care hospitals (*i.e.*, ordinary hospitals). IPPS pays participating hospitals fixed, predetermined amounts for defined services.

27. Specifically, under IPPS, each patient's condition is classified into one of over 520 Diagnosis-Related Groups ("DRG") to which CMS has assigned a numeric weight reflecting the amount of resources needed, on average, to treat a patient with the corresponding diagnosis. Greatly simplified, a hospital's payment for treating a specific patient is determined by multiplying the numeric weight for that DRG by a standardized amount. The standardized amount is based on the average resources used to treat cases in all DRGs and is adjusted to take into account regional wage rates as well as certain other factors. The normal operating IPPS payment may be supplemented with add-ons applicable to teaching hospitals or hospitals that treat a disproportionately large share of low-income patients. In addition to reimbursement of operating costs, hospitals can recover capital expenditures through a separate DRG calculation.

B. The Outlier Pool

28. Although IPPS assumes that fixed payments based on cases of average complexity will provide adequate compensation to efficiently run hospitals, Congress recognized that an extremely costly case could undermine any averaging. Accordingly, the Social Security Act provides for extra payments (in addition to payments received under IPPS) for especially costly hospital stays, referred to as "Outliers." Outlier payments are designed to supplement standard IPPS payments "for extraordinarily high-cost cases." *See* 42 C.F.R. § 412.84. Specifically, the Outlier provision permits hospitals to "request additional payments in any case where charges, adjusted to cost," exceed an amount specified by the Secretary. *See* 42 U.S.C. § 1395ww(d)(5)(A)(ii). According to CMS, "[t]his additional payment is designed to protect the hospital from large financial losses due to unusually expensive cases." 68 Fed. Reg. 10420, 10421 (March 5, 2003). The Outlier payment is meant to "approximate the marginal cost of care." *See* 42 U.S.C. § 1395ww(d)(5)(A)(iii).

29. Under IPPS, a hospital may receive Outlier payments when the costs it incurs to treat a patient exceed the normal IPPS payment by a fixed amount (*i.e.*, a deductible), the exact magnitude of which is established by a computer program on an annual basis, *i.e.*, the "Outlier Threshold."

30. The higher the Outlier Threshold, the fewer the number of cases that qualify as Outliers, and for those that qualify, the lower the Outlier payments. According to CMS:

> [t]he actual determination of whether a case qualifies for outlier payments takes into account both operating and capital costs and DRG payments. That is, the combined operating and capital costs of a case must exceed the fixed-loss outlier threshold to qualify for an outlier payment. The operating and capital costs are computed separately by multiplying the total covered charges by the operating

> and capital cost-to-charge ratios. The estimated operating and capital costs are compared with the fixed-loss threshold after dividing that threshold into an operating portion and a capital portion. . . . The thresholds are also adjusted by the area wage index (and capital geographic adjustment factor) before being compared to the operating and capital costs of the case. Finally, the outlier payment is equal to 80 percent of the combined operating and capital costs in excess of the fixed-loss threshold.

68 Fed. Reg. at 10422.

31. Each hospital, including Tenet hospitals, use what is called a "charge master," a listing of the charges for each item or service that the hospital provides. Thus, by way of example, the charge master might list the charge for an aspirin at $5, a double occupancy standard hospital room at $800 per day, the use of an operating room for a 2-hour surgical procedure at $2,500, and so on.

32. The Outlier system is based on the costs that a hospital incurs to treat a specific Medicare patient. The charges can act as a surrogate for a hospital's costs if there is a rational relationship between a hospital's charges and its underlying costs. Each hospital has a "cost-to-charge ratio" or "CCR." The CCR, which is an average, can be used to transform a charge into a cost. For example, if a hospital's CCR is 0.5 and its charges for a patient total $10,000, then its costs to treat that patient would be roughly $5,000. The Outlier system assumed, and CMS issuances required, that a hospital's charges be reasonably and consistently related to its costs of providing the services. *See, e.g.*, Prov. Reimb. Man., Part I, §§ 2202 – 2203; *see also* 42 C.F.R. § 413.53(b)(2)(ii) ("Implicit in the use of charges as the basis for apportionment is the objective that charges for services be related to the cost of the services").

33. The Outlier payment is 80% of the difference between the hospital's costs for treating a patient (calculated by adjusting its charges by its CCR), less the sum of the IPPS payment and the Outlier Threshold, as given in the equation below:

Outlier Payment = 80% x [(Charges x CCR) – IPPS Payment – Outlier Threshold]

In the above equation, charges are the hospital's charges for services provided to the patient; the CCR is derived from the hospital's latest "Settled Cost Report" (as audited by CMS' Fiscal Intermediary); the IPPS payment is the standard DRG payment plus any applicable add-ons (*e.g.*, indirect medical education, disproportionate share of low income patients); and the Outlier Threshold is the amount established annually by CMS.

C. Tenet's Scheme: Manipulating the Outlier System

34. The amount of Outlier payments, if any, depended on various factors, including: (a) the hospital's charges and (b) the hospital's CCR. As CMS indicated in September of 1988, "the use of hospital-specific cost-to-charge ratios is essential to ensure that outlier payments are made only for cases that have extraordinarily high costs, and not merely high charges." 68 Fed. Reg. at 10423 (March 5, 2003) (citing 53 Fed. Reg. 38476, 38503 (Sept. 30, 1988)).

35. Tenet improperly manipulated the Outlier system by artificially inflating its charges when its real costs remained constant or even declined.

36. By artificially inflating their billed charges, the Tenet Hospitals transformed ordinary or average-cost IPPS patients into Outlier patients, even though the costs actually incurred by the hospital to treat those patients fell within the norm and, therefore, would not entitle the hospital to receive Outlier payments. By dramatically increasing their billed charges, the Tenet Hospitals represented to CMS that their costs had similarly increased.

37. Thus, when the Tenet Hospitals artificially inflated increased their charges, their "costs," computed by using CCRs that predated the charge increases, dramatically increased even though their real costs remained the same or even declined. By inflating charges, the Tenet Hospitals improperly obtained more Outlier payments than they were entitled to claim or receive.

38. For example, suppose that in 2001 a hospital's latest audited CCR (from 1999) was 0.5. Suppose that the hospital decided to double its charges even though its costs had remained stable. Thus, its "real" CCR was 0.25. Suppose that a patient incurred $100,000 in charges for a hospitalization and the hospital received an IPPS payment of $25,000. The hospital's actual costs to treat that patient were $25,000 (0.25 x $100,000). However, because the hospital artificially doubled its charges in 2001, its CCR from its 1999 cost reports was outdated, and if the hospital applied that CCR to its 2001 inflated charges, it would yield costs of $50,000, double its actual costs. The hospital should not have received an Outlier payment because its real costs were not sufficient to trigger an Outlier payment; indeed, in this example, the hospital's IPPS payment actually equaled its true costs to treat that patient. The hospital could have improperly received an Outlier payment by using its inflated "costs," as compared to its actual costs.

39. Logically, as in any system where audits follow the payments, the audited CCR should have eventually caught up with the hospital. That was not the case here. Instead, many of the Tenet Hospitals dramatically increased their charges over time to the extent that their CCRs fell precipitously below the range that was considered reasonable under Medicare regulations (*i.e.*, three standard deviations from the mean of the log distribution of CCRs for all hospitals) by the next settled cost report. The Fiscal Intermediary then assigned a Statewide Average ("SWA") CCR to these hospitals instead of the hospital-specific CCR figure. CMS

allowed the use of a SWA CCR based on its belief that a hospital-specific CCR falling outside this range was "unreasonable and probably due to faulty data reporting or entry." 53 Fed. Reg. 38476, 38508 (Sept. 30, 1988). CMS stated that it "[believed] that 3.0 standard deviations represents an appropriate range and that the accuracy of cost-to-charge ratios falling outside that range is questionable." *Id.* at 38504. However, the use of a SWA CCR for many of the Tenet Hospitals was not due to any data reporting or entry errors, but the intentional conduct of Tenet.

40. The SWA, which replaced the CCR in that case, was considerably higher than the hospital's actual CCR. For example, certain of the Tenet Hospitals in California had a CCR below 0.19 in 2002 due to dramatically increased charges, thus triggering the use of the California-applicable SWA, such that their CCR became 0.34. The higher SWA was then applied by the Fiscal Intermediary pursuant to the above reimbursement formula to compute that hospital's Outlier payment and, therefore, generated excessive Outlier payments to Tenet.

41. A CCR would only fall below the national threshold for legitimate reasons in unusual circumstances. Indeed, only 67 hospitals (out of approximately 4,000) have had their CCR reset to the SWA one or more times between 1997 and 2003. Yet nearly half of those were Tenet hospitals. Twenty-eight Tenet hospitals had their CCRs reset to the SWA between 2000 and 2003. For instance, Doctors Medical Center in Modesto, California had a CCR of 0.0801 in 2000, 0.0764 in 2001, and 0.0726 in 2002. This means that Doctors Medical Center's charges were more than twelve times higher than its costs (*i.e.*, a 1200% markup). In each of these years, Doctors Medical Center's CCR was reset to the SWA. Tenet's dominance in this group of hospitals is strong evidence that Tenet was intentionally increasing its charges to lower its CCRs and generate excess Outlier payments.

D. The Effects of Excessive Outlier Payments

42. In accordance with 42 U.S.C. § 1395ww(d)(2)(E), CMS withholds 5.1% from the payments that hospitals should have received under IPPS to make up the fund that is used to cover Outlier payments for the benefit of all participating hospitals in the nation.

43. According to the CMS Administrator, "[o]utlier payments can be viewed as insurance for hospitals against the large losses that could result from extremely expensive cases. . . . [The] fixed-loss threshold [*i.e.*, the Outlier Threshold] operates like the deductible in a typical insurance policy. When the cost of a case exceeds the fixed-loss threshold, [CMS] pay[s] the hospital an additional amount equal to 80 percent of the estimated costs beyond that loss threshold – similar to coinsurance required in most insurance policies." Thomas A. Scully, Testimony Before the Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education (March 11, 2003).

44. Based on prior experience, the Secretary uses a computer algorithm that automatically "set[s] the fixed-loss threshold [*i.e.*, the Outlier Threshold] each year at an amount that [when used to compute Outlier payments] is projected to generate [total] outlier [p]ayments equal to 5.1 percent of total payments under the [IPPS]. Medicare then pays 80 percent of hospitals' costs above their fixed-loss threshold amounts." *Id.* In other words, the Outlier Threshold is designed so that the Outlier payments for the upcoming year will approximately equal the payments into the Outlier Pool during that year, assuming participating hospitals act honestly.

45. "[A]s hospitals claim more and more outlier cases, [CMS has] been forced to raise the fixed-loss threshold to remain close to the 5.1 percent target (and we have not been close)."

Id. Further, "[a]s outlier claims increased (and the agency had no idea why) the outlier threshold has skyrocketed – from $14,050 in 2000 to $33,560 in 2003 – as the agency raised the bar to try (very unsuccessfully) to stay within the 5.1 percent target." *Id.*

46. Notwithstanding CMS's upward adjustments of the Outlier Threshold in each of the years 2000-2002, actual Outlier spending in those years exceeded the projected 5.1%. Outlier payments totaled 7.6% of total IPPS payments in 2000 ($5.3 billion in total, or $1.8 billion more than projected); 7.7% of total IPPS payments in 2001 ($5.5 billion in total, or $1.9 billion more than projected); and 7.9% of total IPPS payments in 2002 ($6.2 billion in total, or $2.5 billion more than projected).

47. Specifically, the Outlier Threshold for 2000 was set at $14,600; was raised to $17,550 for 2001; was raised to $21,025 for 2002; and, then, it was raised again to $33,560 for 2003. *See* 68 Fed. Reg. 34494, 34496 (June 9, 2003). For 2004, following changes in the Outlier rules, the Outlier Threshold was set at $31,000. For 2005, it has been set at $25,800. The huge cost overruns by the Outlier Pool and the accompanying sharp increases in the Outlier Threshold coincide with the implementation of the inflated charging scheme by Tenet. Likewise, the recent decreases in the Outlier Threshold coincide with a change in the regulatory scheme preventing a continuation of the abusive practices of Tenet.

48. Thus, as the Outlier Threshold has been raised as a result of Tenet's scheme, the Hospital Plaintiffs have received less in Outlier payments than they would have received but for the wrongful conduct of Tenet.

49. Suppose, for example, that a hospital incurred costs of $100,000 to treat a Medicare patient, but only received $35,000 under IPPS. If the Outlier Threshold was $15,000, then that hospital would have received an Outlier payment of $40,000, computed as follows:

Outlier Payment= 80% x [Cost – IPPS payment – Threshold]
= 80% x [$100,000 - $35,000 - $15,000] = $40,000

However, if the Outlier Threshold was instead $30,000, the hospital's Outlier payment would have been $28,000, a loss of $12,000.

50. Tenet knew or should have known that its improper and excessive claims for Outlier payments would result in a reduction in Outlier compensation for the Hospital Plaintiffs. Thus, the Hospital Plaintiffs are foreseeable victims.

51. Explaining the consequences of raising the Outlier Threshold, CMS's Administrator, Thomas A. Scully, stated that "[a]s a direct result, more hospitals have been forced to absorb the costs of the complex cases they treat, while a relatively small number of hospitals that have been aggressively gaming the current rules benefit by getting a hugely disproportionate share of outlier payments. As you can see, the behavior of a few hundred hospitals – those that took advantage of the outlier program – [is] the main cause of the sharp increases in the loss threshold." *Id.*

E. Tenet Inflates its Charges

52. Beginning in 1999 and continuing into 2003, Tenet engaged in a scheme to improperly maximize its Outlier payments by inflating its charges. Tenet received Outlier payments of $346 million between June 1, 2000 and May 31, 2001 or 14.8% of its total Medicare revenues (both inpatient and outpatient). Tenet received Outlier payments of $455 million

between June 1, 2001 and May 31, 2002 or 16.1% of its total Medicare revenues. Tenet received Outlier payments of $305 million between June 1, 2002 and December 31, 2002 or 17.9% of its total Medicare revenues. Thus, in a period of only 31 months, Tenet collected more than $1.1 billion from the Outlier Pool, or more than $35 million per month. In contrast, if Tenet's Outlier payments had been 5.1% of its IPPS payments, Tenet would have received roughly $6 million per month during the same time period.

53. Indeed, in 2000, Outlier payments were more than 46% of Doctors Medical Center's IPPS payments. In 2001, that percentage jumped to 57.28%; in 2002, it went up to an extraordinary 109.92%; and in 2003, its Outlier payments were 197.71% of the IPPS payments. Upon information and belief, Doctors Medical Center in Modesto, California received over $100 million in overpayments through the inflated charging scheme.

54. Similarly, Garfield Medical Center in California had a CCR of 0.0936 in 2001, and 0.0970 in 2002, improperly triggering the use of the SWA each of those years. Garfield Medical Center's Outlier payments as a percentage of IPPS payments rose from 36.49% in 2001 to 48.91% in 2002, and then shot up to 84.73% in 2003. Upon information and belief, Garfield Medical Center received over $50 million in overpayments through the inflated charging scheme.

55. As a final example, Brownsville Medical Center in Texas had a CCR of 0.1243 in 2000, 0.1101 in 2001, and 0.1043 in 2002, improperly triggering the use of the SWA each of those years. Brownsville Medical Center's Outlier payments as a percentage of IPPS payments in 1998 was only 4.6%. In 2001, after Tenet implemented its inflated charging scheme, the percentage of Outlier payments soared to an astonishing 46.83%. In 2002, the percentage of Outlier payments increased to 75.70% and then increased again to 105.77% in 2003. Upon

information and belief, Brownsville Medical Center received over $75 million in overpayments through the inflated charging scheme.

56. More than a third of the Tenet hospitals had dramatic increases in their Outlier payments since 2000. Doctors Medical Center, Garfield Medical Center, and Brownsville Medical Center hold positions in the top 10 of the 200 hospitals nationwide with the greatest increases in Outlier payments since 2000. Doctors Medical Center holds the top spot. In total, approximately 39 Tenet hospitals made the top 200 list.

57. A study of Medicare cost reports for fiscal year 2000/2001 revealed that of the top 100 hospitals with the lowest CCRs, 64 were Tenet hospitals, and the top 14 hospitals were all Tenet hospitals. *The IHSP Hospital 200: The Nation's Most – and Least – Expensive Hospitals* at Table 4, Institute for Health and Socio-Economic Policy (publisher) (June 2003). Overall Tenet hospitals averaged gross markups of 477% over costs, indicating that Tenet was inflating gross charges to make windfall profits from the Outlier Pool in violation of the Medicare rules and policies. *Id.*

58. Although Tenet Hospitals file claims for Outlier reimbursement, and are the initial recipients of the payments, the money is channeled to Tenet. As Tenet improperly siphoned money from the Outlier Pool to the detriment of honest hospitals, its profits increased and its stock prices soared.

59. Tenet's scheme caused direct, foreseeable, and substantial economic harm to the Hospital Plaintiffs. As a direct and foreseeable result of Tenet's scheme and the resulting depletion of the Outlier Pool, the Outlier Threshold has been increased in each of the last four years through 2003, consequently reducing the frequency and amount of the Hospital Plaintiffs'

Outlier payments. The Hospital Plaintiffs continued to experience the effects of Tenet's scheme even after Tenet changed its practices as of January 1, 2003, since the Outlier Threshold calculation is based, in part, on prior experience.

60. The damages suffered by the Hospital Plaintiffs consist therefore of significant amounts of unpaid Outlier costs that were actually incurred by the Hospital Plaintiffs. These Outlier costs were not reimbursed as a direct, proximate, and foreseeable consequence of Tenet's scheme.

61. Tenet knew that the natural, direct, proximate, foreseeable—and, indeed, expected and automatic—consequence of its scheme would be an increase in the Outlier Threshold in the following years. That increase would and did adversely affect the Hospital Plaintiffs, a fact known to Tenet.

62. On January 2, 2003, Tenet announced that it had received an administrative investigative demand subpoena from the Department of Justice. The subpoena sought documents from Tenet and 19 subsidiary hospitals related to Outlier payments.

63. Four days later, Tenet announced that it had volunteered to adopt a new policy on Medicare Outlier payments as of January 1, 2003. Under the new policy, the CCR used to calculate Outlier payments would be based on the most recent cost report available. In addition, the SWA would not be used in place of the hospital-specific CCR. Tenet's Outlier payments for 2003 were only $101 million, as compared to $513 million for 2002, a more than 80% decrease.

Count I

Violation of RICO through Transporting and Receiving Stolen or Converted Money
18 U.S.C. § 1962(c)

64. The Hospital Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1 - 63, *supra.*

65. This is an action pursuant to 18 U.S.C. § 1964(c), by the Hospital Plaintiffs asserting a private right of action against Tenet for its conduct of an enterprise through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(c).

66. At all time periods relevant hereto, Tenet, its officers, directors, managers, employees, agents, and representatives, by, through, and with each of the Tenet Hospitals, including those owned as part of a joint venture (*e.g.*, Encino-Tarzana Regional Medical Center in Tarzana, California) and those leased by Tenet (*e.g.*, Doctors Medical Center in San Pablo, California), and their officers, directors, managers, employees, agents, representatives, and outside consultants devised and engaged in a scheme whereby it formed a separate association-in-fact enterprise in order to wrongfully obtain Outlier payments that it was not entitled to, resulting in the receipt of Outlier overpayments in excess of $1 billion, to the direct, obvious, and inescapable injury to the business and property of the Hospital Plaintiffs. The Tenet Hospitals that were part of the RICO enterprise are listed in Paragraph 25 of the Complaint. The outside consultants met with Tenet's officers shortly after the enactment of the Balanced Budget Act of 1997, Pub. L. No. 105-33 ("BBA"), to advise Tenet of alternative revenue sources in light of the adverse financial impact of the BBA. The outside consultants recommended that Tenet artificially increase its charges in order to maximize Outlier payments, a recommendation that Tenet subsequently followed.

67. In violation of 18 U.S.C. § 1962(c), Tenet conducted or participated in the affairs of the association-in-fact enterprise identified herein through a pattern or racketeering activity as set forth herein.

68. The pattern of racketeering activity described in this count is but one more example in Tenet's long history of fraud, corruption, and other criminal acts. Tenet has reached the pinnacle of corporate wrongdoing, with ongoing criminal activity spanning at least fourteen years.

69. The Hospital Plaintiffs are each "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

70. Tenet is a "person" within the meaning of 18 U.S.C. § 1961(3).

Tenet's RICO Enterprise

71. The RICO "enterprise" is an association-in-fact consisting of Tenet, Tenet Hospitals, including those owned as part of a joint venture (*e.g.*, Encino-Tarzana Regional Medical Center in Tarzana, California) and those leased by Tenet (*e.g.*, Doctors Medical Center in San Pablo, California), their officers, directors, managers, employees, agents, representatives, and outside consultants who assisted in devising and implementing the inflated charging scheme ("Tenet's RICO Enterprise").

72. Tenet's RICO Enterprise is an ongoing and continuing organization consisting of both corporations and individuals that have been associated for the common or shared purpose of inflating patient charges in order to improperly obtain and then retain higher amounts of Outlier payments for Tenet. This scheme caused a consistent and direct increase in the Outlier

Threshold so that the Outlier Threshold was at an artificially high level, thereby decreasing the number of the Hospital Plaintiffs' claims that would qualify for Outlier payments as well as decreasing the dollar amount of qualifying Outlier payments to the Hospital Plaintiffs.

73. At all relevant times, the association of entities that form Tenet's RICO Enterprise was also associated for the lawful purpose of engaging in the business of hospital management, hospital management consulting, and providing medical services in the Tenet Hospitals.

74. Tenet constructed and implemented a common network with each of the Tenet Hospitals through various contractual relationships, financial ties, and coordinated reporting, billing, and information systems. Tenet and each of the Tenet Hospitals are separate and distinct corporations. Each of the Tenet Hospitals is a separate ongoing business with its own customer base that is separate and distinct from Tenet.

75. At all relevant times, Tenet owned, controlled or operated, in whole or in part, each of the Tenet Hospitals and engaged outside consultants which were part of Tenet's RICO Enterprise and coordinated and agreed with each of the Tenet Hospitals and outside consultants to engage in a course of business dealing in order to further its illegal scheme and the RICO enterprise.

76. The revenues and profits generated by the unlawful activities of Tenet's RICO enterprise (the excessive and improper Outlier compensation stolen and/or converted from the Outlier Pool) have been transported in interstate commerce to Tenet.

Conduct of the Affairs of Tenet's RICO Enterprise

77. Tenet exercised ownership and/or control over the Tenet Hospitals, whether or not wholly owned by Tenet, in order to conduct, or participate in the conduct of, Tenet's RICO Enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Such conduct and participation was carried out in the following ways:

(a) Each of the Tenet Hospitals was controlled and/or, directly or through subsidiaries, owned by Tenet;

(b) Each of the Tenet Hospitals was a party to the provider agreement with CMS;

(c) Tenet, together with each of the Tenet Hospitals, directly controlled the charges for each Outlier patient submitted to CMS for reimbursement from the Outlier Pool;

(d) Tenet, together with each of the Tenet Hospitals, directly controlled, or was directly aware of, the costs for care of each Outlier patient submitted to CMS for reimbursement from the Outlier Pool;

(e) Tenet relied on the Tenet Hospitals and their officers, directors, managers, employees, agents, and representatives to have direct contact with CMS and its representatives and submit to CMS inflated patient charges in order to promote the inflated charging scheme of Tenet's RICO Enterprise;

(f) Tenet implemented and controlled the inflated charging scheme it devised with the assistance of outside consultants through each of the Tenet Hospitals, their officers, directors, managers, employees, agents, and representatives;

(g) Each of the Tenet Hospitals received reimbursement from CMS for such inflated Outlier patient charges on a regular and constant basis and, at the direction of Tenet, through its officers, directors, managers, employees, agents, and representatives, transmitted, transported or transferred those proceeds through interstate commerce to Tenet; and

(h) Tenet caused the transfer and received the monies that constituted stolen and/or converted Outlier payments to each of the Tenet Hospitals.

Tenet's Pattern of Racketeering Activity –

Transfer and Receipt of Stolen or Converted Money

78. At all time periods relevant hereto, Tenet knowingly, willfully, and unlawfully conducted or participated, directly or indirectly, in the conduct of the affairs of Tenet's RICO Enterprise, through a pattern of racketeering activity, including multiple predicate acts chargeable under 18 U.S.C. § 2314 (transporting stolen or converted money) and 18 U.S.C. § 2315 (receiving stolen or converted money) in violation of 18 U.S.C. § 1962(c).

79. Tenet, through its RICO Enterprise, willfully and knowingly engaged in, or furthered, a systematic, ongoing course of conduct with the goal and intent to steal and/or convert money from the Outlier Pool. It was the common and intended practice of Tenet, through its RICO Enterprise, to submit claims to CMS and its representatives for Outlier reimbursement that were wrongfully based on inflated charges. This improper conduct was

carried out by a wide array of Tenet's and the Tenet Hospitals' officers, directors, employees, managers, agents, and representatives, as well as with assistance and guidance from outside consultants.

80. As a foreseeable, willful, and intentional result of the inflated charging scheme perpetuated by the Tenet RICO Enterprise, the Tenet Hospitals received excessive Outlier compensation on thousands of occasions.

81. The money (*i.e.*, Outlier overpayments) sought and received by the Tenet Hospitals did not belong to them. At no time did Tenet or the Tenet Hospitals have a legitimate ownership or possessory right, entitlement or interest in that money from the Outlier Pool. Thus, Tenet and the Tenet Hospitals' exercise of control over the money was unauthorized and wrongful.

82. Tenet caused these payments to be transported, transmitted or transferred from the thirty Tenet Hospitals, through interstate commerce, to itself through mail, wire and/or other delivery, and reported this money as revenue for Tenet. Therefore, Tenet's pattern of racketeering activity, upon information and belief, involved thousands of separate instances of transporting, transmitting or transferring stolen or converted monies through interstate commerce from the Tenet Hospitals to Tenet over the course of several years.

83. Tenet at all times knew this money was stolen or converted and indeed devised and implemented the inflated charging scheme for the purpose of stealing and converting money from the Outlier Pool that was held for the benefit of the Hospital Plaintiffs.

84. Tenet willfully and knowingly caused these stolen or converted monies to be transmitted, transported or transferred to it and willingly received this money after it traveled interstate knowing it was stolen or converted.

85. The payments Tenet received were far in excess of what it was entitled to, thereby depleting money from the Outlier Pool and directly and proximately causing injury to the Hospital Plaintiffs. The Hospital Plaintiffs suffered injury in that they were forced to absorb the costs of care for Outlier patients that they would have otherwise been compensated for from the Outlier Pool but for Tenet's improper and illegal acts. Tenet, therefore, took for itself money that would have gone to benefit the Hospital Plaintiffs which had valid Outlier claims that went unpaid or underpaid as a direct and foreseeable consequence of the actions of the RICO Enterprise.

86. It is evident that Tenet had a clear indication of the effects its scheme had on its Outlier revenues and on the Outlier Threshold because it continued to inflate its charges and submit claims based on overly inflated charges for several years. Indeed, the year after Tenet implemented its criminal scheme it stated in its 10-K, "Congress has mandated that [CMS] limit Outlier Payments to equal between 5% and 6 % of total DRG payments. In order to bring expected Outlier Payments within this mandate, [CMS] has proposed raising the threshold standard used to determine the patients for which a hospital will receive Outlier Payments, effective October 1, 2000." Tenet Healthcare Corp., Form 10-K (FY ended May 31, 2000) filed August 15, 2004, p.14. In addition, during this time, Tenet saw the extraordinary increase in its Outlier payment receipts that were not related to its actual costs incurred for Outlier patient care.

87. Tenet witnessed and experienced the effects of the increase in the Outlier Threshold during these years, as did the Hospital Plaintiffs. However, only Tenet knew that there was a significant increase in the Outlier Threshold as a result of its own inflated charging scheme and knew that it was its transportation and receipt of these stolen or converted monies that had a direct impact on other participants in the Medicare system. All the while, Tenet was directly and immediately benefiting from the increased revenue the charging scheme provided.

88. Therefore, Tenet's illegal acts were tainted with the deliberate intent to commit the predicate acts and cause the injury alleged in this Complaint.

89. It was only after Tenet's inflated charging scheme was discovered, that Tenet revealed that it recognized extraordinary Outlier revenues.

90. Since 2000, the value of the stolen or converted money that was transported, transmitted, or transferred interstate and received by Tenet far exceeds $5,000, as required by 18 U.S.C. §§ 2314 and 2315, and is believed to be at least $1 billion. On each individual occasion that stolen or converted money was transferred and received through interstate commerce, the amount of the money transferred and received was over $5,000. Each transfer, as well as each receipt, of stolen or converted funds constitutes a separate predicate act.

91. The Hospital Plaintiffs have been harmed by an amount far exceeding $5,000. The Hospital Plaintiffs' damages include at least the difference between what they would have received in Outlier reimbursement and what they did receive as a direct result of Tenet's violation of 18 U.S.C. §§ 2314 and 2315. This amount exceeded $5,000 on hundreds of occasions that the Hospital Plaintiffs received Outlier payments. Therefore, Tenet's commission of these criminal predicate acts directly and proximately caused injury to the Hospital Plaintiffs'

business or property by an aggregate amount of at least $ 1 million during the time periods relevant hereto.

92. Like the majority of other crimes, tortious acts, and violations that Tenet has committed over the past fourteen years, Tenet's criminal activity in furtherance of its intent and plan to steal or convert money from the Outlier Pool was ongoing and continuous and only ceased upon Tenet being caught. CMS discovered Tenet's criminal acts and changed the Outlier compensation process, ensuring that Tenet could not continue its inflated charging scheme. Collectively, these violations constitute a "pattern of racketeering activity," within the meaning of 18 U.S.C. § 1962(c).

93. In accordance with 18 U.S.C. § 1964, Tenet is liable to the Hospital Plaintiffs for threefold the actual damages sustained by them, plus the costs of bringing this suit, including reasonable attorney's fees.

Tenet's Motive

94. The motive of Tenet in conducting or participating, directly or indirectly, in the conduct of the affairs of Tenet's RICO Enterprise was to steal or convert money from the Outlier Pool through an inflated charging scheme to increase revenues and profits for Tenet, while decreasing profits and revenues from Outlier patient treatment for the Hospital Plaintiffs and other participating hospitals.

Damages Caused by Tenet's RICO Enterprise

95. Tenet's violations of 18 U.S.C. §§ 1962(c) directly and proximately caused the Hospital Plaintiffs to be injured in their business or property by an aggregate amount of at least $1 million. The Hospital Plaintiffs had to absorb the costs of care for treatment of Outlier

patients that they were entitled to compensation for from the Outlier Pool and which they otherwise would have received but for Tenet's theft and/or conversion of these monies.

Count II

<u>Conspiracy to Violate 18 U.S.C. § 1962(c) Through Transporting and Receiving Stolen or Converted Money in Violation of 18 U.S.C. § 1962(d)</u>

96. This is an action pursuant to 18 U.S.C. § 1964(c), by the Hospital Plaintiffs asserting a private right of action against Tenet for its conspiracy to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d). The Hospital Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1 – 63, and 66 - 92, *supra.*

97. At all time periods relevant hereto, Tenet knowingly, willfully, and unlawfully conspired and agreed with the Tenet Hospitals and the outside consultants to conduct or participate, directly and indirectly, in the conduct of the affairs and activities of Tenet's RICO Enterprise through a pattern of racketeering activity, including acts chargeable under 18 U.S.C. § 2314 (transporting stolen money) and 18 U.S.C. § 2315 (receiving stolen money), in violation of 18 U.S.C. § 1962(c) and (d), by Tenet agreeing to the objective of the conspiracy and/or by agreeing to commit at least two of the criminal predicate acts alleged herein.

98. At all relevant times, Tenet knowingly and willfully agreed to participate, and participated, in an inflated charging scheme to steal and/or convert money from the Outlier Pool and consequently, from the other participants in the Medicare program, including the Hospital Plaintiffs, in order to further Tenet's RICO Enterprise and derive increased profits from such enterprise.

99. The object of the conspiracy was to steal or convert money from the Outlier Pool to which the Hospital Plaintiffs were entitled, which money was held for their benefit, and would have been paid to them but for Tenet's improper acts. This objective was to be achieved through a scheme to misrepresent the true costs of Outlier patient care by wrongfully inflating patient charges so that the Tenet Hospitals would receive Outlier compensation to which they were not entitled. Tenet, through its officers and directors, directed, controlled, and implemented the inflated charging scheme in the Tenet Hospitals. Tenet's receipt of stolen money from the Outlier Pool was to be accomplished by causing the transportation, transmission or transfer of these monies from the thirty Tenet Hospitals through mail, wire and/or other delivery, in violation of 18 U.S.C. §§ 2314 and 2315.

100. Tenet's violations of 18 U.S.C. § 1962(d) directly and proximately caused the Hospital Plaintiffs to be injured in their business or property by an aggregate amount of at least $1 million. As a result of Tenet's false and inflated patient charges, Tenet took for itself Outlier compensation to which the Hospital Plaintiffs were entitled and which they otherwise would have received but for Tenet's theft and conversion of these monies from the Outlier Pool. The injuries suffered by the Hospital Plaintiffs as a result of the conspiracy to commit the offenses described in this complaint includes at least the difference between what the Hospital Plaintiffs would have received in Outlier compensation and what they did receive as a direct result of Tenet's violation of 18 U.S.C. §§ 2314 and 2315. This amount exceeded $5,000 on hundreds of occasions that the Hospital Plaintiffs received Outlier payments.

101. In accordance with 18 U.S.C. § 1964, Tenet is liable to the Hospital Plaintiffs for threefold the actual damages sustained by them, plus the costs of bringing this suit, including reasonable attorney's fees.

Count III

Violation of Florida Civil RICO - §§ 772.103(3), and .104, Fla. Stat.

102. The Hospital Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1 - 63, *supra.*

103. This is an action pursuant to § 772.104, Fla. Stat., by the Hospital Plaintiffs asserting a private right of action against Tenet for its conduct of an enterprise through a pattern of criminal activity in violation of § 772.103(3), Fla. Stat.

104. At all time periods relevant hereto, Tenet, its officers, directors, managers, employees, agents, and representatives, by, through, and with each of the Tenet Hospitals, including those owned as part of a joint venture (*e.g.*, Encino-Tarzana Regional Medical Center in Tarzana, California) and those leased by Tenet (*e.g.*, Doctors Medical Center in San Pablo, California), and their officers, directors, managers, employees, agents, representatives, and outside consultants devised and engaged in a scheme whereby it formed a separate association-in-fact enterprise in order to wrongfully obtain Outlier payments that it was not entitled to, resulting in the receipt of Outlier overpayments in excess of $1 billion, to the direct, obvious, and inescapable injury to the business and property of the Hospital Plaintiffs. The Tenet Hospitals that were part of the RICO enterprise are listed in Paragraph 25 of the Complaint. The outside consultants met with Tenet's officers shortly after the enactment of the Balanced Budget Act of 1997, Pub. L. No. 105-33 ("BBA"), to advise Tenet of alternative revenue sources in light of the adverse financial impact of the BBA. The outside consultants recommended that Tenet artificially increase its charges in order to maximize Outlier payments, a recommendation that Tenet subsequently followed.

105. In violation of § 772.103(3) Fla. Stat., Tenet conducted or participated in the affairs of the association-in-fact enterprise identified herein through a pattern of criminal activity as set forth herein.

106. The pattern of criminal activity described in this count is but one more example in Tenet's long history of fraud, corruption, and other criminal acts. Tenet has reached the pinnacle of corporate wrongdoing, with ongoing criminal activity spanning at least fourteen years.

107. The Hospital Plaintiffs are each "persons" within the meaning of § 772.104, Fla. Stat.

108. Tenet is a "person" within the meaning of § 772.103, Fla. Stat.

Tenet's RICO Enterprise

109. The RICO "enterprise" is an association-in-fact consisting of Tenet, Tenet Hospitals, including those owned as part of a joint venture (*e.g.*, Encino-Tarzana Regional Medical Center in Tarzana, California) and those leased by Tenet (*e.g.*, Doctors Medical Center in San Pablo, California), their officers, directors, managers, employees, agents, representatives, and outside consultants who assisted in devising and implementing the inflated charging scheme ("Tenet's RICO Enterprise").

110. Tenet's RICO Enterprise is an ongoing and continuing organization consisting of both corporations and individuals that have been associated for the common or shared purpose of inflating patient charges in order to improperly obtain and then retain higher amounts of Outlier payments for Tenet. This scheme caused a consistent and direct increase in the Outlier Threshold so that the Outlier Threshold was at an artificially high level, thereby decreasing the

number of the Hospital Plaintiffs' claims that would qualify for Outlier payments as well as decreasing the dollar amount of qualifying Outlier payments to the Hospital Plaintiffs.

111. At all relevant times, the association of entities that form Tenet's RICO Enterprise was also associated for the lawful purpose of engaging in the business of hospital management, hospital management consulting, and providing medical services in the Tenet Hospitals.

112. Tenet constructed and implemented a common network with each of the Tenet Hospitals through various contractual relationships, financial ties, and coordinated reporting, billing, and information systems. Tenet and each of the Tenet Hospitals are separate and distinct corporations. Each of the Tenet Hospitals is a separate ongoing business with its own customer base that is separate and distinct from Tenet.

113. At all relevant times, Tenet owned, controlled or operated, in whole or in part, each of the Tenet Hospitals and engaged outside consultants which were part of Tenet's RICO Enterprise and coordinated and agreed with each of the Tenet Hospitals and outside consultants to engage in a course of business dealing in order to further its illegal scheme and the RICO enterprise.

Conduct of the Affairs of Tenet's RICO Enterprise

114. Tenet exercised ownership and/or control over the Tenet Hospitals, whether or not wholly owned by Tenet, in order to conduct, or participate in the conduct of, Tenet's RICO Enterprise through a pattern of criminal activity in violation of § 772.103(3) Fla. Stat. Such conduct and participation was carried out in the following ways:

(a) Each of the Tenet Hospitals was controlled and/or, directly or through subsidiaries, owned by Tenet;

(b) Each of the Tenet Hospitals was a party to the provider agreement with CMS;

(c) Tenet, together with each of the Tenet Hospitals, directly controlled the charges for each Outlier patient submitted to CMS for reimbursement from the Outlier Pool;

(d) Tenet, together with each of the Tenet Hospitals, directly controlled, or was directly aware of, the costs for care of each Outlier patient submitted to CMS for reimbursement from the Outlier Pool;

(e) Tenet relied on the Tenet Hospitals and their officers, directors, managers, employees, agents, and representatives to have direct contact with CMS and its representatives and submit to CMS inflated patient charges in order to promote the inflated charging scheme of Tenet's RICO Enterprise;

(f) Tenet implemented and controlled the inflated charging scheme it devised with the assistance of outside consultants through each of the Tenet Hospitals, their officers, directors, managers, employees, agents, and representatives, and thereby knowingly obtained the property of the Hospital Plaintiffs with intent to permanently deprive the Hospital Plaintiffs of a right to that property or a benefit from that property and/or to appropriate that property to Tenet's own use.

(g) Each of the Tenet Hospitals received reimbursement from CMS for such inflated Outlier patient charges on a regular and constant basis and, at the direction of Tenet, through its officers, directors, managers, employees, agents, and representatives, transmitted, transported or transferred those proceeds to Tenet; and

(h) Tenet caused the theft of the monies that constituted stolen Outlier payments to each of the Tenet Hospitals.

Tenet's Pattern of Criminal Activity – Theft

115. At all time periods relevant hereto, Tenet knowingly conducted or participated, directly or indirectly, in the affairs of Tenet's RICO Enterprise, through multiple acts constituting a pattern of criminal activity, as defined in § 772.102(1)(a)(20), Fla. Stat., in violation of § 772.103(3), Fla. Stat.

116. Tenet, through its RICO Enterprise, knowingly obtained or used the property of CMS and/or the Hospital Plaintiffs with intent to, either temporarily or permanently, deprive CMS and/or the Hospital Plaintiffs of a right to the property or a benefit from the property and/or appropriated the property to its own use in violation of § 812.014(1)(a), Fla. Stat., and/or § 812.014(1)(b), Fla. Stat. It was the common and intended practice of Tenet, through its RICO Enterprise, to submit claims to CMS and its representatives for Outlier reimbursement that were wrongfully based on inflated charges. This improper conduct was carried out by a wide array of Tenet's and the Tenet Hospitals' officers, directors, employees, managers, agents, and representatives, as well as with assistance and guidance from outside consultants.

117. As a foreseeable, willful, and intentional result of the inflated charging scheme perpetuated by the Tenet RICO Enterprise, the Tenet Hospitals received excessive Outlier compensation on thousands of occasions.

118. The money (*i.e.,* Outlier overpayments) sought and received by the Tenet Hospitals did not belong to them. At no time did Tenet or the Tenet Hospitals have a legitimate ownership or possessory right, entitlement or interest in that money from the Outlier Pool. Thus, Tenet and the Tenet Hospitals' exercise of control over the money were unauthorized and wrongful.

119. The payments Tenet received were far in excess of what it was entitled to, thereby depleting money from the Outlier Pool and directly and proximately causing injury to the Hospital Plaintiffs. The Hospital Plaintiffs suffered injury in that they were forced to absorb the costs of care for Outlier patients that they would have otherwise been compensated for from the Outlier Pool but for Tenet's improper and illegal acts. On multiple occasions, through a pattern of criminal activity, Tenet knowingly obtained or used the property of CMS and/or the Hospital Plaintiffs with intent to, either temporarily or permanently, deprive CMS and/or the Hospital Plaintiffs of a right to the property or a benefit from the property and/or appropriated the property to its own use.

120. Therefore, Tenet's illegal acts were tainted with the deliberate intent to commit the predicate acts and cause the injury alleged in this Complaint.

121. It was only after Tenet's inflated charging scheme was discovered, that Tenet revealed that it recognized extraordinary Outlier revenues.

122. Tenet's commission of these criminal predicate acts directly and proximately caused injury to the Hospital Plaintiffs' business or property by an aggregate amount of at least $ 1 million during the time periods relevant hereto.

123. Therefore, Tenet's violations of § 772.103(3), Fla. Stat., directly and proximately caused the Hospital Plaintiffs to be injured in their business or property by an aggregate amount of at least $1 million. The Hospital Plaintiffs had to absorb the costs of care for treatment of Outlier patients that they were entitled to compensation for from the Outlier Pool and which they otherwise would have received but for Tenet's theft of these monies.

124. In accordance with § 772.104, Fla. Stat., Tenet is liable to the Hospital Plaintiffs for threefold the actual damages sustained by them, plus the costs of bringing this suit, including reasonable attorney's fees.

Count IV

Conspiracy to Violate Florida Civil RICO - § 772.103(4) Fla. Stat.

125. This is an action pursuant to § 772.104, Fla. Stat., by the Hospital Plaintiffs asserting a private right of action against Tenet for its conspiracy to violate § 772.103(3), Fla. Stat., in violation of § 772.103(4), Fla. Stat. The Hospital Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1 – 63, and 104 - 122, *supra.*

126. At all time periods relevant hereto, Tenet, with the Tenet Hospitals and the outside consultants, conspired or endeavored to violate § 772.103(3), Fla. Stat., by conducting or participating, directly or indirectly, in the affairs of Tenet's RICO Enterprise through a pattern of criminal activity, including multiple criminal acts chargeable under § 772.102(1)(a)(20), Fla.

Stat., by Tenet agreeing to the objective of the conspiracy and/or by agreeing to commit at least two of the criminal predicate acts alleged herein.

127. At all time periods relevant hereto, Tenet conspired to and agreed to participate, and participated, in an inflated charging scheme to steal money from the Outlier Pool and consequently, from the other participants in the Medicare program, including the Hospital Plaintiffs, in order to further Tenet's RICO Enterprise and derive increased profits from such enterprise.

128. Tenet's violation of § 772.103(4), Fla. Stat., directly and proximately caused the Hospital Plaintiffs to be injured in their business or property by an aggregate amount of at least $1 million.

129. In accordance with § 772.104, Fla. Stat., Tenet is liable to the Hospital Plaintiffs for threefold the actual damages sustained by them, plus the costs of bringing this suit, including reasonable attorney's fees.

Count V

Violation of Florida Deceptive and Unfair Trade Practices Act Chapter 501, Part II, Fla. Stat. (2004)

130. This is an action against Tenet pursuant to Chapter 501, Part II, Fla. Stat. Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, repeats and realleges each and every allegation contained in ¶¶ 1-63, *supra*.

131. Chapter 501, Part II, Fla. Stat. is entitled, "Florida Deceptive and Unfair Trade Practices Act." Section 501.204(1) of the Act provides that "[u]nfair methods of competition,

unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

132. Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, is an enforcing authority of the Act pursuant to § 501.203(2), Fla. Stat. (2004). The statutory violations alleged herein affected more than one judicial circuit in the State of Florida.

133. Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, is authorized to seek damages and other statutory relief on behalf of governmental entities who have been damaged by violations of the Act pursuant to § 501.207(1)(c), Fla. Stat. The Hospital Plaintiffs are each governmental entities pursuant to § 501.207(1)(c), Fla. Stat. The Hospital Plaintiffs have suffered actual damages as a result of Tenet's violations of the Act.

134. The Attorney General has reviewed this matter and determined that an enforcement action serves the public interest.

135. As set forth in ¶¶ 1 - 63, *supra,* Tenet has engaged in unfair methods of competition; has engaged in unconscionable acts or practices; has engaged in representations, acts, practices or omissions that are material, and that are deceptive; and/or has committed acts or practices in the conduct of trade or commerce that offend established public policy and are immoral, unethical, oppressive, unscrupulous or substantially injurious to governmental entities. Thus, Tenet has engaged in unfair methods of competition and/or unconscionable, unfair or deceptive acts or practices in the conduct of any trade or commerce in violation of § 501.204(1), Fla. Stat. (2004).

136. Tenet's acts in connection with the Outlier Pool involve the conduct of trade or commerce as defined in § 501.203(8), Fla. Stat.

137. The aforesaid acts and practices of Tenet were to the injury and prejudice of the public and governmental entities, including the Hospital Plaintiffs.

Count VI

Unjust Enrichment

138. This is an action against Tenet for damages for unjust enrichment. The Hospital Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1 - 63, *supra.*

139. In accordance with 42 U.S.C. § 1395ww(d)(2)(E), the Secretary establishes a standardized amount that Medicare hospital participants are to receive under IPPS for each year. The Secretary withholds a portion of the standardized amount to make up the Outlier Pool. At all times relevant hereto, the amount withheld by the Secretary was 5.1% of the standardized amount.

140. The Outlier Pool included substantial funds withheld from the standardized amount that the Hospital Plaintiffs were to receive under IPPS.

141. The Hospital Plaintiffs have conferred a benefit on Tenet because the reductions in the standardized amount they were to receive under IPPS have been used to pay Tenet for the inflated and improper "costs" it claimed in connection with the treatment of Outlier patients. Thus, the monies received by Tenet from the Outlier Pool far exceeded the true costs of treating the aforesaid Outlier patients.

142. As a participant in the Outlier Pool, Tenet was and is fully aware of this benefit.

143. Tenet has voluntarily and knowingly accepted and retained the benefits conferred on it by the Hospital Plaintiffs. These economic benefits, which were obtained through the intentional and wrongful conduct of Tenet, rightfully belonged to the Hospital Plaintiffs.

144. It would be unjust and inequitable for Tenet to retain the Outlier payments derived from its inflated charging scheme because: (1) Tenet's actions were wrongful and intentional; (2) the payments Tenet obtained were excessive; and (3) the payments were not reasonably related to its actual costs of treating Outlier patients.

145. As a result of the foregoing, Tenet has been unjustly enriched at the pecuniary expense of the Hospital Plaintiffs, who have had to absorb the costs of Outlier treatments for which they would otherwise have been compensated from the Outlier Pool.

Prayer for Relief

WHEREFORE, Plaintiffs pray for judgment:

A. As to Count I, awarding damages to the Hospital Plaintiffs in such amount as may be determined at trial, plus costs and attorney's fees;

B. As to Count II, awarding damages to the Hospital Plaintiffs in such amount as may be determined at trial, plus costs and attorney's fees;

C. As to Count III, awarding damages to the Hospital Plaintiffs in such amount as may be determined at trial;

D. As to Count IV, awarding damages to the Hospital Plaintiffs in such amount as may be determined at trial;

E. As to Count V, awarding Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, actual damages on behalf of governmental entities injured by the unfair competition or unconscionable, unfair or deceptive acts or practices of Tenet, in accordance with § 501.207(1)(c), Fla. Stat.;

F. Assessing Tenet civil penalties in the amount of ten thousand dollars ($10,000) for each violation of Chapter 501, Part II, pursuant to § 501.2075, Fla. Stat.;

G. Awarding reasonable attorney's fees and costs to Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs, pursuant to §§ 501.2105, and 501.2075, Fla. Stat.;

H. Awarding restitution for governmental entities that have been injured by Tenet's unlawful actions;

I. Requiring that Tenet disgorge all revenues generated as a result of the unfair competition or unconscionable, unfair or deceptive acts or practices set forth herein;

J. As to Count VI, awarding damages to the Hospital Plaintiffs in such amount as may be determined at trial;

K. Awarding prejudgment interest in favor of the Plaintiffs; and

L. Awarding such other and further relief as this Court deems just and proper.

Demand for Jury Trial

Plaintiffs demand a trial by jury on all issues so triable.

Respectfully submitted, this 2nd day of March, 2005.

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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Telephone: (202) 331-3100
Fax: (202) 331-3101

Motions for *pro hac vice* admission to be filed

Attorneys for Plaintiffs

Exhibit C

EXHIBIT C

Exhibit C

Archives & Research Center

Search Archives

Tallahassee Democrat (archives from 1993 - Current)

NewsLibrary.com (archived articles from hundreds of newspapers)

For tenet AND healthcare

Show Most recent matches first From all documents

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Tallahassee Democrat (FL)

March 3, 2005
Page: E6

Crist: Company stole millions in Medicare dollars

The Attorney General's Office sued **Tenet Healthcare** Corp. on Wednesday, alleging the company inflated its cost to bilk millions of dollars from a pool that pays back hospitals for treating Medicare patients.

The suit accuses **Tenet**, the nation's second-largest hospital chain, of racketeering by overstating what its hospitals spent to perform expensive procedures on Medicare patients so it could collect higher reimbursements.

"**Tenet** stole this money from hardworking taxpayers," said Attorney General Charlie Crist.

When hospitals spend far more on procedures than is typically reimbursed by Medicare, they can access a pool to help make up their costs. That account is built up by deducting 5.1 percent of standard Medicare reimbursements. For example, if a hospital applies for and receives a $100 reimbursement, $5.10 would go to the pool.

"**Tenet** systematically, consistently and in a prolonged way has been cheating the system," Crist said. "When you have somebody that's cheating the system the way that **Tenet** has been doing, it takes significant resources from those that are doing it honest and right. And it's not only hospitals, it takes away from patients who need care."

Tenet could be forced to pay triple damages under racketeering laws if Crist's office wins the case.

Tenet, however, denies wrongdoing.

"This appears to be a l uit motivated by a number of our Florida (petitors and critics," said Steven Campanini, a spokesman in the company's Dallas offices. "It is specious and unwarranted. We will vigorously defend ourselves against these charges."

Exhibit 2

EXHIBIT 2

Exhibit 2

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL - LEE, INC.,

Petitioner,

v.

CASE NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

AFFIDAVIT OF KARL DAVID ACUFF

STATE OF FLORIDA

COUNTY OF LEON

I, Karl David Acuff , being duly sworn on oath, affirm under penalty of perjury that the following representations are true and correct to the best of my information, knowledge and belief, and that if called upon to testify, I would state:

1. My name is Karl David Acuff, I am an attorney with the law firm of Watkins & Caleen, P.A. I have been employed in this capacity for over 2 years. I am a member in good standing of the Florida Bar.

2. The law firm of Watkins & Caleen, P.A. represents Lee Memorial Health System in the above captioned case.

3. On April 12, 2005, I discovered on the Florida Senate website that the ALJ who had issued the recommended order in this action, William R. Pfeiffer, was a registered lobbyist for Tenet Healthcare Corporation. A copy of the page from the "2005 Registration by Lobbyist Name" from the Florida Senate website is attached hereto as exhibit "A."

4. On April 14, 2005, I received from the Office of Legislative Services, Division of Legislative Information Services, Lobbyist Registration Office a copy of Mr. Pfeiffer's Lobbyist Registration Form for Tenet Health Care. Mr. Pfeiffer had executed his Lobbyist Registration Form to represent Tenet Health Care on February 9, 2005, and that form was apparently filed with the Legislature on April 4, 2005. A copy of the Lobbyist Registration form is attached hereto as exhibit "B."

Further affiant sayeth naught.

Karl David Acuff

SWORN AND SUBSCRIBED before me this 19th day of April, 2005.

Personally known ✓
Identification
Type

Pamala K. O'Neal

NOTARY PUBLIC

My Commission Expires:

Pamala K. O'Neal
Commission # DD278909
Expires March 28, 2008
Bonded Troy Fain - Insurance, Inc. 800-385-7019

Exhibit A

EXHIBIT A

Exhibit A

Pennekamp, Thomas M. 850/425-6710
215 S Monroe St Ste 125, Tallahassee, FL 32301-1836
SunTrust Bank
200 S Orange Ave, Orlando, FL 32809

Pennington, Roger A. 850/224-5909
235 E Virginia St, Tallahassee, FL 32312
Florida Chamber of Commerce
136 S Bronough St, Tallahassee, FL 32301
Florida Medical Association
113 E College Ave, Tallahassee, FL 32301
Florida Municipal Electric Association
PO Box 10114, Tallahassee, FL 32301
VoteSmartFlorida.org
136 S Bronough St, Tallahassee, FL 32301

Perdue, Tamela Ivey 850/222-2229
Stiles Taylor & Grace PA, PO Box 1140, Tallahassee, FL 32302
Associated Industries Insurance Company, Inc
516 N Adams St, Tallahassee, FL 32301
Associated Industries Insurance Services, Inc
516 N Adams St, Tallahassee, FL 32301
Associated Industries of Florida
PO Box 784, Tallahassee, FL 32302
Comcar
502 W Bridgers Ave, Auburndale, FL 33823
Florida Sports Hall of Fame Foundation, Inc
1631 Dr Martin Luther King Jr N, St Petersburg, FL 33704
Hillsborough Area Regional Transit Authority
201 E Kennedy Blvd, Tampa, FL 33602
Prevent Blindness Florida
3825 Henderson Blvd Ste 40E, Tampa, FL 33629

Perez, David 305/375-5600
Miami-Dade County, 111 NW 1st St Ste 2910, Miami, FL 33128
Miami-Dade County
111 NW 1st Ste 2910, Miami, FL 33128

Perkins-Gilley, Janice E. 850/488-5000
Executive Office of the Governor, The Capitol PL 02, Tallahassee, FL 32399-0001
Executive Office of the Governor
The Capital PL 02, Tallahassee, FL 32399-0001

Perkins, Gary 850/877-2165
2617 Mahan Dr, Tallahassee, FL 32308-5405
Florida Sheriffs Association
2617 Mahan Dr, Tallahassee, FL 32308

Perko, Ann P. 850/385-7900
2121 Delta Blvd, Tallahassee, FL 32303-4221
Florida Legal Services, Inc
2121 Delta Blvd, Tallahassee, FL 32303

Perry, Gail Marie 954/970-3104
PO Box 1766, Pompano Beach, FL 33061
Communications Workers of America Council of Florida
3121 SW 15th St, Pompano Beach, FL 33069-4806

Perry, Jim N. 352/728-9707
Office of the City Manager, 501 E Meadow St, Leesburg, FL 34748
City of Leesburg
501 E Meadow St, Leesburg, FL 34748

Personette, Steven 239/335-8201
Sprint, 1520 Lee St, Ft Myers, FL 33901
Sprint
PO Box 165000, Altamonte Springs, FL 32716-5000

Peters, B. J. 850/508-1900
346 Hunters Crossing, Tallahassee, FL 32312
Edgewater Beach Resort
11212 Front Beach Rd, Panama City, FL 32407
Madison County Memorial Hospital
201 E Macion St, Madison, FL 32340
Orlando Lutheran Tower, The
300 E Church St, Orlando, FL 32801

Peterson, Daniel W. 407/830-3320
PO Box 165000, Altamonte Springs, FL 32716-5000
Sprint
315 S Calhoun St Ste 500, Tallahassee, FL 32301

Peterson, Frank H. 352/697-0954
Allied Data Services LLC, 4517 E Spruce Dr, Dunnellon, FL 34434
Allied Data Services, LLC
4517 E Spruce Dr, Dunnellon, FL 34434

Peterson, Karen M. 850/222-9800
306 E College Ave, Tallahassee, FL 32301
Florida Hospital Association
306 E College Ave, Tallahassee, FL 32301

Petrovich, Mike P. 850/222-7500
Hopping Green Sams & Smith PA, PO Box 6526, Tallahassee, FL 32314-6526
Exxon Mobil Corporation
3225 Gallows Rd Ste 700229, Fairfax, VA 22037
Florida Electric Power Coordinating Group, Inc
405 Reo St Ste 100, Tampa, FL 33609
Florida Water Environment Association Utility Council
PO Box 2553, Sarasota, FL 34230-2553

Pettijohn, JuDee L. 850/245-6471
Dept of State, Cultural & Historical Programs, 500 S Bronough St Ste 305, Tallahassee, FL 32399-0250
Department of State
RA Gray Bldg, 500 S Bronough St, Tallahassee, FL 32399-0250

Pfeiffer, Summer J. 850/561-1102
Florida Coalition for Children, 864 E Park Ave, Tallahassee, FL 32301
Florida Coalition for Children
864 E Park Ave, Tallahassee, FL 32301

Pfeiffer, William 850/212-5941
PO Box 10528, Tallahassee, FL 32302
City of Delray
100 NW 1st Ave, Delray Beach, FL 33444
CONVERGYS
201 E 4th St, Cincianati, OH 45202
Equitas
1201 F St NW Ste 500, Washington, DC 20004
Sprint
315 S Calhoun St Ste 500, Tallahassee, FL 32301
Tenet Health Care
3350 Riverwood Pkwy Ste 1800, Stlanta, GA 30339
Verizon
106 E College Ave Ste 810, Tallahassee, FL 32307

Phelan, William J. 850/224-3907
PO Box 1459, Tallahassee, FL 32302-1459

EXHIBIT B

P. 2

8509215345

LOBBY REGISTRATION

Apr 14 05 02:17p

2005 Kot

LOBBYIST REGISTRATION FORM FOR THE FLORIDA LEGISLATURE CALENDAR YEAR ~~2004~~

Read the registration instructions on the reverse side of form to ensure your timely and accurate registration.

(1) Lobbyist's Full, Legal Name:
PFEIFFER WILLIAM R.
Last Name First Name MI

(2) Lobbyist's Business Address:
P.O. BOX 10528
TALLAHASSEE, FL 32302
City, State, Zip

(3) Lobbyist's Phone Number:
850-212-5941

(4) Lobbyist's Area of Legislative Interest:
GENERAL Health Care RA

(5) Lobbyist's Driver's License Number and Issuing State:
P160-936-66-388-0 FLORIDA

(6) Principal Represented. State *one* principal per form:
TENET HEALTH CARE

(7) Principal's Business Address:
3350 RIVERWOOD PKWY
SUITE 1800
ATLANTA, GA 30339
City, State, Zip

2005 APR -4 PM 4:34
RECEIVED BY LEGISLATIVE INFORMATION DIV.

Complete this section only if applicable:

State the name and the extent of any direct business association or partnership you have with any member of the Legislature:

NONE

If this is *not* a "Joint" Senate and House registration, check one and pay the fee accordingly: The Senate [ ] *OR* The House [ ]

I do solemnly swear that all the foregoing facts are true and correct.

ORIGINAL Signature of Lobbyist

STATE OF FLORIDA, COUNTY OF Leon

Sworn to (or affirmed) and subscribed before me this 4 day of February 2005, by William Pfeiffer

Notary Signature Print, Type or Stamp Name of Notary Personally Known ✓ OR

SHARI HICKEY
MY COMMISSION # DD 364338
EXPIRES: October 20, 2008
Bonded Thru Notary Public Underwriters

Produced Identification ______ Type of Identification Produced ______

Acknowledged by ______ (For use only when registering in person before Lobbyist Registration Office staff.)

2510

RECEIVED
GENERAL COUNSEL

APR 19 2005

Agency for Health
Care Administration

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL — LEE, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_____________________________________/

DOAH NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

CERTIFICATE OF COUNSEL THAT MOTION TO DISQUALIFY IS FILED IN GOOD FAITH

Comes now, W. David Watkins, counsel for Lee Memorial Health System, Cape Memorial Hospital, Inc., HealthPark Care Center, Inc., and Lee Memorial Rehabilitation Hospital (collectively herein " LMHS"), who does hereby certify that the motion to disqualify the administrative law judge and the supporting affidavits are filed in good faith and that copies of the motion and supporting affidavits have been provided to all parties, the ALJ, the clerk of DOAH, and the Chief Judge for DOAH, as listed on the certificate of service.

Certified and respectfully submitted this 19th day of April, 2005.

W. DAVID WATKINS
Florida Bar No. 437190
KARL DAVID ACUFF
Florida Bar No. 587044
Watkins & Caleen, P.A.
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(850) 671-2644 — Telephone
(850) 671-2732 — Facsimile

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were provided by as indicated below to the following addressees, this 19th day of April, 2005:

Thomas F. Panza, Esq.
Mark A. Emanuele, Esq.
Deborah S. Platz, Esq.
Panza, Maurer & Maynard, P.A.
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3600 North Federal Highway
Fort Lauderdale, FL 33308
(Via facsimile and Federal Express)

The Honorable Robert S. Cohen
Director and Chief Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060
(Via Hand Delivery)

Clerk
Division of Administrative Hearings
The DeSoto Building
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Kenneth W. Gieseking, Esq.
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(Via Hand Delivery)

William R. Pfeiffer, Esq.
Administrative Law Judge
P.O. Box 10528
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Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-3060
(Via Hand Delivery)

W. DAVID WATKINS

RECEIVED
GENERAL COUNSEL

APR 19 2005

Agency for Health
Care Administration

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SELECT SPECIALTY HOSPITAL — LEE, INC.,

Petitioner,

v.

DOAH NO. 03-2487CON
CON NO. 9656
AHCA NO. 2003004426

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC.; LEE MEMORIAL HEALTH SYSTEM; CAPE MEMORIAL HOSPITAL, INC.; HEALTHPARK CARE CENTER, INC.; and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE AND VACATE RECOMMENDED ORDER

Come now Intervenors, LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL, by and through their undersigned counsel file this memorandum of law in support of their motion pursuant to Florida Statute Section 38.10 (2004) and Florida Rule of Judicial Administration 2.160, to disqualify the Administrative Law Judge ("ALJ") from this action and to vacate the recommended order issued on April 8, 2005, and in support would show:

1. ALJs are subject to the provisions of Florida Rule of Judicial Administration 2.160 regarding the disqualification of judges. Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1st DCA 2002).

2. Disqualification of a judge or ALJ is an important procedural safeguard, as summarized in *Florida Jurisprudence*:

> Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as would raise no suspicion of the fairness and integrity of the judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. The law intends that no judge will preside in a case in which he or she is not wholly free, disinterested, impartial, and independent. Accordingly, the conditions requiring the disqualification of the judge to act in that particular case are prescribed by statute.

13 Fla. Jur 2d, *Courts and Judges* Section 313 (footnotes omitted).

3. In ruling upon this motion Florida Statutes Section 38.10 (2004) requires that all facts and reasons for the belief of the existence of bias or prejudice contained in the affidavit must be taken as true. Brown v. St. George Island, Ltd., 561 So. 2d 253, 255 (Fla. 1990). There can be no testing, challenge, or attempt to refine or revise the alleged facts by any other party nor by the ALJ. Department of Agriculture and Consumer Services v. Broward County, 810 So.2d 1056, 1059 (Fla. 1st DCA 2002) (**"We reject the suggestion that a meaningful distinction can be made and consistently applied between clarification and refutation of the facts underlying a motion for disqualification."**) Neither may any contrary evidence be considered. Id.; Cave v. State, 660 So.2d 705 (Fla.1995). If the scope of the inquiry exceeds the legal sufficiency of the motion, then recusal is mandated - even if the motion was legally insufficient. See *13 Fla. Jur 2d Courts and Judges § 343* and examples cited therein.

4. A motion to disqualify is sufficient if it alleges facts which are sufficient to "prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." Hayslip v. Douglas, 400 So.2d 553, 556 (Fla. 4th DCA 1981). If the facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the judge to say that the fear does not exist or is unreasonable. Livingston, 441 So.2d at 1087.

5. "[T]he principal issue presented in a motion for disqualification is that of legal sufficiency." Breakstone v. MacKenzie, 561 So.2d 1164, 1167 (Fla. 3d DCA 1989), approved in part and quashed in part, 565 So.2d 1332 (Fla.1990). Legal sufficiency is governed by a reasonable person standard: the sole consideration is whether the litigant requesting disqualification can reasonably fear he will not receive an impartial or fair trial. Breakstone v. MacKenzie, 565 So.2d 1332 (Fla.1990); Fischer v. Knuck, 497 So.2d 240 (Fla.1986); Livingston v. State, 441 So.2d 1083 (Fla.1983); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); Hayslip.

6. It is anticipated that Select-Lee may attempt to argue that this motion is nothing more than "sour grapes." The grounds for the ALJ's disqualification were not discoverable until after the issuance of the recommended order. However, this motion is not premised upon any contrary ruling or decision. This motion is well-founded in facts only discovered within the past week. Therefore, as held in Marcotte V. Gloeckner, 679 So. 2d 1225, 1226 (Fla. 5th DCA 1996):

> [W]hile the motions to disqualify came after an adverse ruling, we do not agree with respondents that the motions were untimely as a result since the affidavits allege that the underlying facts were discovered only afterwards. We therefore conclude that Fischer v. Knuck, 497 So.2d 240 (Fla.1986) , declined to extend on other grounds, Airborne Cable Television, Inc. v. Storer Cable TV of Florida, Inc., 596 So.2d 117 (Fla. 2d DCA 1992) is distinguishable.

7. Fla. R. Jud. Admin. 2.160 sets out the few requirements for the motion to be legally sufficient. Fla. R. Jud. Admin. 2.160(c) requires that the motion to disqualify: (1) be in writing; (2) allege specific factual grounds for disqualification; (3) be sworn to in the motion or include an affidavit swearing to the motion; (4) be certified by the attorney that the motion and statements are made in good faith; and (5) be immediately served upon the clerk and the subject judge per Fla. R. Civ. P. 1.080. Fla. R. Jud. Admin. 2.160(d)(1) requires that the motion show that the party fears bias or prejudice in the judge. Fla. R. Jud. Admin. 2.160(e) requires the motion be filed within 10 days of discovery of the basis for disqualification. This motion is timely filed and satisfies the requirements of Fla. R. Jud. Admin. 2.160(c), (d)(1), and (e). All required elements are well pled, and therefore the motion must be granted.

Respectfully submitted this 19th day of April, 2005.

W. DAVID WATKINS
Florida Bar No. 437190
KARL DAVID ACUFF
Florida Bar No. 587044
Watkins & Caleen, P.A.
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P. O. Box 15828
Tallahassee, FL 32317-5828
(850) 671-2644 — Telephone
(850) 671-2732 — Facsimile

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were provided by as indicated below to the following addressees, this 19th day of April, 2005:

Thomas F. Panza, Esq.
Mark A. Emanuele, Esq.
Deborah S. Platz, Esq.
Panza, Maurer & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, FL 33308
(Via facsimile and Federal Express)

The Honorable Robert S. Cohen
Director and Chief Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-3060
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Clerk
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Kenneth W. Gieseking, Esq.
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William R. Pfeiffer, Esq.
Administrative Law Judge
P.O. Box 10528
Tallahassee, FL 32302
and
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060
(Via Hand Delivery)

W. DAVID WATKINS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL - LEE, INC.,

Petitioner,

v. Case No. 03-2487CON

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC., LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_________________________________/

RENEWED UNOPPOSED MOTION REQUESTING A STATUS CONFERENCE

Come now the Intervenors, by and through undersigned counsel, and file this motion to request a status conference in the above styled proceeding, and in support would state:

1. Two related later batching cycle proceedings for LTCH services in District 8 are pending at DOAH:

(1) Case Nos. 04-0446 and 04-0454 are consolidated and scheduled to commence final hearing on May 24, 2005;

and

(2) Case Nos. 04-2980 and 04-3152 are consolidated and scheduled to commence final hearing on November 7, 2005.

scheduling of those subsequent actions is reasonable pending the issuance of a recommended order in this action.

3. Counsel for Intervenors conferred with counsel for AHCA and for Select-Lee. Neither party opposes this motion.

4. Counsel for Intervenors would be willing to accept responsibility for scheduling the status conference at a date and time convenient to the parties and the ALJ.

WHEREFORE, Intervenors request that an order requiring a status conference be entered.

RESPECTFULLY SUBMITTED this 10th day of February, 2005.

KARL DAVID ACUFF
Florida Bar No. 587044

W. DAVID WATKINS
Florida Bar No. 437190
KARL DAVID ACUFF
Florida Bar No. 0587044

WATKINS & CALEEN, P.A.
1725 Mahan Drive, Suite 201
P. O. Box 15828
Tallahassee, FL 32317-5828
(850) 671-2644

Counsel for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by Facsimile and U.S. Mail to the addressees below, this 10th day of February, 2005:

Mark A. Emanuele, Esq.
Panza, Maurer & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, FL 33308

Kenneth W. Gieseking, Esq.
Agency for Health Care Administration
Fort Knox Building 3, M.S. 3
2727 Mahan DriveTallahassee, FL 32308

KARL DAVID ACUFF
Florida Bar No. 587044

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL - LEE, INC.,

Petitioner,

v. Case No. 03-2487CON

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

CYPRESS COVE AT HEALTHPARK FLORIDA, INC., LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., HEALTHPARK CARE CENTER, INC., and LEE MEMORIAL REHABILITATION HOSPITAL,

Intervenors.
_______________________________________/

UNOPPOSED MOTION REQUESTING A STATUS CONFERENCE

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2. Intervenors request a status conference allowing the parties to apprise the ALJ of the status of related subsequent batching cycle proceedings, and to determine whether the current

2. Intervenors request a status conference allowing the parties to apprise the ALJ of the status of related subsequent batching cycle proceedings, and to determine whether the current scheduling of those subsequent actions is reasonable pending the issuance of a recommended order in this action.

3. If the recommended order is not issued with sufficient time to examine and consider the recommended order's findings and conclusions prior to the discovery cut-off date in the second batched proceeding (May 2, 2005), then the parties may be unintentionally deprived of the opportunity make meaningful discovery on significant issues.

4. Counsel for Intervenors conferred with counsel for AHCA and for Select-Lee. **Neither party opposes this motion.**

5. Counsel for Intervenors are willing to accept responsibility for scheduling the status conference at a date and time convenient to the parties and the ALJ.

WHEREFORE, Intervenors request that an order requiring a status conference be entered.

RESPECTFULLY SUBMITTED this 8th day of March, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by Facsimile and U.S. Mail to the addressees below, this 8th day of March, 2005:

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