STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 5013
JOSHUA H. STEIN, Attorney General, ex rel. DOGWOOD HEALTH TRUST, Plaintiff, v. HCA MANAGEMENT SERVICES, LP, MH MASTER HOLDINGS, LLLP, MH MISSION HOSPITAL, LLLP, and MH HOSPITAL HOLDINGS, INC., Defendants.	**ORDER ON NON-PARTY BUNCOMBE COUNTY'S MOTION TO INTERVENE**

1. **THIS MATTER** is before the Court on Non-Party Buncombe County, North Carolina's Motion to Intervene (the "Motion"), (ECF No. 42). Buncombe County (the "County") seeks to intervene in this action to, among other things, recover damages allegedly resulting from delays in the transfer of individuals transported by Buncombe County's Emergency Medical Services ("EMS") to Mission Hospital's Emergency Department.[1]

2. Having considered the Motion, the parties' briefs, affidavits, supporting materials, and other relevant matters of record, as well as the arguments of counsel at a hearing on the Motion, the Court determines that the Motion shall be **DENIED**.

[1] Since the filing of this Motion, the Attorney General and Defendants stipulated to a voluntary dismissal without prejudice of Defendants HCA Management Services, LP, MH Hospital Manager, LLC, and MH Mission Hospital LLLP, leaving only MH Master Holdings, LLLP as the Defendant. (Parties' Stip. Facts and Vol. Dismissal Non-Signatory Defs., ECF No. 58.) The County, however, includes the three dismissed defendants in its proposed complaint. Accordingly, the Court refers to the four original defendants collectively as "Defendants."

I. FACTUAL AND PROCEDURAL BACKGROUND

3. This case centers on the terms of an Asset Purchase Agreement (the "APA") between MH Master Holdings, LLLP ("HCA") and Mission Health System ("Mission Health") memorializing HCA's acquisition of Mission Health, a six-campus hospital system serving western North Carolina. As a result of the Attorney General's desire for assurance that the deal would not adversely impact essential medical services in western North Carolina,[2] the APA was amended to include Section 7.13(a) and Schedule 7.13(a). These amendments speak to HCA's obligations with respect to the continuation of certain services by Mission Health during the ten-year period from 2019 to 2029, barring certain contingencies or extenuating circumstances.[3] (First Am. Compl., Ex. 1 APA and Schedules ["APA"] Section 7.13(a), Schedule 7.13(a), ECF No. 50.1.)

4. In addition, the APA contains a clause allowing any party to the agreement to elect to have a dispute concerning the parties' rights and duties under Section 7.13 to be heard in this Court and resolved by bench trial. The alternative is arbitration. (APA Sections 13.2(a)(ii)(2), 13.3.)

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[2] Section 55A-12-02(g) of the North Carolina General Statutes requires charitable or religious corporations in North Carolina to provide written notice to the Attorney General thirty days prior to selling, leasing, or exchanging all or most of its property "if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection." N.C.G.S. § 55A-12-02(g).

[3] The amendments address emergency services, oncology services, behavioral health treatment, cardiac services, general medicine services, imaging and diagnostic services, neuro trauma services, pediatric services, obstetrical services, surgical services, graduate medical education, geriatric care services, inpatient and outpatient rehabilitation services, orthotics and prosthetics services, home health and private duty nursing, hospice care, and pediatric specialty outpatient services. (APA Schedule 7.13(a).)

5. After inclusion of the Attorney General's amendments, the APA was executed in January 2019. (First Am. Compl. ¶ 29, ECF No. 50.)

6. On 14 December 2023, the Attorney General, on behalf of the Dogwood Health Trust,[4] filed his Complaint against Defendants, including HCA, for violations of the APA. The Attorney General alleges that HCA has failed to provide the requisite level of emergency and trauma care, as well as the oncology services required by the APA.[5] In particular, the Attorney General alleges that Mission Hospital's Emergency Department is understaffed and fails to meet the requirements of a Level II Trauma Center,[6] resulting in longer patient wait times and overcrowding in the Emergency Department. The Amended Complaint alleges that "[l]ocal emergency management services are frustrated by how long it takes their patients to be transferred into the

[4] Dogwood Health Trust is a North Carolina nonprofit corporation that is referenced in the APA as the "Foundation." Pursuant to Section 3.5 of the APA it became the Seller Representative responsible for making certain decisions and taking certain actions pursuant to the APA. The Trust describes itself as an independent entity that advocates for the housing, education, economic opportunity, health and wellness for the people of western North Carolina. *See Our Roots*, Dogwood Health Trust, https://dogwoodhealthtrust.org/about/our-roots/ (last accessed July 8, 2024).

[5] The Attorney General has since amended his Complaint to supplement the Complaint's factual allegations and remove two Defendants from the action. (Order on Pl.'s Mot. Leave Am. Compl. and Defs.' Mot. Grant Leave Am. Compl. and Set Deadlines Responsive Pleadings, ECF No. 49; First Am. Compl., ECF No. 50.) In addition, the parties stipulated to the dismissal of three other Defendants from this action, leaving only MH Master Holdings, LLLP as the sole Defendant in the Attorney General's suit. (Parties' Stip. Facts and Vol. Dismissal Non-Signatory Defendants, ECF No. 58.)

[6] A Level II Trauma Center is a facility that employs board-certified emergency medicine physicians in its emergency department. *See Resources for Optimal Care of the Injured Patient: 2022 Standards* § 4.7, Am. College Surgeons (rev. ed. Dec. 2023), https://www.facs.org/quality-programs/trauma/quality/verification-review-and-consultation-program/standards/.

emergency department." (Am. Compl. 3, ECF No. 50.) HCA denies these allegations. (*See* Defs.' Answ. and Countercls. Pls.' Am. Compl., ECF No. 55.)

7. Referencing reports from state and federal regulators, the Attorney General alleges that Mission Hospital's Emergency Department has a patient wait time averaging 236 minutes, well above the national average of 161 minutes and the North Carolina average of 175 minutes. (First Am. Compl. ¶¶ 93-95.) In support of these allegations, the Attorney General has submitted multiple affidavits from Mission Hospital employees and patients, as well as from EMS personnel, complaining about an understaffed Emergency Department. (*See e.g.*, Aff. of Ed Jenest ¶¶ 6, 13-14, ECF No. 50.4; Aff. of Hannah Drummond ¶¶ 11-13, ECF No. 50.5; Aff. of David Leader ¶ 10, ECF No. 50.7; Aff. of Landon Miller ¶¶ 3, 9-10, ECF No. 50.9; Aff. of Catherine Owen ¶ 25, ECF No. 50.19.). Allegedly, because of Mission Hospital's longer wait times, there are times when Buncombe County has been left without an available ambulance. (Aff. of Van Taylor Jones ¶¶ 4, 10-13, ECF No. 50.16; Aff. of Jamison Judd ¶¶ 3, 11-13, ECF No. 50.23.)

8. The County filed the instant Motion on 3 April 2024 seeking to intervene in this action to recover both damages and equitable relief resulting from the allegedly excessive wait times its EMS crews have experienced. In its accompanying proposed complaint, the County asserts claims for unjust enrichment, quantum meruit, restitution, and declaratory and injunctive relief, and it demands more than $3 million in damages. (Mot., Ex. A—Proposed Intervenor Compl. ["Buncombe Compl."] ¶¶ 39, 44-64, ECF No. 42.1.)

9. On 22 April 2024, Defendants filed their response. (Def.'s Br. Opp. Buncombe County's Mot. Intervene ["Defs.' Br."], ECF No. 46).[7] The County replied on 2 May 2024. (Buncombe Cnty's Reply Def. MH Master Holding, LLP's Br. Opp. Mot. Intervene ["Buncombe Reply"], ECF No. 52.)

10. On 11 June 2024, the Court held a hearing on the Motion at which the County and all other parties were present and heard. (Not. Rescheduled H'rg, ECF No. 57.) The Motion is now ripe for consideration.

II. LEGAL STANDARD

11. Rule 24 of the North Carolina Rules of Civil Procedure (the "Rule(s)") provides for intervention (1) as of right and (2) permissively. N.C. R. Civ. P. 24. Intervention as of right occurs (1) as provided unconditionally under a statute or (2) when the intervenor:

> claims an interest relating to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. R. Civ. P. 24(a). Accordingly, a prospective intervenor bears the burden of demonstrating that "(1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest

[7] The Attorney General did not respond, but the County indicates in its Motion that the Attorney General does not oppose the Motion and reserved its right to respond to the Motion and, if the Motion is granted, to the County's complaint. (Mot. ¶ 5.)

by existing parties." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459 (1999); *see also Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 672 (2013).

12. An intervenor's interest in the lawsuit must be "a legal interest in the subject matter of the litigation of such direct and immediate character that they will gain or lose by direct operation of the judgment." *Nw. Bank v. Robertson*, 25 N.C. App. 424, 426 (1975); *see also Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 796 (2004) (characterizing the interest necessary for intervention as of right to be a "direct personal or pecuniary interest in the subject of the litigation." (citation omitted)); *Alford v. Davis*, 131 N.C. App. 214, 219 (1998) (assessing that intervenors had "no protectable interest" for intervention as of right because they "have no rights in the estate . . . through the laws of intestate succession, the wrongful death statute, or any other law."). "One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or contingent one cannot claim the right to defend." *Strickland v. Hughes*, 273 N.C. 481, 485 (1968).

13. To intervene as of right, the intervenors' ability to recover must be practically impaired. *See United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 399 (1997) (finding practical impairment of intervenors' interests in a declaratory judgment action concerning a homeowners' insurance agreement because an unfavorable ruling would harm the intervenors' ability to recover from the insured defendants); *Councill v. Town of Boone Bd. of Adjustment*, 146 N.C. App. 103, 108 (2001) (permitting a town's residents to intervene because they alleged that the defendants, a city zoning board, intended to settle their dispute with plaintiff, a

developer, without residents' input); *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 188 (2010) (permitting owners of property near the plaintiff's property to intervene because a trial court's determination that the property was not subject to a conservation zoning ordinance would result in an immediate increase in pollution and irreversible pecuniary damage).

14. In addition, the intervenor's interest must not be adequately represented absent intervention. If the plaintiff is already pursuing the intervenor's claims, the intervenor's interests may be adequately represented, rendering intervention as of right inappropriate. *See River Birch Assoc. v. Raleigh*, 326 N.C. 100, 129 (1990) (denying residents' request to intervene as of right because their homeowners' association asserted every claim the individuals sought to assert, and thus, their claims were adequately represented); *McEntee*, 225 N.C. App. at 674 (determining that the rights of an intervenor, a beneficiary to an estate, were adequately represented by the estate's personal representative because the personal representative had the duty to bring suit on behalf of the estate's beneficiaries). *But see Simpson*, 126 N.C. App. at 399 (permitting intervention as of right because an insurance company could not adequately represent intervenors' interest in satisfying their judgment against defendants).

15. In contrast to the requirements for intervention as of right, a permissive intervenor "need not show a direct personal or pecuniary interest in the subject of the litigation." *In re Baby Boy Scearce*, 81 N.C. App. 531, 541 (1986). Permissive intervention is appropriate either (1) as provided by statute or (2) when an

intervenor's "claim or defense and the main action have a question of law or fact in common[.]" N.C. R. Civ. P. 24(b).

16. The standard for determining whether a common question of law or fact exists presents a relatively low bar. *See, e.g., Bruggeman*, 165 N.C. App. at 796 (finding that intervenors' breach of contract claim required proof of the same elements as those alleged in plaintiff's breach of contract claim); *Sloan v. Inolife Techs.*, 2018 NCBC LEXIS 181, at *2-3 (N.C. Super. Ct. Jan. 18, 2018) (finding that the intervenor's claims had questions of law and fact in common with plaintiffs' action against defendants because both actions required determination of the defendant corporation's ownership and plaintiffs' alleged status as preferred shareholders).

17. However, the common law or fact should not be so tangential that adding the movant's claims has the potential to sidetrack the primary litigation and delay its resolution. "When considering whether the intervention will unduly delay the litigation, courts consider if the intervener's claims raise collateral or extrinsic issues." *Chambers v. Moses H. Cone Mem. Hosp.*, 2017 NCBC LEXIS 22, at **25 (N.C. Super. Ct. Mar. 13, 2017), *rev'd on other grounds*, 374 N.C. 436 (2020). *See also Virmani*, 350 N.C. at 460 (affirming trial court's denial of motion for permissive intervention because movant's interest would unnecessarily delay the litigation). "A mere general interest . . . in the property or transaction involved in a lawsuit will not warrant permissive intervention." G. Gray Wilson, *North Carolina Civil Procedure* § 24-4 (2024).

18. Whether to allow permissive intervention "rests within the discretion of the trial court[.]" *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474 (1992); *see also River Birch Assoc.*, 326 N.C. at 129. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." N.C. R. Civ. P. 24(b); *see, e.g., Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 539-40 (2007) (assessing that permissive intervention of a party would be prejudicial to the original defendant because it would reopen discovery, allow the intervenor to obtain evidence for a separate lawsuit against the defendant, increase the defendant's litigation burden while granting plaintiff an ally, and cause defendant to change its trial strategy).

III. ANALYSIS

A. Intervention As of Right

19. The County contends that it is entitled to intervene because it shares a common interest with the Attorney General: to eliminate excessive patient wait times at Mission Health's Emergency Department. The County argues that a determination in the Attorney General's case with respect to whether the services Defendants currently provide in Mission Health's Emergency Department comply with the APA has the potential to impact the County's claims for Defendants' alleged past noncompliance.

20. In addition, the County argues that the Attorney General does not adequately represent its interests because this is an election year and the current

Attorney General is leaving office, making it unclear whether the underlying litigation will continue. Further, the Attorney General's action is limited to injunctive relief. The current action does not seek to recover damages that the County has allegedly suffered. (Br. Supp. Buncombe Cnty's Mot. Intervene ["Buncombe Br."] 7-12, ECF No. 43; Buncombe Reply 7-9, ECF No. 52.)

21. Defendants respond that the County has no right to intervene because it is not a party to the APA, the transaction that is the subject of this litigation. Defendants further contend that resolution of this lawsuit would not impair the County's claims because the County remains free to initiate its own action. Finally, Defendants argue that the Attorney General adequately represents the County, and mere speculation that the Attorney General's office will not continue to vigorously prosecute this action after the 2024 election is insufficient to satisfy the County's burden. (Defs.' Br. 5-10, ECF No. 46.)

22. The Court agrees that the County has not shown that it has the right to intervene in this action. The present litigation involves Defendant's compliance with the terms of the APA going forward. The County's claims are for past wages and other costs that it allegedly incurred as a result of increased wait times at the Emergency Department. Its claims would exist regardless of whether the APA existed. Thus, the County's interest in the outcome of the Attorney General's lawsuit is at best an indirect one and does not provide the basis for intervention as of right. *See Holly Ridge*, 361 N.C. at 538 (denying motion to intervene because movant did

not have a direct interest in the civil penalty imposed on the plaintiff, which was the subject of the underlying litigation).

23. Similarly, the County's general interest in ensuring, as it put it,[8] "safe and reasonable healthcare" in Western North Carolina is insufficient to warrant intervention as a matter of right in an action to enforce the terms of the APA. *See, e.g.*, *Virmani*, 350 N.C. at 459 (denying motion to intervene as of right because newspaper's interest in seeing matters relating to all civil actions made public was an interest common to all persons); *see also California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 782 (9th Cir. 1986) (rejecting elected officials' general desire to assess the legal status of an environmental plan as the basis for intervention as of right).

24. Further, the County has failed to establish that the Attorney General is unable to continue to protect the County's interest in "safe and reasonable healthcare." *See* N.C.G.S. § 114-2(8)(a) (granting the Attorney General the authority to "institute and originate proceedings . . . on behalf of the State and its agencies and citizens in all matters affecting the public interest."); *cf. McEntee*, 225 N.C. App. at 674 (finding intervenor's interests adequately represented because the estate's personal representative had a duty to represent the intervenor in estate litigation). Movant cites no law to support its argument that a possible change in the office of

[8] *See* Buncombe Reply 7.

the Attorney General resulting from the upcoming election is enough to satisfy this requirement for mandatory intervention.[9]

B. Permissive Intervention

25. Even if it is not entitled to intervene as a matter of right, the County contends that the Court should permit it to intervene because its claims and the Attorney General's claims share common questions of fact regarding prolonged wait times at Mission Health's Emergency Department. The County argues that the same witnesses who will testify in support its claims for damages will also testify in support of the Attorney General's case, at least with respect to Mission Health's Emergency Department. Further, according to the County, permissive intervention would neither unduly delay this litigation nor result in prejudice to any party because the case is still in the pleadings stage and fact discovery remains open. (Buncombe Br. 13-15; Buncombe Reply 1-6.)

26. In response, Defendants maintain that the Attorney General's claims and the County's claims do not have sufficient questions of law or fact in common to warrant the County's intervention. According to Defendants, the County's claims for damages are retrospective in nature and would require evidence regarding the calculation of standard wait times, actual wait times, the value of the EMS services required by the excess wait times, and whether / how the County was compensated for those services—all issues that are collateral to a determination of whether the APA has been breached.

[9] During the hearing, counsel for the Attorney General emphasized that his office has no plans to discontinue this litigation.

27. Even if some common questions of law or fact exist, Defendants contend that the County's intervention would delay resolution of this action, disrupt the parties' discovery schedule, and encourage other counties served by Mission Hospital to intervene, which would further complicate the litigation. Finally, Defendants contend that because the County's claims are not eligible for designation to this Court directly, the County should not be permitted to intervene. (Defs.' Br. 10-17.)

28. The Court agrees that permitting the County to intervene for purposes of pursuing its proposed claims would not be in the best interests of the parties already before the Court. While it is true that both the County and the Attorney General complain about wait times and staffing at Mission Hospital's Emergency Department, for the Attorney General, that evidence is just one aspect of a much broader concern. The Attorney General's focus is on HCA's compliance with the APA, including whether HCA has discontinued the provision of services set forth on Scheduled 7.13(a). The County's focus, on the other hand, is on damages it allegedly sustained as a result of extended wait times in Mission Health's Emergency Department.

29. While there is some factual overlap, the Court concludes that it is not enough to permit this case to be diverted by the effort that will be required for the County to prove liability and damages. Fact discovery in this case is set to close in September, mere weeks away. Should the County intervene, however, additional

discovery and motion practice will undoubtedly result.[10] Moreover, adding the County as a party would increase HCA's litigation burden while the Attorney General's litigation burden would not change. *See Holly Ridge Assocs., LLC*, 361 N.C. at 540 (ruling against permissive intervention in part because the original parties' litigation burdens would have been significantly imbalanced). These factors counsel against permissive intervention.

30. In addition, and importantly, the County's desire for a jury trial is inconsistent with the language of the APA. (Buncombe Compl. 22.) Section 13.13 of the APA provides that disputes arising from Section 7.13 may be resolved by bench trial in this Court. However, the County's proposed complaint contains a jury demand. HCA has stated that, should the County be permitted to intervene and add its claims, it will remove this case to federal court. Such a move has the potential to result in a delay in the progression of the case.

31. Accordingly, because the County does not have the right to intervene and because the Court determines that permissive intervention in this action would delay the proceedings and prejudice the existing parties, the Court concludes that the Motion shall be **DENIED**.

32. **WHEREFORE**, the Court, in its exercise of its discretion, **DENIES** the Motion.

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[10] The County argues that it has computerized records that will expedite this process, but regardless of whether the County's records are computerized, Defendants have the right to conduct discovery and present their own evidence.

SO ORDERED, this the 9th day of July, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases