COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS

2013-CA-000446

UNIVERSITY MEDICAL CENTER, INC. — APPELLANT

v.

Appeal from Jefferson Circuit Court
Civil Action No. 11-CI-7219

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.* — APPELLEES

BRIEF FOR APPELLEE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY

Submitted by:

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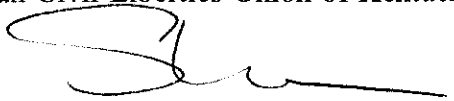
Certificate required by CR 76.12(6)

The undersigned certifies that copies of this brief were sent to the following named individuals *via* first class mail, postage prepaid on October 11, 2013: Philip W. Collier, Bethany A. Breetz, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202; Mark R. Overstreet, Stites & Harbison, PLLC, 421 W. Main Street, P.O. Box 634, Frankfort, KY 40602; Jon L. Fleischaker, Jeremy S. Rogers, Dinsmore & Shohl, LLP, 101 S. Fifth Street, 2500 National City Tower, Louisville, KY 40202; Mr. John K. Smith, 1030 Queen Avenue, Apt. 1A, Louisville, KY 40215; and Hon. Angela McCormick Bisig, Jefferson Circuit Court, Division 10, 700 West Jefferson Street, Louisville, KY 40202. The undersigned further certifies that the record on appeal was not withdrawn by the Appellee American Civil Liberties Union of Kentucky in the preparation of this brief.



William E. Sharp

STATEMENT CONCERNING ORAL ARGUMENT

This case involves complex legal and factual questions implicating the scope of Kentucky's Open Records Act. Because oral argument will likely assist the Court in its resolution of these significant issues, the American Civil Liberties Union of Kentucky therefore requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Facts

University Medical Center, Inc. ("UMC") is a Kentucky non-profit entity incorporated in 1995. [UMC Art. of Incorp., R. 22-30.] It was created specifically for the purpose of submitting an RFP to operate and maintain the University of Louisville Hospital. [Transmittal Letter, R. 1720-21.] Thus, the inception of UMC (and its continued existence) depended solely upon the University's invitation to submit the RFP and its later acceptance of UMC's proposal. Moreover, UMC specifically touted in its RFP the "substantial powers" conferred upon the University as an "active decision maker" in "the governance and management of the University of Louisville Hospital and related patient care facilities" should its proposal be accepted. [Vision Statement, R. 1723-25.] UMC further elaborated on this "shared governance" component of its proposal by stating:

> UMC has been designed to provide the University of Louisville and its constituents a meaningful role in decision making for ULH and the Medical Center including oversight of the operations of ULH and associated facilities and the use of funds generated by its operations.

[Shared Governance and Decision Making, R. 1727-31.]

UMC's proposal also specifically provided that "Alliant and JHHS will not receive a percentage of profit or an unidentified 'management fee,'" but rather any excess revenues "will be used solely for reinvestment into the educational, research, and patient care activities of the University of Louisville." [Optimal Capital and Funding Arrangements, R. 1733.] Thus, UMC was created specifically for the designated purpose of seeking to operate the University of Louisville Hospital, but doing so only for the financial benefit of UofL. The Circuit Court found, however, that "UofL did not

participate in the establishment or creation of UMC. [Ct. Order, R. 1868 ¶ 3.] But evidence produced in discovery by UMC revealed that Steve Williams, President of Alliant Health Systems (and one of UMC's original incorporators), described the creation of UMC as having occurred "at the request of local and state government and UofL." [Taylor Email, R. 1739-40; Cook email, R. 1742.]

UofL, of course, accepted UMC's proposal and soon thereafter UMC adopted its 1996 by-laws to reflect that Jewish, Norton and UofL were its members and that six of UMC's twelve Board seats, including the Board Chair, were reserved solely for UofL. [1996 By-laws, R. 721, *et seq.*] The resulting agreements between UMC and UofL clearly established the University's extensive control over UMC and the unanimity of purpose with which the two entities' operated.[1]

In 2007, UofL decided that it no longer wanted Jewish and Norton as members of UMC, and it requested their withdrawal from the organization. [Withdrawal Agrmnt., R. 826, *et seq.*; Ct. Order, R. 1868 ¶ 7.] On May 1, 2007, Jewish and Norton acceded to UofL's request by withdrawing from UMC, and the new, reconstituted UMC then executed new affiliation agreements and by-laws to reflect UofL's sole membership in the organization. [*Id.*; Affiliation Agrmnt., R 872, *et seq.*] UofL then appointed ten new directors to UMC's Board before it then again amended the by-laws in January, 2008. [UMC's Ans. to ACLU Interrogatories, R. 1387-1389; UMC By-laws, R. 918, *et seq.*]

Pursuant to its 2008 by-laws, UMC's Board consists of seventeen (17) voting directors, the Chair of which *must* be either the president of the University of Louisville

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[1] *See* Brief of Appellees The Courier-Journal, Inc., Patrick Howington, Belo Kentucky, Inc. and Adam Walser ("Co-Appellees' Br."), at 3.

or his/her designee. [UMC By-laws, R. 918, *et seq.*, at §§ 4.01, 4.02(a).] While other directors may be removed (with or without cause) by a majority vote of the voting directors, the Chair may not. [*Id.* at § 4.04.] Moreover, the Chair must appoint at least four (but no more than seven) additional "University" directors. [*Id.* at § 4.02(a).] And these directors must be comprised of: 1) Dean of the Medical School; 2) University of Louisville's Executive Vice President for Health Affairs; 3) chair of one of the clinical departments of the Medical School; and 4) a member of the University of Louisville's Board of Trustees. [*Id.* at § 4.02(a).] UMC's remaining directors are "Community" directors who serve staggered three year terms. [*Id.* at § 4.02(b).] Community directors are nominated by the Board's nominating committee and voted upon by the Board. But the nominating committee is chaired by UofL's President (or his/her designee) and is comprised of another University director and two Community directors — all of whom are selected by the chair annually. [*Id.* at §§ 6.01(B), 6.03.] There is no mechanism by which UMC's Board may consider the selection of new Community directors except upon the recommendation of the nominating committee. Thus, the nominating committee (which is controlled by UofL's president) controls who may be considered by the full Board in choosing new Community directors.

But in addition to the corporate structure, UofL's control over UMC is further illustrated in UMC's Affiliation Agreement. There, UMC agrees to provide (at no cost) management and oversight of the University of Louisville Hospital, but it assumes responsibility "for all losses resulting from the operation" of the hospital. [Affiliation Agreement, R. 872, *et seq.*, at §§ 3, 11.2.1, 11.2.3.] Notwithstanding this arrangement, UMC also agrees that it must pay the University of Louisville "lease payments" as a

lessee of the hospital *and* it must obtain the University's prior approval before making any capital improvements to the facility. [*Id.* at §§ 3, 11.1-11.4.1, 12.1.4; *see also id.* at §12.1.2.] Moreover, to the extent operation of the hospital results in a surplus of money, UMC *must* reinvest those funds into "the operation of the Hospital" or distribute them to the University of Louisville. [*Id.* at §§ 11.1, 11.3, 11.4.1.] Thus, the University of Louisville is the sole entity profiting from UMC's management of the University of Louisville Hospital.

UofL also exercises extensive control over UMC's actual management of the hospital. For example, UMC has agreed that the hospital "shall serve as the principal adult teaching hospital of [UofL] and shall be available for teaching, research and clinical care programs of the University Schools of Medicine, Dentistry, Nursing and Public Health plus residency programs and other programs mandated by state law." [*Id.* at § 5.1.1.] UMC may not, without the University's approval, "withdraw any training program from the Hospital." [*Id.* at § 5.2.] Nor may UMC implement "new programs" at the Hospital without the University's approval. [*Id.* at § 7.1] The Chief of the Hospital's Medical Staff *must* be the Dean of UofL's School of Medicine (or his/her designee). [*Id.* at § 8.2.] And the University also has the right "of prior approval ... of all agreements between any member or members of the faculty and UMC or any Affiliate or party acting on UMC's behalf including network participation agreements, clinical practice agreement, or insurance, provider or capitation products." [*Id.* at § 22.]

Procedural History

In 2011, Appellees separately submitted Open Records Act requests to UMC seeking various public records. In each instance, UMC refused to comply with the

request asserting its purported status as a private, not public, entity, and pointing to a 2006 opinion by the Attorney General supporting that assertion. [*See, e.g.*, Halbleib Letter, R. 1711 (citing 06-ORD-210.] The ACLU of Kentucky and others then sought review of UMC's denial of those requests with the Attorney General's office pursuant to KRS § 61.880(2). After reviewing the respective appeals, UMC's responses, and the available documentary evidence, the Attorney General issued its decision rejecting UMC's contention that it is a private entity. 11-ORD-157. Instead, the Attorney General concluded that UMC *is* a public agency for purposes of the Open Records Act because it was "established, created, and controlled by" UofL. 11-ORD-157 (citing KRS § 61.870(1)(j)).

UMC then initiated the present action in Jefferson Circuit Court seeking declaratory relief regarding its status as a public agency under the Open Records Act, and a declaration regarding the applicability of any statutory exemptions to disclosure for the requested documents. [Complaint, R. 1, *et seq.*] After brief discovery, the Courier-Journal, *et al.* and UMC filed (and fully briefed) cross motions for summary judgment. The ACLU of Kentucky filed its response opposing UMC's motion for summary judgment, but did not separately seek summary judgment on the issue of UMC's status as a public agency.

On November 21, 2012, the Circuit Court issued its ruling on the parties' respective motions. [Ct. Order, R. 1875 ¶ 15.] In doing so, the Court issued several specific factual findings, including: 1) the University of Louisville "did not participate in the establishment or creation of UMC [*id.* at ¶ 3]; 2) in 2007, UMC's by-laws were amended "naming UofL as the sole member and providing UofL sole and exclusive

authority over UMC" [*id.* at ¶ 7]; 3) UMC amended its by-laws in 2008 to require that "[t]he majority of the board of directors and all committees, *with the exception of the nominating committee*, must be Community Directors" [*id.* at ¶ 8 (emphasis added)]; and 4) "Community Directors are appointed by the full UMC Board of directors following recommendation from a nominating committee. ... [that] is chaired by UofL's president (or his designee), who also selects the other three members, one University Director and two Community Directors." [*Id.* at ¶ 10.]

Based upon its factual findings, the Circuit Court disagreed with the Attorney General's opinion by concluding that UMC is *not* a public agency under KRS § 61.870(1)(j) "because it was not established or created by a public agency." [*Id.* at ¶ 8.] But the Court found that UMC *is* nonetheless a public agency under subsection (1)(i) because "the majority (and in fact entirety) of UMC's governing body is appointed by a public agency." [*Id.* at ¶ 15 (finding that "UofL's control over the selection of Community Directors amounts to *de facto* power of appointment over the Community Directors.")(emphasis in original).] Thereafter, on February 5, 2013, the Circuit Court amended its Nov. 21 Order making it final and appealable and thus reserving the parties' respective arguments regarding whether, and if so to what extent, any statutory exemptions preclude the disclosure of the requested records. [Ct. Order, R. 1913-14.] This appeal then timely ensued.

STANDARD OF REVIEW

The Circuit Court's two central rulings in this appeal — that UMC is *not* a public agency under KRS § 61.870(1)(j) but *is* under subsection (1)(i) — are mixed questions of law and fact. As such, both are subject to the "clearly erroneous" standard.[2]

> The circuit court's review of an Attorney General's opinion is *de novo*. As such, we review the circuit court's opinion as we would the decision of a trial court. . . When there are questions of fact, or mixed questions of law and fact, we review the circuit court's decision pursuant to the clearly erroneous standard.

Valentine v. Pers. Cabinet, 322 S.W.3d 505, 507 (Ky. Ct. App. 2010)(*quoting Medley v. Bd. of Educ., Shelby County,* 168 S.W.3d, 398, 402 (Ky. App. 2004)). Under the clearly erroneous standard, "this Court will only set aside the findings of fact of the circuit court if those findings are clearly erroneous." *Medley*, 168 S.W.3d at 402. And the "dispositive question" is whether (or not) "the findings are supported by 'substantial evidence.'" *Id.* (quoting *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003)). Moreover, the Attorney General's Decision construing the Open Records Act, while not binding, is considered "highly persuasive" authority. *Valentine,* 322 S.W.3d at 507.

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[2] UMC agrees that the clearly erroneous standard applies for the decision that it is not a public agency under subjection (1)(j), but argues that de novo review is required for the decision that it is under subjection (1)(i). [Appellant Br. at 13.] However, UMC errs because the decision that it is a public agency under subsection (1)(i) involves factual determinations regarding whether (or not) a majority of UMC's Board is appointed by a public agency. As such, that question, too, is a mixed question of law and fact and thus subject to the clearly erroneous standard. *See e.g., Cardiovascular Specialists, P.S.C. v. Xenopoulos*, 328 S.W.3d 215, 217 (Ky. Ct. App. 2010).

ARGUMENT

I. The Circuit Court Properly Concluded That UMC Is A Public Agency Because a Majority of Its Board Is Appointed By A Public Agency.

In finding that UMC is a public agency under KRS § 61.870(1)(i),[3] the Circuit Court held that the structure and composition of UMC's nominating committee confers control to UofL over the selection of any prospective Community directors. Because UofL also controls the appointment of University directors, the Circuit Court properly concluded that UMC is a public agency under subsection (1)(i) because "the majority (and in fact entirety) of UMC's governing body is appointed by a public agency." [Ct. Order, R. 1867, *et seq.*, at 8, ¶ 15.]

On appeal, UMC asserts that the Circuit Court erred because its Community directors are elected, not appointed, making subsection (1)(i) inapplicable [Appellant Br. at 15]; and 2) in any event, UMC's nominating committee structure does not confer appointment authority to UofL. [*Id.* at 18 (citing 04-ORD-222).] But a close examination of the UMC's governing structure (and the legal authority upon which it relies) reveals the error of UMC's arguments.

First, the weight of evidence supports the Circuit Court's conclusion that UofL controls who may be selected as a Community director for UMC's Board.[4] Specifically,

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[3] KRS § 61.870(1)(i) provides that an entity constitutes a public agency under the Open Records Act "where the majority of its governing body is appointed by a public agency ...; by a member or employee of such a public agency; or by any combination thereof."

[4] In addition to UofL's current control over the selection of Community directors, it is also undisputed that, after having secured the withdrawal of Jewish and Norton from UMC in 2007, UofL solely appointed UMC's Community directors (several of whom continue to serve in that capacity). [UMC Ans. to ACLU's Interrogatories, R. 1387-89.]

UMC's by-laws require that its Board Chair be the president of the University of Louisville or his/her designee. And, unlike all other UMC directors, the Chair cannot be removed by a vote of the Board. [UMC By-Laws, R. 918, *et seq.*, at § 4.04.] Instead, the Chair can only be removed when his/her tenure as UofL's president ends. [*Id.* at § 4.02(b).] Moreover, the Chair possesses the authority to appoint and replace UMC's University directors — which comprise nearly half of UMC's Board of Directors. [*Id.* at § 4.02(a).][5] Thus, it is uncontroverted that UofL's president, as Chair of UMC's Board of Directors, has appointment authority over seven additional University seats on UMC's Board of Directors and possesses unique protection from removal from UMC's board that no other director enjoys.

In addition, however, the Chair also controls who may be selected by the Board as a Community director. Specifically, UMC's by-laws also require the Board Chair *must* also serve as the chair the nominating committee which is responsible for selecting and recommending to the Board candidates for Community directors. [*Id.* at § 6.03.] Although the nominating committee is comprised of two community members and a University director (in addition to the Chair), appointments to the nominating committee are vested solely in the discretion of the Chair. [*Id.* at § 6.01(B).] Thus, because UofL's president chairs the nominating committee and possesses unilateral authority to appoint/veto other members of that committee, the University of Louisville effectively retains veto authority over any prospective Community director's submission (and therefore selection) to UMC's Board — a point conceded by UMC in their opening brief.

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[5] The only limitation upon the Chair's authority to appoint University directors are the requirements that four of the University directors be ex officio members determined by their position with UofL. [See UMC By-Laws, R. 919 at § 4.02(a).]

[Appellant Br. at 17 (conceding that University Directors of nominating committee may block any potential nominee for a Community director position, but describing it as merely "theoretically possible.").]

In an attempt to overcome the logical consequence of its own by-laws, UMC argues that control over the selection of candidates for appointment does not constitute control over the selection authority itself. [Appellant Br. at 15-16.] But, in an analogous situation, the Kentucky Supreme Court has recognized that the power to control who may be considered for appointment constitutes an exercise of the appointment authority. For example, in *Legislative Research Com'n v. Brown*, 664 S.W.2d 907 (Ky. 1984), the Court considered state constitutional challenges to several legislative enactments conferring broad powers upon the Legislative Research Commission, including the authority to compile lists of individuals from which the Governor must choose in appointing various state officials. *Id.* at 920. In striking down that provision as contrary to Kentucky's separation of powers, the Court noted that the provision represented an attempt by the General Assembly "to do indirectly what it cannot do directly," *i.e.* exercise appointment authority conferred exclusively in the Executive. *Id.* at 923-24. *See also Prater v. Commonwealth*, 82 S.W.3d 898, 908 (Ky. 2002)(distinguishing between Legislature's improper attempts to exercise Executive's appointment authority by controlling who may be considered for appointment from permissible delegations of same authority to third parties who are "independent of legislative control"). Here, as in *Brown*, UofL has retained for itself ultimate control over the universe of candidates that may be considered for Community director seats on UMC's Board. That power, because it resides with UofL

as opposed to a third party that is independent of UofL's control, constitutes an exercise of the appointment authority within the meaning of subsection (1)(i).

And UMC's reliance upon 04-ORD-222 does not undermine this conclusion. There, the Attorney General considered whether the Ballard County Economic and Industrial Development Board ("BCEIDB") was a public agency under various subsections of KRS § 61.870(1). Among the statutory bases considered, the Attorney General looked to whether BCEIDB fell within § 61.870(1)(i) given that the County Judge/Executive played a role in appointing the six nominating committee members who, in turn, determined BCEIDB's Board membership. In deciding that question, the Attorney General's analysis consisted of a single sentence — "The Board's membership, which consists of twelve, and not six to eight individuals per KRS § 154.50-316(1), is determined by a six member nominating committee whose members are appointed by the County Judge/Executive *and the Board Chairman*, and its members serve a three year term." 04-ORD-222, at 5-6 (emphasis added). However, there is nothing in 04-ORD-222 to indicate that the County Judge/Executive actually served on the nominating committee or had any role other than *sharing* appointment authority with another person over the committee's members. By contrast, here UofL's President unilaterally appoints the members of UMC's nominating committee *and* he is also a standing member of that committee who is insulated from removal per UMC's by-laws. By virtue of his unique position (and the protection afforded him), UofL's President controls who the nominating committee will recommend for election to the Community director positions, and by extension, who the Board may elect. As such, UMC is a public agency under KRS

§ 61.870(1)(i) because a majority of its board is selected by a public agency, and the Circuit Court's ruling on this point should be affirmed.[6]

II. The Circuit Court Erred In Finding That UMC Was Not Created, Established And Controlled By A Public Agency.

Notwithstanding its decision finding that UMC is a public agency under KRS § 61.870(1)(i), the Circuit Court nonetheless erred by failing to also recognize that UMC is a public agency under subsection (1)(j).[7] That provision defines as a "public agency" any entity "established, created and controlled by a public agency." Here, the evidence, when properly construed, establishes that UMC satisfies these criteria.

A. UMC was established and created by a public agency for the purpose of carrying out a public function.

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[6] Appellant also points to *Mitchell v. University Medical Center, Inc.*, 2010 WL 3155842 (W.D. Ky. 2010), *aff'd*, No. 10-5979 (6th Cir. 2011)(unpublished) for the proposition that UofL lacks authority to appoint a majority of UMC's Board of Directors. [Appellant Br. at 16.] But, the evidentiary record in that case was lacking because UMC defended itself against a pro se plaintiff. In affirming the lower court's grant of summary judgment to UMC, the Sixth Circuit panel specifically noted that "because the record evidence does not reveal a genuine issue of fact regarding the Hospital's status as a private actor ..." *Mitchell*, No. 10-5979, at 6. Thus, *Mitchell* is properly understood as an instance in which the pro se plaintiff failed to establish an element of her claim, not a conclusive determination of UMC's status as a private entity.

[7] At a minimum, the evidence and reasonable inferences drawn therefrom created a genuine issue of material fact regarding whether (or not) a public agency established and created UMC; thus, the Circuit Court erred in granting judgment in UMC's favor on this point. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W2d 476, 483 (Ky. 1991)(summary judgment requires that moving party establish "as a matter of law, it appears that it would be *impossible* for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.")(emphasis added). Specifically, emails produced by UMC in discovery indicated that Steve Williams, President of Alliant Health Systems (and one of UMC's original incorporators), described the creation of UMC as having occurred "at the request of local and state government and UofL." [Taylor Email, R. 1739-40; Cook Email, R. 1742.] This, combined with the other evidence of UofL's control, is sufficient to create a genuine issue of fact regarding UofL's role in the establishment and creation of UMC.

The Circuit Court found that UMC does not fall within subsection (1)(j) because UofL "did not become legally associated with UMC until after" its formation by agents of Jewish Hospital Healthcare Services and Norton Healthcare (formally Alliant Health System, Inc.). [Ct. Order, R. 1867, et seq., at 5-6 ¶ 8.] Thus, according to the Circuit Court (and UMC), the fact that University officials were not the listed "incorporators" of UMC defeats any assertion that it is a public agency under that subsection. But this conclusion fails to account for evidence indicating that the University played a role in directing the creation of UMC for the express purpose of submitting an RFP to manage the University of Louisville Hospital.

Specifically, UMC did not exist prior to the University's request for proposals to operate University Hospital. Rather, UMC was created specifically for the purpose of submitting an RFP and, upon acceptance of that proposal, managing the University of Louisville Hospital. But from the outset, UofL's control over UMC was apparent. UMC specifically noted in its RFP the "substantial powers" UofL would possess as an "active decision maker" in "the governance and management of the University of Louisville Hospital and related patient care facilities." [Vision Statement, R. 1723-25.] Moreover, UMC's creation was solely for UofL's financial benefit. The RFP specifically provided that "Alliant and JHHS *will not* receive a percentage of profit or an unidentified 'management fee,' but rather UMC's excess revenues "will be used *solely for reinvestment into the educational, research, and patient care activities of the University of Louisville.*" [Optimal Capital and Funding Arrangements, R. 1733 (emphasis added).]

The purpose for which UMC was created, combined with its one-sided financial arrangement, renders apparent that it was created "in anticipation" of seeking (and

obtaining) the responsibility for managing University of Louisville Hospital subject to the University's control and for the University's exclusive benefit. *See University of Louisville Foundation, Inc. v. Cape Publications, Inc.*, 2003 WL 22748265 at *5 (Ky. Ct. App. 2003). And this conclusion is further supported by the record evidence establishing that one of UMC's original incorporators, Alliant President Steve Williams, specifically described the role of state and local government officials (including those from UofL) as having requested UMC's creation for that purpose. [Taylor Email, R. 1739-40 (recounting Williams' statement describing the creation of UMC as having occurred "at the request of local and state government and UofL"); Cook Email, R. 1742.] As the Attorney General correctly noted in this case:

> Although officials of the University of Louisville did not affix their signatures to the June 1995 Articles of Incorporation, UMC acknowledges that it was created so as to have a vehicle to compete for the opportunity to enter into an affiliation agreement and lease agreement with the University of Louisville Hospital. Thus, *UMC was established and created in anticipation of* the University's issuance of a Request for Proposals for the operation and management of University Hospital and the renegotiation of its management contract. ... *[T]he causal connection* between the filing of UMC's Articles of Incorporation in June 1995 and the execution of the management contract between UMC and the University of Louisville in October 1995 *is as clear and direct as the causal relationship between the* University of Louisville Foundation and the University of Louisville recognized in *University of Louisville Foundation, Inc. v. Cape Publications, Inc.*

11-ORD-157, at 4 (internal quotations and citations omitted)(emphasis added). Because UMC was created at the request of public officials and designed to ensure UofL's extensive control over its operations while simultaneously reaping the financial benefit

from its services, UMC was "established and created" by a public agency within the meaning of KRS § 61.870(1)(j).[8]

B. UMC is controlled by a public agency.

The evidence also establishes UofL's extensive control over UMC. As discussed in Section I, above, UofL selected UMC's Board in 2007 and, since that time, effectively controls who may be considered as a prospective new Board members. Indicative of UofL's control, UMC's Community directors have been (and presently are) comprised of individuals who simultaneously serve as members of various University-related boards. For example, four UMC Community directors are simultaneously serving on the University's Board of Overseers. [UMC's Answers to ACLU's Interrogatories, R. 1387-89.] The Board of Overseers, according to its by-laws, exists "to provide the Office of the President [of the University of Louisville] with ongoing assistance in achieving the strategic mission of the University." [Bd. of Overseers By-laws, R. 1414 at § 1.1.] Its self-described relationship to the University is as "an integral component of the University of Louisville, serving in an adjunct relationship to the Office of the President, and positioned in the University to reflect its advisory function to the President." [*Id.* at § 1.3.]

UMC argues that UofL's involvement in the nomination of prospective Community directors does not constitute control over the corporate entity, and it points to

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[8] Moreover, as correctly noted by co-Appellees in their brief, UofL reconstituted UMC in 2007 after requesting (and obtaining) the withdrawal of Norton and Jewish. [Co-Appellees' Br., at 24.] In doing so, UofL (as UMC's sole member) adopted new by-laws and appointed ten new board members. [2007 By-laws, R. 856, *et seq.*; UMC's Answers to ACLU's Interrogatories, R. 1387-89.] Thus, UofL's actions in 2007 provide an alternative basis upon which to conclude that it established and created UMC within the meaning of KRS § 61.870(1)(j).

Phelps v. Louisville Water Co., 103 S.W.3d 46 (Ky. 2003) to support is contention. [Appellant Br. at 20.] But that case is readily distinguishable from the present situation, in that the only evidence of "control" in *Phelps* was the Mayor's appointment of 4 of 6 board members of the Louisville Water Company. *Id.* at 51. By contrast, UofL's control over UMC is evident not only in the appointment of UMC's University directors and the selection of prospective Community directors, but also in the contractual relationship between the two entities. For example, UMC is a lessee paying to lease the University Hospital from the Commonwealth and it assumes the financial risks for doing so. But, the University of Louisville pays UMC nothing for the management of the state-owned facility *and* UMC must remit all surplus funds resulting from its management/operation to UofL. In this regard, UMC acts as a conduit to the University for various funding sources and any financial gains derived from its services. Under this one-sided arrangement, the fact that UMC serves as an agent for the University of Louisville is evident. *See University of Louisville Foundation, Inc. v. Cape Publications*, 2003 WL 22748265 (Ky. App. 2003), disc. review denied May 12, 2004 ("acting as one and the same amounts to 'control'"); 11-ORD-054 (Apr. 12, 2011)(finding University Physicians Associates an agency of the University's School of Medicine in light of "objective evidence" that the two "act as one and the same.").

Similarly, the University of Louisville also retains control over non-financial decisions regarding the withdrawal of training programs and the implementation of new programs. [Affiliation Agreement, R. 878-879, §§ 5.2, 7.1.] And UofL also has the right "of prior approval ... of all agreements between any member of members of the faculty and UMC or any Affiliate or party acting on UMC's behalf including network

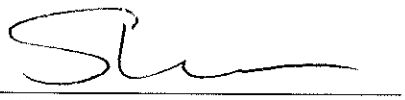
participation agreements, clinical practice agreement, or insurance, provider or capitation products." [*Id.* at § 22.]

Because of the authority UofL possesses over the selection and retention of UMC's Board members, the extensive control it exerts over Hospital operations and UMC's ability to contract with other parties, and the one-sided financial arrangement in which UofL solely benefits from UMC's services, the two entities "operate as one" rendering UMC under UofL's control.

CONCLUSION

For the foregoing reasons, this Court should affirm that portion of the Circuit Court's Order finding UMC a public agency under KRS § 61.870(1)(i), and it should reverse the Circuit Court insofar as it concluded that UMC is not a public agency under subsection (1)(j). This Court should further remand this action to the Circuit Court for further proceedings to determine whether, and if so to what extent, the requested public records are otherwise statutorily exempt from disclosure.

Respectfully submitted,



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