Tuomey's Motion for a Stay, the government's response and Tuomey's reply to that response have been filed with the US District Court for South Carolina:

On December 20, 2013 Tuomey filed a ***Motion for Stay Pending Appeal*** with the United States District Court, related to the matter of the United States, ex rel. Michael K. Drakeford, M.D. v. Tuomey Healthcare System, Inc., a copy of which is attached.

On January 8, 2014 The Department of Justice filed a ***Response to Tuomey's Motion for Stay Pending Appeal***, related to the matter of the United States, ex rel. Michael K. Drakeford, M.D. v. Tuomey Healthcare System, Inc., a copy of which is attached.

On January 23, 2014 Tuomey filed a ***Reply in Support of Motion for Stay Pending Appeal***, related to the matter of the United States, ex rel. Michael K. Drakeford, M.D. v. Tuomey Healthcare System, Inc., a copy of which is attached.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States *ex rel.* Michael K. Drakeford, M.D., Plaintiff, vs. Tuomey Healthcare System, Inc., Defendant.	Case No. 3:05-cv-2858-MBS **TUOMEY'S MOTION FOR STAY PENDING APPEAL**

In accordance with Federal Rule of Appellate Procedure 8(a), Defendant Tuomey Healthcare System, Inc. ("Tuomey"), by and through its undersigned counsel, hereby moves this Court for a stay pending appeal of the Amended Judgment (Dkt. 887) entered on October 2, 2013. As more fully explained in the Memorandum of Law filed herewith, Tuomey cannot post a supersedeas bond in the amount set forth in Federal Rule of Civil Procedure 62(d) and Local Rule 62.01. Thus, Tuomey requests that the Court enter an order staying the execution of the judgment on the same terms that the Government has previously accepted in a forbearance agreement entered into with Tuomey.[1] Alternatively, Tuomey requests that the Court waive the bond requirement altogether or grant a stay upon the posting of an amount less than $50,000,000, which is the amount currently deposited in escrow pursuant to the forbearance agreement.

If a stay is not granted, Tuomey's ability to operate as a going concern will be immediately impaired. Tuomey, and the public it serves, will suffer irreparable harm. There is

[1] Under the forbearance agreement, the Government agreed that $50,000,000 was sufficient collateral to protect the Government's interest as a judgment creditor while Tuomey and the Government attempted to negotiate a settlement of this case. Tuomey currently has $50,000,000 on deposit with a third party escrow agent. The Government, recognizing that $50,000,000 is the most that Tuomey can afford to deposit, agreed to refrain from enforcing the judgment until this Court, and if necessary the Fourth Circuit Court of Appeals, grants Tuomey's motion for a stay.

no conceivable harm to the Government from the entry of a stay in accordance with the terms of the forbearance agreement, or upon such other terms as this Court deems just and proper. Accordingly, Tuomey respectfully requests the Court grant its Motion.[2]

Respectfully submitted,

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December 20, 2013
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[2] In accordance with Local Rule 7.02 DSC, counsel for Tuomey consulted with counsel for the Government regarding this motion. The Government does not consent to the relief sought by Tuomey.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF SOUTH CAROLINA

CA NO. 3:05-CV-02858 (MBS)

UNITED STATES OF AMERICA, ex rel. MICHAEL K. DRAKEFORD, M.D., Plaintiffs, v. TUOMEY d/b/a TUOMEY HEALTHCARE SYSTEM, INC. Defendant.	UNITED STATES' RESPONSE TO TUOMEY'S MOTION FOR STAY OF EXECUTION PENDING APPEAL **PUBLIC VERSION**

On October 2, 2013, this Court entered judgment against defendant Tuomey Healthcare System, Inc., in the amount of $237,454,195, plus post-judgment interest, following a jury verdict finding that Tuomey violated the Stark Law, 42 U.S.C. § 1395nn, and the False Claims Act, 31 U.S.C. § 3729(a)(1) (D.E. 813, 887). Tuomey filed a notice of appeal on the same day and has now applied to the Court for a stay of execution of the judgment pending the disposition of its appeal. D.E. 895. Local Rule 62.01(A) requires a party appealing a money judgment to post a supersedeas bond for 125% of the judgment awarded in order to obtain a stay of execution. In its memorandum in support of its motion for stay of execution, Tuomey concedes that it can post a bond in the amount of $50 million. Def. Mem. in Support of its Motion for Stay Pending Appeal, D.E. 895-1, at 5. That is the amount currently being held in escrow pursuant to a forbearance agreement that was intended to allow the parties to engage in settlement discussions. See D.E. 895-7. Tuomey also held approximately the same amount in escrow in lieu of posting a bond for about 22 months during the pendency of the first appeal, pursuant to the parties' agreement. See Exhibit A (2010 Escrow Agreement). Tuomey has produced no

evidence of any effort on its part to obtain a bond for an amount above $50 million, and instead relies upon subjective opinions from various community members and contradictory statements from a recently-hired consultant as grounds for limiting its bond obligation to this amount. Further, Tuomey invites the Court to restrict it to expenditures "in the ordinary course of business" while the appeal goes on.

The United States recognizes that Tuomey lacks the resources to pay the judgment awarded, and therefore also lacks the resources to post a bond or other acceptable collateral in the full amount required by Local Rule 62.01. The United States does not ask the Court to require a bond for the full amount of the judgment. However, the objective evidence of Tuomey's financial condition demonstrates that Tuomey can set aside at least $70 million of security for the taxpayers' judgment without harming its delivery of healthcare services.[1] Further, the United States is entitled to appropriate protection of the taxpayers' judgment during the pendency of the appeal. Accordingly, the United States requests the following in lieu of a supersedeas bond in the full amount required by the Local Rules: (1) a supersedeas bond in the amount of $50 million and (2) an escrow agreement substantially identical in form to the one

[1] Tuomey incorrectly states that the United States "agrees" that $50 million is the limit of Tuomey's capacity for satisfying this Court's judgment. Indeed, the United States believes that Tuomey can pay substantially more than the $50 million currently held in escrow, as Tuomey is fully aware. The parties agreed that Tuomey would place $50 million amount in escrow as consideration for the United States' forbearance on its collection rights while settlement negotiations took place; Tuomey plainly recognized that it could not claim the placement of $50 million would constitute a hardship because it continued normal operations with that amount held in escrow in lieu of a supersedeas bond during its appeal of the original judgment (which, with accumulated interest, totaled approximately $50 million). Indeed, the forbearance agreement expressly preserves the United States' right "to argue that a higher escrow amount or bond should be required, up to 125% of the amount of the judgment. . . ." D.E. 895-7, at ¶ 13(d). In the same provision of the forbearance agreement, however, Tuomey, waived any argument that it should be obligated to post less security than the $50 million currently in escrow. Ibid. Accordingly, the Court should disregard Tuomey's arguments for providing less than $50 million as security for the judgment.

entered into by the parties in August 2010 (Exhibit A) requiring Tuomey to deposit $20 million.[2] The total amount of these two forms of security ($70 million) is **less than one-third** of this Court's judgment, and indeed, is less than the statutory treble damages award of approximately $117 million. For the reasons stated below and in the attached declaration of Chartered Financial Analyst Eileen Zimmer (Exhibit B), the United States submits that this proposal (a $50 million supersedeas bond plus a $20 million escrow) will allow Tuomey to continue providing healthcare services in its community, while also reasonably protecting the United States' ability to collect to the fullest extent possible upon the judgment assuming it is affirmed on appeal.

Argument

I. Tuomey Bears The Burden of Demonstrating, By Objective Evidence, the Limits of Its Ability to Provide Security for the Judgment Pending the Outcome on Appeal

As the Supreme Court has observed: "To protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution. In the event a stay is entered pending appeal, the Rules require the district court to ensure that the judgment creditor's position is secured, ordinarily by a supersedeas bond." Peacock v. Thomas, 516 U.S. 349, 359 (1996) (footnotes omitted). As the judgment creditor in this case, the United States is entitled to appropriate security while Tuomey pursues its appeal.

At the outset, two facts are undisputed: (1) the United States does not demand that Tuomey be required to post a bond in the full amount required by the Local Rules, and (2) Tuomey concedes that it can post a supersedeas bond in the amount of $50 million. Def. Mem. in Support of its Motion for Stay Pending Appeal, D.E. 895-1, at 5. Thus, at a minimum,

[2] The United States would prefer that Tuomey post a supersedeas bond in the amount of $70 million. However, we would be satisfied with a bond in the amount of $50 million, plus a $20 million escrow account.

the Court should require Tuomey to post a supersedeas bond in the amount of $50 million. The question to be addressed is how much more security the Court should require Tuomey to provide to the United States, and upon what terms. Rather than provide security in addition to the $50 million bond, Tuomey proposes that the Court enjoin it from spending money other than "in the ordinary course of business." But Tuomey's financial statements clearly demonstrate that Tuomey has at least $20 million in additional cash assets that it is able to segregate without interfering with ordinary hospital operations. Further, the establishment of the escrow account would avoid the need for the Court to resolve questions about whether various expenditures by Tuomey are or are not "in the ordinary course of business."

The Fourth Circuit has not addressed in a published decision the circumstances under which a district court may grant a stay of execution for less than a full bond, and district courts in this Circuit have adopted somewhat differing approaches. Compare, e.g., Alexander v. Cheseapeake, Potomac and Tidewater Books, Inc., 190 F.R.D. 190 (E.D. Va. 1999) (adopting Fifth Circuit approach in Poplar Grove Planting and Refining v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979)), with IA Labs CA, LLC v. Nintendo Co., ___ F. Supp. 2d ___, 2013 WL 1759427 (D. Md. Apr. 23, 2013) (declining to assume that, after 30 years of silence on the matter, the Fourth Circuit would fully adopt Poplar Grove approach) (Exhibit H). In Southeast Booksellers Ass'n v. McMaster, 233 F.R.D. 456 (D.S.C. 2006), the district court summarized the various standards utilized by the Fifth, Seventh and D.C. Circuits, as well as those employed by several district courts within the Fourth Circuit. See id., citing, inter alia, Poplar Grove; Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 636 F.2d 755 (D.C. Cir. 1980); Dillon v. City of Chicago, 866 F.2d 902, 904 (7th Cir. 1988). The general principles applied by the three circuit courts are consistent with the Supreme Court's statement in Peacock, and their application to Tuomey's motion in this case supports the United States' proposed resolution.

In Poplar Grove, the Fifth Circuit observed that "[t]he purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal." 600 F.2d at 1190-91. In describing the factors that a district court may consider in determining whether to require a supersedeas bond in the full amount of the money judgment, the Fifth Circuit indicated that:

> if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the [district] court is similarly free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, **which would furnish equal protection to the judgment creditor.**

600 F.2d at 1191 (emphasis added). Likewise, the D.C. Circuit held in Federal Prescription Services:

> The purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution. Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances, such as where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable. In unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays **if they do not unduly endanger the judgment creditor's interest in ultimate recovery**.

636 F.2d at 760-61 (emphasis added).

The Fifth Circuit also held in Poplar Grove that if the district court does decide to depart from the requirement of a full supersedeas bond as a condition of granting a stay pending appeal, the burden is squarely upon the judgment debtor "to objectively demonstrate the reasons for such a departure. It is not the burden of the judgment creditor to initiate contrary proof," since the reduction of the security requirement "is a privilege extended the judgment debtor as a price of interdicting the validity of an order to pay money." 600 F.2d at 1191.

Applying these standards, it is clear from Tuomey's financial statements that Tuomey can post at least $20 million in additional security on top of the $50 million supersedeas bond it proposes. As explained in the declaration of Chartered Financial Analyst Eileen Zimmer, Tuomey had total assets of $260.5 million as of September 30, 2012, and $248,380,555 as of September 30, 2013.[3] Exhibit B, ¶ 5 and Exhibit B(1); see also Exhibit G (excerpt from Tuomey LifeTimes publication, dated Fall 2013). From September 30, 2010 through July 31, 2013, Tuomey's working capital (that is, current assets less current liabilities) varied from $3.5 million to $9.2 million. Working capital is what the hospital uses for ordinary operations, and does not include additional cash that is restricted by Tuomey's donors, bond covenants, or simply at the discretion of Tuomey's Board. As of September 30, 2012, the cash assets restricted only at the discretion of Tuomey's Board totaled $89.5 million. Id.; see also D.E.895-4, at 15, ¶ 3 ("Board designated" assets whose uses are limited). The Board-restricted amount represents cash assets above what Tuomey typically has needed for hospital operations. See Exhibit B, ¶¶ 6, 7, 9. Thus, the objective evidence provided by Tuomey's own financial statements demonstrates that even after setting aside $70 million for the supersedeas bond and proposed escrow account, Tuomey still would retain more than $19 million in Board-restricted funds, in addition to the amounts of cash that the Board does not restrict. In other words, the United States' proposal does not seek to segregate Tuomey's normal operating cash (as much as $10 million, which is not Board restricted) and still will leave the hospital with $19 million in Board-restricted cash to address unexpected and legitimate cash needs of the hospital while the appeal is pending. It is also worth noting that Tuomey has generated a positive operating cash flow over the last several years, even though its total net assets have declined during that period. Exhibit B, ¶ 6. Further,

[3] Tuomey's fiscal year runs from October 1 through September 30.

Tuomey may have access to additional funds from the Tuomey Foundation to support any short-term cash needs.[4]

As noted above, Tuomey placed $49.6 million in escrow pursuant to the 2010 Escrow Agreement that was in force during the first appeal. The financial statements show that Tuomey retained the escrowed funds on its books, but moved the funds to a different restricted account. Presumably, Tuomey has done the same thing with the $50 million it recently placed in escrow pursuant to the current forbearance agreement. At year-end 2011, Tuomey still had as much as $36.8 million in Board-only restricted cash assets, even with the $49.6 million in escrow. D.E.895-4, at 15. As Ms. Zimmer observes, "[N]either [the 2010 nor the 2013] escrow agreement caused any bond covenant violations, or any default actions by creditors," but "did allow a comfort level to all parties, including the United States, that at least a certain level of funds would not be diverted and would be available for collection of the judgment if affirmed on appeal." Exhibit B, ¶ 6.

Thus, the objective evidence demonstrates that Tuomey has ample cash to provide the United States with a $50 million supersedeas bond and an additional $20 million escrow without affecting Tuomey's operating cash needs.

II. The Court Should Require Tuomey To Post At Least $70 Million As Security

The district court in Southeast Booksellers relied upon the rulings in Poplar Grove and Federal Prescription Services, and also applied the more specific factors set forth by the Seventh Circuit in Dillon for considering a motion for stay on less than a full supersedeas bond:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that

[4] Tuomey's financial statements show transfers between Tuomey and the Foundation periodically over the years.

> the district court has in the availability of funds to pay the judgment; (4) whether "the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money"; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

866 F.2d at 904 (internal citations omitted), quoted in Southeast Booksellers, 233 F.R.D. at 459.[5] These criteria are fully consistent with the Supreme Court's statement in Peacock, and with the approaches taken by other circuit courts that have considered the question, and they provide a useful standard for considering the level at which to set an appeal bond. Neither party asserts that Dillon factor 4 is relevant to this case. Taken as a whole, the remaining factors strongly support the United States' proposal that, along with posting a $50 million supersedeas bond, Tuomey should be required to set aside an additional $20 million in an escrow account on substantially similar terms to those in the parties' 2010 Escrow Agreement.

A. The Complexity of the Collection Process

Here, the complexity of the collection process weighs in favor of requiring Tuomey to segregate $20 million in an escrow account, in addition to providing the $50 million bond, in order to facilitate the post-appeal collection process. In the absence of this mechanism, the

[5] Tuomey focuses its legal analysis on the standards required to obtain a stay of the judgment, which the district court in Kirby v. General Elec. Co., 210 F.R.D. 180, 195 (W.D.N.C. 2000), held was a prerequisite to determining the amount of security an appellant should post if it claimed to be incapable of posting a full appeal bond (which affords an appellant a stay of execution as a matter of right). The stay inquiry considers whether the appellant has a reasonable likelihood of success on appeal, whether either party may suffer irreparable harm from the stay, and where the public interest lies – i.e., the factors typically at issue when a party seeks a preliminary injunction or other stay. It is not entirely certain that this analysis applies to the present situation, given the clear authority holding that an appeal bond is ordinarily required for the protection of the judgment creditor. In any event, although the United States believes that Tuomey's likelihood of success on the merits of its appeal is small, it does not challenge Tuomey's right to pursue an appeal, so long as appropriate security is provided for the taxpayers' judgment. Accordingly, the only issues the Court need resolve before granting Tuomey a stay on appeal are the amount and terms of the security Tuomey should be required to post.

United States would have to conduct discovery regarding Tuomey's real estate and capital assets, and then use multiple attachments and garnishments in order to collect upon its judgment. The United States also might have to take time-consuming action to unwind fraudulent conveyances. See 28 U.S.C. § 3001 et seq. (Federal Debt Collection Procedures Act). Since Tuomey has failed to demonstrate that providing $70 million of security will harm its ability to provide health care services to the Sumter community, the Court should ensure a simple and speedy collection mechanism for at least that much of the judgment by adopting the combined bond and escrow account proposal, or alternatively, by requiring a supersedeas bond in the amount of $70 million.

B. The Time Required to Obtain a Judgment After It Has Been Affirmed On Appeal

After the first trial, Judge Perry entered judgment in favor of the United States on July 13, 2010. D.E. 544. The Court of Appeals returned its mandate to this Court on May 22, 2012. D.E. 599. Thus, it is entirely conceivable that the United States will have to wait a substantial time before collecting upon the present judgment. The supersedeas bond will secure at least $50 million of the taxpayer's judgment during that time and the $20 million escrow account will provide additional security and also accrue interest in government-backed securities during the appeal period. By contrast, the value of Tuomey's real estate, capital assets and stocks may well decline over that time period and thus diminish the value of collectible assets. Accordingly, this factor also weighs strongly in favor of the United States' proposal of an additional $20 million escrow account combined with the $50 million bond.

C. The Degree of Confidence the District Court Has in the Availability of Funds to Pay the Judgment

This factor weighs especially heavily in favor of the United States' proposal and against Tuomey's desire to limit the security to a $50 million bond. As is evidenced by Tuomey's

financial statements, Tuomey's total assets have decreased from $275.1 million as of September 30, 2010, to $248,380,555 as of September 30, 2013. See Exhibit B (Zimmer Decl.), ¶ 5 and Exhibit B(1); D.E. 895-4, at 6. In 2011, even while Tuomey was appealing the first judgment (and holding approximately $50 million in escrow), Tuomey spent $5 million on construction (D.E. 895-4 at 16, ¶ 4). In that fiscal year, Tuomey paid its chief executive officer, Jay Cox, compensation totaling $840,622, and handed out substantial bonuses to numerous others individuals as well. Ex. F (2010 Form 990 (excerpt)). Although Tuomey does not explain the reason for the dramatic diminution of its net worth since 2011, the report of Scott K. Phillips, Tuomey's financial consultant, observes that Tuomey has spent $18 million in legal expenses associated with this case. Indeed, Tuomey has engaged no fewer than seven law firms, at last count, to represent it in some aspect of this matter.[6] Yet, the Phillips report makes no effort to indicate any cost-cutting measures that Tuomey can undertake in order to pay the judgment. See Exhibit B, ¶ 6. Thus, although Tuomey claims that its resources are extremely limited and that it is too cash-strapped to provide even the substantially reduced security that the United States seeks, it continues to spend money with no apparent restraint.

[BEGIN SEALED MATERIAL]

[Redacted]

[6] Appearances on behalf of Tuomey in this Court have been entered by E. Bart Daniel, Esq.; the law firm of Lewis & Babcock (now Lewis, Babcock & Griffin); the law firm of Horty, Springer & Mattern; and Matthew Hubbell, Esq., who also represents Mr. Cox individually. The law firm of Nexsen Pruet represented Tuomey during the first appeal. In addition, attorneys from the law firms of Patton Boggs in Washington, D.C., and, most recently, Nelson, Mullins, in Columbia, SC, and Washington, D.C. have informed counsel for the United States that they, too, represent Tuomey in certain aspects of this matter.

[Redacted]

[7] Tuomey has designated the separation agreements and attachments as "confidential" pursuant to this Court's Protective Order, D.E. 124. Pursuant to Paragraph 11 of the Protective Order, counsel for the United States notified counsel for Tuomey in writing on December 31, 2013, that the United States objects to the designation on the basis that, among other things, the compensation paid to these two individuals will need to be reported on Tuomey's publicly-available tax filing. Nevertheless, in these circumstances, the Protective Order requires the material to be filed under seal pending a final resolution by the Court. Tuomey will be required to file a motion to retain the designation and the seal within 15 days of receiving the United States' written notification. However, there is no reason for the Court to delay its ruling on the amount and form of security that Tuomey must post in order to obtain a bond simply because of this issue. Indeed, the United States respectfully urges the Court to set the amount and form of the security as soon as practicable in order to preserve $70 million of Tuomey's collectible assets from further dissipation.

[Redacted]

[END SEALED MATERIAL]

Because Tuomey has not demonstrated fiscal prudence, the Court should have little confidence that anything not conserved now through a supersedeas bond and additional escrow account will remain available for collection by the taxpayers – or, for that matter, by any of Tuomey's other creditors.[8]

D. The Effect of Tuomey's Financial Condition on the Requirement To Post a Bond

As noted above, Tuomey concedes that it can post a supersedeas bond in the amount of $50 million, and the forbearance agreement allows Tuomey to argue only that it should not have to set aside more than that amount. Thus, the key question for the Court to resolve is what amount **in addition to** the $50 million supersedeas bond Tuomey should have to post in order to obtain a stay of execution during the appeal process.

For the reasons set forth above and in the Zimmer declaration, the United States is extremely concerned that Tuomey has taken no evident cost-saving measures, nor has it

[8] It should be noted that regardless of what this Court decides concerning the amount of the bond, and regardless of whether Tuomey declares bankruptcy or not, the government has no intention whatsoever to close Tuomey Hospital or to deprive the community of necessary hospital services. Both this Court and a bankruptcy court would have the authority to appoint a receiver or trustee to manage the hospital in the event that the current board of trustees is no longer able to do so. And even if the hospital ultimately has to change ownership, either this Court or a bankruptcy court could ensure that such a sale was conducted in a fair and responsible manner and that the community would continue to receive necessary and reasonable hospital services – both during the transition and afterwards. Further, Tuomey's own consultant, Mr. Phillips, has acknowledged that even in the absence of the judgment in this case, Tuomey likely would need to sell itself or affiliate with another hospital system, consistent with a national trend among community hospitals. See Exhibit B, at ¶ 10.

indicated any intent to curtail its expenditures. Tuomey requests that the Court allow it to spend money "in the ordinary course." However, Tuomey should not be permitted simply to carry on as if this judgment had never occurred.[9] As one district court observed very recently when faced with a request similar to Tuomey's: "Courts do not excuse appellants in a precarious financial situation from filing a supersedeas bond in order to alleviate the burden on the appellant, but rather to protect the appellant's creditors." Corporate Comm'n of the Mille Lacs Band of Ojibwe Indians v. Money Centers of America, 2013 WL 6630905 (D. Minn. Dec. 17, 2013) (Exhibit I).

In arguing against a requirement that it post more than $50 million as security for this Court's judgment, Tuomey relies heavily upon the September 3, 2013 report of its consultant, Scott Phillips. However, that report does not carry Tuomey's burden to provide objective evidence demonstrating that $50 million is the most it can post because: (1) the report's conclusion that Tuomey can afford to pay only $30 million is contradicted by Tuomey's subsequent execution of the forbearance agreement, in which Tuomey not only agreed to post $50 million in escrow pending the disposition of any motion for stay, but also limited itself to arguing that it should have to post **no more than** $50 million as security; (2) the report does not address Tuomey's financial commitments made to its former executives, as discussed in Part II.C, above; (3) the report makes no effort to assess cost-cutting measures that Tuomey could make as a result of the judgment[10]; and (4) it assumes that Tuomey's current structure as an

[9] The notes to Tuomey's 2012 financial statements show that it placed a total of only $1.79 million in reserve to cover an adverse judgment on the retrial of this case. D.E. 895-4, at 26. This amounts to less than five percent of the illegal Medicare reimbursements Tuomey received.

[10] Tuomey also does not meet its burden by relying upon the Standard and Poors report (D.E. 895-6), which indicated that Tuomey's credit rating could be impacted if it were required to pay the United States more than $40 million. Tuomey cites no authority holding that a judgment debtor is entitled to deprive a judgment creditor of adequate security pending appeal solely to improve its credit rating.

independent community hospital will remain unchanged, notwithstanding Mr. Phillips' acknowledgement that, even in the absence of the judgment, market forces would likely require Tuomey to seek affiliation or sale within the next three to five years.

Contrary to the Phillips report, the objective evidence provided by Tuomey's own financial statements demonstrates that Tuomey can certainly afford to set aside $70 million for the supersedeas bond and proposed escrow account without interfering with normal operations or violating its bond covenants and still leaving the hospital with a substantial cash cushion. Tuomey has provided no evidence whatsoever that moving $70 million from the Board-restricted account to a different restricted account while the appeal is pending will occasion a default. Indeed, the funds will be entirely off-limits to any other use while the appeal is pending and will therefore maintain the status quo reliably during the appeal for all of Tuomey's creditors.

As also noted by Ms. Zimmer in her declaration, the United States, more than perhaps any of Tuomey's other creditors, has a strong interest in ensuring the availability of healthcare services to the community that Tuomey serves. That is why the United States is asking the Court to set aside **less than one-third** of the judgment as security, while not touching Tuomey's operating cash and still leaving Tuomey's Board $19 million in discretionary funds. This is hardly an onerous request, especially given the extent of Tuomey's misconduct and the size of the judgment. Tuomey has failed to supply objective evidence demonstrating that its ability to provide security for the taxpayers' $237 million judgment is limited to a $50 million supersedeas bond. Tuomey's hyperbolic claims of imminent disaster should the Court require security at the level proposed by the United States simply are not supported by the objective evidence.

Conclusion

The case law is clear that any departure from the usual requirement that Tuomey, as the judgment debtor, post a supersedeas bond in the amount required by the civil rules must (1) preserve to the fullest extent possible the United States' ability to collect upon its judgment, and (2) be supported by objective evidence provided by Tuomey regarding its present ability to pay a judgment. Tuomey's motion for a stay fails to satisfy either of these requirements. To the contrary, an application of the appropriate legal criteria to the objective evidence demonstrates that Tuomey can post a supersedeas bond of $50 million (a fact which Tuomey concedes), and that it can also place an additional $20 million in escrow, without adversely affecting its daily operations or its other creditors. The Court should require Tuomey to meet these requirements in order to obtain a stay of execution pending the resolution of its appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 8th day of January, 2014, I served a copy of the foregoing public version of the United States' Response to Tuomey's Motion for Stay of Execution upon the below-listed counsel of record electronically through the Court's electronic case filing system or by placing a copy of the same in the U.S. Mails, addressed as follows:

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I further certify that on this 8th day of January, 2014, I served a copy of the unredacted version of the foregoing document and supporting exhibits, which were filed this date under seal in accordance with the Local Rules of this Court, by overnight mail upon the following counsel:

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/s/ Tracy L. Hilmer
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States *ex rel.* Michael K. Drakeford, M.D., Plaintiff, vs. Tuomey Healthcare System, Inc., Defendant.	Case No. 3:05-cv-2858-MBS **REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL** **[PUBLIC VERSION]**

INTRODUCTION

The Government agrees in its Response to Tuomey's Motion that a stay is appropriate and recognizes that Tuomey cannot post 125% of the Judgment. [ECF No. 898 at 2]. While Tuomey appreciates this recognition, Tuomey cannot post a $50,000,000 bond with the Court, in addition to $20,000,000 in escrow as suggested by the Government without violating its bond requirements and very likely triggering an event of default.[1] If the Court were to adopt the Government's proposal, Tuomey's only option for obtaining a stay of the judgment pending appeal, without breaching its bond covenants, would be to file bankruptcy.

Previously, the Government agreed to a stay conditioned upon Tuomey maintaining $50,000,000 in escrow while Tuomey appealed the earlier judgment. [ECF Nos. 558 & 559]. The first judgment was for $5,000,000 more in actual damages than the current verdict. [*Compare* ECF No. 544 *with* ECF No. 887]. Also, the penalty award of approximately

[1] A violation of Tuomey's bond covenants after any appropriate cure period, when applicable, constitutes an event of default. Tuomey could not cure the violation of the applicable bond covenant within the general 30-day cure period; the funds used to post the bond would not be payable back to Tuomey or to the Government, depending on the results of appeal, until the Fourth Circuit reaches a decision on the appeal, which is not expected until early fall.

$200,000,000 within the current judgment likely will be uncollectable and discharged in bankruptcy if the Government prevails on appeal. Moreover, even as recognized by the Government [ECF No. 898-2 at ¶5 & Ex. 1], Tuomey is worse off financially today than it was three years ago. Yet the Government is demanding more security for a stay without any legitimate justification. Accordingly, Tuomey requests the Court issue a stay conditioned upon Tuomey maintaining $50,000,000 in escrow pursuant to the terms of the Forbearance Agreement.

ARGUMENT

1. **Under the current Forbearance Agreement, the Government's rights as a judgment creditor are adequately protected.**

The $50,000,000 in escrow is sufficient security "to preserve the status quo while protecting the [Government's] rights pending appeal." *Southeast Booksellers Ass'n v. McMaster*, 233 F.R.D. 456, 459 (D.S.C. 2006) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted)). In fact in the previous appeal, the Government agreed this amount was sufficient and agreed to a stay conditioned upon a similar escrow agreement. [ECF No. 558]. Based on this agreement, the Court granted Tuomey a stay pending appeal and required Tuomey to "deposit $49,384,687.42 pursuant to an Escrow Agreement rather than posting a supersedeas bond pursuant to Rule 62(d) and Local Rule 62.01." [ECF No. 559]. This amount in escrow - $49,384,687.42 – represents $44,888,651 in actual damages and $4,496,036.42 in interest awarded to the Government in the first trial. In the second trial, the jury returned an award of $39,313,065 in actual damages. [ECF No. 813]. Notably, this award of actual damages is over $5,000,000 less than the first trial and thus, the $50,000,000 presently in escrow offers the Government more security for the present award of actual damages than it accepted in the

first trial.[2] Yet now, without legitimate justification, the Government argues such conditions are insufficient to secure its rights as a judgment creditor while Tuomey pursues the current appeal.

The Government recognizes that Tuomey cannot pay the amount of the judgment. Thus if the Government prevails on appeal, the amount that the Government can collect will be determined through bankruptcy proceedings. The Government likely will argue that it has a $39,313,065 recoupment right from payment due Tuomey for the ongoing delivery of medical services to Medicare beneficiaries. If successful in that argument, the Government will argue that it has a priority in this $39,313,065, which is tantamount to a bond or other security device. Coupled with the $50,000,000 in escrow, this is more than enough to secure the Government's rights as a judgment creditor while Tuomey pursues its current appeal. [3]

[REDACTED]

2. Tuomey cannot post a supersedeas bond in the amount of $50,000,000 without defaulting on its current bonds.

The Government also claims through the Declaration of Eileen Zimmer that Tuomey can deposit another $20,000,000 in escrow without affecting Tuomey's obligations under the bond covenants. This is not correct. In fact, Tuomey cannot transfer the existing funds from the escrow account to the Court without breaching the terms of the covenants.

Although Tuomey's Motion for a Stay requests that:

[t]he Court enter an order staying the execution of the judgment on the same

[2] The $50,000,000 in escrow is the most Tuomey can restrict without breaching its bond covenants. *See Section 2, infra.*

[3] The Government references the various attorneys that have represented Tuomey in this matter. [898 at 10 n.6]. It should be noted that *as a condition precedent* to settlement discussions, the Government required Tuomey to sever its relationship with Nexsen Pruet – Tuomey's general counsel of more than 25 years. Tuomey complied with this request, and retained Nelson Mullins to fill this vacancy. Irrespective of this litigation, Tuomey, like all hospitals and corporations, has to have general counsel. Thus, the representation that the engagement of Nelson Mullins is part of Tuomey's alleged excessive spending is a mean spirited distortion of the facts meant to once again cast Tuomey in a negative light.

> terms that the Government has previously accepted in a forbearance agreement entered into with Tuomey. Alternatively, Tuomey requests that the Court waive the bond requirement altogether or grant a stay upon the posting of an amount less than $50,000,000, which is the amount currently deposited in escrow pursuant to the forbearance agreement [ECF 895 at 1],

counsel for Tuomey mistakenly stated in its Memorandum that Tuomey could post the $50,000,000 with the Court as security for a supersedeas bond [ECF No. 895-1 at 5].[4] This was incorrect. *Decl. of Tuomey CFO M. Lovell* at ¶ 5, attached as **Exhibit D**. Transferring $50,000,000 from the current escrow account to the Court for security or for the purpose of posting a supersedeas bond would violate the provision of the bond covenants restricting the transfer of cash to entities not in the "Obligated Group." *See 1.14.14 Letter from Bond Counsel to Bond Trustee*, attached as **Exhibit D(1)**; *Bond Supp. No. 5, Section 24*, attached as **Exhibit D(2)**. As set forth in the bond documents:

> (a) Transfers of Cash to entities not in the Obligated Group shall be limited to 15% in each Fiscal Year of Unrestricted Cash and Investments as of the end of the most recent Fiscal Year for which audited financial statements are available, provided [Tuomey], immediately following the transfer or disposition, shall have at least eighty-five (85) Days Cash on Hand.

Bond Supp. No. 5, Section 24.

According to Tuomey's Chief Financial Officer Mark E. Lovell, the most Tuomey can transfer to the Court, rather than keeping the funds in escrow, without violating the Transfer of Cash Restriction and other contractual obligations[5] is $1,700,000. *Decl. M. Lovell* at ¶ 15. If the

[4] As a practical matter, Tuomey literally cannot purchase a bond in this amount. Prior to the first appeal, counsel for Tuomey attempted to secure a bond from several financial institutions. Every request was declined based on concerns regarding Tuomey's financial stability at that time. [ECF 556-2, attached as **Exhibit C**.] Presently, Tuomey is in a weaker financial position now than it was prior to the first appeal. Any attempt to secure a bond at this time, would be an exercise in futility.

[5] Tuomey's current contractual commitments require it to transfer $11,100,000 to Tuomey Medical Professionals, which owns and operates Tuomey's physician practices. Despite being a

$50,000,000 that Tuomey has deposited in escrow were transferred to the Court in the form of a supersedeas bond, or otherwise pledged to secure a supersedeas bond, Tuomey would violate this Transfer of Cash Restriction (because the transfer exceeds the $1,700,000 limitation and because the Government is not part of the "Obligated Group"), ultimately causing an event of default under its bonds. This is why permitting the $50,000,000 to remain in escrow is the best solution for all parties – as it was in the first appeal.

In the event that the Court adopts the Government's proposal, Tuomey would also violate the Liquidity Covenant[6] included in Tuomey's 2006 Series Bonds, which requires Tuomey to have at least 60 days cash on hand.[7] *See Bond Supp. No. 5, section 15*. Excluding the $50,000,000 that is currently in escrow, Tuomey presently has 65 days cash on hand. *Decl. of M. Lovell* at ¶ 10. Thus, the Liquidity Covenant will be breached if Tuomey transfers more than five days of cash into the Court. *Id.*

With $50,000,000 in escrow, Tuomey cannot transfer any money to the Court without violating the bond covenants. Nor can Tuomey transfer the $50,000,000 in escrow to the Court without breaching these covenants. *Decl. of M. Lovell* at ¶ 8. A consequence of violating either of these bond covenants is catastrophic: Tuomey would be subjected to immediate foreclosure of all of Tuomey's assets, thereby forcing Tuomey to stop operations and immediately liquidate. When faced with this catastrophic result, Tuomey's only logical choice will be to file bankruptcy. A bankruptcy filing will allow Tuomey to continue its appeal, while automatically staying the collection actions of its creditors and preventing the Government from moving from

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supporting organization to Tuomey, Tuomey Medical Professionals is not a part of the "Obligated Group." *Decl. M. Lovell* at ¶ 14.

[6] The Transfer of Cash Restriction also requires compliance with the Liquidity Covenant.

[7] "Days Cash on Hand" is defined in the Bond documents as "the quotient produced by dividing the sum of Unrestricted Cash and Investments by Operating Expenses, and then multiplying the quotient by 365."

unsecured to secured status to the prejudice of Tuomey's secured bondholders.

Finally, not only would the purchase of a $50,000,000 supersedeas bond constitute an event of default, but Tuomey's acquiescence to such request could expose Tuomey's volunteer Board Members to claims of breach of fiduciary duty by the bondholders and other secured creditors. Where a corporation is in imminent danger of becoming insolvent - the "zone of insolvency" – courts have ruled that corporate directors owe a fiduciary duty to creditors. *See In re Hoffman Assoc.'s, Inc.*, 194 B.R. 943, 964 (D.S.C. 1995) (citing *Fed. Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973, 976-977 (4th Cir. 1982)); *Bassi & Bellotti S.p.A. v. Transcontinental Granite, Inc.*, No. DKC 08-1309, 2011 WL 856366, *9 (D.S.C. March 9, 2011). The current $237,454,195 judgment arguably places Tuomey within this zone, and thus, Tuomey's Board could be found to have a fiduciary duty to its creditors – including the bondholders. Actions contrary to this duty- such as purchasing a $50,000,000 bond for placement with the Court and thus giving the Government debt priority over the bondholders' debt – may subject Tuomey, as well as its officers and its volunteer Board Members, to derivative claims for breach of fiduciary duty.

The Government's proposal does not preserve its status quo as a judgment creditor, whose rights are junior to the perfected security interest of the bond holders. Rather, the Government seeks to achieve a position superior to the bond holders through its proposal. This is not the purpose of a supersedeas bond and "in an age of titanic damage judgment" it is this exact scenario - "where the requirement would put the defendant's other creditors in undue jeopardy" - in which courts have not required a bond or relaxed the requirements of Rule 62(d). *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *accord Acevedo-Garcia v. Vera-Nonroig*, 296 F.3d 13, 17 (1st Cir. 2002); *Hoffman v. O'Brien*, Civ. No.

WDQ-06-3347, 2009 WL 3216814, at *2 (D.Md. Sept. 28, 2009); *Alexander v. Chesapeake, Potomac and Tidewater Books, Inc.*, 190 F.R.D. 190, 192-193 (E.D.Va. 1999) (holding "any security or bond offered by defendants in this case should simply reflect and preserve defendants' *current ability* to satisfy the judgment" even if it is "significantly less valuable than the amount of the damages award") (emphasis added). Bankruptcy would wipe out all but the actual damages of $39,313,065 awarded to the Government which is why leaving the current funds in escrow is a better option. However, if this Court were to adopt the Government's proposal, Tuomey's only option to obtain a stay and maintain the current priority positions of all of its creditors would be to file bankruptcy. As noted in Tuomey's Memorandum In Support of Motion for Stay, the filing of bankruptcy would be very disruptive and have severe consequences to Tuomey's ability to provide healthcare to the Sumter community. [*See* ECF 895-1 at 5-11].

CONCLUSION

After scrutinizing the Government's arguments that the $50,000,000 presently in escrow is insufficient surety, the Governments primary, if not sole, reason becomes readily apparent; the Government seeks to elevate its status as an unsecured judgment creditor over the bond holders' perfected security interests in Tuomey's assets. Tuomey cannot post the bond sought by the Government without breaching the bond covenants and exposing its Board to the risk of claims alleging breach of fiduciary duties.

In the event the Court requires Tuomey to post a supersedeas bond in with the Court in the amount of $50,000,000 and place an additional $20,000,000 in escrow, Tuomey likely will be forced to file for bankruptcy to obtain an automatic stay without posting a bond. Bankruptcy, however, would not end this litigation because Tuomey would still have the ability to appeal. Finally, and of tantamount importance, is the catastrophic consequences the Sumter Community

and its citizens would experience if Tuomey were forced to file bankruptcy just to preserve its constitutional right to appeal.

Tuomey therefore respectfully requests that the Court enter an order staying execution of the judgment pending appeal conditioned upon Tuomey maintaining the $50,000,000 in escrow pursuant to the terms of the existing Forbearance Agreement – the same amount agreed to by the Government in the first appeal when Tuomey was in a better financial situation. Alternatively, Tuomey requests the Court require Tuomey post a bond in an amount commensurate with its ability to pay[8] and compliant with Tuomey's existing bond covenants as a condition of a stay.

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[8] The Government's assertion that Tuomey agreed not to argue for a lower bond amount is not correct. [ECF No. 898 at 2 n.1]. The Forbearance Agreement merely states that Tuomey is free to argue that the $50,000,000 in escrow is sufficient surety for a stay pending appeal. There is nothing in the Forbearance Agreement that precludes Tuomey from arguing for a lower amount, especially considering the Government's request that Tuomey transfer the $50,000,000 from escrow into the Court for a supersedeas bond.

Respectfully submitted,

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