

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made and entered into by and among Memorial Health Services, a California nonprofit public benefit corporation; and Saddleback Memorial Medical Center, a California nonprofit public benefit corporation (together, "MHS"), on the one hand, and the City of San Clemente, a municipal corporation; Robert Baker, an individual; Katherine Ward, an individual; Timothy Brown, an individual; Lori Donchak, an individual; and Christopher Hamm, an individual (collectively, the "City"), on the other hand (all of the foregoing shall be referred to collectively as the "Parties" or individually as a "Party"). This Agreement memorializes the settlement and compromise recently reached by the Parties and is to be effective as of June 18, 2019 (the "Effective Date").

RECITALS

WHEREAS, MHS is the owner of that certain real property located at the street address of 654 Camino de los Mares in the City of San Clemente, State of California (the "Property"), on which MHS operated an acute care hospital (the "Hospital") until May 31, 2016;

WHEREAS, on January 19, 2016, the City Council held a public hearing to consider items necessary to effectuate re-zoning of the Property, including, without limitation, the adoption of City of San Clemente Resolution No. 16-03 and Ordinance No. 1616;

WHEREAS, on February 2, 2016, on second reading, the City Council adopted Resolution No. 16-03 and Ordinance No. 1616 (the "Zoning Changes");

WHEREAS, disputes arose between the Parties regarding the legality and effect of the Zoning Changes;

WHEREAS, on May 25, 2016, MHS filed a lawsuit against the City challenging the legality and effect of the Zoning Changes, *Memorial Health Services et al. v. City of San Clemente et al.*, which, after being removed to federal court, bears Case No. [8:16-cv-00852-DOC-JCG](#) (the "Lawsuit");

WHEREAS, the Parties acknowledge and agree to resolve the issues relating to the Lawsuit and the Zoning Changes in the manner set forth below;

WHEREAS, the Parties acknowledge and agree that MHS will dismiss with prejudice the Lawsuit on the terms set forth below;

WHEREAS, the Parties agree that there shall be a standstill period, as described below, until the one (1) year anniversary of the Effective Date of this Agreement (as such period may subsequently be reduced or extended under Section 2.c.2.d or Section 2.c.3 hereof or otherwise by written agreement of MHS and the City, the "Standstill Period"), during which the Parties shall in good faith cooperate as described below and have the rights and obligations described below;

NOW, THEREFORE, in consideration of the mutual covenants and releases set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

TERMS

1. **Recitals.** The Recitals set forth above are an integral part of this Agreement, and shall be used in any interpretation of this Agreement.

2. **Settlement Terms.** In consideration for the releases and covenants contained in this Agreement, the Parties hereby agree to the following settlement terms:

a. *Dismissal of Lawsuit.* MHS shall, promptly following the complete execution of this Agreement, prepare and file with the Court documents to accomplish dismissal with prejudice of the Lawsuit, and the City shall cooperate with MHS as may be necessary to accomplish that purpose.

b. *Parties Not to Seek Reimbursement of Costs.* None of the Parties shall file a Memorandum of Costs or otherwise seek payment or reimbursement from any other Party or any other Party's affiliates of any fees, costs or expenses incurred or suffered in connection with the Lawsuit.

c. *Standstill Period.*

1. [Intentionally omitted.]

2. During the Standstill Period, the City shall refrain from filing and prosecuting an eminent domain action or other litigation seeking to acquire or transfer ownership, possession or control of the Property; at conclusion of the Standstill Period, and thereafter, the City shall have the option of proceeding with an eminent domain action to acquire the Property subject to the Zoning Changes for use as an acute care hospital or emergency facility; provided, however, that during the Standstill Period:

a. The City shall be permitted, but not obligated, to take any necessary or convenient pre-filing steps that might be necessary to allow the City to proceed with filing an eminent domain action immediately following the conclusion of the Standstill Period. MHS agrees that, to the extent such pre-filing steps require service of any documents on MHS, Spach, Capaldi & Waggaman, LLP will accept service of such documents on behalf of MHS in a manner that counsel for the Parties work out in order to minimize the costs of service thereof.

b. Neither Party will be prohibited from having discussions with any third parties or regulatory agencies relating to the

current or future use, ownership, operation, possession or control of the Property, including without limitation the City's having discussions with any potential operator for the Property and MHS having discussions with any potential purchaser, tenant or operator for the Property.

c. MHS acknowledges and agrees that, in the event the City files an eminent domain action following the conclusion of the Standstill Period, MHS's claim, if any, for pre-condemnation damages, including without limitation pre-judgment interest, would not begin to accrue until the expiration of the Standstill Period, the result of this provision being that the attorneys' fees and expenses incurred in the Lawsuit shall not be asserted as attorneys' fees or damages recoverable in any post-Standstill Period eminent domain proceeding. Moreover, documents produced and positions taken in the Lawsuit shall not be deemed binding hereafter.

d. At any time during the Standstill Period, the City shall have the option of restoring the Property to its zoning immediately prior to the enactment of the Zoning Changes and, upon such occurrence, the Standstill Period shall be deemed terminated.

e. If during the Standstill period the Parties should reach a mutually acceptable solution for use of the Property, the City agrees to take such steps as may be necessary or convenient to help expediate requests for approvals for any necessary adjustments to the Property Zoning to effectuate such use.

f. If the City adopts a resolution of necessity within one hundred and eighty (180) days following the conclusion of the Standstill Period that commences the process that leads to the filing of an eminent domain action, and MHS or an affiliate controlled by or under common control with MHS then owns an interest in the Property, MHS will not contest the City's right to take MHS's or such affiliate's interest in the Property. The City shall not file a notice of appraisal or otherwise begin the formal condemnation process prior to the conclusion of the Standstill Period.

3. Notwithstanding any provision contained in this Agreement, (a) at any time after September 30, 2019, each of the City and MHS may unilaterally terminate the Standstill Period by delivery to the other Party of not less than sixty (60) days' advance written notice of termination, and (b) the Standstill Period shall terminate automatically effective upon any sale, lease or other transfer or conveyance by MHS of any interest in the Property to any unaffiliated third party. Effective upon termination of the Standstill Period pursuant to this Section 2.c.3, all rights and obligations of the City and MHS under this Section 2.c shall terminate and be of no further force or effect, except for the rights and obligations

under Section 2.c.2.c, Section 2.c.2.f, this Section 2.c.3 and Section 2.c.4, which shall survive any such termination. No termination under this Section 2.c.3 shall constitute a release of or relieve any Party of liability for any breach of this Agreement by such Party occurring prior to the effective date of such termination.

4. If, as of the date that is two hundred and seventy (270) days following the conclusion of the Standstill Period, (a) MHS or an affiliate of MHS continues to own the Property and is not then operating a healthcare facility on the Property or leasing the Property for operation of a healthcare facility by another unaffiliated third party, (b) the City has not restored the Property to its zoning immediately prior to the enactment of the Zoning Changes, and (c) the City has not adopted a resolution of necessity and filed an eminent domain action against the Property (or subsequently ceases to prosecute such eminent domain action), then the City, promptly following receipt of a written demand from MHS, shall reimburse MHS for its reasonable, documented, out-of-pocket costs incurred to maintain and secure the Property and all facilities on the Property not to exceed \$15,000 per month; provided, however, that the City's obligations under this Section 2.c.4 shall terminate and be of no further force or effect as of and following any date on which the City acquires title to the Property through eminent domain or restores the Property to zoning that is no more restrictive than the zoning that was in place for the Property immediately prior to the enactment of the Zoning Changes.

d. Joint Press Release and Public Communications.

1. The Parties acknowledge and agree that, on the day following the Effective Date of this Agreement, the Parties will issue a joint press release concerning this Agreement and the settlement reflected herein, in the form attached hereto as Exhibit A. Each of the City and MHS shall also use good faith efforts to conduct, if appropriate, a joint media interview surrounding the announcement of this Agreement.

2. [intentionally omitted]

e. Fees And Expenses Not Provided For Herein. The Parties acknowledge and agree that, expressly as set forth in this Agreement, the City and MHS shall each bear their own costs, expenses, reimbursement, disbursement, and attorneys' fees that have been incurred in connection with the Lawsuit and the negotiation, preparation and enforcement of this Agreement.

g. Ratification. The Parties acknowledge that this Agreement and the settlement described herein is contingent upon the approval of the Boards of Directors of the two entities constituting MHS and the City Council of the City. Accordingly, the Parties acknowledge and agree that if the Boards of the two entities constituting MHS or the City Council does not approve this Settlement Agreement as written, the terms contained herein are inoperative and unenforceable.

3. **Releases.**

a. *Releases by City.* Except as to obligations created or specifically exempted herein, and effective as of the Effective Date, together with each Party named herein and each official member of its City Council and Planning Commission (collectively, "City Releasers"), do hereby release and absolutely forever discharge MHS, and its respective predecessors, successors, subsidiaries, parents, assigns, agents, affiliates, representatives, officers, directors, shareholders, trustees, partners, attorneys, and employees (collectively, "MHS Releasees"), of and from any and all claims, demands, debts, liabilities, obligations, accounts, and causes of action of every kind and nature whatsoever, whether now known or unknown, suspected or unsuspected, described in or arising from the Lawsuit, which any or all of the City Releasers have ever had, now have or may in the future have against MHS Releasees or any of them, so that the City Releasers shall after the Effective Date hereof have no claim of any kind or nature whatsoever on or against the MHS Releasees, or any of them, directly or indirectly, for any supposed liability or thing or act undertaken, done, or omitted to be done, at any time prior to the Effective Date, described in or arising from the Lawsuit.

b. *Releases by MHS.* Except as to obligations created or specifically exempted herein, and effective as of the Effective Date, MHS, on behalf of itself and any affiliate entities (the "MHS Releasers") do hereby release and absolutely forever discharge City, together with any of its respective predecessors, successors, subsidiaries, parents, assigns, agents, affiliates, representatives, past and current Council members, officers, directors, shareholders, trustees, partners, attorneys, and employees (collectively, the "City Releasees"), of and from any and all claims, demands, debts, liabilities, obligations, accounts, and causes of action of every kind and nature whatsoever, whether now known or unknown, suspected or unsuspected, described in or arising from the Lawsuit, which any or all of the MHS Releasers have ever had, now have or may in the future have against the City Releasees or any of them, so that the MHS Releasers shall after the Effective Date hereof have no claim of any kind or nature whatsoever on or against the City Releasees, or any of them, directly or indirectly, on any contract or account, express or implied in fact or implied by law, or any supposed liability or thing or act undertaken, done, or omitted to be done, at any time prior to the Effective Date, described in or arising from the Lawsuit.

c. *Section 1542 Acknowledgement.* Each Party to this Agreement acknowledges and affirms that it is familiar with Section 1542 of the California Civil Code, which provides that:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Each Party knowingly and voluntarily waives the provisions of Section 1542 of the California Civil Code, as against each Party released hereby with regard to claims released hereinabove, and acknowledges and agrees that this waiver is an essential and material term of

the settlement or compromise that led to this Agreement, and that without such waiver, the settlement or compromise reflected in this Agreement would not have been entered into.

4. **No Admission of Liability.** The Parties acknowledge and agree that the fact that the claims are being settled, as well as any matter referenced or contained herein, shall not constitute an admission of liability, wrongdoing, responsibility, or lack of merit in a claim or defense in this or any other proceeding, any such admission being specifically denied. The Parties agree that they will not speak derogatively to other third parties about the events giving rise to the Lawsuit.

5. **Enforcement.** Should any Party fail to perform their obligations under this Agreement, the non-breaching Party shall be entitled to reasonable attorneys' fees incurred to enforce any right, or collect any sum due, under this Agreement.

6. **Miscellaneous.**

a. *Attorneys' Fees and Costs.* Except as expressly provided otherwise in this Agreement, each of the Parties agrees to bear its own attorneys' fees and other costs with regard to the matters referenced herein and/or arising out of the preparation or enforcement of this Agreement and the processes contemplated under Section 2.c of this Agreement.

b. *Successors; Assignment.* This Agreement shall inure to the benefit of and be binding on each Party's predecessors, heirs, beneficiaries, administrators, representatives, trustees, successor trustees, officers, directors, members, partners, shareholders, principals, employees, agents, affiliated entities, and subsidiaries. This Agreement may not be assigned by MHS without the prior written consent of the City.

c. *Integration.* This Agreement constitutes the entire agreement between the Parties concerning all matters and supersedes any prior discussions, agreements or understandings; there are no promises, representations or agreements between the Parties hereto other than as set forth herein/therein.

d. *Governing Law.* This Agreement and all claims arising hereunder or in connection herewith shall be governed by the laws of the State of California. If any lawsuit arises between the Parties hereafter regarding the enforcement or interpretation of this Agreement, the Parties agree that such lawsuit shall be filed in Orange County, California. The Parties agree to jurisdiction and venue in any court sitting in Orange County, California.

e. *Counterparts.* This Agreement may be executed in counterparts, each of which shall be deemed an original. Copies of signatures transmitted by facsimile from counsel of the signatory shall be deemed an original counterpart hereunder at all times until receipt of the original signature.

f. *Waivers Must Be In Writing.* The provisions of this Agreement, including this paragraph, may be modified or waived only in writing signed by the Party affected by the modification or waiver. No waiver with respect to any portion of this Agreement shall apply to

any other portion of the Agreement, and a waiver on one occasion shall not be deemed to be a waiver of the same or any other breach on a future occasion. No course of dealing by any Party, and no failure, omission, delay or forbearance by any Party in exercising such Party's rights or remedies shall be deemed a waiver of any such rights or remedies or a modification of this Agreement.

g. *Notices.* Whenever notice is required to be given by any Party, such notice may be given by facsimile, certified mail, or overnight delivery. When notice is given by facsimile, notice shall be deemed effective upon receipt of verification that the notice was successfully transmitted. When notice is given by certified mail or overnight delivery, notice shall be deemed effective upon receipt. Notices shall be sent to the Parties as follows, or to any other address designated in writing hereafter by a Party:

If to MHS, notice shall be sent to the following address:

Memorial Health Services
17360 Brookhurst St,
Fountain Valley, CA 92708
Att'n: Chief Legal Officer

With copy by email to:

Madison Spach, Jr.
4675 MacArthur Court, Suite 550
Newport Beach, CA 92677
Email: mspach@scwlawfirm.com

If to City, notice shall be sent to the following address:

The City of San Clemente
San Clemente City Hall
910 Calle Negocio
San Clemente, CA, 92673
Att'n: Mayor of the City of San Clemente, and
James Makshanoff, City Manager

With copy by email to:

Scott Smith and
Jeffrey Dunn
Best Best & Krieger, LLP
18101 Von Karman Ave.
Suite 1000
Irvine, CA 92612
Email: scott.smith@bbklaw.com; jeffrey.dunn@bbklaw.com

h. No Construction Against Any Party. This Agreement shall be deemed jointly drafted and written by all Parties to it and shall not be construed or interpreted against any particular Party, regardless which Party or counsel originated or drafted any portion of it.

i. Agreement Entered Into With Independent Judgment. Each of the Parties declares and represents that:

(1) it and has reviewed, and had an opportunity for its legal counsel, if any, to review, this Agreement in its entirety;

(2) in making this Agreement, it has relied wholly upon its own judgment, belief, knowledge, and investigation and independent legal advice from its counsel with respect to the nature and extent of its claims, rights, and potential liabilities and with respect to the effect of this Agreement;

(3) it has not been influenced to any extent whatsoever in making this Agreement by any representations or statements by any other Party or by any person or persons representing or acting for any other Party.

j. Execution of Other Documents. All Parties shall cooperate fully with each other in the execution of any and all other documents and in the completion of any additional acts or documents that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

k. Voting and Consent Effect of Document. The Parties executing this Agreement below shall be deemed to have agreed that all voting, notice, consent, and approval requirements set forth under any of their respective by-laws, organizational documents or trust documents (or which may be required by applicable law) which may be relevant to the transactions contemplated in this Agreement shall be deemed satisfied or waived.

l. Savings Clause. If any term or provision of this Agreement or the application thereof to any person, entity, or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons, entities, or circumstances other than those as to which is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

m. Warranty of Authority. Each signatory to this Agreement expressly warrants to the other Parties that he, she or it has the authority to execute this Agreement on behalf of the Party or Parties to be bound by his, her or its signature, and on behalf of each and every principal or other owner of a legal, equitable or beneficial interest in such Party or Parties. Each signatory agrees that he, she or it will indemnify the other Parties to this Agreement from any loss or damage resulting from a breach of this warranty of authority.

n. Execution. This Agreement may be executed in multiple counterpart copies, or by facsimile or .pdf signature, each of which shall be deemed an original.

o. *Individual Parties—Obligations Limited to Official Duties.* The releases and other agreements set forth herein shall be effective and binding as to the Individual Parties. In accordance therewith, such releases and agreements shall be deemed operable, and this Agreement complete and enforceable, upon execution, and requisite Council and Board approvals, by MHS and the City, and the signature of this Agreement shall be deemed sufficient to effectuate the foregoing without the necessity of obtaining execution by such individual Parties. Notwithstanding any provision contained in this Agreement, none of the individual Parties shall have any personal liability or responsibility for any matter set forth in this Agreement, it being understood and agreed that the obligations of each individual Party shall be limited to performance in his or her official capacity as an officer or elected official of the City of the obligations of the City under this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date set forth below, provided, however, that the Effective Date of this Agreement shall be deemed to be as defined above.

MEMORIAL HEALTH SERVICES, a California nonprofit public benefit corporation

Dated: June 18, 2019

By: _____
Barry S. Arbuckle
President and Chief Executive Officer

SADDLEBACK MEMORIAL MEDICAL CENTER, a California nonprofit public benefit corporation

Dated: June 18, 2019

By: _____
Marcia Manker
Chief Executive Officer

CITY OF SAN CLEMENTE, a municipal corporation

Dated: June 18, 2019

By: _____
Name:
Title:

JOINT PRESS RELEASE

June 20, 2019
For Immediate Release

Memorial Health Services
Contact: Rhoda Weiss
Tel: (562) 335-4093

City of San Clemente
Contact: [REDACTED]
Tel: [REDACTED]

**City of San Clemente and Memorial Health Services Settle Lawsuit
Over Zoning Action**

(San Clemente, California, June 20, 2019) – The City of San Clemente and Memorial Health Services announced that they have entered into an agreement to settle all claims between them in a lawsuit that has been pending in the United States District Court for the Southern District of California.

Memorial Health Services' lawsuit challenged the City's zoning of Memorial's former hospital campus located at 654 Camino de los Mares in the City of San Clemente. Memorial has agreed to dismiss the suit, and Memorial and the City have agreed to release all claims against each other pertaining to the subject matter of the litigation.

The Honorable Dan Bane, Mayor Pro Tem of the City of San Clemente, and Tony Struthers, Vice President of Memorial, issued the following joint statement:

We are pleased that the litigation has been settled on mutually satisfactory terms. While City officials and Memorial Health Services continue to have different views about potential healthcare uses for the campus, the settlement will better allow each of the parties to explore and consider solutions that will best serve the health needs of the community.

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MEMORIAL HEALTH SERVICES, a California nonprofit public benefit corporation

Dated: June 18, 2019

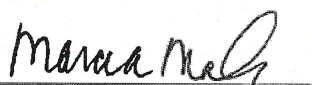
By: _____


Barry S. Arbuckle
President and Chief Executive Officer

SADDLEBACK MEMORIAL MEDICAL CENTER, a California nonprofit public benefit corporation

Dated: June 18, 2019

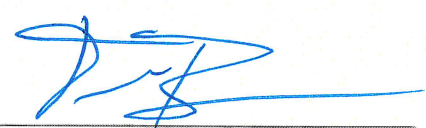
By: _____


Marcia Manker
Chief Executive Officer

CITY OF SAN CLEMENTE, a municipal corporation

Dated: June 18, 2019

By: _____


Name: Dan Bane
Title: Mayor Pro Tem