IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 5:15-cv-00229-BO

COUNTY OF YADKIN,

Plaintiff,

v.

CAH ACQUISITION COMPANY 10 LLC; HMC/CAH CONSOLIDATED, INC.; and RURAL COMMUNITY HOSPITALS OF AMERICA, LLC,

Defendants.

MEMORANDUM IN OPPOSITION TO NOTICE OF YADKIN COUNTY'S PLAN FOR REOPENING THE HOSPITAL AND ITS DAMAGES AND FEES

Pursuant to Local Rule 7.2 EDNC and this Court's Order Granting Modification of Court's Order of July 15, 2015 (Doc. 46.), Defendants CAH Acquisition Company 10 LLC ("CAH 10"), HMC/CAH Consolidated, Inc. ("HMC"), and Rural Community Hospitals of America, LLC ("RCHA") jointly file this Memorandum in Opposition to Notice of Yadkin County's Plan for Reopening the Hospital and its Damages and Fees.

I. NATURE OF THE MATTER BEFORE THE COURT

Before the Court is the Plaintiff's request for damages and fees allegedly suffered as a result of what this Court found was Defendants' civil contempt of the Temporary Restraining Order (the "TRO") entered by the Wake County Superior Court ("State Court") on May 22, 2015 which directed that the Yadkin Valley Community Hospital ("the Hospital") not be closed by the Defendant CAH 10. The TRO expired by its terms on June 1, 2015. Plaintiff did not bring on for hearing by this Court its Motion for Preliminary Injunction or otherwise seek to have this Court order that CAH 10 open or reopen the Hospital.

II. FACTUAL BACKGROUND

CAH 10 operated the Hospital for five years. In 2010, CAH 10 acquired the business and assets of the Hospital from Hoots Memorial Hospital, Inc. ("Hoots Memorial"), a North Carolina not-for-profit corporation. (Docs. 12-2, 12-3, 12-4, 12-5.[1]) CAH 10 leased from Plaintiff the real property, building and improvements occupied by the Hospital (the "Premises"). (Doc. 12-6.) The parties—CAH 10, Hoots Memorial, and Plaintiff—memorialized this purchase and lease transaction by entering into the Agreement to Purchase and Lease effective April 22, 2010 ("Purchase Agreement"). (Docs. 12-2, 12-3, 12-4, 12-5.) At closing on May 1, 2010, CAH 10 and Plaintiff also entered into a lease covering the Premises ("Hospital Lease"). (Doc. 12-6.)

CAH 10 at no time had any agreement with the County wherein CAH 10 covenanted to keep the business or operations of the Hospital open and operating until a specific date, (*See* Doc. 12.); and neither the Purchase Agreement nor the Hospital Lease (or amendments thereto) contain any such duty or covenant of continuing operations. (*See* Docs. 12-2, 12-3, 12-4, 12-5, 12-6.) RCHA was not a party or guarantor of the Purchase Agreement or the Hospital Lease. (Id.) RCHA has never been a party to any contract or other agreement with Plaintiff. (*See* Doc 12.)

The Hospital Lease carried an initial term of 48 months. (Doc. 12-6.) CAH 10 and Plaintiff signed an amendment to the Hospital Lease ("Second Amendment"), which extended the term until April 30, 2015. (*Id.*) In September 2014, representatives of Yadkin County, including the County Manager, County Attorney, and two Yadkin County Commissioners called a meeting and requested that a CAH 10 representative attend. Dennis Davis, Chief Legal Counsel for RCHA, appeared along with legal counsel for CAH 10, Alex Barrett. At that

[1] For this Court's convenience, Defendants will cite to the record whenever possible, using the Document Number from this Court's Docket Sheet in the following form: "Doc. #."

meeting, the County informed CAH 10 that the County had decided to replace CAH 10 with a different hospital operator and would not extend the County's lease of the Hospital facility to CAH 10. (Doc. 12-8.)

After the meeting, the Yadkin County Commission began soliciting a different hospital operator to lease the Premises and purchase the hospital business from CAH 10. That effort extended over the next eight months during which time the County refused to cooperate with CAH 10 in coordinating the termination of its lease and/or the transfer of its hospital business to prospective purchasers. CAH 10 labored to arrange meetings with County representatives to make arrangements for the orderly transfer of the Hospital operation, but each good-faith request made by CAH 10 was personally refused by Yadkin County Commissioner Kevin Austin, then County Manager Aaron Church, County Attorney Ed Powell, and interim County Manager Lisa Hughes (the "County Representatives"). Kevin Austin is both the Chairman of the Yadkin County Commissioners and a member of the Board of Directors of Hugh Chatham Memorial Hospital ("Hugh Chatham") located in Elkin, North Carolina.

In December 2014, a representative of Hugh Chatham contacted CAH 10. Shortly thereafter, Ms. Hughes and Mr. Powell told CAH 10 that the County had chosen Hugh Chatham to replace CAH 10 as the new operator of the hospital and instructed CAH 10 to negotiate the sale and purchase of the hospital assets and business with Hugh Chatham. CAH 10 verified the accuracy of this instruction by speaking directly to Chairman Austin who verified that Hugh Chatham was acting at the request and with the approval of the County Commissioners. On January 2, 2015, CAH 10, Hugh Chatham and the County signed a confidentiality agreement, and the negotiations commenced between CAH 10 and Hugh Chatham. Once again, during the negotiations which spanned a period of approximately 120 days, the County refused to meet with

CAH 10 to coordinate the orderly termination of the Hospital Lease and/or the purchase of CAH 10's hospital business by Hugh Chatham.

On or about February 16, 2015, CAH 10 became aware that one or more of the County Representatives had falsely represented that the County had chosen Hugh Chatham to replace CAH 10 as the new operator of the Hospital. With no notice to CAH 10, the County initiated a Request for Proposal ("RFP") soliciting bids from third party hospital operators (in addition to Hugh Chatham) to lease the Premises. The County's abrupt and unexpected about-face greatly alarmed CAH 10. CAH 10 was already—at the County's instruction—deep in its negotiations with Hugh Chatham for the sale and purchase of the hospital business and assets. As it turned out, the false statements of the County Representatives concerning the County's selection of Hugh Chatham as the purchaser of CAH 10's hospital business, and the eleventh-hour RFP, thwarted the transition of the hospital and made it impossible for CAH 10 to close the sale and purchase of the hospital assets and business to a new operator.

The County directly solicited proposals from five hospital operators and received proposals from three entities: Hugh Chatham, Wake Forest Baptist Medical Center, Community Hospital Corporation (a company located in Austin, Texas). The County instructed CAH 10 to expand its negotiations to include all three bidders. CAH 10 contacted Wake Forest Baptist Medical Center and received no response. CAH 10 contacted Community Hospital Corporation and provided it with due diligence information. CAH 10 received no further response from Community Hospital Corporation. County Manager Hughes shortly thereafter notified CAH 10 that these two bidders had withdrawn their proposals. Because the Hospital Lease expired on April 30, 2015, CAH 10 had repeatedly pleaded with the County for an extension to facilitate the sale. But the County simply refused.

The Worker Adjustment and Retraining Notification (WARN) Act required CAH 10, as an employer, to provide notice 60 days before the shutdown of its business. The WARN notice must be given to the affected employees and to the appropriate unit of local government. CAH 10 cautioned the County that the giving of the WARN notice would, in all likelihood, have a material adverse effect on the hospital's clinical operations and financial viability. With the Hospital Lease expiring on April 30, 2015 and the County rejecting any (however brief) extension of the Hospital Lease, CAH 10 was obligated to provide the WARN notice by February 27, 2015, which CAH 10 did provide after waiting until the final possible day in hopes of some compromise by the County which would obviate the necessity of giving the WARN notice.

Negotiations between CAH 10 and Hugh Chatham continued. On March 26, 2015, CAH 10 and Hugh Chatham signed a non-binding term sheet ("Term Sheet"). The Term Sheet anticipated the sale of CAH 10's hospital business to Hugh Chatham would occur by August 1, 2015 and made the sale expressly contingent upon Hugh Chatham first entering into a lease for the Premises with the County. Only after the term sheet was signed did the County finally agree to negotiate a lease extension. On April 2, 2015, CAH 10 and the County entered into the Third Lease Amended, which extended the Hospital Lease to July 31, 2015.

Suddenly, and without any stated reason, Hugh Chatham stopped communicating with CAH 10. CAH 10 made repeated inquiries to Hugh Chatham. Hugh Chatham ultimately provided CAH 10 with an April 16, 2015 letter sent on Hugh Chatham's behalf by its CEO Paul Hammes to County Manager Hughes. The letter informed the County that Hugh Chatham's Board of Trustees had decided to withdraw from the RFP process. It provided no reason for the withdrawal other than the Trustees "ha[d] concerns with respect to [Hugh Chatham's] ability to

fully meet the County's expectations, both in the near and longer term, in operating the critical access hospital in Yadkinville." Thereafter, Hugh Chatham terminated the Term Sheet with CAH 10.

With the withdrawal of Hugh Chatham—the last prospective purchaser of CAH 10's hospital assets and business—and the County's headstrong resolve to oust CAH 10, the Hospital's future ability to operate looked bleak. Key personnel were justifiably concerned about the uncertainty of continued operations and left. By May 6, 2015, the small, rural Hospital had lost a physician's assistant, a certified registered nurse practitioner, the PFS Director, and a clinic manager. One physician was looking for another practice situation, and another physician had opened an outside practice location. The situation made it nearly impossible to recruit experienced and competent replacement staff. CAH 10 put "the County on notice that if clinical and patient support operations deteriorate further, there is a reasonable likelihood that the hospital will not be able to remain open for business until July 31st."

But CAH 10 made a final, good-faith attempt to rescue the Hospital. It invited negotiations with the County for a long-term lease of the Premises "coupled with the **same package of economic incentives** that the County was offering to Hugh Chatham." In response, the County tendered a "take-it-or-leave-it" offer conditioned on CAH 10's immediate acceptance. (Doc. 12-8.) The Second Amendment had set the annual rent for the property at zero dollars. (Doc. 12-6.) Yet, in its "take-it-or-leave-it" offer, Plaintiff demanded lease payments of $650,000 per year. (Doc. 12-8.) CAH 10 rejected the lease terms demanded by Plaintiff and requested that the parties participate in a negotiation. (Doc. 12-7.) CAH 10 also proposed engaging a third-party appraiser to determine a "fair market value" of the rent for the

Premises.[2] (*Id*.) Should the parties be unable to reach an agreement for a longer lease extension, CAH 10 offered, in the alternative, to negotiate an outright sale of the Hospital business and assets to Plaintiff based on the economic terms stated in the Term Sheet with Hugh Chatham. (*Id*.) Plaintiff rejected both of CAH 10's counteroffers. (Docs. 12-8, 12-14.)

On May 8, 2014, CAH 10 informed Plaintiff that the Hospital was losing over $20,000 per day. (Doc. 12-7.) CAH 10 attributed these losses to the WARN notice and a generalized community uncertainty about the hospital's future. (*Id.*) In fact, the Hospital had suffered a "steep decline in inpatient census from 10 patients to one." (*Id.*) CAH 10 again cautioned Plaintiff that CAH 10 could not "allow losses of this magnitude to continue and it is becoming more and more unlikely that the hospital will be able to remain open until July 31." (*Id.*)

On May 14, 2015, CAH 10 provided to County Manager Hughes all the documents required "to effectuate the transfer of all licenses and provider numbers" of the hospital to the County. Those documents included the so-called "CHOW" application applicable to the CMS provider number. CAH 10 offered to make its representatives available to provide assistance to the County's hospital consultant. CAH 10 informed the County that it wanted to have the CHOW application signed and ready to file with CMS no later than the close of business on Friday, May 22, 2015. Subsequently, County Attorney Powell advised CAH 10: "It is not Yadkin County's intention to accept the existing provider agreement."

On May 8, 2015, CAH 10 authorized and directed RCHA to discontinue the clinical operations and close the Hospital at such time as RCHA reasonably determined that patient safety could no longer be ensured due to deterioration of the financial and clinical condition of the Hospital. Thereafter, during the third week of May 2015, RCHA made its determination that

[2] CAH 10 explained that the rationale for this "fair market value" approach to rent was based on the fact that as a Critical Access Hospital, the Hospital can only receive reimbursement from Centers for Medicare and Medicaid (CMS) for its "allowable costs" which must be determined based on the marketplace where it is located.

because of the continuing deterioration of the hospital's operations, patient safety could no longer be ensured. CAH 10 had no other legal or moral choice but to abide by RCHA's determination; and all clinical operations were discontinued at the hospital late in the day on May 22, 2015. At the time, there were no inpatients at the Hospital and all operations had ceased, except for limited services being provided in the Emergency Department ("ER") where two persons were receiving non-emergent and non-critical care which did not require inpatient hospitalization.

Even though the identities and contact information for Dennis Davis, Chief Legal Officer for Defendant RCHA, and Alex Barrett, counsel for CAH 10, were known to Plaintiff, no effort was made by Plaintiff to contact either of them or otherwise notify CAH 10 that suit had been commenced and a TRO sought from the State Court. There was no opportunity given to CAH 10 to point out to the State Court (among other things) a reasonable determination by Defendant RCHA (the manager of the hospital) had been made that patient safety was at issue if the hospital continued to operate, and there was and is no agreement of any kind requiring any of the Defendants to keep the Hospital open and operational through the end of the lease term.

The Hospital closed on May 22, 2015. The TRO set the hearing on Plaintiff's Motion for Preliminary Injunction for June 1, 2015. On May 26, 2015, the County filed an Amended Application and Order Extending Time to File a Complaint, which now named CAH 10 as well as HMC and RCHA. (Doc. 57-3.) The State Court TRO was not amended to include HMC and RCHA. On May 29, 2015, CAH 10 removed the lawsuit to federal court. (Doc. 1.) On June 1, 2015, the County filed its Motion to Show Cause. (Doc. 7.) It requested that CAH 10, HMC and RCHA be ordered "to appear and show cause why they should not be sanctioned and held in

contempt for violations of the temporary restraining order . . . ." (Doc. 7 at 1.) The County never brought before this Court its Motion for Preliminary Injunction.

At the hearing on June 15, 2015, this Court found that the closure of the Hospital was in violation of the TRO. It further found that it was "no longer possible for defendants to reopen the hospital in order to purge themselves of the contempt" and that "civil contempt sanctions are necessary to compensate the County for its losses sustained as a result of defendants' contumacy." (Doc. 29, June 18 Slip Op at 7 citing *In re General Motors Corp.*, 61 F.3d at 258. In its Order, this Court required that the County provide proof of its damages, "to be measured from the time of the violation (May 22, 2015) to the time of reopening. The measure of damages shall not exceed July 31, 2015, the date that the contract between the County and defendants was set to expire." (*Id.*) This Court went on to rule that "[t]he County shall be awarded its reasonable attorneys' fees..." and that Defendants were to release "patient records upon valid request and return all hospital property subject to the contract with the County to the hospital premises so that the County may elect to purchase such property for fair market value pursuant to the terms of the contract." *Id.*

CAH 10 complied with the Court's Order in all respects.[3] CAH 10 went even further. Though it was obligated under state and federal law and this Court's Order to provide copies of patient records upon proper request, CAH 10 cooperated fully with the County's expressed desire to take over this responsibility. On June 29, 2015, counsel for the County proposed an Agreement under which the County would take over responsibility for the records. Because the proposed Agreement was insufficient to relieve CAH 10 of its legal responsibility, CAH 10 promptly proposed that an Agreed Order be entered by this Court effectuating the transfer. After

[3] By complying with the Court's Order of June 18, Defendants do not concede that CAH 10 had any obligation under the contract to keep the Hospital open through July 31, 2015.

drafts were exchanged and the terms quickly agreed upon, a Joint Motion for Transfer and Assumption of Duties Concerning Medical Records was filed on July 7, 2015 (just after the July 4 holiday) and the proposed Order granting the Joint Motion was entered on July 9, 2015.

Similarly, and even though it had not been ordered to take any action with regard to the Hospital license, CAH 10 promptly provided the County upon its request with the original of the license to operate the Hospital issued to CAH 10 by the State of North Carolina. The County first made its request for the original license on July 1. CAH 10 made arrangements for it to be sent to counsel immediately and it was received after the holiday on July 7 and transmitted to the County on the same day it was received.

Even though it disputes that the County has any rights whatever in CAH 10's equipment and other personal property located on the Hospital premises, CAH 10 made the Hospital premises available and assisted the County in conducting an inventory of CAH 10 property on the premises. CAH 10 also provided copies of its own inventory listings and depreciation schedules to the County, again without any obligation that it do so.

III. LEGAL ARGUMENT

A. Legal Standard

The trial court enjoys broad discretion in determining remedies for civil contempt. Civil contempt, however, is wholly remedial. *Carbon Fuel Co. v. United Mine Workers of Am.*, 517 F.2d 1348, 1349 (4th Cir. 1975). Any remedy or sanction "must be remedial and compensatory and, unlike criminal contempt, nonpunitive." *In re Gen. Motors Corp., 61 F.3d 256, 259 (4th Cir. 1995*. A "sanction" for civil contempt is a cash award to the injured party. It "is not imposed to vindicate the court's authority or to punish the contemnor, but rather serves to make reparation to the injured party, restoring that party to the position it would have held had the court's order been obeyed." *Matter of Grand Jury Subpoena of June 12, 1986*, 690 F. Supp.

1451, 1453 (D. Md. 1988). Therefore, the sanction may not exceed the actual loss to the complainant caused by the actions of the party in contempt. *In re Gen. Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995). Civil contempt is "terminable if the contemnor purges himself of the contempt." *Carbon Fuel Co. v. United Mine Workers of Am.*, 517 F.2d 1348, 1349 (4th Cir. 1975). It is accepted that courts need to exercise "care and restraint" when awarding attorneys' fees because of the concerns of the danger of provoking disputes that might not otherwise reach the court system. *Wright, Miller & Kane*, 10 Fed. Prac. & Proc. § 2675.1 (3rd Ed.). The burden is on the prevailing party to demonstrate the time spent and the other factors that would aid the court's decision. *Davis v. Fletcher*, 598 F2d 469 (5th Cir. 1979).

B. The County Failed to Adequately Support its Demand for Reasonable Attorney Fees.

The County's summary of claimed attorney's fees does not contain sufficient information to allow Defendants to challenge the amounts being claimed. *See* Declaration of William R. Forstner in Support of Attorneys' Fees Related to Plaintiff's Show Cause Order ("Forstner Affidavit"). (Doc. 42-2.) Therein, Plaintiff summarizes by attorney name, hours, rates charged and amount billed the services for which the County seeks payment from Defendants for the period May 22 through June 19, 2015, but does not provide copies of the billing statements themselves. (See Doc. 42-2, at 6, Table A.) Instead, the Forstner Affidavit generally summarizes the services provided and lists only the hours devoted to the tasks without identification of the lawyers performing the work. *Id.* at 7, Table B. The Forstner Affidavit then repeats this process for the period June 20 through June 30, 2015, again providing only summaries of hours and services provided. *Id.* at 7, 8, Tables C and D.

The Court faced a similar situation concerning claimed attorney's fees in the case of *W.S. Badcock Corp. v. Beaman*, 531 B.R. 576 (E.D.N.C. 2015). There, the defendant appealed a

Bankruptcy Court order awarding fees to this Court which reversed the Bankruptcy Court, finding that the Defendant had been ordered to pay fees without the information necessary to be able to challenge the amount awarded. 531 B.R. at 582. The same is the case here. With only the summaries of the services provided, and not the detailed billing statements, Defendants are without sufficient information to be able to challenge the amount of the fees being claimed for the services provided. The Plaintiff's bare-bones "summary" demonstrates Plaintiff's failure to carry its burden to support its fee claim and it proves that Plaintiff is seeking fees to which it is not entitled. Although Plaintiff may be entitled to its reasonable and appropriately documented attorney's fees for bringing and enforcing the motion for civil contempt, it is not entitled to those fees incurred for bringing the action or the pre-contempt work. Consequently, as set forth in Plaintiff's Table B (which is supposed to depict the time incurred from May 22 through June 19, 2015), Plaintiff is not entitled to the 18.3 hours for filing suit and obtaining the TRO; the 30.4 pre-contempt hours for negotiating with defendants regarding problems; the 7.9 pre-contempt hours that it supposedly devoted to efforts to reopen the hospital; the 22 pre-contempt hours spent on hospital closure (*e.g.*, patient care, patient records, hospital employees, etc.); the 21.6 pre-contempt hours spent on its efforts to obtain a preliminary injunction in state court; the 13.2 pre-contempt hours to prepare the complaint and address service issues; and the 14.3 pre-contempt hours spent on the issue of the hospital license. Obviously, the claim for work done on the Complaint and motions for injunctive relief were not caused in some way by any violation of the TRO – they were incurred before the TRO was entered and before it could have been violated. The largest block of time, over 120 hours of the more than 320 hours claimed, is alleged to have been consumed in bringing the contempt motion before this Court. That Motion, of course, did not seek to enforce an order then in effect, the TRO having expired by its terms,

but instead sought punishment in the form of criminal contempt which the Court did not award and has not allowed despite Plaintiff's repeated requests.

Moreover, Plaintiff's minimal schedule is so vague and indistinct that it does not satisfy Plaintiff's obligations to prove that it is entitled to the attorneys' fees requested. For example, Plaintiff claims it spent 40.6 hours to develop "facts related to hospital closure, including numerous witness interviews, for use in Plaintiff's complaint, motions for injunctive relief, and motions/briefs for contempt." As stated above, Plaintiff is not entitled to recover attorney time for work that was not related to the contempt proceeding. Under the Plaintiff's scheme it is impossible to determine what part of the Plaintiff's 40.6 hour entry (if any) was spent on the complaint versus the time spent on contempt items. Plaintiff also seeks 21.6 hours and 120.2 hours for pursuing the contempt action in state and federal court. Without, the specific time entries, however, neither the court nor the Defendants can ascertain how the time was actually spent, whether the amount of time was reasonable, or to what extent there were redundancies. Plaintiff's failure to properly document its time, is an appropriate basis to deny the motion.

C. The County Cannot Collect Civil Contempt Damages Beyond June 1, 2015.

The State Court TRO expired on June 1, 2015. (Doc. 12-9.) An expired TRO can provide the basis for a finding of civil contempt and an award of damages. *Reliance Ins. Co. v. Mast Const. Co*., 84 F.3d 372, 376 (10th Cir. 1996). Damages, however, are limited to those "based on violations of the order which occurred while it remained in effect." *See In re EZ Pay Servs., Inc*., 390 B.R. 445, 454 (Bankr. M.D. Fla. 2008); *see also Marshall v. Blasters, Drillrunners, & Miners Union, Local 29, Laborers' Int'l Union of N. Am., AFL-CIO-CLC,* 30 Fed. R. Serv. 2d 866 (S.D.N.Y. 1980) (finding employees seeking to enforce an expired TRO ordering their reinstatement were entitled to compensatory damages consisting of the salary they would have been paid during the period before the TRO expired).

On May 22, 2015, the County elected—contrary to federal law[4]—to not notify CAH 10, an identified entity with known contact information, before securing an *ex parte* TRO from the State Court. (*See* Doc. 1-2 at 11-12.) The State Court TRO enjoined CAH 10 "from ceasing operations at Yadkin Valley Community Hospital" until June 1, 2015. (Doc. 12-9.) The Hospital closed on May 22, 2015. CAH 10 removed the case to Federal Court on May 29, 2015 (Doc. 1.), and the TRO expired on its own terms on June 1, 2015. (Doc. 12-9.). The County did nothing to extend the TRO or move for a preliminary injunction. On a finding of civil contempt, the County is entitled to be compensated as though the hospital operated until **June 1, 2015.** Therefore, the County's damages are limited to those it suffered resulting from the Hospital being closed **from May 22, 2015 and June 1, 2015**. *See In re EZ Pay Servs., Inc*., 390 B.R. at 454; *Marshall*, 30 Fed. R. Serv. 2d 866.

Although the County may argue that the Hospital's closing rendered further injunctive activity moot, the County has never made any showing and no court has made any finding that the County would have been entitled to injunctive relief beyond June 1, 2015.[5] The County has clamored that the Purchase Agreement and/or Hospital Lease obligated CAH 10 to operate the Hospital until July 31, 2015. (*See* Doc. 8 at 3-4, 6, 14; Doc. 42 at 1-2.) Those contracts impose

[4] An ex parte TRO should be granted in only one of two limited circumstances. First, notice must be impossible because either the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing. *Adobe Sys., Inc. v. Ajin*e, No. CIV. A. 3:01CV00009, 2001 WL 252916, at *3 (W.D. Va. Feb. 12, 2001); *see also Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006); *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984). Alternatively, "courts have recognized "a very narrow band of cases in which ex parte orders are proper because notice to the defendant would render fruitless the further prosecution of the action." *McCord*, 452 F.3d at 1131; *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993); *Am. Can Co. v. Mansukhan*i, 742 F.2d 314, 322 (7th Cir. 1984). This latter justification requires a showing that the defendant, if given notice, would likely frustrate the plaintiff's action by destroying evidence or disposing of goods or funds based on the defendant's history of destroying evidence or violating court orders. *Renaud v. Gillick*, No. CV6-1304RSL, 2006 WL 2841866, at *3 (W.D. Wash. Sept. 29, 2006). Insufficient time to notify a known party with known contact information is not a valid justification for an ex parte TRO. *See Johnson v. Taylor Bean Whitaker Mortg. Corp.*, 2010 WL 4038603, at *1 (D.S.C.,2010)

[5] On June 1, 2015, the day the TRO was set to expire, the County made its Motion to Show Cause, electing to request damages for civil contempt instead of seeking a preliminary injunction. (Doc. 7.)

no such obligation. Neither document contains a duty or covenant of continuing operations, (Docs. 12-2, 12-3, 12-4, 12-5, 12-6), and there is no separate operating agreement with the County. (*Id.*). The Purchase Agreement defines the manner in which the Hospital should operate. (Docs. 12-2, 12-3, 12-4, 12-5.) It does not establish a date certain the Hospital must remain operational. (*Id.*) Likewise, the Hospital Lease is nothing more than a real property lease. (Doc. 12-6.) Neither contract, read individually or collectively, forbids CAH 10 from closing the Hospital before the end of the lease period. (*See* Docs. 12-2, 12-3, 12-4, 12-5, 12-6.)

If this Court imposes civil contempt damages from the day the Hospital closed, May 22, 2015, until July 31, 2015, that is tantamount to this Count either (i) extending the TRO or imposing a preliminary injunction upon CAH 10 running until July 31, 2015, or (ii) deciding the merits of the County's pending lawsuit against Defendants, *i.e.*, finding that CAH 10 had a contractual duty to keep the Hospital open and operational until July 31, 2015, which it breached, and awarding contractual damages. The Defendants will discuss the latter in the following section. As to the former, there are procedural and substantive requirements that must be met—and clearly have not been met—before a TRO may be extended or a preliminary injunction may be entered.

Substantively, this Court would need to have considered the following four factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *Ciena Corp. v. Jarrard*, 203 F.3d 312, 322 (4th Cir. 2000) (quotations omitted).

"It is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." *Barton v. District of Columbia*, 131 F.Supp.2d 236, 242 (D.D.C.2001)

(citing *Benten v. Kessler*, 505 U.S. 1084, 1085, 112 S.Ct. 2929, 120 L.Ed.2d 926 (1992)). To meet its burden, the movant must make a "prima facie case showing a reasonable probability that it will prevail on the merits." *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) *holding modified by Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc*., 42 F.3d 1421 (3d Cir. 1994).[6]

At no point has **any court**—including this Court—considered the actual obligations of the Purchase Agreement or Hospital Lease. When the County applied for the TRO, the County did not identify or submit—and the State Court did not consider—any specific contract, let alone specific terms of any contract. (*See* Doc. 1-2 at 8-10.) In its application for a TRO, the County summarily stated: "The County has been informed by multiple sources . . . that Defendant intends to close the Hospital tomorrow, Saturday, May 23, 2015**, in breach of its agreements with the County which require Defendant to continue operations until July 31, 2015**." (*Id*. ¶ 3) (emphasis added). The State Court TRO is utterly silent on the merits of the County's contract claim, saying nothing about any contract, nonetheless a violated term or provision of a specific contract. (Doc. 12-9.) And, on its Motion to Show Cause and supporting memorandum, the County did not cite to any specific provision of the Purchase Agreement or Hospital Lease other than the lease's expiration date. (Docs. 7, 8.)

This Court did not extend the State Court TRO until July 31, 2015 or impose a preliminary injunction expiring on July 31, 2015. Because the State Court TRO expired on June

[6] The court, at a minimum, must examine the moving party's identified cause of action, its elements and whether the facts as presented by the moving party would support the action. *PCS Wireless LLC v. A to Z Wireless Solutions Inc*., 841 F. Supp. 2d 649, 653 (E.D.N.Y. 2012) (examining the elements of breach of contract to determine whether movant made a prima facie case supporting a TRO); *see also Saturn of Denville New Jersey, LP v. Gen. Motors Corp*., No. CIV.A. 08CV5734 DMC, 2009 WL 1545559, at *5 (D.N.J. May 29, 2009) (granting a TRO where conduct alleged by movant would constitute a violation of the a New Jersey Fair Practices Act); *Kuper Indus., LLC v. Reid*, No. 8:15-CV-42, 2015 WL 412518, at *3-4 (D. Neb. Jan. 30, 2015) (granting a TRO where the movant provided evidence to establish a prima facie case of a violation of the Lanham Act); *Feed Mgmt. Sys., Inc. v. Brill*, No. CIV 06-4126 MJD/SRN, 2006 WL 3247195, at *5 (D. Minn. Nov. 9, 2006) (rejecting application for TRO because movant could not meet the essential elements of promissory estoppel or equitable estoppel.)

1, 2015, the County's damages are limited to those incurred between May 22, 2015 and June 1, 2015.

D. The County Cannot Collect Breach of Contract Damages Masquerading as Civil Contempt Damages.

The County unleashes a flurry of claims about what Defendants owed it. Ultimately, the Defendants' obligations to the County will be determined in the County's pending litigation in this Court. The County secured the *ex parte* TRO against CAH 10 based on a forthcoming contract action. (Doc. 1-2 at 8, ¶ 2-3.) On June 3, 2015, the County filed a Complaint bringing three causes of action—breach of contract, unfair trade practices and tortious interference—against three entities: CAH 10, HMC, and RCHA. (Doc. 13.) Fundamentally, the County asserts that its "action involves claims by the County against Defendants related to their unjustified closure of the Hospital without adequate notice and in breach of multiple legally binding contracts and a Court Order and related conduct." (Doc. 8 at 14). CAH 10 has answered the County's Complaint. (Doc. 52.) HMC and RCHA have filed separate motions to dismiss. (Docs. 54-57.)

With the County's Notice of Damages, though, the County opportunistically tries to sidestep the litigation process. Instead of undergoing discovery, withstanding dispositive motions and proving its claims, the County would prefer to cash in now. So the County dresses what should be contractual damages as civil contempt damages and parades them before this Court.

The County's asserted damages rest on a collection of unproven assumptions about the terms of the Purchase Agreement and Hospital Lease and the duties owed by CAH 10 to the County. These assumptions include, but are not limited to, the following:

- CAH 10 had a contractual obligation to keep the Hospital open and operational until July 31, 2015 (*see* Doc. 8 at 3-4, 6, 14; Doc. 42 at 1-2);

- CAH 10 had a contractual obligation to operate the Hospital despite suffering dramatic financial losses (*see* Doc. 8 at 3-4, 6, 14; Doc. 42 at 1-2);

- CAH 10 had a contractual obligation to provide the County formal notice before closing the Hospital (*see* Doc. 8 at 2, 8);

- The WARN notice sent to the County did not constitute formal notice of the Hospital's closing;

- CAH 10 had a contractual obligation to provide security to the building after closing (*see* Doc. 42 at 17);

- The County did not commit a prior breach by obstructing CAH 10's attempts to sell its Hospital business;

- The County did not commit a prior breach by refusing to effectuate the transfer of all licenses and provider numbers from CAH 10 to the County;

- The County did not commit a prior breach by refusing to negotiate in good faith based on the package of economic incentives that the County had already offered to Hugh Chatham;

- The County had an absolute right to reversion of all personal property at the Hospital facility and that right was triggered (*see* Doc. 8 at 8; Doc. 42 at 18-20);

- CAH 10 had a contractual obligation to facilitate the transfer of its Hospital business—without compensation to CAH 10—to another operator; and

- The County would have located a hospital operator by July 31, 2015 despite its utter inability to locate another provider from September 2014 to May 2015.[7]

To award the County damages now based on any of these assumptions would be to prematurely decide the merits of the County's pending claims. The County's lawsuit will proceed. The County will have the opportunity to prove its avowed interpretations of the Purchase Agreement and Hospital Lease. The Defendant will have the opportunity to show otherwise. Until then, the County is not entitled to collect contract-based damages merely because it presents what are contested issues as definite.

[7] Of course July 31, 2015 has come and gone without the County finding another operator for the Hospital.

E. The County Overreaches By Seeking Damages before the TRO Was in Effect and after It Expired and Damages that Are Clearly Contractual.

Based on the above analysis, the County may not collect based on civil contempt for alleged damages that the County suffered before the State Order TRO was issued; for alleged damages that the County suffered after June 1, 2015; and/or for alleged damages based on assumptions about the terms of the Purchase Agreement or Hospital Lease and contractual duties of CAH 10. These precluded damages include, but are not limited to, those for:

1. Bringing the application for a TRO in State Court, including attorney's fees (pre-dates entry of TRO):

2. Filing its Complaint and pursuing associated legal claims against the Defendants, including attorney's fees (relates to alleged breach of contract);

3. The County's efforts to reopen the Hospital, including attorney's fees (Doc. 42 at 19, 23) (assumes CAH 10 was contractually obligated to keep the Hospital open and operational until July 31, 2015);

4. The County's efforts to find a new hospital operator (Doc. 42 at 19) (assumes CAH 10 was contractually obligated to keep the Hospital open and operational until July 31, 2015 and to facilitate the transfer its Hospital business—without compensation to CAH 10—to another operator);

5. Providing auxiliary EMS services after June 1, 2015 (Doc. 42 at 21) (post-termination of the TRO);

6. Inventorying all personal property at the Hospital facility (Doc. 42 at 18-21) (assumes all personal property reverted to County);[8]

7. Physical transfer of all personal property at the Hospital facility (Doc. 42 at 18-21) (assumes all personal property reverted to County);

8. Guarding of the Hospital by law enforcement to protect against the removal of Hospital property (*see* Doc. 42 at 17, 21) (assumes all personal property reverted to County);

9. Utility services after June 1, 2015 (Doc. 42 at 18, 21) (post-termination of the TRO);

[8] If the County's contractual right to reversion of some of the Hospital's personal property was triggered the task of accounting for the Hospital's personal property and what property belonged to whom would have been a necessarily incidential to the contract. It is not some separate result of a violation of the State Court TRO.

10. Maintenance of the premise after June 1, 2015 (Doc. 42, at 18, 21) (post-termination of the TRO);

11. Fees for the County's hospital consultant (Doc. 42 at 18-19, 21) (not caused by the Hospital being closed from May 22, 2015 until June 1, 2015);

12. County personnel's time in responding to citizen complaints about closing of the Hospital (Doc. 42 at 19) (assumes CAH 10 was contractually obligated to keep the Hospital open and operational until July 31, 2015 and is an ordinary function of County government);

13. Increase in number of Yadkin County residents who will need governmental and social support (Doc. 42 at 21) (assumes CAH 10 was contractually obligated to keep the Hospital open and operational until July 31, 2015);

14. Individual damages to Yadkin County residents (Doc. 42 at 21, 22) (not proper damages for the County seeking to enforce contracts as a party to the contracts);

F. Neither HMC nor RCHA—Non-Parties to the TRO—Can Have Civil Contempt Damages Levied Against Them Absent a Showing that They Took Specific Action to Violate the TRO or Aid and Abet CAH 10 in Violating the TRO.

An injunction may bind the parties and "other persons who are in active concert or participation with" them. Fed. R. Civ. P. 65(d)(2)(C). The purpose of this Rule is to "ensure that defendants may not nullify a decree by carrying out prohibited acts **through aiders and abettors**, although they were not parties to the original proceeding." *Blockowicz v. Williams,* 630 F.3d 563, 567 (7th Cir. 2010) (emphasis added); *Aevoe Corp. v. AE Tech Co.,* 727 F.3d 1375, 1384 (Fed. Cir. 2013) (stating that the objectives of an injunction may be thwarted by the conduct of parties not specifically named in the text.) "Actions that aid and abet in violating the injunction must occur after the injunction is imposed for the purposes of Rule 65(d)(2)(C) . . . ." *Blockowicz v. Williams,* 630 F.3d 563, 568 (7th Cir. 2010). The party seeking to enforce the injunction must present evidence that the third party either (i) violated the TRO itself, or (ii) took action to aid or abet the named party to violate the TRO after the TRO was issued. *See Blockowicz v. Williams,* 630 F.3d 563, 568 (7th Cir. 2010) ("Blockowicz presented no evidence

that Xcentric or Magedson took any action to aid or abet the defendants in violating the injunction after it was issued . . . ."); *see also Fidlar Technologies v. LPS Real Estate Data Solutions, Inc.*, No. 4:13-CV-4021-SLD-JAG, 2013 WL 5973938, at *12 (C.D. Ill. Nov. 8, 2013) ("And LPS has put forth no evidence showing that the counties aided or abetted Fidlar in violating state statute.")

The State Court TRO enjoined CAH 10 "from ceasing operations at Yadkin Valley Community Hospital" until June 1, 2015. (Doc. 12-9.) Simultaneously, the County secured a Civil Summons for CAH 10 and an Application and Order Extending Time to File Complaint naming CAH 10 as the adverse party. (Doc. 1-2 at 2-4.) After getting the TRO, attorneys for the County sent an e-mail message to Mr. Davis, saying: "Attached are copies of a Temporary Restraining Order executed his afternoon by a Superior Court Judge enjoining CAH Acquisition 10 LLC from ceasing operations at Yadkin Valley Community Hospital . . . ." (Doc. 12-11.)

The Hospital closed on May 22, 2015. On May 26, 2015, the County filed an Amended Application and Order Extending Time to File a Complaint, which now named CAH 10 as well as HMC and RCHA. (Doc. 57-3.) The State Court TRO was not amended to include HMC and RCHA. On May 29, 2015, CAH 10 removed the lawsuit to federal court. (Doc. 1.) On June 1, 2015, the County filed its Motion to Show Cause. (Doc. 7.) It requested that CAH 10, HMC and RCHA be ordered "to appear and show cause why they should not be sanctioned and held in contempt for violations of the temporary restraining order . . . ." (Doc. 7 at 1.) In the County's supporting memorandum, it argued that "CAH should be held in civil contempt for continuing to cease hospital operations after notice of the TRO." (Doc. 8 at 9.) The County cited to Rule 65(d)(2) to claim that HMC and RCHA had actual notice of the TRO. Whether HMC or RCHA had notice, however, or whether the TRO extended to HMC or RCHA is not the issue.

What the County never established is that HMC or RCHA took specific action between 5:59 PM when the email with the TRO was sent to Mr. Davis and 6:40 PM when the two remaining patients were discharged from the ER to violate the TRO or to aid and abet CAH 10 in violating the TRO. (*See* Doc. 8.).[9] There was certainly no showing that CAH 10 tried to circumvent the State Court TRO by having the prohibited acts carried out by HMC or RCHA. *See Blockowicz,* 630 F.3d at 567; *Aevoe Corp,* 727 F.3d at 1384. Instead, the County says generally: "[R]ather than comply, **Defendants** accelerated their plan [to close the Hospital] in direct violation of the court's order" and "**Defendants** nevertheless conspired to hastily shut down the hospital in direct violation of the TRO." (Doc. 8 at 12) (emphasis added). Such blanket assertions about multiple defendants' collective conduct is not sufficient to meet the pleading standards of Rule 12(b)(6)[10] let alone prove the actual conduct of HMC or RCHA by clear and convincing evidence, which is what a finding of civil contempt requires. *See In re Gen. Motors Corp.,* 61 F.3d 256, 258 (4th Cir. 1995). Absent proof of what HMC or RCHA did to violate the TRO or to aid and abet CAH 10 in violating the TRO, neither entity can be assessed damages for civil contempt. *See Blockowicz*, 630 F.3d at 568; *Fidlar Technologies*, 2013 WL 5973938, at *12.

IV. CONCLUSION

As set forth above, Plaintiff has failed to provide sufficient information for Defendants to be able to contest the amount of claimed damages and fees and on that basis alone, Plaintiff's request should be denied in its entirety. Alternatively, Plaintiff should be ordered to submit

[9] Instead the County says: "CAH had actual notice of the TRO and went on to deliberately violate its terms at its own peril." (Doc. 8 at 12.)

[10] *Boykin Anchor Co., Inc. v. AT&T Corp*., 5:10-CV-591-FL, 2011 WL 1456388, at *4 (E.D.N.C. April 14, 2011); *see also B.D. ex rel. Dragomir v. Griggs*, 1:09CV439, 2010 WL 2775841, at *6 (W.D.N.C. July 13, 2010) *aff'd*, 419 Fed. Appx. 406 (4th Cir. 2011) (dismissing claim where plaintiff made no allegations specific to each individual defendant).

detailed records and substantiation for each and every amount claimed in damages, and detailed time and billing records concerning the attorney's fees being claimed. In no event, however, may any amount be awarded to Plaintiff from HMC or RCHA, as neither was a party to this action when the TRO was entered, and there has been no showing that either acted with CAH 10 in violating the TRO. Further, any legitimate damages and fees may only have been incurred during the pendency of the TRO - from May 22 until June 1, 2015, and not before or after, as there has been no determination on the merits of Plaintiff's claim of breach of contract. Plaintiff may not recover any amount which was not incurred as a result of what the Court has determined was failure by CAH 10 to comply with the TRO, while the TRO was in effect. Any damages which are alleged to have been suffered either before or after the pendency of the TRO are matters for later determination.

Respectfully submitted, this the 4th day of August, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO NOTICE OF YADKIN COUNTY'S PLAN FOR REOPENING THE HOSPITAL AND ITS DAMAGES AND FEES** using the CM/ECF system, which will send notification of such filing to:

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This the 8th day of August, 2015.

/s/ J. Alexander S. Barrett
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