

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

KANSAS HEART HOSPITAL, LLC,
a Kansas limited liability company,

Plaintiff,

-vs-

STEPHEN S. SMITH, individually, and
JOYCE A. HEISMEYER, individually,

Defendants.

Case No.

JURY TRIAL DEMANDED

**DESIGNATED PLACE OF TRIAL:
WICHITA, KANSAS**

COMPLAINT

1 Plaintiff KANSAS HEART HOSPITAL, LLC, a Kansas Limited Liability Company,
2 through its lawyers, James A. Walker, Lisa A. McPherson, and Derek S. Casey of TRIPLETT
3 WOOLF GARRETSON, LLC, submits this Complaint praying for JUDGMENT jointly and
4 severally against Defendant STEPHEN S. SMITH, individually, and JOYCE A. HEISMEYER,
5 individually, for (1) compensatory, statutory, and punitive damages; (2) civil penalties; and (3)
6 attorney’s fees, costs, and expenses, with such other and further relief as the Court considers to be
7 just and equitable, in an amount in excess of \$31,000,000 due to Defendants’ violations of
8 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §1961 *et seq.* and their
9 breach of their fiduciary duties of good faith, loyalty, and disclosure as corporate officers.

10 In support of its complaint, Plaintiff Kansas Heart Hospital, LLC states:

THE PARTIES TO THIS ACTION

12 1. Plaintiff KANSAS HEART HOSPITAL, LLC, (the “Hospital”) is a Kansas limited
13 liability company conducting business in Sedgwick County, Kansas.

14 2. Defendant STEPHEN S. SMITH is an adult individual who resides in Kansas.

1 3. Defendant JOYCE A. HEISMEYER is an adult individual who resides in Kansas.

2 **JURISDICTION AND VENUE**

3 4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
4 §1331 because this civil action arises under the laws of the United States, namely, the RACKETEER
5 INFLUENCED AND CORRUPT ORGANIZATIONS ACT or “RICO,” 18 U.S.C. §1961 *et seq.*

6 5. This Court has supplemental jurisdiction over the Hospital’s common law claims
7 pursuant to 28 U.S.C. §1367(a) because the common law claims are intertwined with and related
8 to the Hospital’s RICO claims such that they form part of the same case or controversy under
9 Article III of the United States Constitution.

10 6. This Court has personal jurisdiction over the parties who reside in or have their
11 principal place of business within this judicial district.

12 7. This Court is the proper venue for this action because (a) Defendants reside within
13 this judicial district and the state of Kansas and (b) a substantial part of the events and omissions
14 giving rise to the Hospital’s claims occurred in this judicial district. 28 U.S.C. §1391(b)(1), (2).

15 **STATEMENT OF FACTS**

16 **A. The Hospital’s Management Committee Controls the Hospital’s Business and Affairs.**

17 8. The Hospital is a health-care facility which has been providing specialized and
18 comprehensive cardiovascular healthcare services to patients in Kansas since 1998.

19 9. The Hospital is a limited liability company governed, at all relevant times, by an
20 operating agreement entitled “FOURTH AMENDED OPERATING AGREEMENT OF KANSAS
21 HEART HOSPITAL, LLC” (“Operating Agreement”) dated May 4, 2007.

22 10. The Hospital’s “business and affairs” are “managed by a Management Committee.”

1 11. To that purpose, the Management Committee has “full and complete authority,
2 power and discretion to manage and control the business and properties of the Hospital, to make
3 all decisions regarding those matters, and to perform any and all other acts or activities customary
4 or incident to the management of the [Hospital’s] business” except for those situations where
5 approval of the members of the company is expressly required by the Operating Agreement.

6 12. The Hospital’s corporate officers may sign “any deeds, mortgages, bonds,
7 contracts, or other instruments *which the Management Committee authorized to be executed* except
8 in cases *where the signing and extension thereof shall be expressly delegated by the Management*
9 *Committee or this [Operating] Agreement.*” (Emphasis added.)

10 13. The Hospital’s Operating Agreement appointed Gregory F. Duick, M.D., as
11 Chairman of the Management Committee.

12 14. As Chairman of the Management Committee, Dr. Duick’s duties were limited by
13 the Operating Agreement to preside over meetings of the Management Committee and to cast a
14 deciding vote in those meetings if the committee deadlocked.

15 15. On November 1, 2010, the Hospital, through the Management Committee, entered
16 into an agreement with Dr. Duick to employ him as President of the Hospital.

17 16. The employment agreement expressly delegated duties to Dr. Duick to assist and
18 supervise the Chief Operating Officer and Chief Financial Officer.

19 17. There was no express delegation of authority by the Management Committee to Dr.
20 Duick to enter into contracts with persons to serve as Chief Operating Officer or Chief Financial
21 Officer or to determine the compensation to be paid to those persons for their services in those
22 roles for the Hospital’s benefit without the Management Committee’s authorization. This
23 authority was therefore reserved by the Management Committee under the Operating Agreement.

1 18. The employment agreement, moreover, affirmed that the Hospital’s Management
2 Committee “is the governing body of the Hospital and is responsible for the operation of the
3 Hospital and development of policies with respect to the Hospital” and that the “Hospital, through
4 its Management Committee, shall at all times exercise control over the affairs of the Hospital.”

5 19. As Chairman of the Management Committee and President of the Hospital, Dr.
6 Duick was a corporate officer who occupied a strict and uncompromising fiduciary relationship
7 with respect to the Hospital and its members that required Dr. Duick to act in good faith and loyalty
8 to advance their interests over his own interests.

9 20. As a corporate officer and fiduciary, Dr. Duick must disclose material information
10 to the Hospital’s Management Committee where disclosure was expected to fulfill his strict and
11 uncompromising duty of loyalty.

12 **B. The Hospital Employs Mr. Smith as Chief Financial Officer.**

13 21. The Hospital employed Mr. Smith as Chief Financial Officer on August 1, 1998.

14 22. As the Hospital’s Chief Financial Officer or “CFO,” Mr. Smith was a corporate
15 officer who occupied a strict and uncompromising fiduciary relationship with respect to the
16 Hospital and its members that required Mr. Smith to act in good faith and loyalty to advance their
17 interests over his own interests.

18 23. As a corporate officer and fiduciary, Mr. Smith must disclose material information
19 to the Hospital’s Management Committee where disclosure was expected to fulfill his strict and
20 uncompromising duty of loyalty.

21 **C. The Hospital Employs Ms. Heismeyer as Chief Operating Officer.**

22 24. The Hospital employed Ms. Heismeyer as Chief Operating Officer on July 7, 2011.

1 25. As the Hospital's Chief Operating Officer or "COO," Ms. Heismeyer was a
2 corporate officer who occupied a strict and uncompromising fiduciary relationship with respect to
3 the Hospital and its members that required Ms. Heismeyer to act in good faith and loyalty to
4 advance their interests over her own interests.

5 26. As a corporate officer and fiduciary, Ms. Heismeyer must disclose material
6 information to the Hospital's Management Committee where disclosure was expected to fulfill her
7 strict and uncompromising duty of loyalty.

8 **D. Mr. Smith, Ms. Heismeyer, and Dr. Duick Associate to Divert Funds.**

9 27. Beginning in early 2015 and continuing into late 2020, Mr. Smith and Ms.
10 Heismeyer along with Dr. Duick associated and conspired to divert \$6,051,855.90 from the
11 Hospital through undisclosed and unauthorized bonuses, deferred compensation payments, and
12 severance benefits paid to themselves and damage the Hospital by returning low-interest or
13 forgivable loans totaling \$4,408,000 without the authorization of the Management Committee to
14 avoid federal audits of their conduct of the Hospital's affairs and their self-dealing transactions.

15 **(1) The Undisclosed and Unauthorized Bonuses in 2015.**

16 28. Historically, the Hospital paid bonuses to its corporate officers in recognition of
17 their services. Mr. Smith, for example, had received periodic annual bonuses in a range from
18 \$7,000 to \$16,250 annually. Likewise, Ms. Heismeyer had received bonuses between \$3,750 and
19 \$14,000 annually. Dr. Duick had also received intermittent bonuses of \$7,000 to \$16,250 annually.
20 Similar bonuses were paid by the Hospital from time to time to other corporate officers. This
21 pattern changed dramatically in 2015 for Mr. Smith and Ms. Heismeyer.

22 29. On February 9, 2015, the Hospital's Management Committee met in the Board
23 Room of the Kansas Heart Hospital.

1 30. Mr. Smith and Ms. Heismeyer along with Dr. Duick were present for the
2 Management Committee meeting in their respective roles as corporate officers.

3 31. During the course of the Management Committee meeting, Mr. Smith, Ms.
4 Heismeyer, and Dr. Duick made presentations to the Management Committee on (a) medical staff
5 appointments; (b) changes in the medical staff bylaws; (c) quality improvement plans; (d)
6 compliance activities and performance measures; and (e) fourth quarter financial reports.

7 32. Mr. Smith, as the Hospital's CFO, reported that the Hospital's accountants had
8 performed their annual audit and made no adjustments.

9 33. Mr. Smith also reviewed the income statement noting that "salaries and benefits
10 performed better than 2013 given the increases in volume."

11 34. Mr. Smith, Ms. Heismeyer, and Dr. Duick, at that meeting, did not disclose any
12 intention for or request authorization of the Management Committee for the payment of additional
13 compensation to themselves for their services to the Hospital as corporate officers.

14 35. Two weeks later, Dr. Duick directed Hospital staff to pay a "bonus" of \$500,000
15 each to Mr. Smith and Ms. Heismeyer which was not disclosed to or authorized by the Hospital's
16 Management Committee.

17 36. Mr. Smith, Ms. Heismeyer, and Dr. Duick later disclosed to the Hospital's auditors
18 that the February 2015 bonuses were a settlement for the payout of the severance benefits due to a
19 prior year change of control. These representations were false because there was no change in
20 control at the Hospital in 2014 and neither Mr. Smith nor Ms. Heismeyer left employment to trigger
21 a change-of-control provision.

22 37. The Hospital's Management Committee next met on April 20, 2015.

1 38. Mr. Smith and Ms. Heismeyer were present for the April 20, 2015, meeting in their
2 role as corporate officers along with Dr. Duick.

3 39. During the course of the meeting, Mr. Smith, Ms. Heismeyer, and Dr. Duick
4 reported to the Management Committee on (a) medical staff appointments; (b) community
5 involvement; (c) compliance activities and performance measures; and (d) first quarter 2015
6 financial reports.

7 40. Mr. Smith, in reviewing the first quarter financial reports, reported to the
8 Management Committee that “the cash balance is down due to the distribution [of profits to
9 members] in February.”

10 41. Mr. Smith, however, did not disclose the \$500,000 bonuses the Hospital paid to
11 himself and Ms. Heismeyer in February 2015 which also reduced the cash balance available.

12 42. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
13 uncompromising fiduciary duties, never reported the \$500,000 bonuses paid to Mr. Smith and Ms.
14 Heismeyer on February 25, 2015, to the Management Committee at the April 20, 2015 meeting.

15 **(2) The Undisclosed and Unauthorized Deferred Compensation Plans.**

16 43. Mr. Smith and Ms. Heismeyer, after receiving their bonuses, conspired with Dr.
17 Duick to create deferred compensation plans for themselves without disclosure to or authorization
18 of the Hospital’s Management Committee.

19 **(a) Incentive Compensation Agreement, Plan I – Dr. Duick.**

20 44. On July 11, 2015, Mr. Smith, as CFO, executed a deferred compensation agreement
21 dated August 1, 2015, titled “Incentive Compensation Agreement, Plan I” purportedly on behalf
22 of the Hospital, for the benefit of Dr. Duick (“Duick Plan I”).

1 45. Duick Plan I required the Hospital to pay \$400,000 into an account for Dr. Duick
2 on August 1, 2015, and again on August 1, 2016 which Dr. Duick would receive as deferred
3 compensation on August 1, 2017, upon completion of the plan.

4 46. Duick Plan I stated that the “Committee shall have full power to administer this
5 Agreement in all of its details” but defined the “Committee” as Dr. Duick.

6 47. Duick Plan I further provided that the amounts payable under the Plan “shall be
7 paid exclusively from the general assets of the” Hospital.

8 48. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
9 uncompromising fiduciary duties, never disclosed or sought authorization for the \$400,000
10 deferred compensation agreement executed on July 11, 2015, for the benefit of Dr. Duick.

11 49. The Hospital’s Management Committee did not authorize Mr. Smith to execute
12 Duick Plan I to provide \$400,000 in deferred compensation for the benefit of Dr. Duick.

13 (b) **Incentive Compensation Agreement – Ms. Heismeyer.**

14 50. On July 17, 2015, Dr. Duick executed a deferred compensation agreement
15 purportedly on behalf of the Hospital for the benefit of Ms. Heismeyer titled “Incentive
16 Compensation Agreement” and dated August 1, 2015.

17 51. The agreement required four payments into an account for Ms. Heismeyer’s benefit
18 of \$75,000 each on August 1 in 2015, 2016, 2017, and 2018.

19 52. Ms. Heismeyer would receive the \$300,000 paid into the plan’s account as deferred
20 compensation in August 2019, and January 2020.

21 53. The plan stated that the “Committee shall have full power to administer this
22 Agreement in all of its details” but defined the “Committee” as Dr. Duick.

1 54. The plan further provided that the amounts payable under the Plan “shall be paid
2 exclusively from the general assets of the” Hospital.

3 55. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
4 uncompromising fiduciary duties, never disclosed or sought authorization for the \$300,000
5 deferred compensation plan executed on July 17, 2015, for the benefit of Ms. Heismeyer.

6 56. The Hospital’s Management Committee did not authorize or expressly delegate
7 authority to Dr. Duick to execute the Incentive Compensation Agreement for Ms. Heismeyer to
8 provide \$300,000 in deferred compensation for her benefit.

9 (c) **Incentive Compensation Agreement, Plan I – Mr. Smith.**

10 57. On July 20, 2015, Dr. Duick executed a deferred compensation agreement for the
11 benefit of Mr. Smith purportedly on behalf of the Hospital titled “Incentive Compensation
12 Agreement, Plan I” and dated August 1, 2015 (“Smith Plan I”).

13 58. Smith Plan I required two payments into an account for Mr. Smith’s benefit of
14 \$150,000 each on August 1, 2015, and August 1, 2016.

15 59. Mr. Smith would receive the \$300,000 paid into the account as deferred
16 compensation in August 2017.

17 60. The plan stated that the “Committee shall have full power to administer this
18 Agreement in all of its details” and defined the “Committee” as Dr. Duick.

19 61. The plan further provided that the amounts payable under the Plan “shall be paid
20 exclusively from the general assets of the” Hospital.

21 62. Mr. Smith, Ms. Heismeyer and Dr. Duick, in violation of their strict and
22 uncompromising fiduciary duties, never disclosed or sought authorization for the \$300,000
23 deferred compensation agreement executed on July 20, 2015, for the benefit of Mr. Smith.

1 63. The Hospital's Management Committee did not authorize or expressly delegate
2 authority to Dr. Duick to execute the Incentive Compensation Agreement, Plan I, for Mr. Smith to
3 provide \$300,000 in deferred compensation for Mr. Smith's benefit.

4 **(d) The July 2015 Hospital Management Committee Meeting.**

5 64. Later on July 20, 2015, the Hospital's Management Committee met at 6:30 p.m.

6 65. Mr. Smith, Ms. Heismeyer, and Dr. Duick, were present for the July 20, 2015,
7 Hospital Management Committee meeting in their respective roles as corporate officers.

8 66. During the course of the meeting, Mr. Smith, Ms. Heismeyer, and Dr. Duick
9 reported to the Management Committee on (a) medical staff appointments; (b) community
10 involvement; (c) corporate compliance; (d) recruiting for the anesthesia department; (e)
11 performance measures, infection control, and patient satisfaction; and (f) second quarter financial
12 reports for 2015.

13 67. Mr. Smith, in reporting to the Management Committee about the Hospital's second
14 quarter financials, reviewed the Hospital's balance sheet and income statement noting "that June
15 was a very good month" and proposed a distribution of profits to members.

16 68. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
17 uncompromising fiduciary duties, never disclosed the three deferred compensation agreements
18 they executed for each other's benefit on July 11, 17, and 20, 2015, or the \$1,000,000 in payments
19 the Hospital would be purportedly bound to make under these agreements for the benefit of Mr.
20 Smith, Ms. Heismeyer, and Dr. Duick personally.

21 69. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
22 uncompromising fiduciary duties, never disclosed any intention for or sought authorization from
23 the Hospital's Management Committee for additional deferred compensation plans which

1 purportedly obligated the Hospital to pay out an additional \$600,000 for the benefit of Mr. Smith
2 and Dr. Duick on July 22 and 25, 2015.

3 (e) **Incentive Compensation Agreement, Plan II – Dr. Duick.**

4 70. On July 22, 2015 Mr. Smith, as the Hospital’s CFO, executed a second deferred
5 compensation agreement titled “Incentive Compensation Agreement, Plan II,” and dated August
6 1, 2015, purportedly on behalf of the Hospital for the benefit of Dr. Duick without the knowledge,
7 consent, or authorization of the Hospital’s Management Committee (“Duick Plan II”).

8 71. Duick Plan II stated that the Hospital would make three payments into an account
9 for Dr. Duick. The first payment would be \$133,334 on August 1, 2015, with two more payments
10 of \$133,333 each on August 1, 2016, and August 1, 2017.

11 72. Dr. Duick would receive the \$400,000 paid into the account as deferred
12 compensation on August 1, 2018.

13 73. Duick Plan II stated that the “Committee shall have full power to administer this
14 Agreement in all of its details” but defined the “Committee” as Dr. Duick.

15 74. Plan II also required that the amounts payable under the Plan “shall be paid
16 exclusively from the general assets of the” Hospital.

17 75. Mr. Smith, Ms. Heismeyer and Dr. Duick, in violation of their strict and
18 uncompromising fiduciary duties, never disclosed or sought authorization for the \$400,000
19 deferred compensation agreement executed on July 22, 2015, for the benefit of Dr. Duick.

20 76. The Hospital’s Management Committee did not authorize or expressly delegate
21 authority to Mr. Smith to execute the Incentive Compensation Agreement, Plan I, to provide an
22 additional \$400,000 in deferred compensation for the benefit of Dr. Duick.

1 **(f) Incentive Compensation Agreement, Plan II – Mr. Smith.**

2 77. On July 25, 2015, Dr. Duick executed a second deferred compensation agreement
3 for Mr. Smith purportedly on behalf of the Hospital titled “Incentive Compensation Agreement,
4 Plan II” and dated August 1, 2015 (“Smith Plan II”).

5 78. Smith Plan II required three payments into an account for Mr. Smith’s benefit. The
6 first payment would be \$66,668 on August 1, 2015, with two more payments of \$66,666 on August
7 1, 2016, and August 1, 2017.

8 79. Mr. Smith would receive the \$200,000 paid into the account as deferred
9 compensation in August 2018.

10 80. Smith Plan II stated that the “Committee shall have full power to administer this
11 Agreement in all of its details” and defined the “Committee” as Gregory F. Duick, M.D.

12 81. Smith Plan II further provided that the amounts payable under the Plan “shall be
13 paid exclusively from the general assets of the” Hospital.

14 82. Mr. Smith, Ms. Heismeyer and Dr. Duick, in violation of their strict and
15 uncompromising fiduciary duties, never disclosed or sought authorization for the \$200,000
16 deferred compensation agreement executed on July 25, 2015, for the benefit of Mr. Smith.

17 83. The Hospital’s Management Committee did not authorize or expressly delegate
18 authority to Dr. Duick to execute the Incentive Compensation Agreement, Plan II, for Mr. Smith
19 to provide \$200,000 for his benefit.

20 84. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
21 uncompromising fiduciary duties, executed five undisclosed and unauthorized deferred
22 compensation plans in July 2015 purportedly binding the Hospital to \$2,000,000 for the benefit of
23 Mr. Smith, Ms. Heismeyer, and Dr. Duick.

1 **(g) The Unauthorized Funding of the Deferred Compensation Plans.**

2 85. On August 1, 2015, Dr. Duick executed a document entitled “KANSAS HEART
3 HOSPITAL, LLC DEFERRED COMPENSATION TRUST I” as Trustee which was attested by
4 Mr. Smith and Ms. Heismeyer.

5 86. On August 10, 2015, an account was opened by the use of the United States Mail
6 or interstate wire communications with The Vanguard Group, Inc. in Valley Forge, Pennsylvania.

7 87. The Vanguard account was named the “Kansas Heart Hospital Pooled Account”
8 owned by “Gregory Francis Duick” as Trustee.

9 88. On August 10, 2015, \$665,000 of Hospital funds were transferred by interstate wire
10 transfer or United States Mail for deposit into the Vanguard account to fund the undisclosed and
11 unauthorized deferred compensation agreements without the authorization of or delegation of
12 authority by the Hospital’s Management Committee.

13 **(h) The October 2015 Hospital Management Committee Meeting.**

14 89. On October 19, 2015, the Hospital’s Management Committee met.

15 90. Mr. Smith, Ms. Heismeyer, and Dr. Duick were present for the October 19, 2015,
16 Hospital Management Committee meeting in their respective roles as corporate officers.

17 91. During the course of the Management Committee meeting, Mr. Smith, Ms.
18 Heismeyer, and Dr. Duick, reported to the Hospital’s Management Committee on (a) medical staff
19 appointments, (b) community involvement, (c) performance measures, (d) patient satisfactions
20 results, and (e) financial matters.

21 92. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
22 uncompromising fiduciary duties, did not disclose (a) the deferred compensation agreements; (b)

1 the opening of the account with Vanguard; or (c) the transfer of \$665,000 from the Hospital for
2 deposit into the Vanguard account.

3 (i) **The December 2015 Hospital Management Committee Meeting.**

4 93. On December 4, 2015, Mr. Smith, Ms. Heismeyer, and Dr. Duick transferred an
5 additional \$325,000 of Hospital funds by interstate wire transfer or United States Mail for deposit
6 into the Vanguard account without disclosure to or authorization of the Management Committee.

7 94. Four days later, the Hospital's Management Committee met on December 8, 2015.

8 95. The purpose of the December 8, 2015, Management Committee meeting was to
9 review and approve the proposed 2016 budget for Kansas Heart Hospital.

10 96. Mr. Smith, Ms. Heismeyer, and Dr. Duick, were present for the December 8, 2015,
11 meeting of the Hospital's Management Committee in their respective roles as corporate officers.

12 97. Mr. Smith, as the Hospital's CFO, presented the proposed 2016 budget for the
13 Management Committee's review. In his presentation, Mr. Smith reported on "additional cost" in
14 2015 due to "Administration Expense due to anesthesia recruitment of two physicians."

15 98. Mr. Smith, as CFO, caused the Hospital's financial reports to include the deferred
16 compensation deposits and payments to be categorized as "Administration Expense" in the general
17 ledger and financial statements. Mr. Smith, however, did not inform the Management Committee
18 of any additional costs for "Administration Expense" that were due to the payments of \$990,000
19 to the Vanguard trust account for the undisclosed and unauthorized deferred compensation plans.

20 99. Mr. Smith, Ms. Heismeyer, and Dr. Duick, in violation of their strict and
21 uncompromising fiduciary duties, did not disclose (a) the \$500,000 bonuses; (b) the deferred
22 compensation agreements; (c) the Vanguard account; or (e) the transfers of \$990,000 to Vanguard

1 for their benefit to the Hospital's Management Committee at the December 8, 2015, meeting in
2 their review of the 2015 financial statements for the Hospital or discussion of the 2016 budget.

3 **(j) The Total Unauthorized Compensation for 2015.**

4 100. On December 30, 2015, the Hospital paid Dr. Duick \$781,166, Mr. Smith
5 \$260,389, and Ms. Heismeyer \$156,233 in unauthorized deferred compensation.

6 101. During 2015, Dr. Duick, Mr. Smith, and Ms. Heismeyer associated and conspired
7 to divert \$2,197,788 to themselves as undisclosed and unauthorized bonuses and deferred
8 compensation with an additional \$990,000 diverted without disclosure or authorization from the
9 Management Committee for deposit into the Vanguard account.

10 **(3) Defendants Transfer More Hospital Money to Vanguard in 2016.**

11 102. Prior to June 30, 2016, Vanguard mailed its quarterly and annual statements for the
12 Hospital's trust account to the Hospital's headquarters and principal place of business at 3601
13 North Webb Road in Wichita, Kansas.

14 103. At some point prior to June 30, 2016, Mr. Smith, Ms. Heismeyer or Dr. Duick
15 contacted Vanguard by United States Mail or interstate wire communications to change the mailing
16 address to Dr. Duick's home address to prevent the Hospital's Management Committee from
17 discovering the unauthorized deferred compensation plans and deposits.

18 104. On August 19, 2016, Mr. Smith and Dr. Duick directed the transfer of \$989,999 of
19 Hospital funds by interstate wire or United States Mail for deposit into the Vanguard account
20 without disclosing the transfer to or having the authorization of the Management Committee.

21 105. In total, Mr. Smith, Ms. Heismeyer, and Dr. Duick diverted \$1,979,999 to
22 Vanguard to fund their unauthorized deferred compensation plans for their personal benefit
23 without disclosure to or authorization by the Hospital's Management Committee.

1 **(4) Unauthorized Deferred Compensation Payments Continue in 2017.**

2 106. On July 28, 2017, the Hospital paid Dr. Duick \$817,517 and Mr. Smith \$306,569
3 in deferred compensation without disclosure to or authorization by the Management Committee.

4 107. On July 31, 2017, Mr. Smith and Dr. Duick withdrew \$684,086 from the Vanguard
5 account by United States Mail or interstate wire transfer without disclosure to or authorization of
6 the Hospital's Management Committee.

7 108. Through the end of 2017, Mr. Smith, Ms. Heismeyer, and Dr. Duick had associated
8 and conspired to divert a total of \$3,321,874 in unauthorized compensation to themselves for their
9 personal benefit.

10 **(5) More Deferred but Unauthorized Compensation in 2018.**

11 109. On August 10, 2018, the Hospital paid Dr. Duick \$407,682 and Mr. Smith \$203,841
12 in deferred compensation without disclosure to or the authorization of the Management
13 Committee.

14 110. On December 19, 2018, Mr. Smith or Dr. Duick withdrew \$39,967 from the
15 Vanguard account by United State Mail or interstate wire transfer without disclosure to or
16 authorization of the Management Committee.

17 111. Through the end of 2018, Mr. Smith and Ms. Heismeyer along with Dr. Duick had
18 associated and conspired to divert \$3,933,397 in undisclosed and unauthorized compensation from
19 the Hospital in addition to their base salaries and standard annual bonuses.

20 **(6) The Unauthorized Deferred Compensation Payments Continue in 2019.**

21 112. On April 14, 2019, Dr. Duick and Mr. Smith caused to be withdrawn \$41,797 from
22 the Vanguard account by United States Mail or interstate wire transfer without disclosing the
23 transfer to or having the authorization of the Hospital's Management Committee.

1 113. On August 12, 2019, Dr. Duick and Mr. Smith caused to be withdrawn \$1,134,617
2 from the Vanguard account by United States Mail or interstate wire transfer without disclosing the
3 transfer to or having the authorization of the Hospital’s Management Committee.

4 114. On August 14, 2019, the Hospital paid Mr. Smith \$282,545 and Ms. Heismeyer
5 \$319,527 in unauthorized deferred compensation benefits.

6 115. The Hospital paid Mr. Smith, Ms. Heismeyer, and Dr. Duick a total of \$4,535,469
7 in undisclosed and unauthorized compensation through the end of 2019.

8 **(7) Duick, Smith, and Heismeyer Return Federal Funds to Avoid Audits.**

9 116. In response to the COVID 19 global pandemic, the United States enacted the
10 Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) of 2020. The CARES Act
11 created a “Provider Relief Fund” or “PRF” to distribute funds to healthcare providers and a
12 “Paycheck Protection Program” or “PPP” which provided forgivable loans to small businesses.

13 117. On April 3, 2020, the Hospital applied for a federal funds under the CARES Act.

14 118. On April 10, 2020, the Hospital received PRF funding of \$1,847,529.80.

15 119. The Hospital’s Management Committee met on April 13, 2020, remotely due to the
16 COVID 19 pandemic.

17 120. Mr. Smith and Ms. Heismeyer, along with Dr. Duick, were present for the meeting
18 in their roles as corporate officers.

19 121. Mr. Smith, Ms. Heismeyer, and Dr. Duick made presentations to the Management
20 Committee relating to (a) medical staff appointments; (b) the Hospital’s response to the COVID
21 19 pandemic; (c) the approval of medical staff bylaws and rules; and (3) performance activities
22 including risk management, pending litigation, and patient satisfaction.

1 122. Mr. Smith reported on the Hospital's First Quarter financial status. During his
2 report, Dr. Duick noted that the admission of patients had declined 25-30% which was confirmed
3 by other members of the Management Committee in their practices. Mr. Smith, in response, told
4 the Management Committee that the Hospital had been tentatively approved for PPP loan of \$2.6
5 million which, if received would be applied to payroll, mortgage payments, and leases.

6 123. Mr. Smith also reported that the Hospital does not have 60 days of cash on hand
7 and that the Hospital's year-to-date net income was 20% below budget.

8 124. "The Management Committee discussed cash on hand and the uncertainty of the
9 future given COVID 19." Based upon the financial situation, there were no distributions of profit
10 to members.

11 125. On April 17, 2020, the Hospital received a PPP loan in the amount of \$2,604,000.

12 126. On April 28, 2020, the United States Secretary of the Treasury announced that the
13 federal government would audit any business taking out more than \$2,000,000 in PPP loans.

14 127. On May 7, 2020, Mr. Smith returned the PRF proceeds in the amount of
15 \$1,847,529.80 without disclosure to or authorization of the Hospital's Management Committee to
16 avoid a federal government audit of the Hospital which would likely disclose their unauthorized
17 bonuses and deferred compensation payments.

18 128. On May 12, 2020, Mr. Smith or Dr. Duick returned the PPP loan in the amount of
19 \$2,604,000 without disclosure to or authorization of the Hospital's Management Committee to
20 avoid a federal government audit of the Hospital which would likely disclose their unauthorized
21 bonuses and deferred compensation payments.

22 129. On June 22, 2020, Mr. Smith falsely reported to the Hospital's auditors that the
23 Hospital did not participate in PPP.

1 130. The Hospital’s Management Committee met remotely on July 20, 2020.

2 131. Mr. Smith, Ms. Heismeyer, and Dr. Duick were present at the meeting in their roles
3 as corporate officers.

4 132. After the usual reports, Mr. Smith reported on Second Quarter finances to the
5 Management Committee. His report noted that revenue was down more than \$1,500,000. The
6 committee members reported that their procedures were down 20-50% due to the pandemic.

7 133. One member of the Management Committee asked about the PPP loans. Dr. Duick
8 reported that the Hospital had applied for a PPP loan but he had great concerns about the audit and
9 the Hospital’s ability to show need for the loan as is required. The Management Committee asked
10 for an update at the October Management Committee meeting.

11 134. Mr. Smith, Ms. Heismeyer, and Dr. Duick knew that the PRF proceeds in the
12 amount of \$1,847,529.80 had been declined and returned on May 7, 2020, and that the PPP loan
13 proceeds in the amount of \$2,604,000 had been declined and returned on May 12, 2020. Mr.
14 Smith, Ms. Heismeyer, and Dr. Duick purposefully withheld material information from the
15 Management Committee during a remote meeting conducted through interstate wire
16 communications.

17 135. A special meeting of the Management Committee was convened on July 27, 2020,
18 by members of the Management Committee who wanted further discussion on the PPP loan. Dr.
19 Duick informed the Management Committee that the “Administration,” meaning Mr. Smith, Ms.
20 Heismeyer, and himself, had made the decision to return the PPP loan due to the threat of audit
21 and their concern that the Hospital would not qualify.

22 136. One member of the Management Committee then read from Mr. Smith’s report to
23 the Management Committee on First Quarter finances at the April 13, 2020, meeting. This member

1 then observed that “during the April 13 meeting the case was made by Dr. Duick and Mr. Smith
2 that COVID-19 was a threat that had already negatively affected the business of the hospital in the
3 first quarter and the second quarter was shaping to be the same.” This member wanted to know
4 whether Dr. Duick and Mr. Smith could “predict the future and know that a COVID-19 outbreak
5 was not going [to] happen within the hospital and that would shut down the hospital for a period
6 of time, or that one [or] more of the physicians operating at the hospital could get infected and
7 therefore rendering their services unavailable, or that the Kansas governor will not shut down
8 businesses again in the near future and order to stope elective surgeries, or any other scenarios that
9 could negatively affect [the Hospital’s] business.”

10 137. The member of the Management Committee specifically questioned Mr. Smith’s
11 and Dr. Duick’s decision to return the money without consulting the Management Committee.

12 138. This same member then asked Mr. Smith whether the Hospital had received PRF
13 funds. Mr. Smith confirmed that the Hospital did receive the funds and “that there was no
14 requirement for prior application or attestation in order to receive the funds.” Mr. Smith then
15 reported that he and Dr. Duick decided to return the funds to the federal government because the
16 Hospital had not treated any COVID patients and “Administration” had determined that the
17 Hospital did not qualify for the money.

18 139. The Management Committee member told Mr. Smith that the return of the funds
19 was another incorrect and unauthorized management decision.

20 140. As a result of these disclosures, Management Committee members agreed to meet
21 and review the Hospital’s Operating Agreement and other information which would be important
22 to the Management Committee to provide recommendations. Dr. Duick informed the Management

1 Committee that the Hospital had applied for and received a PPP loan which could be forgiven but
2 returned the money on May 6, 2020.

3 141. Mr. Smith and Ms. Heismeyer, along with Dr. Duick, associated and conspired to
4 return the PRF and PPP funds received from the federal government under the CARES Act through
5 interstate wire transfers to avoid a federal government audit which would have disclosed their
6 unauthorized bonuses and deferred compensation payments.

7 142. The actions of Dr. Duick, Mr. Smith, and Ms. Heismeyer in breaching their
8 fiduciary duties as to return the CARES Act proceeds caused the Hospital to lose funding for which
9 the Hospital qualified in the amount of \$4,408,000.

10 **(8) The Unauthorized 2020 Employment Agreements.**

11 143. At some point in 2020, Mr. Smith and Ms. Heismeyer, along with Dr. Duick,
12 conspired to prepare new employment agreements for Mr. Smith and Ms. Heismeyer.

13 144. These new agreements, like their earlier employment contracts, provided for
14 severance benefits if their employment terminated without cause or due to a “change in control.”

15 145. The change-of-control provision, however, was materially expanded in the 2020
16 employment agreements. Previously, the change-in-control was limited to (a) a change in
17 ownership of the Hospital; (b) a change in the Chairman or Chief Executive Officer; or (c) a
18 merger, consolidation, sale, or similar transaction involving the Hospital.

19 146. Under the 2020 agreements, Mr. Smith and Ms. Heismeyer could voluntarily resign
20 and trigger the change-of-control provisions in each other’s contract meaning a mutual resignation
21 would allow them to collect full severance benefits.

22 147. The severance benefits, if triggered, were lucrative. The severance benefits in Mr.
23 Smith’s 2020 contract equaled (a) two and a half times his annual base salary; (b) two and a half

1 times their most recent bonus; (c) two times the Hospital's and their annual contributions to the
2 Hospital's retirement plan; (d) paid time off accrued through the date of termination and 30 days
3 thereafter; and (e) twenty-four months of insurance benefits.

4 148. Ms. Heismeyer's severance benefits were also lucrative but not as much as Mr.
5 Smiths: (a) two times her annual base salary; (b) two times her most recent bonus; (c) two times
6 the Hospital's and her annual contributions to the Hospital's retirement plan; (d) all accrued paid
7 time off through termination and 30 days thereafter; and (e) eighteen months of insurance benefits.

8 149. The Hospital's Management Committee never expressly delegated authority to Dr.
9 Duick to prepare or execute new employment agreements with Mr. Smith and Ms. Heismeyer or,
10 specifically, the expansion of the change-of-control provision and severance benefits which were
11 not in any respect justified or in the best interests of the Hospital.

12 150. These agreements were executed with an effective date of February 28, 2020.

13 151. Dr. Duick executed these revised employment agreements without disclosure to or
14 authorization by the Hospital's Management Committee.

15 152. Mr. Smith and Ms. Heismeyer knew that Dr. Duick lacked authority to execute the
16 revised employment agreements without authorization from the Management Committee.

17 153. Mr. Smith, Ms. Heismeyer, and Dr. Duick never reported the 2020 employment
18 agreements to Hospital's Management Committee.

19 **(9) Mr. Smith and Ms. Heismeyer Resign.**

20 154. On August 4, 2020, Mr. Smith or Dr. Duick withdrew the remaining \$273,014.51
21 from the Vanguard account using interstate wire communication or United States Mail.

1 155. On August 5, 2020, Mr. Smith and Ms. Heismeyer simultaneously resigned their
2 positions with the Hospital by submitting resignation letters to Dr. Duick. Their resignations,
3 however, were not disclosed to Management Committee until August 10, 2020.

4 156. On August 6, 2020, Dr. Duick instructed the Hospital – without disclosure to or
5 authorization from the Management Committee – to pay Mr. Smith \$273,014.51 in deferred
6 compensation which was the exact same amount withdrawn by interstate wire transfer or United
7 States Mail by Dr. Duick or Mr. Smith on August 4, 2020.

8 157. On August 7, 2020, the Hospital paid Mr. Smith \$841,552.64 and Ms. Heismeyer
9 \$674,834.30 in undisclosed and unauthorized severance benefits by wire transfer.

10 158. The use of wire transfer avoided the necessity to get two authorized signatures on
11 checks as required by the Hospital’s Operating Agreement and limited the ability of the Hospital
12 to stop payment when the payments were discovered.

13 159. On Sunday, August 9, 2020, Dr. Duick circulated a draft letter to Mr. Smith and
14 Ms. Heismeyer. In his email conveying the draft letter, Dr. Duick told them that “this
15 informational letter” must “go out” the next day “after all of our meetings.” The draft letter falsely
16 stated that Mr. Smith and Ms. Heismeyer had presented their resignations on Friday, August 7,
17 2020. Mr. Smith and Ms. Heismeyer had actually resigned on Wednesday, August 5, 2020, as
18 shown by their resignation letters and the payment of severance by wire transfer to Mr. Smith and
19 Ms. Heismeyer on Friday, August 7, 2020.

20 160. On Monday, August 10, Dr. Duick presented a letter dated August 8, 2020, to the
21 Management Committee, with misrepresentations about the dates of Mr. Smith’s and Ms.
22 Heismeyer’s resignations and without mention of payment of \$1,516,386.90 in severance to Mr.

1 Smith and Ms. Heismeyer. The wire transfers were made days before the Management Committee
2 was notified of Mr. Smith's and Ms. Heismeyer's resignations.

3 161. That evening, a special meeting of the Hospital's Management Committee was
4 convened. Mr. Smith, Ms. Heismeyer, and Dr. Duick did not attend. The members of the
5 Management Committee – who had no knowledge of the unauthorized bonuses, deferred
6 compensation, or severance payments – decided to approach Mr. Smith and Ms. Heismeyer to
7 remain with the Hospital or at least through February 28, 2021, to assist in the transition to new
8 leadership. The Management Committee authorized “a stay bonus to be paid on or about February
9 28, 2021 of the sum of \$25,000 in addition to their normal and expected salary.”

10 162. On August 26, 2020, Ms. Heismeyer took steps to remove computer files, folders,
11 and data from the Hospital's computer system. On that date, Ms. Heismeyer conducted internet
12 searches for terms including “how to save email contacto (*sic*) external hard drive” and “how to
13 save outlook to external hard drive.” Ms. Heismeyer purchased 50 GB of cloud storage and then
14 attached external USB drives to the Hospital's computer to upload Outlook data files, email
15 folders, litigation folders, Vanguard files and folders, and others. These items were then deleted
16 from the Hospital's computer systems.

17 163. Mr. Smith also deleted computer files and folders from the Hospital's computer
18 systems in conjunction with his resignation including all of his sent and received emails back to
19 August 2019, bank statements, ownership files, distribution files, and payments made in 2019.

20 164. Mr. Smith, Ms. Heismeyer, and Dr. Duick have also removed Hospital documents
21 from their personnel files including prior employment agreements, signed deferred compensation
22 agreements, and Vanguard account statements to cover up their undisclosed and unauthorized
23 compensation payments.

1 170. Mr. Smith, Ms. Heismeyer, and Dr. Duick engaged in a pattern of racketeering
2 activity in the conduct of their enterprise from 2015 to the present including (a) the use of United
3 States Mail and interstate wire on multiple occasions to communicate with Vanguard to manage
4 the funds diverted without disclosure to or authorization of the Hospital's Management Committee
5 to fund their deferred compensation scheme constituting mail fraud as defined by 18 U.S.C. §1341
6 and wire fraud as defined by 18 U.S.C. §1343 and (b) the interstate transportation of stolen
7 property, that is the money misappropriated from the Hospital and transferred to Vanguard to fund
8 the deferred compensation scheme and the return of the CARES Act proceeds, as defined by 18
9 U.S.C. §2314.

10 171. The racketeering activity conducted by Mr. Smith, Ms. Heismeyer, and others
11 constituted a pattern of racketeering activity by including at least two predicate acts within a ten
12 year period as defined by 18 U.S.C. §1961(5). The predicate acts conducted by this enterprise
13 were related to each other and the enterprise's purposes to embezzle funds from the Hospital
14 constituting a closed period of repeated conduct over approximately 5 years.

15 172. The Hospital was injured in its business and property due to Defendants' violations
16 of 18 U.S.C. §1962, as described above in the amount of \$10,459,855 exclusive of interest, costs,
17 attorney's fees, and expenses.

18 173. The Hospital is entitled to recover treble damages of \$31,379,565 jointly and
19 severally from Mr. Smith and Ms. Heismeyer along with its costs, attorney's fees, and other
20 litigation expenses.

21 WHEREFORE Plaintiff KANSAS HEART HOSPITAL, LLC, through its lawyers, James
22 A. Walker, Lisa A. McPherson, and Derek S. Casey of TRIPLETT WOOLF GARRETSON, LLC,
23 demands JUDGMENT jointly and severally against Defendants STEPHEN S. SMITH and JOYCE

1 A. HEISMEYER for compensatory, statutory, and punitive damages; civil penalties; and
2 attorney's fees, costs, and expenses, to remedy and punish Defendants' RICO violations with such
3 other and further relief as the Court deems to be just and equitable.

4 **COUNT 2 – BREACH OF FIDUCIARY DUTY**

5 Plaintiff KANSAS HEART HOSPITAL, LLC, through its lawyers, James A. Walker, Lisa
6 A. McPherson, and Derek S. Casey of TRIPLETT WOOLF GARRETSON, LLC, incorporates its
7 allegations stated above and, in support of this Count 2, alleges as follows:

8 174. Mr. Smith and Ms. Heismeyer, as corporate officers, owed the Hospital and its
9 members a strict fiduciary duty to act with good faith and loyalty to advance the interests of the
10 Hospital and its members above their own self-interests.

11 175. Mr. Smith and Ms. Heismeyer, as fiduciaries, must disclose material information
12 to the Hospital's Management Committee where disclosure was expected to fulfill their strict and
13 uncompromising duty of loyalty.

14 176. Mr. Smith and Ms. Heismeyer breached their fiduciary duties by engaging in self-
15 dealing as corporate officers by participating in transactions which benefited themselves instead
16 of the Hospital. These self-dealing transactions included the undisclosed and unauthorized
17 bonuses, deferred compensation benefits, and severance payments.

18 177. The Hospital suffered damages as a result of Mr. Smith's and Ms. Heismeyer's
19 breaches of fiduciary duty, including:

- 20 (a) The payment of undisclosed and unauthorized compensation bonuses totaling
21 \$1,000,000 to Mr. Smith and Ms. Heismeyer in 2015;
- 22 (b) The payment of \$3,535,469 in undisclosed and unauthorized deferred compensation
23 between 2015 and 2020;

- 1 (c) The undisclosed and unauthorized return of \$4,408,000 in federal CARES ACT
2 funding to avoid a federal audit which would disclose their diversion of money; and
3 (c) Payment of \$1,516,386.90 in undisclosed and unauthorized severance benefits to
4 themselves in 2020;

5 These damages total \$10,459,855 exclusive of interest, costs, attorney's fees, and expenses.

6 178. Mr. Smith's and Ms. Heismeyer's breach of fiduciary duties were willful, wanton,
7 fraudulent, and malicious acts towards the Hospital. Accordingly, the Hospital is entitled to
8 recover punitive damages to punish Mr. Smith and Ms. Heismeyer for their breach of fiduciary
9 duties and to deter others from like conduct.

10 WHEREFORE Plaintiff KANSAS HEART HOSPITAL, LLC, through its lawyers, James
11 A. Walker, Lisa A. McPherson, and Derek S. Casey of TRIPLETT WOOLF GARRETSON, LLC,
12 demands JUDGMENT jointly and severally against Defendants STEPHEN S. SMITH and JOYCE
13 A. HEISMEYER for compensatory damages, punitive damages, and attorney's fees, costs, and
14 expenses insofar as allowed by law, to remedy and punish Defendants' breach of their fiduciary
15 duties with such other and further relief as the Court deems to be just and equitable.

Respectfully submitted,

TRIPLETT WOOLF GARRETSON, LLC

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