STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Tuomey d/b/a Tuomey Healthcare System, Inc., Plaintiff, v. Nexsen Pruet LLC, Defendant.	Civil Case No. _____ **SUMMONS IN A CIVIL ACTION**

TO: Nexsen Pruet
c/o: John T. Lay, Jr. Esq.
GALLIVAN, WHITE & BOYD
1201 Main Street, Suite 1200
Columbia, SC 29201

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Dated: July 11, 2016

s/ James M. Griffin
Attorney for Plaintiff

Address: James M. Griffin, SC Bar #9995
GRIFFIN DAVIS LLC
Post Office Box 999
Columbia, South Carolina 29202
(803) 744-0800
jgriffin@griffindavislaw.com

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Tuomey d/b/a Tuomey Healthcare System, Inc., Plaintiff, v. Nexsen Pruet LLC, Defendant.	Civil Case No. _____ **COMPLAINT** (JURY TRIAL DEMANDED)

INTRODUCTION

1. At all times relevant to this Complaint, Tuomey d/b/a Tuomey Healthcare System Inc. ("Tuomey") operated a nonprofit community hospital located in Sumter, South Carolina serving an area designated as medically underserved by the federal government. Recruiting surgeons to rural communities is challenging for hospitals like Tuomey. Starting around 2000, surgeons who had previously performed surgical procedures at Tuomey were beginning to perform more outpatient procedures in their offices or off-site surgery centers. Tuomey sought the advice of its long time legal counsel Nexsen Pruet LLC ("Nexsen Pruet") on how to address the growing challenges of recruiting and retaining physicians.

2. Hospital-physician financial arrangements are subject to federal laws that carry severe civil and criminal penalties that are designed to prevent overutilization of services by physicians who stand to profit from referring patients to facilities or entities in which the physicians have a financial interest. There are two principal laws governing physician compensation agreements, Stark, 42 U.S.C. § 1395nn, and the Anti-Kickback Statute (the "AKS"), 42 U.S.C. § 1320a-7b. Both of these statutes generally prohibit a hospital from paying physicians to refer patients to the hospital.

3. Nexsen Pruet researched, designed, drafted, and recommended Tuomey enter into part-time employment contracts (the "Contracts") with the physicians whereby the physicians would be paid to perform out-patient surgeries exclusively at Tuomey's newly constructed out-patient surgery center ("OSC").

4. Nexsen Pruet advised Tuomey that the Contracts complied with Stark; that there was minimal risk that a court or regulator would find that the Contracts violated Stark; and that even if the Contracts were found to be illegal, Tuomey would simply be required to unwind the Contracts without suffering any financial penalty. Tuomey faithfully relied upon Nexsen Pruet's legal advice and from January 2005 to July 2007 entered into nineteen (19) Contracts with physicians.

5. Tuomey paid Nexsen Pruet more than two-hundred and fifty thousand dollars ($250,000) to provide competent legal advice in relation to the design and implementation of the Contracts. However, Nexsen Pruet's legal advice was not only wrong, but statements by Nexsen Pruet attorneys during the course of their representation of Tuomey were misleading and reckless. Many of Nexsen Pruet's reckless representations were successfully used against Tuomey by the Federal Government in a lawsuit alleging that the Contracts were illegal.

6. Despite assurances made by Nexsen Pruet to the contrary, the Contracts were very high risk, "one of a kind," "never before tested" physician financial arrangements. Under the Contracts, the physicians would receive total compensation on average of twenty percent (20%) more than the hospital would collect from the physicians' services; the physicians' compensation fluctuated based upon the number of procedures performed which in turn directly correlated with the amount of fees the hospital could charge Medicare; and the agreements obligated the

physicians to perform all of their out-patient surgeries at Tuomey's out-patient surgery center for ten (10) years.

7. Nexsen Pruet gave Tuomey these assurances, despite its awareness of circumstances that increased the risk of the part-time contracts being scrutinized. For example, Nexsen Pruet was aware that surgical specialty groups within the Sumter County community were contemplating performing out-patient surgeries within their offices. Nexsen Pruet also knew that the urology practice group planned to construct an ambulatory surgery center in Sumter to compete with Tuomey's planned OSC.

8. In fact, Kevin McAnaney, an unbiased expert in the field of Stark Law who was jointly hired by Tuomey and Dr. Drakeford, a physician who refused to sign a Contract and whose counsel raised concerns about the legality of the Contracts, informed Nexsen Pruet that the Contracts were very risky and that (i) the Government would conclude that Tuomey was in fact paying above fair market value for patient referrals; (ii) that the fair market value opinion obtained by Nexsen Pruet would not pass the "red face" test; and (iii) that the Government had successfully prosecuted similar cases where physicians were being paid more than collections and this was very dangerous for Tuomey.

9. In violation of its obligation to be candid and forthright with its client, Nexsen Pruet did not accurately convey McAnaney's opinions to Tuomey. Instead, Nexsen Pruet blocked the Tuomey Board's request to obtain further information from McAnaney and simply advised Tuomey that there was a fundamental disagreement with McAnaney over whether hospitals could compensate physicians in excess of their collections. In addition, Nexsen Pruet doubled down on the bad legal advice it had given Tuomey by advising the Board "it is our

strong opinion…that any agent that came in and said [the Contracts are] 'no good' should be fired."

10. Just as McAnaney foresaw, the United States Government began an investigation based upon a "whistleblower" complaint filed by Dr. Drakeford and determined that the Contracts violated Stark. The Government initially requested that Tuomey unwind the Contracts. Nexsen Pruet advised against doing so, despite previously informing Tuomey that should the Contracts be challenged, the worst case scenario would be for Tuomey to unwind the agreements. Nexsen Pruet's advice to continue with the Contracts was tainted by Nexsen Pruet's self-interest, because Nexsen Pruet was also under investigation for its role in creating the Contracts.

11. Tuomey's reliance on Nexsen Pruet's advice proved very costly. The United States sued Tuomey alleging the Contracts violated the Stark Law and demanded that Tuomey repay over $52,766,519 plus interest at the Medicare Overpayment Rate of at least 9.75% under common law legal theories of payment under mistake of fact and unjust enrichment. In addition, on September 30, 2013, the Federal Government obtained a judgment in the amount of $237,454,195 following a jury trial on the claims arising under the False Claims Act. Thereafter, on July 2, 2015, the Fourth Circuit Court of Appeals affirmed the jury's finding that the Nexsen Pruet crafted contracts violated the Stark law. As a result of this ruling, Tuomey was legally obligated to refund the Medicare overpayments with interest. Tuomey thereafter resolved the common law repayment claims and the False Claims Act judgment by selling substantially all of its assets to Palmetto Health and using the proceeds to pay $72,406,860 to the Federal Government and $2,500,000 to counsel for Dr. Drakeford as reimbursement of attorneys' fees and expenses.

PARTIES

12. Plaintiff Tuomey is a South Carolina charitable entity with its principal place of business in Sumter, South Carolina, and until January 1, 2016, owned and operated a community nonprofit hospital in Sumter.

13. Defendant Nexsen Pruet is a South Carolina corporation engaged in the business of law with its headquarters in Columbia, South Carolina. At all times relevant to this Complaint, Defendant Nexsen Pruet acted through its member lawyers including the following:

a. Al Pollard ("Pollard") was an attorney licensed to practice in South Carolina; is the former managing member of Nexsen Pruet; and at all times relevant to this Complaint was acting within the scope of his authority, actual or apparent, on behalf of Nexsen Pruet;

b. Tim Hewson ("Hewson") is an attorney licensed to practice in South Carolina; is a member of Nexsen Pruet; and at all times relevant to this Complaint was acting within the scope of his authority, actual or apparent, on behalf of Nexsen Pruet;

c. Matthew Roberts ("Roberts") is an attorney licensed to practice law in South Carolina; is a member of Nexsen Pruet; and at all times relevant to this Complaint was acting within the scope of his authority, actual and apparent, on behalf of Nexsen Pruet.

VENUE

14. Venue is appropriate in Sumter County under S.C. Code Ann. §§ 15-7-30(C)(2) and (E)(2) because Nexsen Pruet's legal advice was provided to Tuomey in Sumter County, Nexsen Pruet's attorneys attended meetings with the Directors and Officers of Tuomey at the

hospital located in Sumter County, and the Contracts drafted by Nexsen Pruet were entered into and performed in Sumter County.

FACTS

(Legal Advice Regarding the Contracts)

15. On or before August 2003, Tuomey entered into an attorney client relationship with Nexsen Pruet and its members Pollard, Hewson and Roberts whereby Tuomey sought legal guidance to find a lawful way to address problems Tuomey was experiencing with recruiting and retaining qualified surgeons in Sumter County and to ensure that there would be surgical specialists to provide for patient care in Tuomey's newly constructed OSC.

16. Nexsen Pruet members Pollard and Hewson initially undertook to advise Tuomey with regard to the type of financial arrangements that would be lawful and agreeable to Tuomey and the various surgical specialists on the medical staff.

17. Pollard and Hewson originally recommended that Tuomey propose either full-time employment agreements or exclusive services agreements with the Gastroenterologists ("GIs").

18. However, the GIs, as well as other surgical specialists, were reluctant to enter into full-time employment agreements with Tuomey and preferred a joint venture arrangement whereby the surgical specialists would have an ownership interest in the OSC.

19. Hewson and Pollard then proposed a part-time employment relationship to Tuomey and the physicians as a compromise.

20. On August 27, 2003, at a meeting with members of Tuomey's administration and surgical specialists, Hewson and Pollard presented the part-time employment proposal.

21. The conversations at the August 27, 2003 meeting were audio recorded.

22. During the August 27, 2003 meeting, Hewson initially discussed Stark's limitations on physician and hospital financial arrangements. He then made the following reckless statements: "*I'm not going to make much of a living as a business lawyer if I'm always Dr. No—'oh, you can't do that, no, can't do that'… So you have to be flexible.*" Hewson further explained that the economics did not support an OSC joint venture between the hospital and physicians, and told Tuomey and the physicians that *"the challenge becomes if there is a way to provide economic incentive legally to physicians who have been and continue to be loyal to Tuomey in terms of referrals and obviously we do not want to be in a situation where we're paying for referrals."* Pollard compounded Hewson's reckless statements with the following additional reckless statements. Pollard described the proposed part-time employment relationship with the physicians as way of *"sharing revenues with those people who might otherwise, frankly, go out and compete with us by trying to build their own center…What we have carved out is a relationship…where you can share in those revenues, but you might technically be considered a part-time employee."* Pollard continued, *"You're actually being asked to come to work at it (OSC) and share in some of the return if we're all able to make it work but you're not indentured to it. So if it doesn't work, these guys (Tuomey) are big losers.*" Defendant Hewson further stated, *"So the challenge is, under this arrangement, how can we create something that sort of acts like ownership but we call it an employment relationship to take advantage of the statutory exceptions under the two laws…So that the ultimate overlay of all of this, is that, all of these employment agreements would have to work within a model that replicates in many ways the investor owned for-profit ASC but still running under the ownership. So it's essentially like phantom stock, phantom ownership, as part and parcel of the employment agreement. "* At the civil trial, the Government played audio recordings of these reckless statements to the jury and

argued that the statements of Hewson and Pollard proved that the compensation under the Contracts created by Nexsen Pruet was disguised payments for referrals and in violation of Stark.

23. By written memorandum dated September 12, 2003, Nexsen Pruet addressed the proposed part-time employment agreements and reassured Tuomey that the Contracts were lawful: "*We believe that the structure outlined above for employment of the Physicians* ***will likely comply with the various applicable laws and regulations, including Stark and Anti-Kickback****."*

24. The September 12, 2003 memorandum does not contain any discussion regarding the penalties that Tuomey would face if the proposed employment agreements violated Stark or the AKS.

25. On January 19, 2004, during a meeting of the Outpatient Surgery Center Advisory Committee with members of Tuomey's administration and surgical specialists, Hewson reviewed the compensation that was being proposed under the Contracts. This meeting was audio recorded.

26. Hewson is heard on the January 19, 2004 audio recording discussing the commercial reasonableness of the part-time employment agreements, which is an essential requirement under Stark. Hewson made the following reckless statements that were used against Tuomey at trial: "*And looking at commercial reasonableness, they're going to say what's the value to the hospital for these services and kind of what are they getting for these services? Because of Stark and Anti-Kickback laws, you can't explicitly say, Well, it's because we're getting all the referrals for these patients," and of course that's what we're doing. That's not legal consideration.*" The Government argued that these statements proved that the

compensation under the Contracts was disguised payment to the physicians for referrals and in violation of Stark.

27. Hewson is also heard on the January 19, 2004 audio tape asserting that there is a high level of certainty that the Contracts comply with Stark and the AKS. When comparing the typical full-time employment agreement model with the part-time employment concept Nexsen Pruet was proposing, Hewson stated, *"There is much more certainty under the Federal health laws, and the federal tax laws over that.* ***There is a pretty high level of certainty for this deal****, in terms of compliance…so we have legal protection for this model, but it's not the typical model that's used throughout the country, so a full employment mode is also something that I think could be considered*."

28. Hewson further stated in the January 19, 2004 meeting that if the Contracts were found to violate federal law, the remedy the Government would most likely seek would be for Tuomey to unwind the Contracts.

29. In a written memorandum addressed to Tuomey originally dated January 28, 2004 and updated on November 22, 2004, Nexsen Pruet once again represented that the Contracts were lawful by asserting that the proposed Contracts with the GIs *would* qualify for the employment exception under Stark based on a Cejka Consulting ("Cejka") report that indicated that the proposed compensation arrangements were both at fair market value and commercially reasonable. However, the Cejka report does not address commercial reasonableness. Moreover, there is no discussion of the degree of risk of non-compliance or consequences if the Contracts are found to violate Stark or the AKS.

30. In addition, Nexsen Pruet prepared a memorandum to the Board of Trustees on behalf of the Tuomey Administration originally dated January 29, 2004 and updated November

22, 2004, requesting approval of the Contracts with the GIs and attaching Nexsen Pruet's originally dated January 28, 2004 and updated on November 22, 2004 memorandum opinion.

31. Neither memoranda contained a meaningful discussion sufficient to apprise Tuomey of the risks the Contracts presented regarding their compliance with Stark or the AKS and the potential penalties Tuomey would face for Stark violations. Instead both memoranda merely state "[f]ailure to comply with this law can result in significant penalties and exclusion from the Medicare Program."

32. In advance of a Tuomey Board meeting on December 6, 2004, Nexsen Pruet prepared a memorandum of the same date entitled "Executive Summary of Development of Tuomey Professional Services LLC, Tuomey Gastroenterology Services LLC & Arrangements with Gastroenterologists" to the Board from "Tuomey Administration."

33. In this December 6, 2004 memorandum, Nexsen Pruet again represents that the "*Employment Agreements and Services Agreement* ***will be structured to comply with applicable Stark exceptions***." The memorandum further states that the Contracts ***will comply with the bona fide employment relationship exception,*** which has the following requirements: (1) the employment is for identifiable services; (2) the amount of remuneration under the employment (i) is consistent with the fair market value of the services; and (ii) is not determined in a manner that takes into account (directly or indirectly) the volume or value of referrals by the referring physician; (3) the remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the employer; and (4) the employment meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse." This memorandum also discussed fair market value and states "[a]t the advice of legal counsel, Tuomey Administration has obtained a

fair market value report from Cejka Consulting for the compensation paid under the Employment Agreement…This fair market value and commercial reasonableness analysis was necessary to document compliance with Stark…."

34. Pollard and Roberts attended the December 6, 2004 Tuomey Board meeting where the Board voted to approve the Contracts with four (4) GIs. According to the audio recording of this meeting, Tuomey's CEO Jay Cox reiterated that Nexsen Pruet has advised Tuomey that the worst thing that would happen if the Contracts were found to be non-compliant was the Government would say "dismantle" the Contracts and would not hold anyone criminally or civilly culpable. Pollard and Roberts did not dispute Mr. Cox's verbalization of his understanding of their advice.

35. On January 1, 2005, twelve (12) Contracts went into effect, which included four (4) GI Contracts, one (1) Ophthalmology Contract and seven (7) OBGYN Contracts. Thereafter Tuomey entered into seven (7) additional Contracts: four (4) Contacts with general surgeons in May 2005; one (1) Contract with a vascular surgeon in September 2005; one (1) Contract with a general surgeon in November 2006; and one (1) Contract with an OBGYN in July 2007. In total, Tuomey entered into 19 Contracts based on Nexsen Pruet's advice.

36. The standard of care applicable to attorneys practicing healthcare law required Nexsen Pruet to inform Tuomey that these Contracts were very risky and that by entering into the Contracts, Tuomey was being exposed to ruinous financial penalties.

37. Tuomey would have never agreed to the Contracts and knowingly accepted the degree of risk to which Tuomey was being exposed but for Nexsen Pruet's negligent failure to properly advise Tuomey.

(Dr. Drakeford's Lawyer Questions the Contract)

38. Tuomey also offered Contracts to the orthopedic surgeons who worked in a practice managed by Dr. Drakeford.

39. Dr. Drakeford retained Greg Smith an attorney with Womble Carlyle to negotiate on behalf of the orthopedic practice.

40. Hewson represented Tuomey in the negotiations with Greg Smith.

41. During these negotiations, Greg Smith raised significant legal concerns with Hewson about the legality of the Contracts, specifically questioning the fair market value and commercial reasonableness of the compensation plans that paid the physicians more than the physicians collected for their services.

42. A physician compensation arrangement must be fair market value and commercially reasonable in order to comply with Stark. The Stark Regulations Commentary (69 Fed. Reg. 16093 (March 26, 2004)) states that "an arrangement will be considered commercially reasonable" in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential designated health services referrals."

43. At the civil trial, Greg Smith testified that Hewson defended the commercial reasonableness of the Contracts by stating "*you are not going to want to hear this, but the hospital does not lose money on the contracts, because the hospital makes money on the facility fees that are referred to the hospital when the doctors perform procedures there.*" Once again, the Government used the statement of Tuomey's counsel Hewson to Tuomey's detriment at the

civil trial as additional proof that the compensation under the Contracts structured by Nexsen Pruet unlawfully took into account the volume and value of referrals.

44. Because Hewson refused to acknowledge that there were any compliance concerns with the part-time agreements being offered to Dr. Drakeford's group, Greg Smith suggested that both Tuomey and Dr. Drakeford jointly hire Kevin McAnaney to provide his independent and unbiased assessment of the compliance risks of the Contracts.

45. McAnaney had recently been the Chief of the Industry Guidance Branch of the United States Department of Health and Human Services Office of Counsel to the Inspector General. In that position, McAnaney wrote a substantial portion of the regulations implementing the Stark Law.

46. McAnaney was jointly retained by Tuomey and Dr. Drakeford to provide advice with respect to the proposed business relationship between them. Nexsen Pruet failed to advise Tuomey to obtain a written confidentiality agreement with Dr. Drakeford and his counsel regarding the dissemination or restrictions on the use of McAnaney's advice, and thus preventing Dr. Drakeford from using the attorney client information provided by McAnaney against Tuomey.

47. Tuomey, without receiving adequate protection against Dr. Drakeford's potential use of McAnaney's advice, and without being provided sufficient information by Nexsen Pruet to enable Tuomey to give informed consent, agreed to retain McAnaney upon Hewson's recommendation.

(Nexsen Pruet Shields McAnaney's Opinions from Tuomey)

48. In a conference call on June 22, 2005, in which only Greg Smith, Tim Hewson, and others from Nexsen Pruet participated, McAnaney advised Hewson that the Contracts raised significant "red flags" under the Stark Law.

49. McAnaney testified at the civil trial that he told Hewson that the "*OIG would find it very suspicious that doctors would be making more than their collections…So what I said was I thought that was a red flag, that was dangerous from the government because they had seen this fact pattern…this wouldn't be a novel theory for them. So I thought it was risky from that standpoint."* McAnaney described what he considered unusual features of the Contracts, specifically including the part-time nature of the employment arrangement, an exclusivity provision, a term of ten (10) years with a non-compete and then stated that he told Hewson *"I thought all of those made it likely that the government would think the point of this was that they were reinforcing the view they were paying them above fair market value for referrals."* McAnaney advised Hewson that he *"didn't think it passed the red face test."* As to the fair market value report, McAnaney testified that, *"I said to them I thought if you go to the last column, the column that was net gain above collections, I said I thought that in a case that would be government's exhibit number one because it just shows they (the physicians) are making more money than they were collecting."*

50. Hewson testified in a deposition given in the civil case that he advised Tuomey's Chief Financial Officer Greg Martin of his conversation with McAnaney and explained to Martin that McAnaney had an "*overly simplistic formulation in the way of looking at these transactions.*" Hewson informed Martin that he disagreed with McAnaney's "*fundamental premise, which is if the hospital pays more than it collects, it cannot be fair market value."*

51. Word of McAnaney's negative view of the Contracts quickly spread throughout the hospital, causing many of the physicians who had already entered into the Contracts to express concerns to the Tuomey administrative staff.

52. On July 13, 2005, Hewson held a meeting with the Tuomey administrative staff and some of the physicians who were under contract to re-assure Tuomey and the physicians that the Contracts were legal. Hewson once again represented to Tuomey that the "*worst case scenario would be that the arrangement would have to be undone.*"

53. On July 19, 2005, Dr. Drakeford delivered a letter to the Tuomey Board requesting that he and his attorney Greg Smith be allowed to appear before the Board at its scheduled July 25, 2005 Board meeting to discuss their concerns and those raised by McAnaney about the Contracts.

54. Dr. Drakeford's July 19, 2005 letter outlined issues that McAnaney raised in his conference call with Hewson and Smith. In this letter Dr. Drakeford states "I am concerned the Hospital does not fully appreciate the gravity of the Medicare fraud risk they are accepting in their current part-time employment agreements with OSC physicians."

55. In his July 19, 2005 letter to the Board, Dr. Drakeford also requested that the Board seek a written opinion from McAnaney.

56. On July 19, 2005, Pollard attended a Tuomey Executive Committee meeting to discuss Dr. Drakeford's letter. Pollard advised the Board that it should not permit Dr. Drakeford to attend the July Board meeting and further advised the Board to adopt a policy addressing how physicians may request to attend a Board meeting and that under no circumstances should a physician's attorney be permitted to attend the meeting.

57. The Board adopted the policy recommended by Pollard, thus preventing Dr. Drakeford and Greg Smith from directly addressing the Board about the Medicare fraud risk associated with the Contracts.

58. Pollard and Hewson attended the July 25, 2005 Board meeting and addressed the contents of Dr. Drakeford's July 19, 2005 letter with the Board. During this meeting, Hewson brought in numerous file boxes to demonstrate the magnitude of work Nexsen Pruet had done on the Contracts. Hewson and Pollard assured the Board that the Contracts were legal.

59. The audio recording of the July 25, 2005 Board meeting reflects a request from a Tuomey Board member asking Nexsen Pruet to contact McAnaney to ask "*Hey, where are you coming from…Just to find out, hey, what is the problem."* In response to this request, Pollard stated *"It's not going to happen, I can tell you that right now. Greg, that's a noble, honest approach to a system that really is not fair. The entire judicial system is really kind of lousy. Anytime you're headed towards court, although you try your best to avoid it, but no matter what you do and evidenced by a number of situations. In this case very much like a patient who has a really pretty bad malignancy, and get advice from three doctors, find a forth one. They'll go to Mexico or Costa Rica or wherever they have to go, they'll do it. It is our clear opinion, based upon the process that we've been through that he (Drakeford) does not want this arrangement to work."*

60. In this same meeting, Pollard reassures the Tuomey Board that the Contracts are legal. He can be heard on the audio tape stating "*There is no factual basis for that challenge (to the legality of the Contracts). But the challenge that is being placed here is one of hypothesis that is based on going down the road, something might happen where this might not work. In design, it works. Now, you might find a government reviewer who comes in some day and says,*

well, I don't know about this, but you can find-did you know if you call the Internal Revenue Service hotline, you know the accuracy of the answers you get on that? 60 percent. Okay? So you have got all kinds of folks who come in and one will come in and say [inaudible] people operate [inaudible]. ***But it is our strong opinion, it would take a fairly incompetent reviewer to come in and say, 'In design this does not work,' and a total incompetent reviewer would say 'Well, yeah. I know you've got an independent consultant, qualified—well—qualified as an expert saying that the metrics of this arrangement are—commercially reasonable.' Any agent that came in and said that, 'That's no good,' should be fired, unless there's fraud involved and there's no fraud here."***

61. Pollard was referring to the Cejka fair market value appraisals when he stated that "*you've got an independent consultant, qualified—well—qualified as an expert saying that the metrics of this arrangement are—commercially reasonable."* However, Cejka's fair market value reports do not express an opinion on commercial reasonableness.

62. Pollard's characterization of Cejka as an "independent consultant" was inaccurate because Cejka assisted in creating the structure of the part-time agreements, including the consideration paid, and thus, had an inherent conflict in opining on the fair market value and reasonableness of the same.

63. On August 19, 2005, Dr. Drakeford's attorney Greg Smith wrote a letter to McAnaney requesting McAnaney put his opinions in writing. Hewson was copied on this letter.

64. Hewson in turn wrote McAnaney on September 2, 2005 advising McAnaney that he was "not authorized to do any further work in this matter, including preparing a written opinion."

65. Hewson also stated in his September 2, 2005 letter that McAnaney was "in an unfortunate conflict of interest situation" because a "difference of opinion now exists between the parties."

66. However, there had always been a difference of opinion between Dr. Drakeford's counsel and Nexsen Pruet regarding the legality of the Contracts and the sole purpose of McAnaney's involvement was to give the parties an independent assessment of the Contracts. To the extent there was a conflict of interest, it is one that could have been waived by both Tuomey and Dr. Drakeford.

67. The Government, during the prosecution of Tuomey, and the Court rulings, affirming the devastating judgment rendered by the jury, placed great significance on McAnaney's opinions conveyed to Hewson. In the Fourth Circuit Court of Appeals opinion affirming the judgment against Tuomey, the Court observed the following with regard to McAnaney:

> We think the importance of McAnaney's testimony to the government's case is self-evident. Indeed, it is difficult to imagine any more probative and compelling evidence regarding Tuomey's intent that the testimony of a lawyer hired by Tuomey, who was an undisputed subject matter expert on the intricacies of the Stark Law, and who warned Tuomey in graphic detail of the thin legal ice on which it was treading with respect to the employment contracts.

68. The standard of care applicable to lawyers advising clients under these circumstances required Nexsen Pruet to accurately convey to Tuomey the warnings McAnaney had given to Hewson "in graphic detail" regarding "the thin legal ice on which Tuomey was treading with respect to the employment contracts." Nexsen Pruet deviated from the elementary standard of care by discrediting McAnaney, "an undisputed subject matter expert on the intricacies of the Stark Law," when Pollard implied to the Tuomey Board that McAnaney was an "*incompetent reviewer*" who "*should be fired*" and by white-washing McAnaney's warnings

as a simple disagreement over the question of whether hospitals can pay physicians more than the physicians collect.

(Nexsen Pruet Advises Tuomey Not to Unwind the Contracts)

69. On October 4, 2005, Dr. Drakeford filed a federal "whistleblower" Complaint under seal in the United States District Court for the District of South Carolina as required in such cases.

70. Under the federal rules applicable to "whistleblower" cases, the United States is given an opportunity to investigate the claims alleged in the Complaint and decide whether to take over the prosecution of the lawsuit.

71. In January 2006, Tuomey was informed by Nexsen Pruet that Pollard resigned from the firm due to health related issues. Upon information and belief, these health-related issues adversely affected Pollard's ability to provide competent legal advice and Pollard was suffering from these health-related issues when providing legal advice and professional services to Tuomey throughout 2005 and perhaps earlier.

72. Following Pollard's resignation from Nexsen Pruet in January 2006, Matthew Roberts became Tuomey's relationship partner.

73. Also, in January 2006, Tuomey learned that the United States was investigating the Contracts when Tuomey was served with a Civil Investigative Demand letter.

74. Tuomey again sought advice from Nexsen Pruet regarding its response to the Government investigation.

75. In February 2006, Nexsen Pruet was informed that the investigation was not limited to civil claims but the United States was also investigating whether criminal laws were violated.

76. Hewson and Nexsen Pruet were also under investigation by the Government and therefore Nexsen Pruet had a significant personal interest in the matters.

77. Rule 1.7 of the South Carolina Rules of Ethics provides that a lawyer shall not represent a client if there is a significant risk that the representation will be limited by a personal interest of the lawyer.

78. The United States requested that Tuomey terminate the Contracts in the initial discussions conducted with attorneys representing Tuomey.

79. Rather than withdrawing from providing legal advice regarding the continuation of the Contracts, Roberts advised Tuomey that it should not terminate the Contracts because to do so would be an admission of guilt.

80. Tuomey relied upon Roberts' advice not to terminate the Contracts.

81. If Nexsen Pruet had refrained from giving Tuomey advice regarding the continuance of the Contracts as required under the South Carolina Rules of Ethics, Tuomey would have terminated the Contracts as requested by the prosecuting attorney for the United States in early 2006.

82. The standard of care applicable to attorneys practicing healthcare law required Nexsen Pruet to advise Tuomey to either restructure or unwind the Contracts after being placed on notice of the Government investigation in order to minimize the financial consequences of an adverse outcome.

83. In addition, upon Nexsen Pruet's advice, Tuomey entered into two (2) additional Contracts after learning of the investigation.

84. According to the Government's damages expert's report used in the civil lawsuit, the total amount of the improper Medicare payments received by Tuomey for fiscal year 2005 was $5,575,586.

85. However, because Tuomey followed Nexsen Pruet's advice not to unwind the Contracts, the total improper Medicare Payments to Tuomey from January 1, 2005 until the Contracts were finally terminated in April 2010 was $52,766,519.

86. Nexsen Pruet's advice caused Tuomey to incur an additional liability to the Medicare program in the amount of $47,190,933 plus interest of at least 9.75% for the refund of payments received for claims submitted in violation of the Stark law.

87. Nexsen Pruet continued representing Tuomey until the fall of 2013 when prosecutors for the United States insisted that Tuomey replace Nexsen Pruet as Tuomey's outside general counsel.

LEGAL MALPRACTICE

88. Tuomey realleges paragraphs 1 through 87.

89. Tuomey had an attorney-client relationship with Nexsen Pruet whereby Tuomey sought Nexsen Pruet's legal guidance to find a lawful way to address problems Tuomey was experiencing with recruiting and retaining qualified surgeons in Sumter and to ensure that there would be surgical specialists to provide patient care in Tuomey's newly constructed OSC.

90. Tuomey paid Nexsen Pruet in excess of $250,000 for these legal services.

91. Defendant Nexsen Pruet, through its member attorneys acting within the scope of their authority, breached its duty of care owed to Tuomey by failing to render independent, competent and ethical legal professional services required of attorneys practicing under the same

or similar circumstances and otherwise engaging in negligent and reckless acts and omissions in one or more of the following particulars:

a. Designing, drafting, and recommending that Tuomey enter into part-time employment contracts requiring the physicians to perform all of their out-patient surgeries at Tuomey's OSC for ten (10) years and providing compensation to the physicians which fluctuated based upon the number of out-patient surgical procedures performed at the OSC and exceeded the physicians' collections by approximately 20% per year;

b. Informing the physicians in meetings that were audio recorded that the purpose of the part-time employment agreements is a "way of sharing revenues with those people who might otherwise…go out and compete with us by trying to build their own center;"

c. Informing physicians in meetings that were audio recorded that the purpose of the Contracts was to "replicate in many ways the investor owned for-profit ASC…So it's essentially like phantom stock, phantom ownership, as part and parcel of the employment agreement;"

d. Failing to recognize that the specific type of part-time agreements Nexsen Pruet designed, drafted and recommend Tuomey enter had never before been tested and that based upon the amount of compensation and structure of the compensation arrangements there was a very high risk that if challenged the Contracts would be found to violate Stark and the AKS;

e. Failing to inform and advise Tuomey that the specific type of part-time agreements being proposed had never before been tested and that based

upon the amount of compensation and structure of the compensation arrangements there was a very high risk that if challenged the Contracts would be found to violate Stark and the AKS;

f. Representing to Tuomey that there was a high level of certainty for the Contracts in terms of compliance;

g. Representing to Tuomey that the Contracts were commercially reasonable;

h. Advising Tuomey that because Nexsen Pruet obtained fair market value opinions from Cejka there was little or no risk that the Government could find that the compensation provided under the Contracts was not fair market value or commercially reasonable;

i. Representing to counsel for Dr. Drakeford that the Contracts were commercially reasonable since Tuomey makes up for the money it loses on the Contracts from the facility fees Tuomey collects when the doctors perform procedures;

j. Representing to the Tuomey Board in a memorandum prepared on behalf of the Tuomey administration that the Contracts would be structured to comply with applicable Stark exceptions;

k. Advising Tuomey that the worst case scenario Tuomey would realistically face if the Contracts were challenged by the federal government would be to dismantle or unwind the Contracts;

l. Failing to advise Tuomey to obtain a written confidentiality agreement with Dr. Drakeford and his counsel regarding the dissemination or restrictions on the use of McAnaney's advice, and thus preventing Dr.

Drakeford from using the attorney client information provided by McAnaney against Tuomey;

m. Failing to fully inform Tuomey of the full extent of McAnaney's negative view of the Contracts;

n. Affirmatively preventing Tuomey from obtaining information from McAnaney regarding his opinions after Tuomey had retained McAnaney upon Nexsen Pruet's recommendation;

o. Advising Tuomey's Board that it would take a "totally incompetent" reviewer who "should be fired" if the reviewer determined the Contracts violated the law, thus implying that McAnaney was totally incompetent and should be fired.

p. Representing to Tuomey that McAnaney had a conflict of interest which prevented him from putting his opinions in writing;

q. Failing to withdraw from representing Tuomey in relation to the Contracts after the United States initiated its investigation of both Tuomey and Nexsen Pruet;

r. Advising Tuomey not to dismantle or unwind the Contracts after being requested to do so by the United States and advising Tuomey that unwinding the Contracts would be an admission of guilt;

s. Failing to exercise independent and professional judgment and candid advice as required by Rule 2.1 of the Model Rules of Professional Conduct;

t. Failing to explain matters to the extent reasonably necessary to permit the client to make informed decisions as required by Rule 1.4 of the Model Rules of Professional Conduct;

u. Continuing representing Tuomey when Nexsen Pruet had a conflict of interest and an interest in the subject matter under investigation as prohibited by Rule 1.7 of the Model Rules of Professional Conduct.

v. Failing to advise Tuomey to restructure and/or unwind the Contracts after being placed on notice of the Government investigation in order to minimize the financial consequences of an adverse outcome;

w. Advising Tuomey to enter into two (2) additional contracts after Nexsen Pruet learned that it was under federal investigation.

92. Nexsen Pruet is vicariously liable for the acts and omissions of its member attorneys, including but not limited to Pollard, Hewson and Roberts.

93. On July 2, 2015, Tuomey suffered damage as a result Nexsen Pruet's breach of its duties to Tuomey and Tuomey's complete and unwavering reliance upon Nexsen Pruet's advice when the Fourth Circuit Court of Appeals ruled that the Contracts violated Stark and affirmed the civil judgment in the amount of $237,454,195.

94. As a result of the Fourth Circuit's decision that the Contracts violated the Stark law, Tuomey was obligated to refund $52,766,519 plus interest of at least 9.75% to the Medicare Program for payments received for claims submitted in violation of the Stark law. This liability arose from the Federal Government's common law claims of payment under mistake of fact, unjust enrichment and was independent of Tuomey's liability for damages under the False Claims Act. .

95. Tuomey subsequently resolved all of the Federal Government's common law claims for repayment and the False Claims Act judgment for $72,406,860

96. Nexsen Pruet's negligent and reckless conduct as more fully described above was a proximate cause of direct and consequential damages suffered by Tuomey, which include but are not limited to:

a. $72,406,860, which represents a compromise of Tuomey's refund liability to the Medicare Program of $52,766,519 plus interest since 2005;

b. Defense costs of at least $15 Million;

c. Reorganization and transactional costs relating to the sale of assets to Palmetto of at least $5 Million; and

d. Loss of value to business good will of the hospital totaling at least $25 Million.

97. In compliance with S.C. Code Ann. § 15-36-100(B), the expert affidavits of Dr. Gregory B. Adams, Patrick D. Souter, and Mark S. Thomas are attached hereto as Exhibits 1, 2, and 3, respectively. These affidavits "specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."

WHEREFORE, Tuomey respectfully requests the Court enter judgment for actual damages and punitive damages in an amount to be determined by the trier of fact and for such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED.

By: *s/ James M. Griffin*

James M. Griffin, SC Bar #9995
Margaret N. Fox, SC Bar #76228
GRIFFIN DAVIS, LLC
P.O. Box 999
Columbia, SC 29202
Tel. 803.744.8000
Fax 803.744.0805
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

ATTORNEYS FOR PLAINTIFF

July 11, 2016

Columbia, South Carolina