

RESOLUTION NO. 109-15

A RESOLUTION APPROVING AN AGREEMENT BETWEEN THE CITY OF COLORADO SPRINGS ON BEHALF OF ITS MEMORIAL HEALTH SYSTEM ENTERPRISE AND THE COLORADO SPRINGS HEALTH FOUNDATION TO GOVERN THE TRANSFER OF LEASE AND OTHER FUND PAYMENTS TO THE COLORADO SPRINGS HEALTH FOUNDATION IN ACCORD WITH THE HEALTH SYSTEM OPERATING LEASE, INTEGRATION AND AFFILIATION AGREEMENT AND THE FINANCIAL GUARANTY

WHEREAS, in Resolution No. 92-12, City Council authorized the formation of the Colorado Springs Health Foundation (the "City Health Foundation"), with the express purpose "to receive, hold and manage in perpetuity all funds and monies received" pursuant to the agreements and transactions approved by City Council and by vote of the citizens of the City of Colorado Springs concerning the lease of the City's Memorial Health System ("MHS") and as set forth in Resolution No. 89-12; and

WHEREAS, pursuant to Resolution No. 92-12, City Council directed that all funds and monies received pursuant to the Health System Operating Lease and the Affiliation and Integration Agreement (the "Lease") "shall be placed directly into the City Health Foundation"; and

WHEREAS, in connection with the Lease, the City Health Foundation issued its Guaranty and Indemnification Agreement (the "Guaranty"), under which it agreed that obligations of City and MHS under the Lease would be the "direct and primary obligations" of the City Health Foundation; and

WHEREAS, pursuant to Section 14.9 of the Lease, certain obligations of City and MHS under the Lease are to be satisfied first from the funds and monies received under the Lease and paid to the City Health Foundation; and

WHEREAS, pursuant to Resolution No. 121-12, City Council provided that the obligations of the City Health Foundation under Guaranty "shall be in no way limited or restricted by ... any past or future resolutions of the City (including, without limitation, Resolution No. 92-12...)"; and

WHEREAS, a lawsuit filed by the City of Colorado Springs against the Public Employees' Retirement Association and a lawsuit filed by former employees of the Memorial Health System against the City of Colorado Springs (the "Romstad" lawsuit) prevented the immediate placement of funds received from the transaction and agreements with the City Health Foundation; and

WHEREAS, the governing documents for the Lease transaction do not specifically address the timing for transfer of payments from the MHS Enterprise

("Enterprise") to the City Health Foundation or establish specific requirements concerning investment actions on behalf of the City Health Foundation to protect the City's and Enterprise's obligations for outstanding liabilities and potential claims associated with the Memorial Health System; and

WHEREAS, the Parties agree that there is a need for a funds management agreement to govern the above described circumstances.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. City Council hereby approves the Funds Management Agreement attached as Exhibit A and incorporated herein by reference and authorizes the President of Council to execute the same.

Dated at Colorado Springs, CO, this 10th day of November, 2015.


Council President

ATTEST:


Sarah B. Johnson, City Clerk



FUNDS MANAGEMENT AGREEMENT

This FUNDS MANAGEMENT AGREEMENT (this "Agreement"), dated as of November 12, 2015, is entered into by and between the City of Colorado Springs and its wholly-owned and controlled municipal enterprise, MHS Enterprise (individually, "MHS") (collectively, the "City") and the Colorado Springs Health Foundation ("CSHF"). The City and CSHF are referred to jointly as the "Parties," and may sometimes be referred to individually as a "Party" in this Agreement.

RECITALS

A. MHS is the health system enterprise of the City of Colorado Springs that owns and previously operated licensed hospital facilities formerly known as Memorial Hospital; and

B. On or about July 2, 2012, the City, UCH-MHS ("New Memorial"), and Poudre Valley Health Care, Inc. ("PVHS") entered into a "Health System Operating Lease Agreement" (the "Operating Lease") and an "Integration and Affiliation Agreement" ("Affiliation Agreement"), referred to collectively herein as the "Transaction;" and

C. Under the Transaction, the City agreed to lease certain of the assets of MHS as set forth therein, and pursuant to its terms the Transaction closed on or about October 1, 2012; and

D. In connection with the Transaction, the City by resolution authorized the establishment of the CSHF as a City controlled non-profit public foundation established to receive, hold, and manage funds and monies received pursuant to the Transaction in fulfillment of obligations in connection with the Foundation Guaranty (hereinafter defined) and to address health issues in the City and MHS service area; and

E. Pursuant to the Operating Lease, the CSHF entered into a Guaranty and Indemnification Agreement with PVHS and New Memorial (the "Foundation Guaranty") in order for the CSHF to guarantee the performance of the obligations of the City and certain related parties under the Operating Lease and the Affiliation Agreement; and

F. MHS continues to operate as an enterprise of the City, including for purposes of managing and addressing pre-Transaction liabilities, monitoring the implementation of the Transaction and facilitating the exercise of the City's rights thereunder, and potentially resuming operation of the leased assets in the event of termination of the Transaction; and

G. Certain actual or potential claims remain outstanding between the City, New Memorial, and third parties; and

H. The Parties believe that it is in their mutual benefit to establish and memorialize certain standards, practices, and other commitments relating to the management of funds; and

I. The Parties are each empowered to undertake the obligations and commitments on its part herein set forth.

NOW THEREFORE, for and in good consideration of the mutual promises, covenants, and agreements set forth herein, and other good and valuable consideration, the sufficiency of which is acknowledged by the Parties, the Parties agree as follows:

TERMS

Section 1. **Defined Terms.** All capitalized terms used herein which are not otherwise defined shall have the meanings given to such terms in the Operating Lease.

Section 2. **MHS Funds for Transaction Administration.**

(a) In recognition of MHS's ongoing operation as an enterprise of the City of Colorado Springs, including for the purposes set forth in Recital F, the Parties hereby agree that until such time as the City receives notice of the termination of the Transaction or the parties designate a different amount, the target balance of the sum of all MHS cash and cash equivalents shall be Five Million Dollars (\$5,000,000.00) (the "Funds Administration Target").

(b) Within twenty (20) business days following the execution of this agreement, MHS shall transfer to CSHF all MHS funds in excess of the Funds Administration Target. Thereafter, the City will continue to receive Monthly Lease Payments, Margin Sharing Payments, and any other monies due from the Lessee under the Operating Lease.

(c) Within the first ten (10) business days of each month thereafter, MHS shall calculate the balance of all MHS cash and cash equivalents as of the close of the immediately preceding month (the "Monthly Balance"), and:

(i) MHS shall transfer, within the first twenty (20) business days of the month, a sum equal to the amount that the Monthly Balance exceeds the Funds Administration Target (an "Excess Balance Transfer"), except that no such transfer shall be required if the balance of all MHS cash and cash equivalents has in the interim fallen below the Funds Administration Target.

(ii) MHS shall promptly notify the CSHF if the Monthly Balance falls below the Funds Administration Target, and within ten (10) business days of the receipt of such notice, the CSHF shall transfer to MHS a sum equal to the amount of the deficiency (a "Deficient Balance Transfer") unless the deficiency is an amount that is reasonably expected to be replenished by the subsequent Monthly Lease Payment, in which case a Deficient Balance Transfer is not required. The deficiency shall be accounted for and addressed as part of the following Monthly Balance calculation.

(d) Annually, or upon special circumstances the frequency of which shall not exceed twice per year, either Party may request a review of the appropriateness of the amount of the Funds Administration Target in light of changing MHS operational requirements, inflation, or other relevant factors. A review of the Funds Administration

Target shall also be conducted by the Parties upon the final disposition including on any appeal or remand thereof, of certain claims on appeal in the United States Court of Appeals for the Tenth Circuit, No. 15-1334 in connection with *Romstad v. City of Colorado Springs*, Civil Action No. 14-CV-3508-CMS-CBS (the "Romstad Claims"). Upon the request of such review or the automatic review associated with final disposition of the Romstad Claims, the Parties will engage in good faith discussions of such matter, but the amount of the Funds Administration Target will not change absent the mutual agreement of the Parties, and each Party may withhold its agreement in such Party's reasonable discretion.

Section 3. Funds Management

(a) The CSHF hereby reaffirms its commitments under or arising from the Foundation Guaranty. The CSHF shall timely fulfill all monetary obligations of the Guaranty, including without limitation, payment of any judgment, court approved settlement, or court ordered obligation against City or MHS, associated with the Romstad Claims.

(b) Until such time as the Foundation Guaranty is no longer in effect, the CSHF shall continue to maintain segregated monies, in unencumbered and readily available funds, consistent with the requirements of the Foundation Guaranty.

(c) Notwithstanding that the City and the CSHF assess the Romstad Claims to be wholly without merit, and recognizing the Romstad Claims have been dismissed accordingly by the United States District Court for the District of Colorado, the Parties agree to the following funds management requirements until the final disposition of the Romstad Claims including any appeals or action on remand thereof:

(i) The CSHF shall invest the Twenty Five Million Dollars (\$25,000,000.00) in previously-segregated monies released from the Foundation Guaranty on October 1, 2015 in accord with the City Investment Policy. The CSHF shall have discretion under that policy to determine asset allocation and instrument terms so long as the investment instruments are in accord with the City Investment Policy then in effect. Upon final disposition of the Romstad Claims, and any appeals thereof, any segregated monies previously released may be invested by the CSHF in its discretion and pursuant to its investment policy.

(ii) The Twenty Five Million Dollars (\$25,000,000.00) of segregated monies scheduled for release from the Foundation Guaranty on October 1, 2017 shall continue to be governed by and invested in accord with the Foundation Guaranty without modification.

(d) Although the Parties do not anticipate a termination of the Transaction, consistent with the intent of the City in establishing the CSHF as a City-controlled non-profit public foundation to receive, hold, and manage funds and monies received pursuant to the Transaction and to address health issues in the City and MHS service area, the CSHF agrees that, in the event of termination of the Transaction and the incurrence of

repurchase obligations by the City, it will promptly liquidate a Repurchase Portion (hereinafter defined) of its Unrestricted Funds (hereinafter defined) and make such funds available to MHS to facilitate such repurchase and the resumption of hospital operations by MHS, thereby ensuring continuity of access to health care for residents. As used herein, "**Repurchase Portion**" means all Unrestricted Funds less a reasonable amount calculated by the CSHF in its reasonable discretion as necessary to (i) administer any restricted funds of the CSHF into the foreseeable future, and (ii) support continued fundraising and funds management activities (recognizing that the mission of the CSHF would continue following the repurchase of MHS assets). As used herein, "**Unrestricted Funds**" means monies of the CSHF that are neither (x) subject to any continuing requirement to be maintained in a segregated bank account in connection with the Foundation Guaranty, nor (y) subject to usage restrictions imposed by a private donor such that their use in connection with the repurchase of MHS assets would constitute an impermissible use.

Section 4. Miscellaneous Provisions.

(a) Any amendment of this Agreement shall be binding only if evidenced by a writing executed by each of the Parties.

(b) The Parties acknowledge that the City by resolution authorized the establishment of the CSHF as a City controlled non-profit public CSHF established to receive, hold, and manage funds and monies received pursuant to the Transaction, and the CSHF acknowledges and agrees that no changes to its governing documents, in derogation of this Agreement or otherwise, shall be valid and enforceable without the City's consent.

(c) All notices, requests, demands, and other communications required under this Agreement shall be in writing, in English, and shall be deemed to have been duly given if delivered (i) personally, (ii) by facsimile transmission with written confirmation of receipt, (iii) on the day of transmission if sent by electronic mail ("e-mail") to the e-mail address given below, and written confirmation of receipt is obtained promptly after completion of transmission, (iv) by overnight delivery with a reputable national overnight delivery service, or (v) by mail or by certified mail, return receipt requested, and postage prepaid. If any notice is mailed, it shall be deemed given five business days after the date such notice is deposited in the United States mail. If notice is given to a Party, it shall be given at the address for such Party set forth below. It shall be the responsibility of the Parties to notify the other Party in writing of any name or address changes.

If to the City:

City of Colorado Springs
City Administration Building
30 S. Nevada Avenue, Suite 501
Colorado Springs, CO 80901-1575

Attention: Wynetta Massey
Telephone: 719-385-5909
E-mail: wmassey@springsgov.com

If to the CSHF:

Colorado Springs Health Foundation

Post Office Box 509
Colorado Springs, CO 80901
Attention: Cari Davis-Executive Director
Telephone: 719-203-6306
E-mail: cdavis@cshf.net

(d) Time is of the essence in the performance of the obligations imposed by this Agreement.

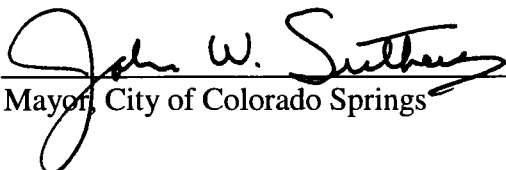
(e) If any section, paragraph, clause, or provision of this Agreement shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause, or provision shall not affect any of the remaining provisions of this Agreement.

(f) This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute one instrument. Executed copies hereof may be delivered by facsimile or email of a .pdf document, and, upon receipt, shall be deemed originals and binding upon the Parties.

(g) The Parties expressly agree that this Agreement is subject to, and shall be interpreted and performed under, the laws of the State of Colorado, and the Charter, City Code, Ordinances, Rules and Regulations of the City of Colorado Springs. Court jurisdiction over any dispute arising under this Agreement or the documents referred to herein shall exclusively be in the District Court for the Fourth Judicial District of Colorado.

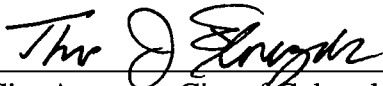
IN WITNESS WHEREOF, the undersigned Parties have caused this Funds Management Agreement to be signed in their respective names by their respective authorized officers, all as of the day and year first written above.

CITY OF COLORADO SPRINGS,
COLORADO, on behalf of itself and Memorial
Health System, its wholly-owned municipal
enterprise

By 
Mayor, City of Colorado Springs

By 
President, Colorado Springs City Council

APPROVED AS TO FORM:

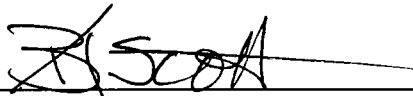
By 
for City Attorney, City of Colorado Springs

ATTEST

By 
City Clerk



**COLORADO SPRINGS HEALTH
FOUNDATION**

By 
President, Board of Trustees