

**REPORT TO THE BOARD OF TRUSTEES OF THE
METROHEALTH SYSTEM**

November 19, 2022

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I. EXECUTIVE SUMMARY

By his own admission and as supported by numerous documents, The MetroHealth System's President and Chief Executive Officer, Akram Boutros, M.D. ("Boutros"), failed to disclose significant additional bonus compensation he awarded himself between 2018-2022. Through a self-assessment process, Boutros received supplemental bonus payments that totaled in excess of \$1.9 million during the years at issue.

The key facts are as follows:

- The MetroHealth System Board of Trustees ("BOT" or "Board") has the sole authority to determine the compensation to be paid to the President and Chief Executive Officer. The Board's authority on CEO compensation has never been delegated.
- The CEO's employment agreement calls for the CEO to receive a base salary plus performance based variable compensation (PBVC) set at 35% of base salary at target. The PBVC could extend to 52.5% of base salary, provided PBVC goals were achieved at max.
- The performance bonus compensation Boutros received exceeded 80% of his base salary in each relevant year and in the last two years exceed 90% of his base salary.
- The Board's approved policy has, at all relevant times, required that the Board set the goals for the President and CEO's PBVC award.
- Boutros admitted that he did not disclose to the Board the metrics used to calculate the Supplemental PBVC bonus paid to him.
- Boutros admitted that, as it relates to the Supplemental PBVC bonus, he assessed his own performance against the metrics developed at his direction and that the Board was not involved in that process.
- Neither the Board's nor the MetroHealth System's national compensation consultants were aware of any Supplemental PBVC compensation paid to Boutros, and Boutros appears to be the key individual working with compensation consultant, Sullivan Cotter,

to prepare the data that was subsequently used by both compensation consultants.

- Boutros did not otherwise acknowledge or disclose his receipt of Supplemental PBVC bonus compensation at other points in time in which such a disclosure would be relevant, including during contract negotiations.

This evidence, at a minimum, establishes the Board's right to terminate Boutros's employment for Cause, as defined in the employment agreement. And, at worse, this evidence suggests that Boutros may face potential criminal liability for Ohio ethics violations, theft in office, and other related statutes.

II. INTRODUCTION

The MetroHealth System ("System" or "MetroHealth") is a public hospital system operating pursuant to Chapter 339 of the Ohio Revised Code. The System's main campus is located in Cleveland, Cuyahoga County. Pursuant to Chapter 339 of the Ohio Revised Code, the System is governed by the MetroHealth Board of Trustees ("BOT" or "Board") comprised of ten voluntary members appointed by the Cuyahoga County Council and County Executive for a term of six years. The Board retains the President and CEO, who reports to the Board, for day-to-day management of the hospital system. Its current President and Chief Executive Officer is Akram Boutros, M.D. ("Boutros").

In late November 2021, Boutros announced his intent to retire from the System at the end of December 2022 after serving as its President and CEO since 2013.

In connection with the search and selection of the next President and CEO, it was discovered that Boutros received annual additional Performance Based Variable Compensation ("Supplemental PBVC") payments in the years 2018-2022 (for performance in the years 2017-2021) beyond those amounts called for in Boutros's employment agreement, and without the BOT's apparent knowledge or approval. The

Supplemental PBVC payments and Section 457(f) non-qualified plan awards received to date by Boutros for the years 2018 through 2022 totaled \$1,980,333.25. These annual Supplemental PBVC payments were in addition to annual cash compensation, which consists of a base salary and a Performance Based Variable Compensation (“Base PBVC”) award.

When informed of this situation, the BOT engaged outside legal counsel to investigate the circumstances concerning the Supplemental PBVC payments issued to Boutros. Shortly thereafter, Boutros (with the assistance of his legal counsel) arranged for the repayment of the Supplemental PBVC funds paid to him (with interest). On October 31, 2021, Boutros prepared \$2,104,337.12 to be deposited into MetroHealth’s general account. (Ex. 1 wire transfer confirmation.) The only condition agreed upon by the BOT in connection with Boutros’s repayment was that the BOT would independently assess Boutros’s contributions for the years at issue.

The BOT directed the investigation concerning the Supplemental PBVC payments continue and that it be regularly informed of developments. The BOT learned (and Tucker Ellis confirmed from Boutros’s legal counsel) that on November 1, 2022, Boutros self-reported the Supplemental PBVC and repayment to the Ohio Ethics Commission (“OEC”).

At this juncture in the investigation, sufficient information has been compiled such that the Board has directed Tucker Ellis to make a report of its findings. Tucker Ellis was asked to report to the BOT with its initial findings and recommendations on an expedited timetable, recognizing in this instance, it was critical to find the truth quickly

rather than explore every possible avenue.¹ The BOT was provided regular updates as to the progress of the ongoing investigation during special meetings conducted in executive session.²

III. INVESTIGATIVE PROCESS

A. Documentation

The BOT engaged Tucker Ellis on October 14, 2022, to investigate the circumstances concerning Supplemental PBVC payments made to Boutros. Tucker Ellis was initially provided numerous material, including documents concerning Boutros's employment agreements, payroll documents, emails concerning Supplemental PBVC metrics, Supplemental PBVC worksheets, compensation-related Board resolutions, and PowerPoint presentations relating to modifications to the System's executive compensation plan. Additional documents of the same character as this initial production were obtained and reviewed over the course of the investigation. Hardcopy documents concerning Boutros's employment, maintained by former MetroHealth General Counsel Michael Phillips, also were provided. Tucker Ellis also obtained documents directly from compensation consultants Sullivan Cotter and Associates, Inc. ("Sullivan Cotter") and USI Insurance Services ("USI") (f/n/a Findley Davies). Tucker Ellis is continuing to work with Sullivan Cotter for a more complete production of emails from October 2016 through the present that Sullivan Cotter possesses with MetroHealth.

¹ As part of this investigation, review of documents (discussed in greater detail below) continues on a regular basis. To the extent that review yields additional relevant documents that materially change the contents of this report, such information will be provided to the Board.

² McCaffrey updated the Board on the progress of the investigation on the following dates: Oct. 20th, Oct. 26th, Nov. 2nd, and Nov. 9th.

The System retrieved the email communications it had archived for Boutros and Phillips.³ Select search terms were developed and utilized to identify initial documents for review.

B. Interviews

Tucker Ellis conducted select interviews of individuals within and outside the System. The decision of whom, and how many people, to interview was influenced by the confidentiality of the investigation. Statements were obtained from Boutros, portions of which are identified below.

1. Interview of Boutros (Oct. 17, 2022)

Boutros was one of the individuals interviewed in connection with the internal investigation.⁴ Boutros acknowledged that the BOT has the sole authority to determine and award his compensation. However, Boutros stated that the BOT never requested Boutros present information on his compensation or the compensation paid to other System executives. Had the BOT made such a request, Boutros would have disclosed the existence of the Supplemental PBVC plan payments he received. Boutros stated that any presentations or resolutions made to the Board had to be vetted, disclosed, and reviewed by the legal department. Boutros denied involvement in drafting or revising the written statement contained on an attachment to the annual BOT resolutions approving PBVC payments to eligible participants.⁵

³ The System's email retention protocol maintains a custodian's emails for up to 15 months unless emails were archived for another purpose such as a litigation hold request. The emails of Phillips were archived for a 3 year period due to the nature of his position.

⁴ Boutros's interview was obtained under the terms of a *Gerrity* warning. A *Gerrity* warning is similar to a *Miranda* advice of rights warning administered in connection with an internal investigation of a public employee suspected of misconduct. Given the issuance of the *Gerrity* warning, no statements from Boutros or information derived from the statements obtained during the October 17, 2022 interview will be disclosed to the OEC.

⁵ The evidence will show this statement to be false as Boutros's revisions to this statement were identified in electronic communications.

Boutros admitted the BOT was never informed on or presented with the metrics used in connection with annual Supplemental PBVC plan payments. The metrics used for the Supplemental PBVC plan were selected by Boutros and his senior leadership team. Boutros also advised that he was evaluated by the Executive Vice Presidents that report to him. Boutros and these senior team members would sit in a room and evaluate Boutros for the purpose of determining Boutros's annual Supplemental PBVC award. The spreadsheets used to track PBVC and Supplemental PBVC payments were initially retained by Boutros and are now kept by Craig Richmond.

2. Boutros's Statements to Board (Nov. 9, 2022)

At a BOT meeting on November 9, 2022, Boutros (and his legal counsel David Matty) presented two documents to the BOT and made statements consistent with the information contained in those documents. The first document contained chronological information Boutros identified as "Notification Timeline of Issue." (Ex. 2 Nov. 9, 2022 Boutros's timeline.) Included within the first document is information Boutros identified as "Organizational Context" outlining modifications made to the System's executive compensation plan, and specifically the Supplemental PBVC awards. (*Id.*) The second document Boutros provided is identified as "President and CEO Supplemental Self-Assessment." (*See* Ex. 3 Boutros's PBVC Self-Assessment.) This document purports to identify the specific metrics used in connection with the Supplemental PBVC payments made to Boutros in 2018 through 2022. (*Id.*)

IV. SUMMARY OF RELEVANT FACTS

At present the evidence shows the following:

A. Employment Agreements with Boutros

The Ohio Revised Code Section 339.07 authorizes the BOT to hire a hospital administrator. Specifically, R.C. 339.07 permits the BOT to “directly” employ “a hospital administrator” and “shall adopt a job description delineating the administrator’s powers and duties.” R.C. 339.07(A). The BOT “may pay the administrator’s [CEO] salary and other benefits from funds provided for the hospital.”

Id. The System employed Boutros on the basis of this statutory authority.

1. Original Agreement

There are three separate employment agreements between the System and Boutros. The first agreement with the System (“Original Agreement”) was effective June 1, 2013, providing for a three-year term expiring on June 1, 2016 (the “Initial Term”). (Ex. 4 Original Agreement, at ¶ 1.A.) The Original Agreement provided for an annual base salary of \$680,000.00, with the possibility of increase “from time to time as determined in the discretion of the” BOT. (Ex. 4 Original Agreement at ¶ 2.A.)

In addition to the base salary, Boutros was eligible “for annual incentive performance compensation . . . under an incentive performance plan, which will be developed and approved by the Board in consultation with” Boutros. (*Id.* at ¶ 2.B.). At the time of the Original Agreement’s execution, the System did not have a defined “incentive performance plan,” but was in the process of developing such a plan. (*See* Section III.B of this report.) Because the incentive plan was in the development phase, the methodology was not given significant detail in the agreement. (*Id.*) The Original Agreement basically provided that:

- The incentive plan would include “a range of specific System performance targets with the amount of incentive compensation

... tied to such targets.” Those targets are not specified in the Original Agreement.

- The targets for the first year of the term would be established no later than July 1, 2013, and then no later than February 15 for each subsequent year.
- The amount of the potential incentive compensation was graduated, depending upon how Boutros’s performance compared to the targets.
 - Minimum performance target - the incentive compensation would be 30% of the base salary.
 - At “target,” - the incentive compensation would be 35% of the base salary.
 - Exceeding the target – Boutros could receive a maximum of 40% of the Base Salary.
- For fiscal year 2013, Boutros was entitled to “minimum incentive of \$150,000.00 (One Hundred Fifty Thousand Dollars), with subsequent payments “subject to satisfaction of the targets established by the Board.”

Those terms were later memorialized and further structured in a July 2013 Board Resolution. (Ex. 5 Resolution 18608.)

Importantly, the BOT determined whether Boutros received incentive compensation. If the minimum performance targets were not satisfied, there would be no “entitlement or right” to receive incentive compensation. (*Id.* at ¶ 2.B.). Assuming the BOT determined that Boutros performed to this standard, the compensation for that year would only be base salary plus the incentive performance payment, the combination of which is characterized as his “Total Cash Compensation.” (*Id.* at ¶ 2.B.)

2. Amended Agreement

In February 2016, Boutros executed an Amended and Restated Employment Agreement (“Amended Agreement”). (Ex. 6 Amended Agreement.) The Amended

Agreement was effective July 1, 2015, and like the Original Agreement, provided for a three-year term (expiring on July 1, 2018).⁶ Under the Amended Agreement, Boutros would begin with a base salary of \$869,000.00, effective for the calendar year 2015. (Amended Agreement at ¶ 2.A.)

The Amended Agreement introduced new methodology to Boutros's base salary determination. First, the System would use "a nationally recognized compensation consultant" to assist the BOT in its annual review of CEO compensation. (Amended Agreement at ¶ 2.A.) The compensation consultant would be selected by the Board, and "in consultation with" Boutros, compare his total cash compensation to a comparable group of executives in the market. Specifically, the Amended Agreement noted that Boutros's base salary was "confirmed as approximately the 38th percentile of the total cash compensation levels in the market consistent with the System's executive compensation philosophy . . . by Sullivan Cotter and Associates, independent compensation consultant to the System." (*Id.*) That percentile is referred to as "the Target Base Salary." (*Id.*)⁷ Next, Boutros's salary would "reset" each year to the "Target Base Salary." (*Id.*)

(a.) Annual Performance Based Variable Compensation

As before, Boutros's total cash compensation was the aggregate of his base salary and any authorized incentive plan payment. Unlike the general terminology used in the Original Agreement, at the time of the Amended Agreement's execution, the System had developed an incentive plan – the PBVC plan - referred to in the Amended Agreement as

⁶ On September 23, 2015, via Resolution 18906, the Board agreed to the modification of Boutros's Original Agreement, as described in this section of the report.

⁷ Resolution 18906 notes that "Base Salary for the first year will be set at the 38th percentile for the comparable group as confirmed by the independent compensation consultant, consistent with MetroHealth's current compensation philosophy."

the “Performance Plan.” (Ex. 6 Amended Agreement at ¶ 2.B.; Ex. 5 Resolution 18608.) The Amended Agreement, thus, specifically stated that Boutros was eligible for “annual performance based variable compensation under a Performance Based Variable Compensation Plan.” (Amended Agreement at ¶ 2.B.)

The Amended Agreement placed the discretion for the terms of the Performance Plan with the BOT, as it provided that “[a]ll awards pursuant to the Performance Plan shall be subject to the terms of such plan as determined by the Board in consultation with [Boutros], from time to time.” (*Id.*) (emphasis added). Like its predecessor agreement, the Amended Agreement tied the amount of compensation under the Performance Plan to “specific System performance benchmark targets.” (*Id.*). Unlike the Original Agreement, however, the Amended Agreement did not set forth a graduated system of increases related to the extent to which Boutros met those targets.

3. Current Employment Agreement

The System extended Boutros’s employment with the current and final agreement in effect since January 1, 2020 (“January 2020 Agreement”) (Ex. 7 January 2020 Agreement, at ¶ 1). The January 2020 Agreement provides for the same three-year Initial Term as the other agreements. (*Id.*)

Unlike its predecessors, the January 2020 Agreement does not set forth a specific amount for Boutros’s base salary. (January 2020 Agreement at ¶ 2.A.) Instead, the January 2020 Agreement refers back to the Amended Agreement, stating that Boutros’s Base Salary for 2020 was “confirmed by the BOT based upon” the Amended Agreement “in accordance with the process provided in that agreement.” (*Id.*). Presumably, this means the BOT set Boutros’s 2020 Base Salary at the Target Base Salary described in the Amended Agreement—*i.e.*, the 38th percentile of the total cash compensation levels

for the comparable group of executives as confirmed by the compensation consultant – Sullivan Cotter. However, Tucker Ellis has not confirmed this presumption.

Instead of resetting Boutros’s salary to the Target Base Salary on an annual basis—as was required by the Amended Agreement—the January 2020 Agreement provides that the Board will “reassess” Boutros’s base salary “based upon data and analysis provided by” the compensation consultant “and confirmed to the Board by its compensation advisor.” (*Id.* at ¶ 2.A).

The above reflects a variation between the January 2020 Agreement and the Amended Agreement with respect to the role of the compensation consultant. Both agreements require that the compensation consultant be a nationally recognized expert selected by the BOT, in consultation with Boutros. (*Compare* Ex. 6 Amended Agreement at ¶ 2.A with Ex. 7 January 2020 Agreement at ¶ 2.A.) The Amended Agreement, however, did not contemplate that the BOT would receive information or assistance on the issue of compensation from anyone other than the compensation consultant. (*See, e.g.,* Amended Agreement at ¶ 2.A.) (“Base salary will be reset on each anniversary date of this Agreement as the Target Base Salary as determined by a nationally recognized independent compensation consultant.”) In contrast, the January 2020 Agreement introduced “a compensation advisor” who will “confirm[] to the Board” the data and analysis provided by the compensation consultant. (January 2020 Agreement at ¶ 2.A.). In other words, under the terms of the January 2020 Agreement, the BOT is entitled to receive input and advice from a third-party advisor about the compensation consultant’s work.⁸

⁸ The compensation consultant retained by System management was Sullivan Cotter. The principal representative from Sullivan Cotter that worked with the System’s management is Jose Pagoaga. The

In summary, in terms of contents and structure, the three employment agreements share several similarities. First, they each provide for a base salary, annual incentive performance compensation, a Section 457(f) non-qualified deferred compensation plan, and contributions to the Ohio Public Employees Retirement System (“OPERS”).⁹ Second, Boutros’s compensation involves input from compensation consultants. Lastly, and most importantly, none of the employment agreements includes any reference to Supplemental PBVC or to any other “supplemental” incentive or bonus compensation.

B. Modifications to the PBVC Plan in 2017

In late 2016, Sullivan Cotter was engaged to work with Boutros to annually evaluate the System’s senior executive compensation and benefits plan and develop recommendations and modifications to the plan. (Ex. 8 The MetroHealth System 2017 PBVC Report – Management Recommendations; Ex. 9 The MetroHealth System 2017 PBVC Program – Management Recommendations – Addendum.) The modifications introduced two distinct elements to the program – the Funding Metric and Performance

BOT selected Findley Davies, Inc. (“Findley Davies”) as the compensation advisor. In November 2020, Findley Davies was acquired by USI. The principal USI representative that interacted with the BOT is Robert Rogers.

⁹ A detailed review concerning the features of the 457(f) plan is not included in this report. In the Original Agreement, the System agreed to establish a Section 457(f) plan for Boutros, and to make an annual contribution credit equal to 15% of his Total Cash Compensation for that year. (*Id.* at ¶ 3.A.). Under the Amended Agreement, the System’s contribution to the 457(f) plan increased from 15% to 20%. (*See* Amended Agreement at ¶ 3.A.) The percentage would again be calculated using Boutros’s Total Cash Compensation. (*Id.*) Under the January 2020 Agreement, the annual contribution from the System increased from 20% to 25% of Boutros’s Total Cash Compensation. The January 2020 Agreement sets forth a different plan for vesting of the funds in the Section 457(f) Plan. (*See* January 2020 Agreement at ¶ 3.A.) The two prior agreements provided that Boutros was fully vested in the funds in the account on the final day of the Initial Term, provided he was still employed by the System, and would be 100% vested in amounts credited to the account thereafter. (*See* Original Agreement at ¶ 3.D; Amended Agreement at ¶ 3.D.) Under the January 2020 Agreement, one-third of each “Plan Year Contribution” (which does not appear to be defined in the January 2020 Agreement) together with one-third of any income, gain, interest or loss, **will vest each year**, provided that Boutros remains employed by the System “on the last day of each of the subsequent three years.” (January 2020 Agreement at ¶ 3.D.)

Metric. Under the recommendations, the PBVC Plan would now decouple the metrics, separating the funding aspect (“Funding Metric”) from the performance aspect (“Performance Metric”), whereas before, the metrics were combined. It is not clear from the documents why the metrics were proposed to be decoupled.

The Funding Metric would determine two things: (1) a target level of financial performance the System needed to meet before any PBVC awards could be made available to eligible participants for distribution, the “on-off switch” or “trigger” mechanism; and (2) the amount of funds available to distribute under the PBVC Plan. The Funding Metric was adjusted according to EBIDA (earnings before interest, taxes, and amortization). Specifically, this metric was tied to an investment grade bond rating at BBB-. (Ex. 10 PowerPoint “Performance Based Variable Compensation Program – Management Recommendation for Funding 2018.) The “trigger” would then be calculated as net of PBVC awards.

The Performance Metrics would determine what amount of the available funds in the PBVC program would be awarded. Specifically, the award would occur based on levels of achievement. The levels ranged from: (1) minimum - 50%; (2) target - 100%; (3) maximum - 150%. These levels were applied on a sliding scale such that if the total level of achievement scored at 98%, the precise achievement percentage would be used in the PBVC calculation rather than revert to the minimum 50% level.

The compensation methodology underwent further modifications as requested by Boutros. For instance, the BOT approved increasing the percentile limit of total cash compensation “for each executive” from 105% of the 75th percentile to the 90th percentile. (See Ex. 11 Resolution 19108.) The BOT subsequently eliminated that cap, with the caveat that the CEO “will not approve any Total Cash Compensation [in excess

of the 90th percentile] for a senior executive without the approval of the Board.” (Ex. 12 Resolution 19219 at Exhibit A to Resolution.). Further, the BOT required the CEO to “inform Board” of the compensation levels “for all of the CEO direct reports.” (*Id.*).

With these modifications, the BOT reinforced and restated the approved compensation process. (*See* Resolution 19108.) Specifically, the BOT continued requiring the following in connection with the PBVC plan:

- Required that “the Board will set goals for the System and for the President and Chief Executive Officer.”
- Authorized the CEO to set “goals for senior leadership.”
- Required the CEO to regularly report on the “terms and performance of this [PBVC] plan on a regular basis.”
- Required BOT approval for any exceptions to the methodology or plan terms.

(*Id.*). Importantly, the 2017 and 2018 modifications to the PBVC plan make no reference to supplemental incentive payments, Supplemental PBVC, or supplemental achievement awards that Boutros was to receive as components of his total cash compensation. (Ex. 11 Resolution 19108 and Ex. 12 Resolution 19219.)

C. Implementation of the PBVC Plan

In March 2017, the Board was presented with and approved the performance metrics to be utilized in connection with the PBVC plan for 2017. (Ex. 13 Resolution 19083.) In July 2017, the Board adjusted the metric dealing with the diversity and inclusion goal. (Ex. 14 Resolution 19113.) In the first quarter of 2018, the Board accepted the 2017 performance results against the plan metrics and approved for distribution under the PBVC plan an amount not to exceed \$7,029,497. (Ex. 15 Resolution 19185).

The BOT resolution approving the PBVC payments included an attachment and table summarizing the PBVC metrics and final performance results. The attachment further included the following language:

Based upon these 2017 results below the **total Performance Based Variable Compensation** to be distributed will not exceed \$7,029,497 and this amount has been fully accrued in the calculation of the System's financial results as reflected in its audited financial statements. Performance Based Variable Compensation payments will average approximately 18.1% of base salary.

(Emphasis added.) (*Id.*).

Neither Resolution 19185 approving the PBVC payments nor the attachment to Resolution 19185 reference additional metrics or payments beyond the BOT-approved PBVC program. Importantly, there is no reference to Supplemental PBVC. Nevertheless, Boutros received a \$400,000 Supplemental PBVC payment in addition to his Base PBVC award of \$398,072.44 - for a total bonus payment of \$798,072.44.¹⁰

D. Revision to Verbiage in PBVC Funding Resolutions – the First Reference to the Term “Supplemental”

In the first quarter of 2018, the BOT approved the PBVC metrics proposed for use in the PBVC plan for calendar year 2018 provided the System achieved the financial trigger funding the plan. (Ex. 16 Resolution 19186). Again, there is no mention of Supplemental PBVC. One year later, the BOT accepted and approved the 2018 performance results for the PBVC plan. (Ex. 17 Resolution 19270.) However, the attachment to the authorizing resolution incorporated language **different** from the

¹⁰ Section 457(f) contributions are based on a percentage of PBVC compensation. Therefore, by receiving a Supplemental PBVC award, Boutros also obtained an additional \$80,000 contribution into his 457(f) plan.

resolution for the 2018 PBVC program performance results. Specifically, the attachment contained a paragraph that provides:

Based upon these 2018 results above, the **total incentive program funding** shall not exceed \$7,800,000. This amount has been fully accrued in the calculation of the System's financial results as reflected in its audited financial statements. **Incentive program payments (PBVC, one-time recognition, supplemental incentives) shall be distributed to eligible employees** based on corporate and individual performance. The average incentive payment is approximately 20.5% of the base salary. The President and Chief Executive Officer, or his designee, are hereby authorized to take necessary actions consistent with this resolution. (Emphasis added.)

That same day, the BOT approved the 2019 metrics for the PBVC plan as recommended by the CEO. (Ex. 18 Resolution 19285.)

The language quoted above referencing "**incentive program funding**" and "**incentive program payments**" was also used in the resolutions authorizing PBVC payments based on the PBVC metrics established for the performance years 2019 and 2020. (Ex. 19 Resolution 19354 and Ex. 20 Resolution 19423.) In 2022, the language for performance year 2021 was slightly modified:

Based upon these 2021 results above, the total **performance based** incentive program funding shall not exceed \$10,000,000. This amount has been fully accrued in the calculation of the System's financial results as reflected in its audited financial statements. **Performance based** incentive program payments (PBVC, one-time recognition, supplemental incentives) shall be distributed to eligible employees based on corporate and individual performance. The average incentive payment is approximately 21.6% of the base salary. The President and Chief Executive Officer, or his designee, are hereby authorized to take necessary actions consistent with this resolution.

(Ex. 21 Resolution 19495).

In November 2021, the BOT approved the PBVC metrics for use in the years 2022-2025. (Ex. 22 Resolution 19484.) As 2022 has not concluded, no PBVC awards or payments for performance in 2022 have been authorized by the Board.

E. Supplemental PBVC Process

The System's methodology of establishing PBVC performance metrics in the first quarter of a performance year, and the procedure of determining the level of achievement against those metrics in the first quarter of the following year is transparent and documented in the BOT resolutions identified above. However, the process used to identify, designate, and weigh the metrics used to award Supplemental PBVC payments was not disclosed to the BOT in any written document nor, based on discussions with Trustees, verbally. Following is a discussion of what the evidence reveals about the process Boutros employed to select metrics and payment awards under the Supplemental PBVC plan, including the payments to himself.

There is no BOT resolution or action that specifically references Supplemental PBVC or a Supplemental PBVC plan. However, the BOT delegated to the President and CEO, the authority to determine the compensation for all employees, including "senior leadership." (See e.g., Resolutions 18608, 19108, and 19219.) The total cash compensation for each senior executive could not exceed an amount equal to the 90th percentile of the total cash compensation for the peer group utilized for such comparisons. (Ex. 11 Resolution 19108 – Executive Compensation Principles attachment.) Any exception to this compensation principle for senior executives of the System had to be authorized by the BOT. *Id.*

The evidence confirmed that Boutros (and employees eligible for PBVC) received both base PBVC payments and Supplemental PBVC payments in the years 2018 through 2022 based on performance years 2017 through 2021.

1. Performance Year 2017 - Unknown Metrics

Unlike years to follow, no separate metrics were identified for use in connection with the award for Supplemental PBVC in 2017.¹¹ (*See e.g.*, Ex. 23 Email between Boutros and Stern dated Feb. 1-7, 2019 with 2018 PBVC worksheet; Ex. 24 Email from Boutros to senior executives dated Dec. 22, 2020 re: Supplemental PBVC metrics; and Ex. 25 Email from Boutros to Whiting dated Aug. 10, 2022 re: List of Supplemental [PBVC] Goals 2019-2021.) Thus, it is difficult to independently confirm how Boutros arrived at the amount he received under the Supplemental PBVC plan for 2017.¹²

The Supplemental PBVC in 2017 was rounded up or down depending on the amount of the award. For example, Boutros calculated his payment at 17.5% of total Supplemental PBVC funds available (\$2,332,542), which amounted to \$408,194.85. Yet, the Supplemental PBVC amount paid to Boutros was rounded down to \$400,000.

The evidence shows that beginning in the fourth quarter of a performance year, Boutros would identify specific metrics and the weight to be assigned to each metric for use in determining Supplemental PBVC compensation awards. The metrics identified by Boutros would be shared with Executive Vice Presidents or senior executives comprising the “Office of the President.” Feedback from senior leadership, including

¹¹ The Excel spreadsheets calculating the 2017 Supplemental PBVC awards do not reveal any metrics in the spreadsheet and appear to base the Supplemental PBVC award on a multiple of the total Supplemental PBVC funds available.

¹² The Boutros Supplemental PBVC Self-Assessment document (Ex. 3) he provided at the Nov. 9, 2022 Board meeting contains the following performance metrics for calendar year 2017: “HealthSpan Growth & EDs; Creating of CCH and Select Assurance.”

offering or excluding certain goals and the weight assigned to each, was solicited by Boutros. The final decision as to the metrics and weight for each was determined by Boutros. Senior executives and all managers with direct reports who were eligible for PBVC would then evaluate their subordinates for Supplemental PBVC awards and submit their evaluations to Boutros.

The evidence shows, and Boutros admitted during the November 9, 2022 Board meeting, that he engaged in a self-evaluation and that he himself determined the percentage of achievement to be assigned to each of the Supplemental PBVC metrics that determined his Supplemental PBVC award. For example, while Boutros evaluated and scored Executive Vice Presidents and members of the Office of the President, there is no evidence that anyone performed the same task with respect to Boutros. While Boutros initially identified to the Board Chairperson and Tucker Ellis that he was evaluated by his senior leadership team, this was determined to be incorrect. Two senior executives were interviewed by Tucker Ellis and specifically asked if they evaluated or participated in the evaluation of Boutros. Both stated they had no involvement in the evaluation of Boutros. Both were asked whether they knew of any senior executive involved in the evaluation of Boutros, and both denied any such knowledge.

In summary, without the knowledge or involvement of the Board, Boutros selected backward looking metrics for which he ultimately determined the weight to be assigned to each metric, and he determined the score to be assigned to himself in calculating his annual Supplemental PBVC payment.

The evidence shows that total cash compensation information was maintained by and at the direction of Boutros for the years in question on detailed Excel spreadsheets.

These spreadsheets tracked those System employees that were eligible for PBVC and Supplemental PBVC awards, and the amounts ultimately approved for payment.¹³ (*Id.*). The spreadsheets were maintained by Boutros and shared with the System’s CFO and other senior executives.

These compensation spreadsheets were utilized to calculate the “not to exceed” amount that would be presented to the BOT in the attachment to the resolution authorizing the “total Performance Based Variable Compensation” (2018), or “incentive program” (2019-2020) or “performance based incentive program” (2021) payments to Boutros and other eligible participants. (*See e.g.*, Resolutions 19185 and 19285.) These spreadsheets also monitored the total cash compensation for eligible employees and how those total amounts compared to the 90th percentile for maximum compensation.

In the fall of 2022, Boutros circulated his proposed Supplemental PBVC metrics to senior leadership for the 2022 performance year. However, no further action has occurred in relation to these Supplemental PBVC metrics as a result of the pending investigation.

F. Review of CEO Compensation and Benefits

The Board also relied on two executive compensation consultants in assessing Boutros’s and senior executives’ compensation, but the Supplemental PBVC amounts were not identified in their reports and analyses. Tucker Ellis reviewed relevant executive compensation reports prepared by compensation consultants Sullivan Cotter and USI. Initial interviews of Sullivan Cotter’s principal representative Jose Pagoaga and USI’s principal representative Robert Rogers were performed. Requests for

¹³ The Excel spreadsheets would also include one-time achievement awards or bonuses that were made to employees that were not eligible participants in the PBVC plan.

documents were made to both Sullivan Cotter and USI. Each organization provided some initial documents, but the document requests and production process are not yet complete.

Tucker Ellis also interviewed the System's former General Counsel and current Special Counsel to the Board, Michael Phillips. Portions of those interviews focused on Phillips' involvement with, and review of, materials produced by Sullivan Cotter and USI.

1. Sullivan Cotter – Jose Pagoaga

In October 2016, Sullivan Cotter entered into a master purchase agreement to provide the System's management with a report as to the competitiveness and reasonableness of the total compensation the System paid senior executives, including the CEO. "Total Compensation" is defined as base salaries plus variable compensation and the System's costs of standard and supplemental benefits and perquisites. Sullivan Cotter also provided management with directional guidance on restructuring the PBVC plan and to review the plan proposed by management.

In May 2017, Sullivan Cotter produced an Executive Total Compensation Review report for several senior executives, including the President and CEO. (Ex. 26 Executive Total Compensation Review – May 17, 2017.) The Total Cash Compensation identified for Boutros disclosed his base salary and annual incentive award. (*Id.* at Appendix A, p. 14).

In a draft Sullivan Cotter report dated February 8, 2018, the cash compensation identified for Boutros shows his current salary and bonuses paid in 2017 for 2016 performance. The non-salary information included an annual incentive award and \$40,000 amount identified as "Other" which was linked to a one-time bonus awarded to

Boutros and other senior executives for their work in connection with the bond issuance the System achieved in 2017. (Ex. 27 Draft - Executive Total Compensation Review – February 2018 at Appendix B, p. 26.) This “Other” payment is referenced as a “Top-Talent” award in the payroll records for Boutros.

Phillips confirmed that there was no formal BOT resolution concerning the authorization and payment of a “Top-Talent” award to Boutros. Phillips recalled that BOT Chair McDonald supported the payment and discussed it with members of the BOT in an executive session. Efforts to locate a letter or documentation authorizing this payment are ongoing.

Sullivan Cotter prepared reports in each subsequent year. The following are observations obtained from a review of these final and draft reports:

- In 2019 (Sept. 11, 2019) it reported on the Total Compensation for 22 executive positions, including the CEO. (Ex. 28 Executive Total Compensation Review – September 11, 2019.)
- In 2020 (Dec. 16, 2020) it reported on the Total Compensation for 33 executive positions, including the CEO. (See Ex. 29 Executive Total Compensation Review – December 16, 2020.)
- Only the 2019 and 2020 reports detail information on the Cash Compensation for CEO Boutros.
- In 2021 (Sept. 28, 2021) it prepared a draft report on 34 executive positions. The draft 2021 report omits the “MHS Tally Sheet” appendix to the report which disclosed information on Cash Compensation. (See Ex. 30 Executive Total Compensation Review – Draft - September 28, 2021.)
- In 2022 (Oct. 12, 2022) it prepared a draft report on 18 executive positions. The 2022 draft report also omits the “MHS Tally Sheet” appendix to the report and does not address Total Compensation for the CEO position. (See Ex. 31 Executive Total Compensation Review – Draft – October 12, 2022.)

The total cash compensation amounts for Boutros and the other System's executives identified in the 2019 and 2020 reports disclosed only the base salary amount and the base PBVC calculation at target level (100% of PBVC), not the actual PBVC amount awarded in 2019.¹⁴ Importantly, the Sullivan Cotter reports for 2019 and 2020 contain no disclosure as to the actual PBVC payment made to Boutros or any of the other executives identified in its report. Further, the Sullivan Cotter reports for 2019 and 2020 do not provide for any payment, formula, calculation or estimate as to Supplemental PBVC payments received by any of the executives identified in its reports.

When interviewed on two separate occasions, Jose Pagoaga was familiar with the System's PBVC program and how it worked to fund and calculate PBVC payments. He denied any knowledge concerning the existence of a Supplemental PBVC plan or the Supplemental PBVC payments that were made to the executives for whom he was engaged to review total cash compensation. He does not recall Sullivan Cotter's scope of services including any work or assistance on the development of a Supplemental PBVC plan.

Tucker Ellis continues its work to identify communications between Sullivan Cotter and the System that will inform Sullivan Cotter's specific requests for compensation data from the System and the compensation data actually provided to Sullivan Cotter.

¹⁴ Boutros's PBVC award was based on 35% of his base salary. For example, if Boutros's base salary was \$1 million and the System achieved the financial target that permitted the funding of the PBVC program, and the System succeeded in achieving the pre-established metrics at 100% (i.e., target), then Boutros's base PBVC award would be \$350,000.

2. USI – Robert Rogers

In early 2017, USI was retained by the BOT to serve as its compensation advisor. Thomas McDonald was the Chair of the BOT at the time of that engagement. With management retention of a compensation consultant, the BOT determined that it needed to retain the services of an independent compensation consultant that would advise the Board. Initially, the scope of USI's engagement was limited to a review of the total compensation the System paid to the CEO. Later, the scope of USI's engagement was expanded to include an examination of the total compensation paid to other senior executives.

USI provided the BOT with comments on the revisions to the executive compensation program that the System's management proposed in 2017 and 2018. It made recommendations on the Section 475(f) non-qualified plan and current benefit packages. It also provided comments on the methodology for determining the compensation peer group identified by Sullivan Cotter. In doing so, USI essentially relied on the data contained in the Sullivan Cotter reports as the starting point for its analysis and recommendations to the BOT. In summary, USI advised the BOT as to the reasonableness of the System's executive compensation program, and specifically as it concerned the CEO, based on the figures compiled by Sullivan Cotter.

Roberts confirmed that he would receive the Sullivan Cotter reports from Boutros, Phillips or directly from Sullivan Cotter. Roberts did not make any independent request for total compensation data for the CEO or any other executives. Roberts was unaware of the existence of a compensation system beyond what he understood was the Base PBVC plan, its funding and award formulas. He had no knowledge of a separate program referred to as the Supplemental PBVC plan.

G. Further Instances Demonstrating Concealment of Supplemental PBVC Payments

The investigation identified at least two instances in which Boutros's disclosure of Supplemental PBVC payments would have been called for, but did not occur.

1. 2018 Media Inquiry on Executive Compensation

On April 4, 2018, the System received a public records request from Ginger Christ, a healthcare reporter for The Plain Dealer ("PD"). The request sought, in part, compensation information for 14 senior executives of the System, including Boutros, for the years 2017 and 2018. (Ex. 32 System letter to Christ dated April 10, 2018.) More specifically, the media request was understood to request "performance based variable compensation payments made to the 14 designated individuals paid in 2017 and 2018." (*Id.*)

In connection with the PD's request, a meeting with the PD's Editorial Board occurred on April 27, 2018. Boutros and BOT Chair McDonald attended on behalf of the System. In preparation for the meeting with the PD's Editorial Board, the System's Public Relations Manager Tina Arundel emailed BOT Chair McDonald and Boutros an "outline for our editorial board prep meeting." On that email string, Boutros replied to its recipients and attached a PowerPoint titled "Presentation to PD" (Ex. 33 Boutros Apr. 26, 2018 Email to Arundel and McDonald with attachment). The "Presentation to PD" and PowerPoint slide deck titled, "MetroHealth Year-In-Review – Editorial Board Meeting." (*Id.*) Slides 10-12 of the PowerPoint contain talking points discussing the PBVC program. One of the bullet points states: "Program is metric-driven and is focused on financial, strategic, quality, diversity & community, and operations and patient engagement." (*Id.* at slides 10-12.) This bullet point is a reference to the 2017

metrics reviewed and approved for use by the BOT in connection with the 2017 PBVC plan. At slide 12, each of the metrics identified on the slide correspond to 2017 PBVC plan metrics. (*Id.* at slide 12.) The PowerPoint makes no reference to a Supplemental PBVC program as comprising the total cash compensation paid to any of the 14 senior executives.

On April 27, 2018, Boutros sent an email to the members of the BOT and copied the System's General Counsel Michael Phillips. (Ex. 34 Boutros Apr. 27, 2018 Email to BOT with attachment.) The subject line of the email was "CONFIDENTIAL – Plain Dealer Editorial Board Meeting – 4/27/2018" and included a similar but not identical PowerPoint slide deck referenced above and an attachment that identified compensation information responsive to the media's public records request. (*Id.*) The spreadsheet identified the top 14 senior executives of the System, including Boutros. Salary information for 2017 and 2018 was identified in addition to the 2017 base PBVC payments issued in 2018. For Boutros, that PBVC amount was identified as \$398,072. In his email to the BOT on April 27, 2018, Boutros stated, "In addition [to discussion of the PowerPoint presentation] I delivered the attached information to the PD." (*Id.*)

However, on April 6, 2018 (3 weeks before the meeting with the PD and email to the BOT), Boutros was paid a performance bonus in the amount of \$798,072.44 from the System. (*Id.* at attachment to email). In the information submitted by Boutros, there was no disclosure of the \$400,000 Supplemental PBVC payment Boutros received in 2018 for 2017 performance. The same omission existed for the other senior executives.

The timing of the media’s inquiry and the information omitted from materials provided to the media and the BOT is evidence of Boutros’s early efforts to conceal from the Board and the general public his receipt of a Supplemental PBVC payment. Recall also, the BOT resolution approving the PBVC payments (Ex. 15 Resolution 19185 dated March 28, 2018) included an attachment and table depicting the PBVC metrics and final performance results. The attachment further included the following language:

Based upon these 2017 results below the **total Performance Based Variable Compensation** to be distributed will not exceed \$7,029,497 and this amount has been fully accrued in the calculation of the System's financial results as reflected in its audited financial statements. Performance Based Variable Compensation payments will average approximately 18.1% of base salary.

(Emphasis added.) (*Id.*) There is no reference to Supplemental PBVC and yet included within the total amount to be distributed for PBVC were both the \$398,072 PBVC and the \$400,000 Supplemental PBVC payments made to Boutros on April 6, 2018.

2. 2021 Negotiations on New Terms of Compensation

Second, in the summer of 2021, negotiations commenced with Boutros over a new employment agreement, as the January 2020 agreement was scheduled to expire at the end of 2023. Negotiations focused on compensation issues. In connection with the negotiations, Boutros engaged Sullivan Cotter to prepare a report and assessment of his compensation. Sullivan Cotter provided Boutros a draft report titled, “Executive Total Compensation Review” dated September 28, 2021. The report used Boutros’s compensation information for 2020. In an email dated October 3, 2021, Boutros sent BOT Chair Whiting a copy of the Sullivan Cotter draft report and also a single page term sheet outlining the “Initial Terms 07/09/2021” and “Revised Terms 10/03/2021” for the

proposed new contract. (Ex. 30 Sullivan Cotter Executive Total Compensation Review - September 28, 2021.) At page 35 of the Sullivan Cotter draft report, a Total Cash Compensation table shows Boutros's cash compensation with the PBVC plan payment at threshold (50%), at target (100%) and at exceptional (150%). (*Id.*). With a base salary in 2020 of \$1 million and a PBVC award at exceptional, the Total Cash Compensation was identified as \$1,525,000 in the report.

However, for the performance year 2020, Boutros actually received a PBVC award of \$489,755 (the achievement score for 2020 was 139.93%)¹⁵. And there is no information in the Sullivan Cotter report that identifies Boutros's receipt of a Supplemental PBVC payment of \$416,292 in 2020 at the time he received his PBVC payment. Despite what was reported in the Sullivan Cotter report, the evidence shows that Boutros total cash compensation for 2020 was actually \$1,906,048.

In the email October 3rd email to BOT Chair Whiting, Boutros points out an incorrect assumption in the Sullivan Cotter report that has nothing to do with his total cash compensation analysis in the report. (Ex. 35 Boutros Oct. 3, 2021 email to Whiting with attachments.) Boutros made no effort to correct the total cash compensation analysis in the Sullivan Cotter report or to disclose to BOT Whiting that he received a substantial Supplemental PBVC payment in approximately April 2021 as part of his total cash compensation for 2020 that was in addition to his base salary and PBVC award.

If the Supplemental PBVC payment Boutros received for 2020 performance (\$416,292) was added to the Total Compensation analysis performed by Sullivan Cotter, plus the retention bonus and new SERP calculation Boutros proposed for the new

¹⁵ The calculation for the PBVC award is as follows: \$1M base salary * 35% = \$350,000 * 139% = \$489,755.

contract, the 2020 analysis by Sullivan Cotter would place Boutros far in excess of the 90th percentile in Total Compensation. The BOT’s compensation consultant Rob Rogers of USI was also copied on the email and its attachments. (*Id.*) This email communication demonstrates further evidence of Boutros’s failure to disclose to the compensation consultants and the BOT Chair that Boutros was receiving Supplemental PBVC payments.

These two instances of Boutros’s failure to disclose his Supplemental PBVC payments fly in the face of Boutros’s assertion that he was ethical and transparent in his dealings on this issue, and that the BOT’s approval of the payments was clear. If so, why would he not include the payments in these calculations?

H. Status

Presently, the Supplemental PBVC payments at issue have been repaid to the System (with interest) by Boutros. The System has also implemented specific oversight and monitoring “guardrails” concerning certain activities that required Boutros provide advance notice to a Transition Oversight Team comprised of certain Trustees and the incoming President and CEO. (Ex. 36 Resolution 19537 - Nov. 9, 2022.) However, Boutros’s recent written communications to Board Chair Whiting on November 11, 2022 evidence an intent to resist. (Ex. 37 Boutros Nov. 11, 2022 letter to Whiting; Ex. 38 Boutros’s “Written Notice” dated Nov. 11, 2022.)

V. LEGAL ANALYSES

A. Standard for “Cause” to Terminate Employment

The current Employment Agreement between Boutros and the System includes a provision that allows the BOT to terminate Boutros for cause only in certain situations:

The System, through its Board, may terminate this Agreement and Executive's at-will employment for Cause. For purposes of this Agreement, the System shall have "Cause" to terminate employment hereunder only for the following reasons: * * *(iv) willfully engaging in illegal conduct or gross misconduct which is materially and demonstrably injurious to the System [or] (vi) an act of fraud, embezzlement, theft or other act involving dishonesty by Executive against the System.

(January 2020 Agreement at ¶ 12.A.i.) The January 2020 Agreement also provides for the suspension of Boutros (with pay and benefits) "pending an investigation, assessment or determination as to whether Cause exists." (Ex. 7 January 2020 Agreement at ¶ 12.A.i.)

1. Provision (iv) – Willful Illegal Conduct or Gross Misconduct

With respect to the definition of cause at (iv), several terms are pertinent, but undefined. They can be defined, however, using other sources.

For example, "willful" is defined in Ohio law as implying intent—*i.e.*, "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing some wrongful act with knowledge or appreciation of the likelihood of injury." (Internal quotations marks omitted.) *Developers Diversified Realty v. Coventry Real Estate Fund II, LLC*, 8th Dist. Cuyahoga No. 97231, 2012-Ohio-1056, ¶ 21 (describing the phrase "willful misconduct"). "Illegal conduct" is likely best interpreted to mean conduct that violates the law.

"Gross misconduct" is defined in various employment-related contexts as "conduct that is intentional, wanton, willful, deliberate, reckless or in deliberate indifference to an employer's interest," or "glaringly, obvious, or flagrant." *Lang v. Quality Mold, Inc.*, 9th Dist. Summit No. 23914, 2008-Ohio-4560, ¶ 10-11 (internal

quotations omitted); *see also Beyer v. Vestagen Protective Techs., Inc.*, M.D.Tenn. No. 3:16-cv-2736, 2017 WL 9807336 at *5 (Dec. 8, 2017) (defining “willful misconduct” in an employment agreement “to require misconduct committed voluntarily and intentionally, with misconduct defined as ‘a dereliction of duty or unlawful, dishonest, or improper behavior’) (internal quotation marks omitted; cleaned up); *Brown Jordan Int’l, Inc. v. Carmicle*, S.D.Fla. No. 0:14-cv-60629, 2016 WL 815827, at *59 (Mar. 2, 2016) (finding that employee who had accessed other employees’ email accounts without authorization, despite awareness of a company policy addressing email access and without consulting anyone about the issue, had engaged in willful misconduct for purposes of his employment agreement); *TransFirst Holdings, Inc. v. Phillips*, N.D. Texas No. 3:06-cv-2303, 2010 WL 11537522, at *29 (finding that officers had engaged in willful misconduct “by repeatedly breaching the fiduciary duties they owed to PRI LLC and TransFirst and engaging in undisclosed, competitive conduct that violated the terms of” an asset purchase agreement).

Finally, the term “materially and demonstrably injurious to the System” is likely open to broad interpretation, within the confines of the well-established convention that an agreement must be construed against its drafter. *See, e.g., Clifton Steel Co. v. Trinity Equip. Co.*, 2018-Ohio-2186, 115 N.E.3d 10, ¶ 19 (8th Dist.). The terms there have common meanings. “Materially” means “to an important degree; considerably,” and “injurious” means “harmful, hurtful, or detrimental.” *See* “materially” and “injurious” at dictionary.com.

Together, the terms in this provision allow the BOT to terminate Boutros for Cause if the facts demonstrate, essentially, that he was aware that his conduct with respect to the Supplemental PBVC was contrary to the law or contrary to restrictions,

requirements, or expectations set by the BOT, and that he undertook that conduct despite that knowledge. The facts established above strongly suggest that Boutros knew or should have known that the Board had no knowledge of the Supplemental PBVC payments and that he had not received any approval from the Board for Supplemental PBVC payments to him. And, his conduct continued over a period of years.

2. Provision (v) – Act of Fraud, Embezzlement, Theft, or Other Act of Dishonesty

This provision is more straightforward than provision (iv). As discussed in Section IV.B, *infra*, the facts here suggest that Boutros may have engaged in conduct involving the offense of theft in office, in violation of R.C. 2921.41, and perhaps the offense of falsification, in violation of R.C. 2921.13. Theft in office is a “theft offense” as defined by the Ohio Revised Code. *See* R.C. 2913.01(K)(1). In addition, there is little room for dispute that such conduct also “involves dishonesty by [Boutros] against the System.” As reflected above, there were numerous opportunities at which Boutros could and should have disclosed his Supplemental PBVC payments to the BOT – the annual PBVC approval process, his regular compensation updates, his salary negotiations, and in response to a public records request that he forwarded to the BOT. But he failed to do so.

B. Potential Criminal Liability

1. R.C. 102.03 – Public Officers - Ethics

In relevant part, R.C. 102.03 provides:

(D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

The statute incorporates the definition of “anything of value” set forth in R.C. 1.03, which is broad, encompassing money, goods, receipts for payment, rights in action, interest in real estate, promises of future employment, and “every other thing of value.”

Subsections (D) and (E) both prohibit a public official from securing or soliciting “anything of value” that is “of such character as to manifest a substantial and improper influence upon” the public official with respect to his duties. *See* Ohio Eth.Comm. Advisory Op. No. 97-001, 1997 WL 143814 at *2 (Mar. 14, 1997). Subsection (D) prohibits a public officer from using or authorizing his authority or influence to secure anything of value, while subsection (E), does not include that requirement. *Id.*

The statute does not describe when something of value is “of such character as to manifest a substantial and improper influence” over the official. The Ohio Ethics Commission, however, has determined that a thing of value is of “improper character”—such that it can trigger a violation of the statute—when it might improperly influence the public official:

[A] thing of value is considered to be of an improper character for purposes of R.C. 102.03(D) and (E) where it is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed.

Id. at *3.

The above definition contemplates that the official must receive the thing of value from a third party—*i.e.*, someone who might benefit from the public official’s favor and, thus, wishes to curry that favor with things of value. *See id.* (“The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence.”).

Review of other Ohio Ethics Opinions reflects that subsections (D) and (E) are frequently applied or analyzed in the context of a third party giving or offering to give something to a public official. *See, e.g.*, Ohio Eth.Comm. Advisory Op. No. 2001-08, 2001 WL 1669191 (Nov. 16, 2001) (concluding that a substantial discount given by a business to individual public officials whose public duties affect the financial interests of the business would be of improper character); Ohio Eth.Comm. Advisory Op. No. 95-01, 1995 WL 783047 (R.C. 102.03(E) prohibits city council members from accepting free season tickets from sports team located in the city); Ohio Eth.Comm. Advisory Op. No. 92-018, 1992 WL 487162 (Nov. 20, 1992) (statute prohibits employees of Division of Oil and Gas from accepting free passes to meetings of the Ohio Oil and Gas Association). The reasoning of these opinions suggests that R.C. 102.03(D) and (E) might not apply to Boutros’s conduct in this matter, as he did not solicit or receive something of value from a third party and, thus, there is no “improper influence” at issue.

But that analysis may not end the question. The Ohio Ethics Commission has determined that R.C. 102.03(D) and (E) also apply to prohibit a public official from generally “using his position to benefit his personal or private financial interest,” without regard to whether the benefit was obtained from a third-party. Ohio Eth.Comm. Advisory Op. No. 91-007, 1991 WL 338541 (Dec. 5, 1991).

For example, in Advisory Opinion No. 91-007, the Commission determined that members of a city council would violate R.C. 102.03(D) and (E) by enacting an ordinance granting them in-term increases in compensation, and that the president of the city council would violate those sections by accepting an increase in compensation enacted by city council during his presidency. In analyzing the question, the Ohio Ethics Commission reasoned that it was the duty of city council members to enact ordinances, and “[a]n increase in compensation paid to council members currently serving and acting on the increase would be of such character as to manifest a substantial and improper influence upon the council members with respect to their performance of this duty.” *Id.* at *5. With respect to the president of the council, the Ethics Commission acknowledged that the president only voted on ordinances when necessary to break a tie. That authority, however, was sufficient to trigger a violation of the statute, even if the president did not exercise it:

[T]he president has the opportunity to directly exercise authority and exert influence in the enactment of an ordinance granting an increase in benefits. R.C. 102.03(D) would prohibit the president of council from voting to break a tie in favor of granting to the president an in-term increase in compensation, and from otherwise using his authority or influence, formally or informally, to secure an increase. Division (E) would prohibit the president, as well as the members of counsel, from accepting an in-term increase in compensation enacted by council * * *.

Id. at *11; *see also* Ohio Eth.Comm. Advisory Op. No. 90-013, 1990 WL 306004 at *3 (Oct. 11, 1990) (“The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from voting, discussing, participating in deliberations, or otherwise using the authority or influence of his office or employment, formally or informally, to secure anything of value where the thing of value could impair the official’s or

employee's objectivity and independence of judgment with respect to his official actions and decisions for the agency which he serves.”).

This is not to say that the Ohio Ethics Commission applies R.C. 102.03(D) and (E) broadly to prohibit increases in compensation for public officials. The linchpin is the role the public official plays with respect to the increase. *See, e.g.,* Ohio Eth.Comm. Advisory Op. No. 91-008, 1991 WL 338542 at *2 (Dec. 5, 1991) (“[I]t is necessary * * * to examine the authority and duties of the city officials in question.”). Where an official has no authority with respect to whether he will receive an increase in compensation—*e.g.,* a city auditor who does not have a role in introducing or enacting ordinances that increase city officials' pay—there is no violation. *See, e.g., id;* Ohio Eth.Comm. Advisory Op. No. 91-007, 1991 WL 338541 (clerk of council and treasurer not prohibited from accepting increases because they do not exercise discretionary authority with respect to the enactment of ordinances or the appropriation of funds, and do not otherwise establish their own compensation).

But where a public official's duties include actions that can affect his compensation, R.C. 102(D) and (E) prohibit a public official from using those duties to take steps that increase his compensation. *See, e.g.,* Advisory Op. No. 91-008, 1991 WL 338542 at *3 (“It is apparent that an increase in the mayor's salary would provide a definite benefit to the mayor's personal financial interests, and that this financial benefit could impair the mayor's objectivity and independence of judgment in determining, as a city official, whether the increase would be in the best interests of the city. Therefore, R.C. 102.03(D) would prohibit the mayor from participating to approve the enactment of an ordinance granting him an increase in compensation.”).

Admittedly, these ethics opinions arise in a specific context, but nothing in them necessarily limits their application to city councils or other municipal entities. It is not a far stretch to say that Boutros’s role in awarding himself Supplemental PBVC payments was akin to council members who enact ordinances affecting their compensation, or mayors who have authority to approve or veto those same ordinances. If approving the Supplemental PBVC program was within Boutros’s official duties, then conduct related to that program that resulted in him receiving additional compensation, that conduct arguably violated R.C. 102.03(D) and/or (E).

2. R.C. 2921.41¹⁶ – Theft in Office

R.C. 2929.41 reads, in part:

(A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:

(1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense;

(2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund.

R.C. 2921.41(A).

(a.) Substantive Considerations

With respect to subsection (A)(1), much of the case law discussing the statute focuses on whether there was a “nexus” between the public official’s official duties and

¹⁶ This statute does not fall within the jurisdiction of the Ohio Ethics Commission. R.C. 102.03(A) (“The appropriate ethics commission shall receive and may initiate complaints against persons subject to this chapter concerning conduct alleged to be in violation of this chapter or section 2921.42 or 2921.43 of the Revised Code.”)

the theft. *See, e.g., State v. Bowsher*, 116 Ohio App.3d 170, 175-176, 687 N.E.2d 316 (6th Dist.1996). That “nexus between the auspices of the office and the wrongdoing” constitutes the “use” of the office that is required by the statute.

The mere fact that a public official commits a theft is not sufficient to support a conviction under the theft in office provision of subsection (A)(1). For example, in *Bowsher*, the defendant was a Toledo police officer who was also the volunteer treasurer of a police-firefighters organization, and the officer solicited and collected funds in that capacity. The officer took money from the fund. His subsequent conviction for theft in office under subsection (A)(1) was reversed on the basis that there was an insufficient nexus between the officer’s position and the theft, despite the fact that he solicited donations for the fund while in uniform and in his police vehicle. The State argued that the officer would not have been involved in the charitable organization but for his position as a police officer. The appellate court rejected that argument, finding that the defendant’s position as a police officer had little, if any, to do with his unlawful withdrawals of private funds from the organization. *Id.* at 176.

A case that is closer to the facts of this matter is *State v. Brumback*, 109 Ohio App.3d 65, 671 N.E.2d 1064 (9th Dist.1996). There, a school district treasurer gave herself raises not authorized by the school board. That conduct, in part, formed the basis of her conviction for theft in office. On appeal, the defendant argued that her conviction was against the weight of the evidence because the conduct was not deceptive, as she made no attempt to hide her receipt of the salary. (The jury was instructed on theft by deception as the underlying theft offense.) The appellate court rejected that argument, observing, “[r]ather than require compliance with Ohio law in the matter of her contract, or seek board approval of adjustments to her salary, Brumback proceeded to

take raises based upon resolutions that applied to others and upon a contract that contained terms not assented to by the board in official action. Her conduct could well be deemed deceptive.” *Id.* at 85.

To be clear, *Brumback* does not indicate whether the treasurer was charged under subsection (A)(1) or (A)(2). And the court does not discuss the issue of “nexus,” but *Brumback* is a good example of how theft in offense could apply to the facts of this matter. There, the treasurer was able to accomplish her theft by virtue of her position and did so by authorizing payments to herself. Here, Boutros did the same thing. Unlike the PBVC award—which was based on metrics mutually agreed upon by Boutros and the BOT and which were forward-looking—the supplemental PBVC award was based upon metrics decided by Boutros (who also assigned their weight), and which were backward looking. Boutros was able to accomplish this by virtue of the discretion the Board had delegated to him with respect to incentive payments for System employees, who all report up to him. Like the conduct of the treasurer in *Brumback*, Boutros’s conduct could be “deemed deceptive.” *Brumback* at 85.

A conviction under subsection (A)(2) appears to be a bit more straightforward, as it does not require that the defendant “use” the public office to accomplish the theft, but, rather, that the service or property “involved” in the offense is owned by the state or one of the other public entities listed in the statute. A analogous case involving a conviction under subsection (A)(2) is *State v. Shannon*, 191 Ohio App. 3d 8, 2010-Ohio-6079, 944 N.E.2d 737 (12th Dist.). There, a village treasurer-clerk failed to deduct healthcare premiums from her paycheck despite a village ordinance requiring the deduction. It was part of her job to make sure the deductions were taken from village employees’ pay. She was convicted of theft in office under (A)(2) and challenged the trial court’s denial of her

motion for acquittal, arguing that the failure to deduct the premiums was an error. The appellate court rejected the argument, noting that “the ‘mistake’ went on for 21 months.” *Id.* at ¶ 18.

Admittedly, *Shannon* does not include fulsome discussion of the issues and questions related to a conviction under subsection (A)(2), but it does show that courts will sustain convictions under the statute using a definition of “property” that includes funds, and including funds that were paid by the public entity due to a public officer’s failure to comply with an official ordinance or requirement.

(b.) Sanctions

Given the amount at issue in this matter, the offense of theft in office would be a first degree felony. R.C. 2921.41(B). In addition to the potential sanctions resulting from that level of offense, the statute provides for other sanctions:

- **Disqualification:** a public official who pleads guilty to, or is found guilty of, theft in office is “forever disqualified from holding any public office, employment, or position of trust” in Ohio. R.C. 2921.41(C)(1).
- **Restitution:** A conviction under either (A)(1) triggers a restitution requirement if the court determines that the political subdivision in question suffered actual loss. A conviction under (A)(2) triggers a restitution requirement just based upon the fact of conviction. R.C. 2921.41(C)(2)(a)(i)-(ii).
- **Retirement Benefits:** Where a court orders restitution under subsection (C)(2)(a), the entity to which restitution will be paid can file a motion requesting that the trial court order the Ohio Public Employees Retirement System (“OPERS”)—in which Boutros is a participant—to withhold the amount of restitution from any payment made under a pension. R.C. 2921.41(C)(2)(b).

3. R.C. 2921.13¹⁷ - Falsification

¹⁷ Like R.C. 2921.43, this statute does not fall within the jurisdiction of the Ohio Ethics Commission. R.C. 102.06(A).

R.C. 2921.13 describes the offense of falsification. In relevant part, it provides:

(A) No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following applies:

* * *

(9) The statement is made with purpose to commit or facilitate the commission of a theft offense.

R.C. 2921.13(A).

R.C. 2921.13(A)(9) might if apply if Boutros made false statements to the Board about whether he participated in the Supplemental PBVC, or statements about his total cash compensation that did not reflect his participation in that program, with the purpose of committing or facilitating a “theft offense.” Here, as discussed above, there is a reasonable basis for arguing that Boutros committed the offense of “theft in office,” in violation of R.C. 2921.41. For purposes of Chapter 29, “theft offense” is defined to include a violation of R.C. 2929.41. *See* R.C. 2913.01(K)(1). Thus, “theft in office” could serve to support a conviction under R.C. 2921.13(A)(9), which, under the circumstances of this case (*i.e.*, value in excess of \$150,000) that offense would be a third-degree felony. R.C. 2921.13(F)(2).

C. Breach of Fiduciary Duty

Research does not reveal that any court applying Ohio law has examined the fiduciary duties that arise specifically from employment as the administrator of a county hospital. In the analogous context of corporations, however, Ohio law is clear that an officer occupies a fiduciary relationship to his employer, which imposes upon the officer a number of duties, including “good faith, a duty of loyalty, a duty to refrain from self-dealing and a duty of disclosure.” (Internal quotation marks omitted.) *Wing Leasing*,

Inc. v. M & B Aviation, Inc., 44 Ohio App.3d 178, 181, 542 N.E.2d 671 (1988).

Importantly, in the context of a breach of fiduciary duty, intent is not relevant, but, rather, “as long as the [fiduciary] places himself in a position of conflicting loyalties and subsequently violates his duty of trust and benefits at the expense of the corporation, liability attaches.” *Ohio Drill & Tool Co. v. Johnson*, 625 F.2d 738, 742 (6th Cir.1980).

Here, Boutros’s conduct violated, at least, his duties of good faith and loyalty to the System. A fiduciary violates that duty where he “intentionally acts with a purpose other than that of advancing the best interests” of his employer. *Vontz v. Miller*, 2016-Ohio-8477, 111 N.E.3d 452, ¶ 48 (1st Dist.), quoting *In re Walt Disney Co. Derivative Litig.*, 609 A.2d 27, 66-67 (Del.2006). Further, where a fiduciary is in control of corporate processes, he violates the duty of loyalty where he manipulates those processes to maintain that control. *Id.*, citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del.1971). By participating in the Supplemental PBVC plan as he did—without Board authorization—Boutros arguably acted with the purpose of advancing his own financial interests over the System’s interest in controlling executive compensation by maintaining it at a certain level. He also manipulated the processes of the System to maintain control of the Supplemental PBVC Program by failing to disclose information about payments under that program to the Board.

VI. RECOMMENDATIONS

Given the proximity of Boutros’s conduct to conduct prohibited under Ohio Ethics (and other laws), it is recommended that the BOT disclose the facts surrounding the issue to the Ohio Ethics Commission for their review and assessment. This process has already been initiated after Boutros’s self-report to the OEC on November 1, 2022.

Preliminary modifications and changes affecting the governance of the relationship between the BOT and CEO were instituted as the investigation was proceeding. This included adoption of Executive Compensation Policy BOT-06 which provides, in part, for a committee of the BOT to perform an annual review of the System's CEO and other senior executive compensation.

With the benefit of further investigation and analysis, additional recommendations will be identified. The System, through the efforts of its Co-General Counsel, Laura McBride, and Sonja Rajki, is developing a comprehensive list of recommendations that will be presented to the BOT for further consideration and, if appropriate, implementation. The aim of these further recommendations will be to avoid a circumstance, such as the Supplemental PBVC matter involving Boutros, from occurring, or to assist in the BOT's early detection of such a scheme.

Report to the Board of Trustees of The MetroHealth System

APPENDIX TO EXHIBITS

Exhibit	Description
1.	Wire Transfer Confirmation
2.	November 9, 2022 Boutros Timeline
3.	Boutros Supplemental PBVC Self-Assessment
4.	Original Agreement
5.	Resolution 18608
6.	Amended Agreement
7.	January 2020 Agreement
8.	The MetroHealth System 2017 PBVC Report – Management Recommendations
9.	The MetroHealth System 2017 Program – Management Recommendations – Addendum
10.	PowerPoint Performance Based Variable Compensation Program – Management Recommendation for Funding 2018
11.	Resolution 19108
12.	Resolution 19219
13.	Resolution 19083
14.	Resolution 19113
15.	Resolution 19185
16.	Resolution 19186
17.	Resolution 19270
18.	Resolution 19285
19.	Resolution 19354
20.	Resolution 19423
21.	Resolution 19495
22.	Resolution 19484
23.	Email Between Boutros and Stern February 1-7, 2019

Exhibit	Description
24.	Email From Boutros to Senior Executives 12-22-2022
25.	Email From Boutros to Whiting 8-20-2022
26.	Executive Total Compensation Review – May 17, 2017
27.	Draft – Executive Total Compensation Review Feb 2018
28.	Executive Total Compensation Review – September 11, 2019
29.	Executive Total Compensation Review –December 16, 2020
30.	Executive Total Compensation Review –September 28, 2021
31.	Executive Total Compensation Review –October 12, 2022
32.	System Letter to Christ April 10, 2018
33.	Email From Boutros 4-26-2018
34.	Email From Boutros 4-27-2018
35.	Boutros Oct. 3, 2021 Email to Whiting with Attachments
36.	Resolution 19537
37.	Boutros November 11, 2022 Letter to Whiting re: Written Notice
38.	Boutros November 11, 2022 “Written Notice” to Whiting