



61 SOUTH PARAMUS ROAD, SUITE 250

PARAMUS, NEW JERSEY 07652

NEW JERSEY
NEW YORK

TELEPHONE: (201) 928-1100
TELEFAX: (201) 928-0588
WWW.DECOTIISLAW.COM

THOMAS A. ABBATE
TABBATE@DECOTIISLAW.COM
201.907.5294

Via Electronic Mail

December 11, 2020

Hon. Judith M. Persichilli, Commissioner
New Jersey Department of Health
P.O. Box 360
Trenton, New Jersey 08625-0360

Re: Petition for Declaratory Ruling Pursuant to N.J.S.A. 52:14B-8 Regarding Certificate of Need Applications of BMC Hospital, LLC to Purchase the Assets of Bayonne Medical Center or, in the Alternative, to Assume a Minority Interest in IJKG Opco, LLC

Dear Commissioner Persichilli:

I write on behalf of Hudson Regional Hospital (“HRH”)¹ to object to the certificate of need application, dated November 2, 2020, submitted by IJKG Opco, LLC d/b/a CarePoint Health System, seeking approval for a transfer of a 49% ownership stake in Bayonne Medical Center to BMC Hospital, LLC (“BMC”), and to further note our objections to BMC’s previous – and still pending – application seeking a certificate of need to purchase substantially all of the assets of Bayonne Medical Center.

As explained below, and in the attached default letter to CarePoint, see **Exhibit A** (Letter from HRH to CarePoint, dated 12/11/20), that entity is presently in default of its lease obligations and, accordingly, HRH has provided a notice to CarePoint that, effective December 31, 2020, it will exercise the following remedies: (1) termination of the current management company and a demand for disgorgement of management fees paid contrary to the Subordination of

¹ Hudson Regional Hospital is a trade name for, among other things, NJMHMC, LLC, as the licensed operator of Hudson Regional Hospital in Secaucus, and 29 E 29 Street Holdings, LLC, which holds title to the real estate associated with Bayonne Medical Center and is also CarePoint’s landlord as assignee of a Lease. Both entities are under common ownership and control and for ease of reference are referred to collectively herein.

Management Agreement, replacement of the management company with a designee of HRH's choosing, the granting of physical access to Bayonne Medical Center and an inspection of its books and records; (2) termination of the Lease and conversion to an at-will tenancy; (3) withdrawal of all pending certificate of need applications and execution of the necessary documents to transfer control of the operating license and certificate of need in favor of HRH's designee.

Accordingly, we hereby petition the Commissioner pursuant to N.J.S.A. 52:14B-8 for a declaratory ruling holding that, in light of the exercise of HRH's remedies under the Lease and the ongoing litigation amongst HRH and CarePoint in the Delaware Court of Chancery, and elsewhere: (1) CarePoint and BMC are without authority to seek certificate of need approval for a sale of substantially all of the assets of Bayonne Medical Center or, in the alternative, seeking to transfer a purported minority ownership interest to BMC; (2) BMC may not seek certificate of need approval for a purported minority interest in CarePoint absent a full review process in which HRH shall be permitted plenary participation as an interested party-intervenor; and (3) no certificate of need application filed by CarePoint or BMC shall be processed contrary to the right, title and interest of HRH as the Lessor, which has a superior contractual right under the Lease to consent to any such filing.

With respect to the certificate of need applications, because CarePoint is in default of its obligations under the Lease and the associated Security Agreement, and HRH's rights are subject to an action for specific performance, CarePoint's submissions to the Department are in breach of those agreements, lack force and effect, and are subject to injunctive relief. Under those documents, in the event of a default, the landlord has the right to demand that CarePoint execute and place the necessary transfer documents in escrow. CarePoint's filing of the certificate of need application at issue, without notice or an opportunity to comment, or grant consent by the landlord, appears to be intended to cut off and undermine the landlord's contractual rights and thereby invites additional legal action. Accordingly, absent our consent and resolution of all the pending litigation, we urge the Department to grant our petition, and thereby refuse further processing of, or deny the application without further consideration.

With respect to the exercise of our lease rights, we do not take these actions lightly, and in order to ensure continuity of care we have made the exercise of our remedies effective on December 31, 2020, we are not seeking to immediately dispossess CarePoint from the facility, nor will we otherwise replace any medical staff or operational personnel. We contemplate having our management consultant undertake a third-party review or monitorship to study the appropriate next steps. To the outside public, the hospital will continue to operate as-is and we will, for the moment, permit the tenant to remain in possession.

We will also work with the Department to ensure that there is a seamless transition that is entirely respectful of its authority over health care during this critical time and fully recognize

that a transfer of ownership of the hospital business, or control of the license would require certificate of need approval. But, on the other hand, we can no longer afford to stand by while CarePoint engages in procedural gamesmanship and underhanded tactics, all the while extracting money from a hospital facility and thereby potentially imperiling health care in Hudson County. We are prepared to take these extraordinary steps because these extraordinary times require decisive action.

A. CarePoint's Underlying Defaults

To summarize the immediate issues with respect to CarePoint's defaults:

- Although calendar year 2020 is in its coda, CarePoint has not provided audited financial statements for 2019. We suspect that this is because, if asked to do so, CarePoint's auditor would accompany any such financial statement with a "going concern" opinion that the business is insolvent. The other, even more unpleasant alternative, is that CarePoint's books are not in order and not kept in accordance with generally accepted accounting principles. To like effect, CarePoint has not provided the required quarterly and monthly financials under the Lease, thus obscuring from our view its true financial condition. The failure to provide these statements is a default in its own right.
- Nonetheless, to the extent we have been able to review the unaudited financials, they disclose major financial defaults under the Lease because: (1) for two consecutive calendar quarters, EBITDAR has failed to exceed 150% of Fixed Charges; and (2) for two consecutive calendar quarters, EBITDAR has failed to exceed 200% of Lease payments. CarePoint's failure to meet the required EBITDAR ratios is objective in nature and constitutes a Major Event of Default under the Lease.
- The significance of CarePoint's failure to meet the EBITDAR ratios bespeaks the financially precarious condition of the business and its apparent insolvency. In short, it appears from the fragmentary financials we have been provided, that CarePoint is hemorrhaging money. Indeed, by its own admission, CarePoint is seeking to convey a 49% interest to BMC Hospital so that it can obtain capital to pay its secured creditors, and admitted in its press release that it needs these funds to "provide needed cash flow." Therefore, CarePoint's insolvency is an additional Event of Default above and beyond the deficient EBITDAR ratios.

- CarePoint's proposed sale of a 49% interest to BMC Hospital is an evasion of the landlord's right to approve an assignment or sublease of the tenancy. We have previously denied consent for BMC Hospital to assume or take a sublease of CarePoint's tenancy. See **Exhibit B** (Letter from HRH to Department, dated October 6, 2020) and **Exhibit C** (Letter from HRH to CarePoint, November 12, 2020, re-affirming denial and noticing additional Lease defaults). The parties are presently in litigation on this very issue in the Delaware Court of Chancery. See **Exhibit D** (HRH's First Amended Complaint); and **Exhibit E** (CarePoint's Answer and Counterclaim).
- Knowing that the relevant standard under the Lease cannot be met, this "Plan B" approach of granting BMC a 49% interest is intended to subvert the landlord's rights. However, any "Change in Control" transaction under the Lease still requires landlord approval. Furthermore, a "Change in Control" under the Lease is not limited simply to the percentage of equity interest in the business and requires an examination of the relative value and assessment of the ownership rights, involvement in the management of the facility, future rights and expectancies, and the substance behind the form of the entire transaction.

CarePoint did not provide us with any of the transaction documents and did not seek landlord consent for this transaction. However, CarePoint's publicly announced plan is to provide BMC Hospital with interim control of the management of Bayonne Medical Center and, ultimately, 100% ownership and control. Therefore, CarePoint has obviously engaged in an unlawful, incremental Change in Control transaction constituting an additional Event of Default.

- In addition to the Lease, it is noteworthy that CarePoint also executed a Subordination Agreement, under which CarePoint's right to select and pay a manager for Bayonne Medical Center was secondary to, and contingent upon the tenant's performance under the Lease. CarePoint's decision to pay millions, essentially, to itself in management fees while hollowing out the business and defaulting upon its financial covenants with its landlord is a blatant violation of the Subordination Agreement. A default under the Lease likewise triggers a reciprocal default under the Subordination Agreement.
- Furthermore, CarePoint also executed a Security Agreement with the landlord under which it granted a first priority security interest in all of its personal property, furniture, fixtures, equipment including intangible property, and, specifically, in any operating license or certificate of need. Therefore, the filing of a certificate of need application without the landlord's approval and while in a state of Default and Major Default is a violation of the Security Agreement.

B. BMC Hospital's Opaque Funding Source

In addition to the material breaches of the Lease, serious and substantial questions are presented on the face of BMC's two certificate of need applications with respect to its financial viability and funding source, Titan Capital. No information has been provided by BMC other than a one page letter from Titan Capital indicating that it would provide \$75M in funding to that entity. In the ongoing litigation between HRH and BMC, pending in the Chancery Division of the Superior Court, we have issued a subpoena seeking access to all of the records from Titan Capital relating to the proposed funding. See **Exhibit F** (Subpoena to Titan Capital).

Predictably, BMC filed an action in the State of New York seeking to quash the subpoena, which we have opposed. See **Exhibit G** (HRH's Opposition to BMC's Petition to Quash Subpoena to Titan Capital). As explained in our opposition brief, there are serious questions relating to the financial terms upon which Titan Capital will purportedly be funding BMC, whether there is a hidden or reversionary equity interest at stake that has not been disclosed to the Department and, further, whether the proposed financial terms are so onerous as to constrain BMC's cash flow and thereby pre-ordain its failure as a business enterprise if the certificate of need application is approved.

The parties will be litigating these issues in the courts because they are relevant to the validity of HRH's denial of CarePoint's request to assign the Lease to BMC, as well as BMC's claims against HRH for tortious interference. The Department need not concern itself with the minutiae of that litigation or even await its outcome, but should instead exercise its regulatory jurisdiction to demand from BMC the very same information we are seeking by way of subpoena. The public interest certainly militates in favor of full disclosure of the financial terms and conditions upon which BMC proposes to receive \$75M in working capital from a third-party, non-traditional lending source. We believe that if it inquires the Department will find, as we suspect, that the proposed funding is either illusory or offered on terms that are well outside normal market boundaries.

C. HRH's Intended Exercise of its Remedies

Therefore, because Bayonne Medical Center is being mismanaged, in open disregard of the Lease, effective December 31, 2020, HRH has decided to exercise its contractual remedies as follows:

- **First**, HRH has terminated the management company of Bayonne Medical Center and intends to put in place its own management company to oversee the operation of the hospital and ensure that its investment is protected. In connection with this remedy, HRH will seek disgorgement of management fees paid contrary to the Subordination

Agreement, and will seek physical access to the facility as well as to the books and financial records.

- Second, the Lease will be terminated and converted to an at-will tenancy without prejudice to HRH's potential future exercise of its additional rights and remedies under the Lease.
- Third, HRH is exercising its right to demand that CarePoint execute, and deliver into escrow all of the necessary documents to transfer ownership and control of the operating license and certificate of need for Bayonne Medical Center to a third-party of HRH's choosing, subject to the Department's approval through the filing of a certificate of need application.
- Fourth, HRH is demanding that CarePoint immediately withdraw any and all certificate of need applications from consideration by the Department, because the filing of the same while operating under a state of Major Default is in violation of the Lease and the Security Agreement, and therefore has no force and effect.

C. Conclusion

We appreciate the Department's consideration of the foregoing and ask that our petition for a declaratory ruling be granted. We understand the seriousness of the actions we are taking and remain available to discuss this matter in further detail with the Department at its convenience. Thank you.

Very truly yours,

**DECOTIIS, FITZPATRICK,
COLE & GIBLIN, LLP**

By: _____

Thomas A. Abbate

Encl.

cc: Marcela Ospina Maziarz, Deputy Commissioner, Health Systems
Maria Christensen, Assistant Commissioner, Division of Certificate of Need and Licensing
Jean M. DeVitto, Executive Director, Certificate of Need and Healthcare Facility Licensure Program

Joy L. Lindo, Director, Office of Legal and Regulatory Compliance
Michael J. Kennedy, Office of Certificate of Need and Facility Licensure
Matthew G. Oliver, Counsel for IJKG Opco, LLC
Louis A. Modugno, Counsel for IJKG Opco, LLC
James P. Flynn, Counsel for BMC Hospital, LLC
Sheila A. Woolson, Counsel for BMC Hospital, LLC