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February 21, 2021

VIA EMAIL

Thomas Abbate, Esq.
DeCotiis, Fitzpatrick, Cole & Giblin, LLP
Glenpointe Center West, Ste. 31
500 Frank W. Burr Blvd.
Teaneck, NJ 07666

**Re: DEMAND THAT HRH RETRACT ITS PRESS RELEASE &
CEASE AND DESIST FROM FURTHER DEFAMATORY STATEMENTS**

Dear Mr. Abbate:

As you know, this firm represents BMC Hospital LLC (“BMC”), and this serves as notice that we also represent BMC’s principals as well as Surgicore.

We demand that your clients, HRH, Yan Moshe, and Nizar Kifaieh immediately retract the press release they issued Thursday, February 18, 2021 at 1:04 PM (copy attached as Ex. A), and at that instant and thereafter, cease and desist from further defamatory statements concerning BMC Hospital LLC, Surgicore and all related parties and principals. This false, misleading, and maliciously tortious document is filled with defamatory and actionable falsehoods, including many that are defamatory *per se*, leaving your clients exposed to liability for substantial provable and presumable compensatory damages, punitive damages, and further legal and equitable liabilities, if not retracted and ended.

Without retraction and cessation, BMC and Surgicore stand to be damaged to the tune of millions to tens of millions of dollars, and you and your client are now on notice of these falsities, and that we have been authorized to prepare a complaint against your clients due to their utter disregard for truth, willingness to hurl untruths indiscriminately, and clearly evident desire and maliciously focused intent to interfere with our clients’ existing business relations and prospective economic advantage. You and your clients may expect all previous claims to be re-ignited along with new claims based on the new lies your clients have fired off. Any additional false public statements by your clients will only further inflame the situation and increase the damages caused by your clients.

HRH’s executives and paid spokespeople have demonstrated a pattern of issuing defamatory statements that they know to be false and malicious. My clients reserve the right to seek relief for each and every defamatory or tortious statement or combination of statements in Ex. A or other of your clients’ statements. We have highlighted several here to demonstrate that HRH’s press release is filled with lies:

- The statement that BMC has not “made any public filings related to their financial condition in more than one year” is *a lie*. You personally have received copies of such filings on multiple occasions since June 2020, *i.e.* over the last eight months. Because such statements suggest “misfeasance in business” for a regulated entity, they amount to defamation *per se*, and

damages are presumed. *See WJA v. DA*, 210 N.J. 229, 240 (2012) (citing *Biondi v. Nassimos*, 300 NJ Super. 148, 154 (App. Div. 1997)) These include BMC's submissions to the Department of Health in:

- (i) June, July, October **and** November 2020 documentary evidence of the availability to BMC of \$75 million in invested and investable funds, along with bank proof of such funds being on deposit, all such documents amounting to public record submissions on which you or counsel for your clients' predecessors were copied or which were otherwise available under OPRA. *See* Ex. B for listing of such communications.
 - (ii) July and November 2020 detailed, documented and extensive financial projections outlining BMC Hospital's plan to invest significant funds to enhance service line capabilities, strengthen physician alignment, improve the patient experience, and achieve improvements in the hospital's EBITDA to more than \$17 Million by August 2023. *Id.*
- HRH's claim that DOH is not processing BMC CN applications, including its July 1, 2020 Application for approval of license transfer is also a lie. Again, not only do your clients know that to be untrue, but you do as well, because HRH's December 11th request that DOH stop its review was rejected.
 - (i) You sought a declaration that BMC CN Applications "Not Be Considered At This Time," and **DOH denied HRH's request.**
 - (ii) In fact, DOH said—in its January 21, 2021 letter addressed to you-- that **each "pending CN application filed by BMC" was one that "must be considered by the Department"** and that **the "appropriate course of action" for the Department is to consider and apply applicable statutes and regulations "in considering the application."** and that HRH's efforts to "end-run" that process and use litigation as a "cudgel" would not be countenanced or considered.
 - (iii) Further, you yourself noted in a February 11th email that issues concerning BMC as a successor tenant at Bayonne Site are being addressed in the "CN proceedings before the Department of Health." *See* Ex. C.
 - ***A third HRH lie*** is HRH's statement that BMC "abandoned" its claims, and HRH's substantive positions were vindicated. First, you know full well, and your client consented to the dismissal knowing, that it was "without prejudice" and that all claims were therefore preserved,¹ which is in fact the direct opposite of "abandoned."² Second, HRH's positions were not vindicated—HRH itself filed one affirmative motion seeking dismissal of three counts of BMC's complaint, and that motion was denied without even a grant of oral argument. *See* September 18, 2020

¹ *Mason v. Nabisco*, 233 N.J. Super. 263, 269 (App. Div. 1989) ("without prejudice" means that there has been no adjudication on the merits of the claim and that a subsequent complaint alleging the same cause of action will not be barred")

² *See Thesaurus.plus* ("Abandon and Preserve--Opposite meaning words"; "Preserve is an antonym for abandon"), available at [https://thesaurus.plus/related/abandon/preserve#:~:text=Abandon%20verb%20%E2%80%93%20To%20stop%20doing%20\(something\)%20permanently.&text=Preserve%20is%20an%20antonym%20for%20abandon.](https://thesaurus.plus/related/abandon/preserve#:~:text=Abandon%20verb%20%E2%80%93%20To%20stop%20doing%20(something)%20permanently.&text=Preserve%20is%20an%20antonym%20for%20abandon.)

Order and September 18, 2020 transcript (excerpts at Ex. D).

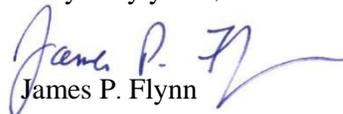
- **A fourth HRH lie** is any suggestion that my clients are involved in any “alleged improper physician recruitment and inducement practices, in contravention of the lease and applicable law,” as apparently you and your clients have expressed in correspondence that you have collectively taken in the press release. *See* Ex. C.
 - (i) Despite the thrust, connotation and innuendo of the press release, you admit, and bind your clients by such admission, that “the letter was addressed only to CarePoint.”³
 - (ii) Your client focuses a press release on the never served letter as an attack by innuendo on BMC—that is defamation *per se*, as such allegations interfere with various economic relationships and prospects, and suggest conduct, characteristics or a condition that is incompatible with BMC and Surgicore’s lawful business, trade or office.

That there may be some arguably accuracy in this or that word or phrase shoved amongst such lies is no defense--if the statement is substantially false, as each of these is, the statement is defamatory because “the falsity goes to the defamatory ‘gist’ or ‘sting’ of the statement.” NJ Form Jury Instructions, Section 2.16 (Defamation)(citing *Lawrence v. Bauer Pub. & Print., Ltd.*, 89 N.J. 451, 460-461 (1982)). Withdraw the press release, and know that even such withdrawal will not fully eliminate liability for your client.

Further, this letter constitutes notice to you and your clients to preserve all relevant documents and communications concerning Ex. A, its drafting, issuance and communications in anyway concerning it, including any and all communications between and among you, your colleagues and your clients concerning the above matters. Because defamation is a likely claim, and that claim and/or defenses to such will likely involve questions of your clients’ negligence, intent, reckless disregard, and/or malice,⁴ and the advice and understanding under which your clients proceeded, such communications are not entitled to privilege and you and other of your clients’ counsel will likely be witnesses, so be guided accordingly.

Please copy me on the dissemination of any retraction. If no retraction will occur, so advise. If uncompromised counsel will take over these communications, please forward this letter to same, and advise me of the identity of new counsel.

Very truly yours,


James P. Flynn

Attachments

³ Indeed, you specifically admit that your clients “were not joining issue with BMC, at this point,” and that if it would be necessary to do so “at all, we will address those separately and directly with their counsel, outside the context of the letter.” Ex. C. Neither my colleagues nor my colleagues have received any such communications.

⁴ *See Bainhauer v. Manoukian*, 215 N.J. Super. 9, 31-34, 42 n.13 (App. Div. 1987); *Restatement (Second) of Torts*, Section 580B (1977); NJ Form Jury Instructions, Section 2.16 (Defamation).

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Ex. A

From: **Marjorie Kaplan** <MarjorieK@axiominc.net>
Date: Thu, Feb 18, 2021 at 1:04 PM
Subject: HRH Ownership of Bayonne Medical Center Status
To:

From: Hudson Regional Hospital
55 Meadowlands Pkwy.
Secaucus, NJ 07094

Contact: Marjorie Kaplan or Ron Simoncini
Axiom Communications
201.348.8998 or 201.741.6616 (mobile)
marjoriek@axiominc.net or rons@axiominc.net

BAYONNE MEDICAL CENTER STATUS

*Activity by BMC Hospital LLC and CarePoint Health Subject of Inquiry
NJ Department of Health, US Department of Justice, Hudson Regional Hospital*

SECAUCUS, N.J., February 18, 2021—Several conditions related to Hudson Regional Hospital’s ownership of the Bayonne Medical Center property, leased to CarePoint Health, have materially changed. In the public interest, we are providing the following update:

1) BMC Withdraws All Litigation Against Hudson Regional

On February 8th, BMC Hospital LLC voluntarily abandoned its litigation against Hudson Regional Hospital. We vigorously defended these allegations and prevailed in three substantive preliminary hearings and motions that vindicated our position;

2) CarePoint Lease at Bayonne Medical Center Is Terminated

HRH served notice of significant and material defaults under its lease for Bayonne Medical Center on December 11th and terminated CarePoint Health’s lease on December 31st, changing its status to month-to-month pending eviction proceedings. In a 300+ page document * that detailed its defaults under the lease, HRH directed CarePoint to terminate all management agreements related to the property and its operations; and that it escrow the documents necessary to transfer the hospital operating license to HRH or its designee upon resolution of the parties’ lawsuit. To the extent CarePoint has produced informal financials, they show it to be in fiscal distress, on shaky ground and in violation of its financial covenants. CarePoint has also been unable to produce a certified audit report for two consecutive years, and in the last year it produced an audit report – 2018 – the independent auditor determined CarePoint had “substantial doubt as a going concern.” What is CarePoint now hiding from the public that its auditor will not issue a certified audit report?

Despite the passage of all cure periods, CarePoint has continued to flaunt its obligations under the lease and is still hiding the facts. Therefore, HRH has terminated the lease and will evict CarePoint from the premises upon issuance of a judgment in related court proceedings now pending in Delaware, where all legal disputes between the parties have been consolidated.

3) The New Jersey Department of Health Has Declined to Advance BMC Hospital's Certificate of Need Application

The Department of Health has notified BMC that it will not process the incomplete application for Certificate of Need filed by BMC Hospital LLC, precluding it from moving forward with plans to operate Bayonne Medical Center. In addition, neither CarePoint nor BMC has made any public filings related to their financial condition in more than one year; and despite a DOH request for more information, there are no public documents filed related to CarePoint's announcement that it would sell its Hoboken University Medical Center operations to KPC, a California healthcare operator that has no status or filings with the New Jersey Department of Health. Seemingly, KPC would encounter similar difficulties obtaining a Certificate of Need from the Department of Health. HRH is under contract to purchase the Hoboken University Medical Center property.

4) CarePoint's Illegal Marketing Practices and Connection to Clover Health Prospectively Compromises Its Acute Care Facilities in Hudson County

HRH has served a cease-and-desist letter on CarePoint seeking to discontinue CarePoint, BMC Hospital, its affiliate Surgicore Surgical Centers, and others from engaging in alleged improper physician recruitment and inducement practices, in contravention of the lease and applicable law.

Furthermore, unscrupulous business practices by CarePoint's ownership were also published in a recent Hindenburg Research report – since picked up by national financial publications – reporting that prior to a merger that allowed it to go public, an affiliated insurance entity, Clover Health, had been under an undisclosed active investigation by the U.S. Department of Justice on 12 counts ranging from kickbacks to marketing practices to undisclosed third-party deals (referenced in a recent Forbes article).^{*} Clover did not reveal that it was under active investigation by the DOJ and now is the subject of numerous class action lawsuits, and according to one filed by Labaton Sucharow, “certain of its executives may be liable for securities fraud.”

Vivek Garipalli, who founded both CarePoint and Clover, was previously found by a New Jersey State Commission of Investigation report to have plundered CarePoint Health for more than \$157 million in excessive management fees. With all of these Department of Justice, securities enforcement and class action litigation matters swirling around CarePoint's ownership, is it any wonder that CarePoint is not paying attention to the healthcare needs of Hudson County residents?

5) HRH Has Filed a Certificate of Need to Operate Bayonne Medical Center

BMC's inability to obtain a license and CarePoint's repeated indications that it will cease operating compels HRH to serve its mission of providing high-performing healthcare in Hudson County and to protect its real estate investment. HRH has filed a Certificate of Need application with the Department of Health that will allow it to step in as operator once the Delaware court confirms HRH's right to terminate the lease and re-take possession of the premises or, in the interim, if CarePoint abandons or otherwise is forced to cease operating Bayonne Medical Center.

“As the landlord for CarePoint at Bayonne, we are gravely concerned that the denouement of the BMC business plan and CarePoint's inability to meet the conditions of its lease could at any time result in its abandonment or its inability to continue operating an acute care facility at Bayonne,” says Dr. Nizar Kifaieh, President and CEO of Hudson Regional Hospital. “As we have asserted frequently during this process, Hudson Regional stands ready to assume operations at Bayonne at a moment's notice. Our

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pending Certificate of Need application acknowledges that CarePoint remains the operator for Bayonne until such time as it fulfills on its announced intention to exit the market; but asserts that in the public interest the remainder of the Application should be considered on the merits and approved conditioned upon the Delaware courts enforcing HRH's leasehold right to possession."

*For related links, materials and filings, [click here](#).

Marjorie Kaplan

Vice President, Public Relations

Axiom Communications

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Marjoriek@axiominc.net

Ex. B

BMC Has Provided DOH Financial Information, Assurances And Confirmations On Numerous Dates Beginning In June 2020—In Other Words, Multiple Times In The Last Eight Months

1. “[HRH has] **just three (3) days cash on hand**...This paucity of liquidity **contrasts sharply with the substantial, \$75 Million proof of funds that BMC Hospital LL previously provided to DOH.**” [June 18, 2020 Letter to DOH Commissioner]
2. “[BMC has] **seventy five million dollar (\$75,000,000.00) of unrestricted cash funds** to be used toward the acquisition [of] Bayonne Medical Center and its working capital needs.” [June 18, 2020 Letter to DOH Commissioner, Attachment 4, with bank proof of funds]
3. The July 1, 2020 CN Application contained:
 - extensive financial projections outlining BMC Hospital’s plan to invest significant funds to:
 - enhance service line capabilities,
 - strengthen physician alignment and
 - improve the patient experience.
 - increase the hospital’s EBITDA to more than \$17 Million by August 2023.
 - Proof \$75 million in invested and investable funds.
[July 1, 2020 CN Application—Full Review]
4. “[T]he **\$75 million proof of funds** previously submitted with BMC’s application **is evidence of invested and investable funds, not a loan**. If that needed to be made any clearer, and we do not think it does, we attach as Ex. H a confirmation of that fact from that investor.” [October 19, 2020 Letter to Commissioner]
5. “[BMC has] **seventy five million dollar (\$75,000,000.00) of unrestricted cash funds** to be used toward the acquisition [of] Bayonne Medical Center and its working capital needs.” [October 19, 2020 Letter to Commissioner, Attachment H, with bank proof of funds]
6. The November 2, 2020 CN Application contained both:
 - extensive financial projections outlining BMC Hospital’s plan to invest significant funds to:
 - enhance service line capabilities,
 - strengthen physician alignment and
 - improve the patient experience.
 - to increase the hospital’s EBITDA to more than \$17 Million by August 2023.
 - Proof \$75 million in invested and investable funds.
[November 2, 2020 Request For DOH Approval of BMC Acquiring An Additional 39.1% of Bayonne Hospital]

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Ex. C

From: Thomas A. Abbate

Sent: Thursday, February 11, 2021 7:10 PM

To: McMichael, Lawrence G. <lmcmichael@dilworthlaw.com>

Subject: RE: CarePoint Health System/Hudson Regional Hospital -- Cease and Desist

Larry – I just want to clarify a couple of issues and will take some responsibility for being less than clear in my initial email to you. First of all, we have not publicized this letter and it was sent in confidence. I regret that I did not state that in my transmittal but that was our intention. Of course, HRH does so without prejudice, and reserves the right to litigate or file a claim at which point it's obviously a public process. Second, I appreciate your referral to Gary Herschman for BMC, but it appears that the letter made its way to BMC very quickly before I could frame a meaningful response. To be clear, the allegations that we wish you to look into are specifically with respect to CarePoint, and the existence of individual actors who purport, in reality or not, to be acting on behalf of your client's hospitals. Your client operates and controls the business, and we would like your client to look into the matter, and that is why the letter was addressed only to CarePoint.

As you may or may not be aware, the litigation between HRH and BMC was recently resolved and discontinued. We did not resolve one litigation in order to start a new one, and thus we were not joining issue with BMC, at this point. To the extent we have any further issues with BMC, if at all, we will address those separately and directly with their counsel, outside the context of the letter and without the need, necessarily, for CarePoint's involvement. While it is true that we have expressed our disapproval of BMC as a successor tenant, that is a matter which is best directed to the existing litigation between our respective clients in the Delaware litigation and in the CN proceedings before the Department of Health.

Thanks and hope you understand our position but am happy to discuss in further detail as needed. Tom



Thomas A. Abbate

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Thank you very much.

Ex. D

HRH Lost Its Substantive Motion To Dismiss:

THE COURT: We are now turning to BMC Hospital v. WTFK and others. That's under Docket No. 99-20.

The first is an application brought by NJMHMC seeking to dismiss the remaining counts of the suit brought against them by BMC Hospital.

* * *

Similar arguments are made by HRH in its application to dismiss the complaint brought against IJKG in companion litigation.

For the same reasons that I decided there, this application is similarly denied here.

[Sept. 18, 2020 Court Transcript]



IT IS on this 18th day of September, 2020:

ORDERED that the Hudson Regional Defendants' motion is ~~GRANTED~~ Denied



[Sept. 18th Court Order]