



May 29, 2012

ELECTRONIC MAIL

Devon Graf, Director
Office of Legal and Regulatory Compliance
NJ Dept. of Health and Senior Services
P.O. Box 360
Trenton, New Jersey 08625-0360

DAG Jay Ganzman
NJ Dept. of Law and Public Safety
Division of Law
P.O. Box 106
Trenton, New Jersey 08625-0106

Re: Proposed Sale of Christ Hospital to Hudson Hospital
Opco LLC and Hudson Hospital Propco, LLC.

Dear Director Graf and DAG Ganzman:

In conjunction with the May 24, 2012, public hearing regarding the proposed sale of Christ Hospital ("Christ") to Hudson Hospital Opco LLC and Hudson Hospital Propco, LLC ("Hudson Hospital"), we are writing to provide our comments pursuant to the Community Health Assets Protection Act ("CHAPA"), N.J.S.A. 26:2H-7.11. These comments are made on behalf of New Jersey Appleseed Public Interest Law Center ("New Jersey Appleseed"), and are intended to assist the Attorney General in his role as "protector, supervisor and enforcer of charitable trusts and charitable corporations." N.J.S.A. 26:2H-7.11. They supplement our written comments submitted to DHSS pursuant to the CN process on May 23, 2012 (which we incorporate herein), and our verbal statements presented at the respective CN and CHAPA hearings.

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It is our understanding that CHAPA "codifies" the Attorney General's common law responsibilities with respect to nonprofit hospitals, and supplements his "authority under the common law to act in the public interest to oversee and protect charitable trusts and charitable corporations." Governor's Conditional Veto Message, Assembly Bill No. 1439-L.2000, c.143. The Act also delegates a portion of these responsibilities to DHSS that must affirmatively find that the proposed transaction "is not likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities." N.J.S.A. 26:2H-7.11(b).

A review of the factors the Attorney General must consider when determining whether a "fundamental corporate change that involves transfer of ownership or control of charitable assets or a change of the nonprofit's mission or purpose" (in the event of a for-profit conversion) N.J.S.A. 26:2H-7.11, is in the public interest indicates that CHAPA also codifies the common law fiduciary duties of directors of nonprofit corporations. Those duties include the duty of obedience to purpose,¹ the duty of care and the duty of loyalty. See Peregrine and Schwartz, "The Nonprofit Board's Duties When Considering a Change of Control," Health Law Analysis, (April 2008)p. 26-27. Although CHAPA applies certain criteria to all proposed acquisitions regardless of the nature of the acquiring entity, and applies certain criteria only to for-profit acquisitions (due to the fact that in the latter circumstance, the board has decided to abandon the hospital's charitable mission), all the Acts' strict standards for board review and approval are intended to assure that the board does not exceed or fail to carry out the corporation's charitable purpose. Id. at 27. In this way, CHAPA's review criteria supplant the application of the common law business judgment rule. Id.²

1 Peregrine and Schwartz, "The Application of Nonprofit Corporation Law to Health-Care Organizations," American Health Lawyers Association, (2002), p.40-41.

2 This conclusion is consistent with the Bankruptcy Court's declaration at the Sale Hearing on March 27, 2012, that it was not making any findings with respect to CHAPA. Indeed, the Court's determination in its Order dated 3/27/12, In the Matter of Christ Hospital, Case No. 12-1290(MS), Doc. 290 ("BC Order"), finds that "the transaction contemplated by the Purchase Agreement is in the best interest of the Debtor, its creditors, and its estate," Para. Q at p. 6; not the public's interest in preserving charitable health and hospital assets --i.e., CHAPA's primary concern.

New Jersey Appleseed recognizes the importance of adhering to standards set forth in CHAPA in order to ensure against (i) deterioration in the quality of and access to community-based health care services, and (ii) unnecessary loss of hospital assets otherwise irrevocably dedicated to charitable health care purposes. We respectfully urge both the Attorney General and the Commissioner of Health to consider the long-term effects of this transaction on the quality, accessibility and affordability of health care services at Christ, and in Hudson County generally, and not to permit short-term political considerations to overwhelm such considerations. We want Christ Hospital to become financially viable and continue to exist, but believe that there is an alternative purchaser that would do so, but by putting the license in the hands of another nonprofit hospital without the attendant elimination of Christ's charitable purposes.

As currently described in the documents provided by the parties to the Department of Health and Senior Services ("DHSS") and the Attorney General, the proposed sale is not in the public interest. See N.J.S.A. 26:2H-7.11(b). The proposed sale is "likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities," id., and constitutes a transformation of charitable assets that was not required by the Hospital's insolvent status.

Though more fully explained in our comments submitted pursuant to the CN process, our chief concern addressed to the Commissioner is:

The business model employed by Hudson Hospital at its other Hudson County affiliates contradicts its commitment to the community that it will enjoy continued access to safe, affordable health services.

With respect to the matters within the Attorney General's jurisdiction, the value and mission of Christ Hospital's charitable assets have not been properly safeguarded and preserved in violation of CHAPA. Id. As detailed more fully infra at Point II, we have the following key concerns.

The selection and acquisition process employed by Christ Hospital, including the criteria used in deciding to pursue a conversion, has not sufficiently protected its charitable mission and purposes.

There is no documentation in the record assuring the public that promises of future employment to board officers or senior management did not unduly influence the decision to convert.

There is no right of first refusal; nor provisions ensuring that the nonprofit hospital will receive full and fair market value for the real estate assets sold to Hudson Hospital Propco.

I. The Proposed Sale is "Likely to Result in the Deterioration of the Quality, Availability or Accessibility of Health Services in the Affected Communities."

As more fully stated in our CN comments, dated May 23, 2012, attached hereto, New Jersey Appleseed asserts that the business model employed by Hudson Hospital at its other Hudson County affiliates contradicts its commitment to the community that it will enjoy continued access to safe, affordable health services. The fact that the Bankruptcy Court has ordered Hudson Hospital to enter into four Medicaid HMO agreements with Medicaid providers in connection with the operations of Christ, and to "immediately commence implementation of consolidation and integration consistent with the Navigant Report," BC Order at p. 25, does not ameliorate our concerns.

First, Hudson Hospital has not agreed to enter into such contracts with respect to Hoboken University Medical Center or Bayonne Medical Center, and existence of such agreements does not guarantee Medicaid patients access to services at Christ. Hospital providers have numerous methods to deter patients from seeking services at their facilities. Second, with respect to consolidation, how one consolidates, which services are eliminated or transferred to another facility are all open questions, and how they get resolved will have a major impact on whether people currently serviced at Christ Hospital will still have access to those services. Furthermore, the obligation to implement the Navigant Report directly contradicts statements made by Hudson Hospital in the CN application, and thus gives little security to the public.

In our CN comments, New Jersey Appleseed pointed out the Department's obligation under its CN criteria not merely to accept the allegations of the applicant but to make its own findings as to the impact the transfer of license will have on other urban hospitals. This obligation is explored in the New Jersey Supreme Court decision In re Application of Virtua-West

Jersey Hospital Voorhees for a Certificate of Need, 194 N.J. 413, 436 (2008). Here, we highlight the Department's independent obligation to find that the proposed conversion will not result in the deterioration in health services in Jersey City. We point to the impact analysis undertaken by the California Attorney General prior to denying the purchase of Victor Valley Hospital by Prime Healthcare Services, a purchase that had been approved by the relevant Bankruptcy Court, as an example of the analysis the DHSS must undertake prior to recommending approval of this transaction. See Effect of the Acquisition by Prime Healthcare Services Foundation, Inc. of Victor Valley Hospital on Availability or Accessibility of Healthcare Services, prepared by Medical Development Specialists (August 5, 2011). In short, we are calling for a Navigant II report---a report that takes Hudson Hospital's business model into consideration when undertaking its impact analysis and is not only focused on the proposed acquisition's effect on other urban hospitals, but also accessibility and affordability of health services to affected residents.

Furthermore, given the track record of the proposed operators of Christ Hospital, DHSS must appoint an independent health care monitor for a period of three years in order to ensure the public that there will be no adverse health consequences to this sale. CHAPA permits DHSS to do so. N.J.S.A. 26:2H-7.11(i)(1).

It puzzles members of the public that the Board of Christ resolved that "the needs of the community and the underprivileged patients that the Hospital treats," (CH007894), would be better served by Hudson Hospital Opco than Jersey City Medical Center ("JCMC") in face of several factors in addition to the known practices of the proposed owners. These factors include, but are not limited to, DHSS' "preference" for the CHA/JCMC bid from a "healthcare planning perspective" (CH007896), the Navigant Report's discussion of payer mix at JCMC indicating JCMC's strong commitment to servicing the underinsured and uninsured, and JCMC's known status as an essential hospital (as defined by the Reinhardt Commission Report).

Residents have grave concerns about this sale, and they need to be protected. DHSS cannot rely on solely on potential whistle-blowers to advise them of violations of CN conditions or other business practices and policies that will have an adverse impact on patients; rather DHSS must have its own eyes and ears at the hospital to monitor activities that will impact on

community health care access. Such activities must include levels of uncompensated care for indigent person, emergency room admissions, termination of insurance contracts, waiver of cost sharing, excessive average daily charges, and nurse/patient ratios to maintain hospital quality and safety standards.

II. The Value and Mission of MHMC's Charitable Assets Have Not Been Properly Safeguarded As Required By CHAPA.

Pursuant to N.J.S.A. 26:2H-7.11(n), the Attorney General, in consultation with the Commissioner of Health and Senior Services, is directed to adopt regulations "to carry out the purposes of this act." To date, no such regulations have been issued. As a result, the opinions rendered by the Attorney General and the Orders issued by the Commission (which are then approved or modified by the Superior Court) are the primary source of legal interpretation and precedent governing hospital transactions that fall within the ambit of CHAPA. Each factor delineated in the statute must be considered and the Attorney General should explain why failure to satisfy any one factor does or does not impugn the transaction as a whole.

In a letter dated September 13, 2011, Counsel for Christ Hospital, notified the Attorney General that the Hospital had entered into a letter of intent to sell all its assets, including its license to operate, to Prime Healthcare Services, LLC, and requested expedited review. Expedited review was denied, but the CHAPA process commenced. The process was put on hold when Prime Healthcare Services withdrew and Christ Hospital filed for bankruptcy; the application was deemed complete sometime in May when all information set forth in the Attorney General's letter dated February 22, 2012, was provided. Based on the entire record presented to the Attorney General, including documents reflecting the Christ Board's deliberations during the bankruptcy proceedings, it appears that the Board did not adhere to the standards set forth in CHAPA when proceeding to sell the Hospital (or, at best, seemed indifferent to such standards).

Most importantly, the Board did not explore nonprofit options in a systematic way prior to deciding to convert, and in the bankruptcy proceeding, it did not consider JCMC's nonprofit mission when selecting Hudson Hospital's bid over the CHA/JCMC bid. Indeed, testimony of certain Board members at the CHAPA hearing indicates that the Board preferred turning the Hospital over to a for-profit operator rather than seeking to partner with a financially viable non-profit/for-profit partnership,

where the license would remain with the charitable corporation.³ The Board's failure to understand the paramount importance of its duty of obedience to the charitable purposes of the entity cannot be overlooked. The Attorney General must make clear that CHAPA's standards matter, they reflect a deep legal and moral commitment to preserving charitable assets, and they should be followed, by other nonprofit hospitals seeking to sell charitable assets to for-profit entities, as closely as possible.

1. The selection and acquisition process employed by Christ Hospital, including the criteria used in deciding to pursue a conversion, has not sufficiently protected its charitable mission and purposes.

As noted above, Christ's board has fiduciary duties to the corporation itself --- and not to personal interests of board members, executives, donors or other private -- that are reflected in the various review criteria set forth in CHAPA. Several criteria implicate the obligation to further the charitable purpose of the hospital. See N.J.S.A. 26-2H-7.11(c) (6); (d) (4) and (5). Under common law, this duty of obedience to purpose means that all the assets of the corporation must be used to satisfy the mission of the hospital as set forth in its articles of incorporation, unless it is **impossible or impracticable** to do so. See, e.g., Sharpless v. Medford Monthly Meeting of Religious Soc. Of Friends, 228 N.J. Super. 68, 74 (App. Div. 1988) (diversion of trust income appropriate "since there is an impossibility of using the excess income to advance the particular charitable purpose expressed by the donors"); Matter of Gonzalez, 262 N.J. Super. 456, 459 (Ch. Div. 1992) (cy pres is a judicial mechanism for the "preservation of a charitable trust when accomplishment of the particular purpose of the trust becomes impossible, impracticable or illegal"); In re Crichfield Trust, 177 N.J. Super. 258, 261 (Ch. Div. 1980) (court is only able to "redirect the precise terms of a trust when it become impracticable, impossible or illegal to administer the trust in accordance with its terms"); Cinnamenson Library Assoc. v. Fidelity-Philadelphia Trust Co., 141 N.J. Eq. 127, 132 (Ch. Div. 1948) (change in circumstances since the Bank accepted the trust made it impossible to execute in the particular mode proposed by the donor).

³ One Board member noted how Hudson County used to have six nonprofit hospitals and three of them have failed; thus implying that their nonprofit status was the cause of their downfall.

Although it is commonly accepted that charitable corporations are not identical to charitable trusts - i.e., "a charitable corporation . . . has its roots in the law of trusts, to some extent in the law of corporations; to some extent it may partake of both or indeed be *Sui generis*⁴ -- acceptance of assets from a donor by a charitable corporation establishes a charitable trust for the declared purposes of the corporation as set forth in their charter or articles of incorporation. See Am. Jurisd 2d, Charities, §74 at 72-75 (West 2011); Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (App. 2 Dist., 1977) (finding that under articles of incorporation, Queen held its assets in trust primarily for the purpose of operating a hospital and thus could not lease it to a for-profit entity to operate the hospital on its behalf). Moreover, a board of trustees may only divert assets from the purposes of of a hospital as prescribed by the certificate of incorporation when changed circumstances are beyond their control. That is, **the flexibility of the cy pres doctrine cannot be used to vary the terms of a bequest merely because such variation suites the desires or the convenience of the trustees.** Howard Sav. Institutin of Newark v. Peep, 34 N.J. 494, 510 (1961) (discussing Connecticut College v. United States, 276 F. 2d 491 (D.C. Cir. 1960)). Over 140 years of donations and preferential tax treatment received by Christ Hospital due to its status as a charitable and benevolent corporation does not permit its Board of Trustees to transfer those assets to an entity whose primary mission is to make money by operating a hospital simply because of personal preference. It is only when there are no owners willing to operate the hospital on a nonprofit basis that the Board may look to the for-profit sector as its only means to keep the doors of the hospital open.

CHAPA reflects this common law principle of impossibility or impracticability in the context of a hospital conversion when its requires the Attorney General to determine "whether the nonprofit board considered the proposed conversion as the only alternative or as the best alternative to carrying out its mission." N.J.S.A. 26:2H-7.11(d) (5).

In this case, a review of the Board and Board committee meeting minutes provided to the Attorney General, including the minutes of meetings occurring during the bankruptcy proceeding, indicate that Board did not consider the nonprofit/for-profit status of the potential purchasers/bidders in its consideration.

⁴ City of Paterson v. Paterson General Hospital, 97 N.J. Super. 514, 518 (Ch. Div. 1967).

In fact, for at least one-year prior to August 2011, the time at which the CEO of Christ entered into a letter of intent to sell the hospital to Prime Healthcare Services --- one month before Christ's Board of Trustees approved such action in September 2011, and a few weeks after the Board heard a presentation from Prime during the last week in July, 2011 - there was no recorded discussion reflecting the Board's deliberate intent to transfer ownership of all the Hospital's assets to anyone. It does appear from the record that any experts were retained to locate potential partners, no criteria were developed to guide the search and selection process, and sale of the hospital was not even an item on the 2011 agenda of the Strategic Planning Committee.⁵

There is little doubt, as the record indicates, that the CEO of Christ Hospital, Peter Kelly, was having discussions with Hackensack Hospital about developing a comprehensive cancer center at Christ, which fell through, and was exploring a potential partnership with St. Barnabus Health System that also collapsed (allegedly due to Barnabus' "diversion of attention" to its potential public private partnership with University Hospital). But there is no indication that the Board decided to sell the hospital, look for a partner in a systemic way, develop selection criteria and go public with its intent to transfer control of the Hospital; let alone conduct an explicit discussion about its obligation to first explore nonprofit options before considering a conversion. Indeed, the only mention of the issue of nonprofit versus for-profit status that we found in the CHAPA documents was a statement by Mr. Kelly in the January 25, 2011, Strategic Planning Committee minutes, in which he stated during a discussion of the pending conversion of Hoboken University Medical Center, that he had "made clear to the Commissioner that the addition of another for-profit institution will potentially throw the healthcare delivery system in Hudson County into chaos." (CH005642)

This issue was not mentioned in the minutes reflecting the Trustee's resolution to enter into the Asset Purchase Agreement with Prime Healthcare Services on November 22, 2011 (CH007186) after the issue had been raised publicly by the community,

5 These are issues the Attorney General must consider when determining whether the sale is in the public interest. See N.J.S.A. 26:2H-7.11(c) (2) (Attorney General must decide whether trustees exercised due diligence in deciding to effectuate the acquisition and selecting the other party); 26:2H-7.11(c) (3) (review of procedures used by nonprofit board, including whether appropriate expert assistance was used).

(CH007182-7187), and it is absent from the various Board meeting minutes and resolutions in the bankruptcy court selecting Hudson Hospital as the "highest and best bidder" See e.g., (CH007891-7898); (CH008025-8026); (CH007006-7007).⁶

The Board's resolutions selecting Hudson Hospital over the CHA/JCMC bid do not mention the nonprofit, charitable status of JCMC. One such resolution does acknowledge DHSS' preference for that bid from a "health planning perspective" (CH007896), but it implies from the Board's decision to re-open the auction⁷ reflected in such resolution (after it was clear that CHA/JCMC's bid was financially the highest) and the language of the resolution itself that the Board was closed to the CHA/JCMC bid.⁸ Without factual support, the resolution implies that JCMC would not have the wherewithal "to sustain the operations of the Hospital;" id., a conclusion that cannot be supported by the record. In fact, a review of the affidavit submitted by Matthew Marcos, on behalf of Alvarez & Marsal ("A & M"), indicates that A & M neither performed due diligence of either Hudson Hospital or CHA/JCMC for Christ's Board nor produced accurate data that would justify such conclusion.

⁶ It should be mentioned that it was not until February 6, 2012, that the Board of Christ retained a financial advisor, Alvarez & Marsal, to help them market their assets "to a shortened list of potential bidders, contacting approximately twelve potential buyers, including not-for-profit local, not-for-profit national, private equity funds and for-profit entities." (CH008111-8112) In order to satisfy their fiduciary duty to Christ Hospital and the community it has served, the Board should have retained such an expert well over one year earlier. We also note that the bankruptcy court did not approve such retention until March 21, 2012, after the auction was held.

⁷ It must be noted that the Board decision "authorizing the bidding process to be reopened by the court" occurred at a special meeting held on March 23, 2012, by phone that lasted no more than 15 minutes. (CH007895)

⁸ There is also a question as to whether Hudson Hospital was a qualified bidder that was eligible to participate in the auction. It appears that Hudson Hospital placed only a portion of the Good Faith Deposit in a trust account for the Debtor (leaving the remaining \$1.9 million in the trust account of its attorneys) contrary to the court's Bidding Procedures Order. (CH008044). If this is accurate, the Attorney General must investigate whether Hudson Hospital was given preferential treatment by attorneys for the Debtor.

As noted infra. Point I, the Board of Trustees, during the bankruptcy proceeding, did correctly consider "community need" as a major selection factor. However, there is no explanation how the Board determined that such factor weighed in favor of the Hudson Hospital bid, given the business model of the proposed owners as well as JCMC's documented commitment to servicing the uninsured and indigent. Furthermore, although the Asset Purchase Agreement and Christ's CN application both assert that Hudson Hospital intends to maintain all services currently provided, the Bankruptcy Court has ordered the investors to implement the Navigant Report, which means that such commitment is illusory. It therefore could not be used by the Board to justify its selection of Hudson Hospital's bid over CHA/JCMC's bid, who from day one explicitly stated its intent to implement the Navigant Report within the confines of Jersey City to insure continued access to all its residents.

Obviously, the public was not in the board room of Christ Hospital; nevertheless, it appears that the minutes reflect a rationalization for a decision that was made much earlier—perhaps as early as September 2011, when the Board authorized Mr. Kelly to enter into a letter of intent with Prime Healthcare Services. That is, the CEO and the Board of Christ simply did not want to hand over the license of Christ Hospital to JCMC, historically a competitor of Christ, despite the fact that they are both longstanding nonprofit Jersey City institutions. New Jersey Applesseed believes that the board rejected CHA/JCMC's bid that was initially financially higher than Hudson Hospital's bid (see Purchase Price Comparisons, Debtor 1-7), and then again after the bidding was reopened (even though Hudson Hospital increased its consideration only by increasing "assumed liabilities" not cash, CH008115)⁹ because of "institutional" animosities, not the health care needs of Jersey City residents.

In short, the record indicates that one of the two bidders, CHA was committed to keeping the license to operate the hospital in the hands of another nonprofit charitable hospital, JCMC. Conversely, there is nothing in the record that indicates that this proposal was not **in fact** financially viable, operational

⁹ The financial terms of the two deals is very confusing, especially since the winning bid was allegedly only \$625,000 more in value than the losing bid, and is not consistent with purchase price numbers presented in the Revised Sources and Uses Statement.(CH008600-8603). Moreover, it appears that Hudson Hospital was given \$1 for \$1 credit for assuming payment of the "Replacement DIP", valued in the purchase price at \$22.5 million, but allocated in the uses as only \$20.9 million, (CH008115) and in the revised uses as only \$19.646 as of April 30, 2012. (CH00860).

sound and consistent with Christ's charitable purpose. For this reason alone, we believe that the Board did not meet its fiduciary duties to Christ Hospital and the community it has served since 1872, and the transaction must not be approved.

2. There is no documentation in the record assuring the public that promises of future employment to board officers or senior management did not unduly influence the decision to convert.

Pursuant to CHAPA, the Attorney General must consider "whether the officers, directors, board members or senior management will receive future contracts in existing, new, or affiliated hospitals" when the change in control decision involves a change in the hospital's charitable purposes. N.J.S.A. 26:2H-7.11(d) (7). This is because the public has to make sure that the personal interests of such persons did not influence the Board's decision to convert to for-profit status (or remove control of the charitable assets out-of-state). In the event that such employment or ownership contracts exist, the Attorney General in all change of control situations must determine whether the contract is for fair value prior to approving the transaction. N.J.S.A. 26:2H-7.11(c) (5); see also Attorney General's recommendation to the Superior Court in the matter of Warren Hospital. The Attorney General must also assure himself that all conflicts of interest, if any, were disclosed. N.J.S.A. 26:2H-7.11(c) (4).

In the matter at hand, when Mr. Kelly made it known to his staff and certain members of the Jersey City Council that he expected to be retained by Prime Healthcare Services, the Attorney General requested, as part of the CHAPA process, that Christ provide him with a copy of that contract. Since no such contract has been produced with respect to this purchase, one must assume that Hudson Hospital has no intention to retain Mr. Kelly for any period of time. If they intend to hire him, they must produce such future contract for review. Furthermore, in order to prevent the relevant parties from evading the necessary scrutiny, we request that "all members of senior management" be precluded from accepting employment with Hudson Hospital or any of its affiliates for up to two years after the approval of this transaction. N.J.S.A. 26:2H-7.11(d) (7).

During this CHAPA process, members of the public uncovered that the company that was retained by Christ Hospital to undertake the initial fair market value had a conflict of interest because of their previous business relationship with

Prime Healthcare Services. This was not disclosed by the applicant itself. We request that the Attorney General require certifications by all relevant parties disclosing any conflict of interest or affirming that there are no such conflicts prior to recommending approval of this purchase.

In all previous conversions, your office has required certifications addressing the question of whether "any conflict of interest was disclosed, including, but not limited to, conflicts of interest related to board members of, executives of and experts retained by the nonprofit hospital, purchaser or other parties to the acquisition." N.J.S.A. 26:2H-7.11(c)(4).

3. There is no right of first refusal; nor provisions ensuring that the nonprofit hospital will receive full and fair market value for the real estate assets sold to Hudson Hospital Propco.

The enactment of CHAPA in New Jersey was in great part a response to a trend in other states where nonprofit hospitals were sold to for-profit entities, who in a matter of months, re-sold the hospital assets for significantly more money. Therefore, the Attorney General in the case of a conversion, must not only determine whether "the acquisition proceeds will be used for appropriate charitable health care purposes consistent with the nonprofit hospital's original purpose", N.J.S.A. 26:2H-7.11(c)(6), but also whether the "nonprofit hospital will receive full and fair market value for the assets." N.J.S.A. 26:2H-7.11(d)(6)

Although we acknowledge that the Attorney General must defer to the Bankruptcy Court's finding "that the terms and conditions of the Purchase Agreement, including the total consideration to be realized by the Debtor pursuant to the Purchase Agreement, are fair and reasonable," BC Order, Para. Q. at p.6, the Attorney General is not without authority to prevent the new owners from realizing a windfall to the detriment of the community. Based upon the structure of the proposed transaction, past practice and the language in the Asset Purchase agreement, New Jersey Appleaseed believes that Hudson Hospital intends to sell the real estate assets of Christ Hospital in the near term future to realize a significant profit to cushion themselves against any operational losses, to acquire other hospitals or simply to reward their investors (as people have noted, leaving them with "no skin in the game").

We base our belief on the following. Like the transactions with respect to the purchase of Bayonne Medical Center and Hoboken University Medical Center, this transaction is structured from the start with an Opco and a Propco, with the latter holding the real estate assets of Christ Hospital. Second, within two years of purchasing Bayonne out of bankruptcy for \$18 million, the investors of Hudson Hospital sold it to a Real Estate Investment Trust (Medical Trust Properties) for a profit of approximately \$40 million and then leased the hospital back. Within months of their purchase of Hoboken, we have been told that these same investors also sold the hospital's real estate assets to Medical Trust Property, but due to the amount of money they needed to outlay to purchase Hoboken (given the public bonds that had to be retired), the profit realized was significantly less.¹⁰ Although the Asset Purchase Agreement in this case does not specifically name Medical Trust Property as the recipient of the hospital facility, as it did in the Hoboken asset purchase agreement, it does acknowledge the buyers' authority to execute a similar sale-leaseback arrangement with respect to the real estate assets of Christ Hospital. APA, §5.14(d). Accordingly, in order to protect the public' interest in the preservation of charitable assets, the Attorney General must condition this transaction on a 7-year claw-back provision (the duration the new owners commit to operate the hospital as an acute care facility), which would result in the profits made on such sale placed in a "conversion" foundation in furtherance of Christ's charitable purpose.

The public interest in preserving charitable assets also requires the Attorney General to direct Christ Hospital to renegotiate the purchase agreement to secure a right of first refusal. N.J.S.A. 26:2H-7.11(d)(3). A review of the Asset Purchase Agreement indicates that there is no mention of a right of first refusal of any sort. A right of first refusal like that secured by the trustees of Salem Memorial Hospital or the more limited right negotiated by the trustees of Mountainside Hospital is absent from this transaction; further indicating the gross indifference by the Christ Board of Trustees to their fiduciary obligations to preserve the charitable mission of Christ Hospital.

10 As the CHAPA process revealed, this sale-lease back arrangement with Medical Trust Properties was also a hallmark of Prime Healthcare Services, which we understand from other hospital administrators, serves as a business model for Hudson Hospital.

We also understand that there substantial assets in the Christ Hospital Foundation as well a second Hospital related foundation that will be subject to a cy pres hearing. We also assume, given the number of years Christ has existed, that there are endowment funds that must be similarly treated. See Crane v. Morristown School Foundation, 120 N.J.Eq. 583 (Err & App 1936) (endowment fund not available for use by creditors even though it became impossible to execute the terms of the trust due to insolvency; income from the funds should be devoted to a new school organized by the alumni). Accordingly, we respectfully request that participants in the CHAPA proceeding be deemed "persons of special interest" for purposes of standing at such future proceedings.

Thank-you for your anticipated consideration of our comments.

Sincerely,

Renée Steinhagen, Esq.
On behalf of NJ Appleseed

