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ELECTRONIC MAIL

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Re: Proposed Sale of Saint Michael's Medical Center to
Prime Healthcare Services, LLC

Dear DAG Ganzman and Director Calabria:

In conjunction with the January 5, 2016, public hearing regarding the proposed sale of Saint Michael's Medical Center ("SMMC") to Prime Healthcare Services, LLC ("Prime"), 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 December 23, 2015 (which we incorporate herein), and our verbal statement presented at the CHAPA hearing.

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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

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

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

2 It most also be noted that the fact that the Bankruptcy Court may have found that the transaction contemplated by the Asset Purchase Agreement is in the best interest of the Debtor, its creditors, and its estate, does not answer the relevant question here: whether the proposed transaction is in the best interest of the public--i.e., CHAPA's primary concern.

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 in the Greater Newark area, and not to permit short-term political considerations to overwhelm such considerations. We want SMMC to become financially viable, and to continue to exist, but not at the expense of University Hospital, other area hospitals and the state taxpayer. Specifically, we want SMMC to continue to exist as a community hospital that is "right" sized, provides the very services needed in the community (as outlined by the various community needs assessments undertaken by the Newark's Department of Health and Community Wellness) in contrast to emphasizing surgical interventions and admissions through the emergency room, as Prime is known to do; a hospital that emphasizes well-being, mental health and prevention over acute care treatment.

We understand that when the board initially requested bids in 2012, there were several New Jersey-based and out-of-state healthcare institutions who demonstrated interest in SMMC, including a nonprofit bidder. Based on public comments made by SMMC officers, we have concluded that the SMMC Board did not even consider that bid, and summarily dismissed it as a bid to "close the hospital" rather than a bid to transform the facility into an ambulatory care center or a smaller, acute care facility with more outpatient and ambulatory services. We further understand that the second round of bidding resulted in competition between two for-profits that unfortunately both employ the same out-of-network/emergency room admissions model, and both bids did not make any serious attempt to pay off the public debt on the hospital. Furthermore, despite Board members' description, at the public CHAPA hearing, of a rigorous selection process in which they were fully engaged, the board minutes we reviewed (that were produced to the Attorney General) were devoid of any such discussions. In fact, this was the first CHAPA transaction that New Jersey Appleseed reviewed, where the full Board minute meetings that were produced were devoid of any discussion of the sale process at all.

Rather than engage in an transparent selection process in which Board members discussed the various issues implicated by this transaction in open Board meetings (most importantly, the obligation to the public to deal with the \$230 million loan that was given to SMMC when it closed St. James and Columbus Hospitals and was purchased by Catholic Healthcare East, "CHE"), the Board seemed to hunker down, select Prime, ignore the

findings of the "Final Report for: Greater Newark Healthcare Services Evaluation," dated March 2, 2015, (hereinafter the "Newark Navigant Report", file for bankruptcy³ and then, after a public auction, select Prime over another for-profit that offered a different, more appropriate business model and indicated a willingness to implement some of the recommendations in the Newark Navigant Report.

Accordingly, as currently described in the documents provided by the parties to the Department of Health and Senior Services ("DHSS") and the Attorney General, we believe that 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 the best alternative to carry out the Hospital's healthcare mission.

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

The preferred business model employed by Prime, as it has been described by staff members within the company as well as the more than a decade's worth of data about the effect of Prime ownership on California hospitals, will have a negative outcome for the patient population of Newark. We are further concerned that Prime's intended operation of SMMC creates a credible threat to the continued operation of University Hospital, an essential healthcare facility, in an economically-secure fashion, leading to either greater direct taxpayer support for that institution to ensure its solvency or a deterioration of the quality, availability or accessibility of services.

³ We also find SMMC's decision to file for bankruptcy highly suspect. For several years, the current corporate parent of SMMC, Trinity CHE financially supported the hospital and, we understand, had made a commitment to do so for the full duration of the sale review period. That parent has both the operating reserves and a net operating income as a system to continue supporting the ongoing operation of the hospital. Therefore, to file for bankruptcy to "call the State's hand," as we have heard SMMC officials publically state, rather than to file for bankruptcy due to genuine insolvency, we believe is a misuse of the bankruptcy courts and should be investigated as such by the Attorney General.

With respect to the matters within the Attorney General's jurisdiction, the value and mission of SMMC'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 Board did not exercise due diligence in negotiating the terms and conditions of the acquisition, especially with respect to securing repayment or assumption of the public debt.

There is no right of first refusal; nor provisions ensuring proper local governance of the hospital.

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 December 23, 2015, attached hereto, New Jersey Appleseed asserts that the business model employed by Prime and its track record as developed in files of Rhode Island regulators (which we noted in our CHAPA comments regarding the sale of St. Mary's Hospital to Prime) contradicts its commitment to the community that it will enjoy continued access to safe, affordable health services; let alone services that emphasize well-being, mental health and prevention over high tech surgical interventions and unnecessary admissions through the emergency room. The fact that many of the abusive practices that some of us have brought to your attention in previous hospital sales to Prime are based on allegations set forth in at least three lawsuits that, to the best of our knowledge, have still not been resolved (including a whistleblower action filed in federal court regarding emergency room admissions) and there is a pending Medicaid fraud investigation (concerning up-coding that may undermine the data underlying Prime's quality awards) that still has not been completed does not allay consumers' fears. As the information NJ Appleseed and the Committee of Interns and Residents have provided, Prime is "bad" actor and we fear that it will destabilize the cost and delivery of services in the Greater Newark area, rather than serve the people who currently rely on the Hospital. See <http://www.wnyc.org/story/surplus-beds-affects-deal-newarks-landmark-hospital/> (Comment of David Ricci indicating that it is Prime's intent to increase market share by competing with other hospitals rather than improving access to needed services).

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 the City of Newark and its environs. 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). Short of such a report that looks at Prime's documented practices within the context of Newark, the Department has issued the Newark Navigant Report, which does make recommendations regarding SMMC, and it is those recommendations that must inform the Department's recommendation as to whether to approve the proposed transaction.

Furthermore, given the track record of the proposed operators of SMMC, 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 SMMC implicitly determined that the needs of the community and the underprivileged patients that SMMC treats would be better served by either the State (if the Board had welcomed a credit bid from NJ HCFFA) or Prospect Medical Holdings, LLC, who had just committed to abiding by the principles of the Newark Navigant Report with respect to East Orange General Hospital and whose track record in California indicated that it did not employ an out-of-network/emergency room admissions model, but one driven by physician practices in urban communities.

Notwithstanding, the Board's selection, New Jersey Appleseed, on behalf of many residents who did not participate in the hearings, has grave concerns about this sale. 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, provision of unnecessary medical treatment, up-coding of proper diagnoses, 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.

Most importantly, the Board did not adequately explore nonprofit options in a systematic way prior to deciding to convert, especially given the amount of debt that only a nonprofit entity would have been able to assume, and in the bankruptcy proceeding, it did not consider Prospect Medical Holding's track record when selecting Prime's bid over Prospect's bid. The Board's failure to protect state taxpayers in this "change of control" decision, and to understand the paramount importance of its duty of obedience to the charitable purposes of the entity cannot be overlooked. Maintaining SMMC as either a public or nonprofit healthcare facility mattered more than selling it to a for-profit entity that may in fact negatively impact the delivery of all health care services in the City of Newark. The Attorney General must make clear that CHAPA's standards matter, they reflect a deep legal and moral commitment to preserving charitable assets and ensuring that they should be followed, by other nonprofit hospitals seeking to sell charitable assets to for-profit entities, as closely as possible.

1. The Board did not exercise due diligence in negotiating the terms and conditions of the acquisition.

As noted above, the SMMC board has fiduciary duties to the corporation itself that are reflected in the various review criteria set forth in CHAPA. One of the primary factors to be considered is whether the board "exercised due diligence in selecting the other party to the acquisition and negotiating the terms and conditions of the acquisition" N.J.S.A. 26:2H-7.11(c)(2) and "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).

As noted above, our review of the documents submitted to the Attorney General in 2013 revealed very little information about Board's selection process. See Letter from Renée Steinhagen to Jay Ganzaman, dated June 3, 2013. What was said, to members of the public over the past two years, however, was that the nonprofit bidder wanted to close the hospital, and Prime was the only for-profit bidder who agreed to follow the Catholic Directives. We simply do not know if the former characterization is accurate nor whether the Board of SMMC seriously considered approaching the State to take over the hospital. Given the fact that HCFFA had issued approximately \$230million bonds on behalf of SMMC, and the 2008 FMV indicated that the Hospital was worth only \$120million, there is a serious question as to why the Board did not explore right from the beginning alternative ways to maintain the healthcare mission of the hospital so that the taxpayer would not be on the hook for full repayment of the bonds. The documents we reviewed did not indicate that any other alternative way to preserve the Hospital's services was contemplated; just sell to Prime or Care Point or close the Hospital. There is no indication that SMMC approached the State to take over SMMC, especially, once the Newark Navigant Report was issued. Not to belabor the point, but NJ Appleseed urges nonprofit boards to think more creatively and to seek capital partners without selling the acute care license to the financier; thus enabling them to keep the hospital's nonprofit status, while bringing in new sources of capital. Here, however, we believe that SMMC's Board should have worked with the State to ensure that the facility could stay open as a healthcare facility of some sort, but continue to support repayment of the public debt.

Nonetheless, once the Board selected Prime Healthcare Services, it had a duty to negotiate terms that protected the

healthcare services needed by the community and the taxpayer's investment in the Hospital, especially in light of Prime's track record. NJ Appleseed believes that the Board did not meet its fiduciary duty in this regard when it (1) did not require the buyer to defease a higher value of the outstanding bonds that have been guaranteed by New Jersey taxpayers; (2) did not require the buyer to agree to transform the facility in the direction recommended by the Newark Navigant Report; (3) did not require Prime to create a fully operational local governance board, and (4) did not negotiate a right of first refusal.

The fact is that unlike the Hoboken Municipal Hospital Authority when it sold Hoboken University Hospital, an equally money losing entity, SMMC's Board did not demand full repayment of the outstanding bonds. In Hoboken, the hospital's board demanded full repayment of the approximately \$52million in bonds that Hoboken taxpayers had guaranteed. As a municipal hospital board it was directly accountable to Hoboken taxpayers. Unfortunately, in the case of St. Mary's Hospital, where that nonprofit board left state taxpayers with approximately \$15million in debt, and here, where the SMMC Board has left taxpayers holding the bag for over \$180million in debt, these boards did not satisfy their duty to the taxpayers of New Jersey by failing to get the purchaser to assume, or in the case of a for-profit like Prime, to defease a higher value of the outstanding bonds. If they had, other alternatives would have been devised. The State, however, is accountable to state taxpayers, and accordingly, it should not approve this transaction.

Secondly, it is our understanding of the APA, that prime is committed to establishing only

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

