

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION**

In re: : CHAPTER 11
: :
NEW HAVEN HEALTH CARE, INC. d/b/a : CASE NO. 09-33678(lmw)
WEST ROCK HEALTH CARE FACILITY, :
Debtor. :

**MOTION FOR ORDER AUTHORIZING TRUSTEE TO WIND-DOWN AND
CEASE TO OPERATE THE DEBTOR'S NURSING HOME FACILITY**

TO THE HONORABLE LORRAINE MURPHY WEIL, CHIEF, U.S. BANKRUPTCY
JUDGE:

Barbara H. Katz (the "Trustee"), the trustee appointed in the bankruptcy case of New Haven Health Care, Inc. d/b/a West Rock Health Care Facility ("Debtor"), by her undersigned counsel, Zeisler & Zeisler, P.C., hereby moves for an order pursuant to Sections 363 and 364 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), authorizing her to cease to operate the nursing home facility maintained by the Debtor, and providing for the funding of such termination. In support of this motion, the Trustee respectfully represents as follows:

I. BACKGROUND

1. On December 31, 2009, the Debtor filed its voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code. The Debtor continued to

operate its business and manage its property as debtor in possession pursuant to Bankruptcy Code §§ 1107 and 1108, until April 12, 2010.

2. The Debtor owns and operates an eighty-seven (87) bed skilled and intermediate care nursing facility ("Facility") located at 34 Level Street, New Haven, Connecticut. The Debtor employs approximately sixty-eight (68) people.

3. The Debtor currently has 79 residents in its care.

4. On April 12, 2010, based on the numerous substantial violations of Connecticut regulations governing nursing homes, this Court directed the United States Trustee to appoint a chapter 11 trustee in this case.

5. On April 12, 2010, the United States Trustee appointed the Trustee.

6. Also on April 12, 2010, the Trustee immediately employed Phyllis A. Belmonte ("Belmonte") to serve as the Debtor's Chief Operating Officer.

7. The Court has jurisdiction to consider this Application pursuant to Sections 157 and 1334 of Title 28 of the United States Code. Venue is proper in this district pursuant to Sections 1408 and 1409 of Title 28 of the United States Code. This is a core proceeding pursuant to Section 157(b)(2) of the United States Code.

8. The statutory basis for the relief requested herein is §§ 363 and 364 of the

Bankruptcy Code.

II. RELIEF REQUESTED

9. Bankruptcy Code §363(b)(1) provides, in pertinent part, that the “trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate” 11 U.S.C. § 363(b)(1). “The rule . . . requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.” Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983). See also Ind. State Police Pension Trust v. Chrysler, LLC (In re Chrysler), 576 F.3d 108, 113-18 (2d Cir. 2009) (discussing Lionel).

10. In this case, since her appointment, the Trustee has investigated and evaluated various issues related to the management of the Debtor’s Facility, its impact upon the health, care and welfare of the Debtor’s residents, and the financial viability of the Debtor’s continued operations especially in light of these other issues. The Trustee has balanced the needs of the residents with the best interests of the Debtor’s bankruptcy estate and its creditors. Based upon her thorough examination, the Trustee has determined that there are sound business reasons to close the nursing home facility. The orderly and

expeditious termination of the Debtor's operations is in the best interest of both the residents in the Debtor's care as well as the Debtor's bankruptcy estate, creditors and other parties in interest.

11. On March 29 and 31, 2010, and April 1, 2, 3, and 4, 2010, prior to the Trustee's appointment, unannounced visits were made to the Debtor's Facility by representatives of the Facility Licensing and Investigations Section of the Department of Public Health ("DPH") for the purpose of conducting multiple investigations and monitoring visits. (See Aff. Of Janet Williams, Public Health Services Manager, attached hereto as Exhibit 1.) As a result of these visits, a violation letter dated April 6, 2010, was issued by the DPH, to the Debtor citing the facility for numerous substantial violations of the Connecticut regulations governing nursing homes involved in direct care of residents. (Id. ¶ 8.). The letter is attached as Exhibit A to the Affidavit of Janet Williams. Ms. Williams represented further that the "regulatory violations were systemic and extensive and were a manifestation of the incompetence of the clinical and administrative management of the facility" and the "regulatory violations identified were the product of gross mismanagement of the Debtor." (Id. ¶¶ 9 & 10.) Ms. Williams concluded that, in her professional opinion, she does not believe that the "Facility has appropriate structures

and/or systems in place in order to correct the identified violations.” (Id. ¶ 11.)

12. The April 6, 2010 letter from the DPH scheduled an office conference for April 20, 2010, to be held at the DPH, and instructed the Debtor to prepare a Plan of Correction for regulatory violations to be presented by the Debtor at that time.

13. On April 12, 2010, the DPH issues a statement of violations of the federal regulations governing the Facility’s participation in the Medicaid and Medicare programs, as set forth in the letter appended hereto as **Exhibit 2** (“Notice of Federal Violations”). The Notice of Federal Violations again referenced the “widespread deficiencies” observed during the multiple investigations conduction by the Facility Licensing & Investigations Section of the DPH. The DPH attached to the Notice of Federal Violations a seventy-four (74) page Statement of Deficiencies (Form CMS-2567), setting forth in particular the various deficiencies observed during the visits.

14. By its Notice of Federal Violations, the DPH provided notice that an “Enforcement Cycle” had been initiated and will not end until substantial compliance is achieved for all deficiencies from all surveys within the Enforcement Cycle.

15. The Notice of Federal Violations stated that a Plan of Correction (“PoC”) for these deficiencies must be submitted by the 10th day after the facility received the Statement

of Deficiencies. The Notice of Federal Violations stated further that “[f]ailure to submit a signed and dated acceptable PoC by April 25, 2010, may result in the imposition of remedies listed below by the 20th day after the due date for the submission of the PoC.”

16. The Notice of Federal Violations provided further that the PoC for each deficiency shall include the following components:

- What correction action(s) will be accomplished for those residents found to have been affected by the deficient practice;
- How you will identify the other residents having the potential to be affected by the same deficient practice and what corrective action will be taken;
- What measure will be put into place or systemic changes made to ensure that the deficient practice does not recur; and
- How the facility will monitor its corrective action(s) to ensure that the deficient practice will not recur, (i.e., what quality assurance or other program will be put into place to monitor the continued effectiveness of the systemic change).
- Identify the staff member, by title, who has been designated the responsibility for monitoring the individual plan of correction for each deficiency and the completion date for each component.

(Ex. 2 Notice of Federal Violations.)

17. The Notice of Federal Violations also states that:

Remedies will be recommended for imposition by the Centers for Medicare and Medicaid Services (CMS) Regional Office and the State of Connecticut Department of Social Services if your facility has failed to achieve substantial compliance by

May 15, 2010.

(Id.)

18. The Debtor lacks the ability to prepare and submit the PoC or achieve substantial compliance in the time periods required by the DPH. In addition to the difficulty, if not, impossibility of reconstructing complex systems for the delivery of services within the statutory parameters, the Debtor simply lacks the necessary financial resources and no reasonable prospect for obtaining such resources in the near future. Furthermore, the past violations and overall condition of the Facility drastically impair the Debtor's ability to employ the personnel required to the address the deficiencies.

19. Since the commencement of the Debtor's case, the Debtor has been operating at a loss. As reflected in the Debtor's monthly operating report for the reporting period ending February 28, 2010—merely two months after this case commenced—the Debtor had accrued post-petition trade payables of \$148,033. This amount is extremely significant considering that the Debtor realized gross revenues of \$458,833 during the month of February, 2010.

20. Additionally, pursuant to orders of this Court, the Debtor received advances of its Medicaid receivables from the State of Connecticut, Department of Social Services

("DSS"). In accordance with state law and as a condition for the advances, this Court ordered that DSS be allowed to recover its advances as well as the \$250,000 in Medicaid advances made by DSS to the Debtor in the month of December, 2009, through reductions in payments due to the Debtor within ninety (90) days of the issuance of the advances. Consequently, the following Medicaid advances may be recouped by DSS against current Medicaid receivables due the Debtor as follows:

<u>Issued</u>	<u>Amount</u>	<u>90 Days Expire On</u>
12/08/09	\$250,000	03/08/10
01/06/10	\$147,000	04/06/10
01/28/10	\$100,000	04/28/10
02/24/10	\$85,000	05/25/10
3/10/10	<u>\$85,000</u>	06/08/10
Total:	\$667,000	

21. The Debtor lacks the financial resources to repay the advances in the 90 days required pursuant to this Court's orders and Public Act 09-3 (June Special Session) § 54. The monthly Medicaid revenue for the Facility is approximately \$400,000, and the Debtor does not have any other significant source of revenue. Assuming that DSS implements the

recoupment against the next payment cycle (due on April 28, 2010), the Debtor would be left with no cash funds to operate the Facility.

22. With the consent of the Debtor and considering the numerous deficiencies and violations, DPH imposed an admissions ban on the Facility. As residents depart the Facility, no new admissions replace them. The current census is 79 residents down from 87 residents in March, 2010. Consequently, the Debtor's revenue has been declining and will continue to decline with no hope of reversing course in the near future.

23. As evidenced by the advances, DSS in the early portion of this case has been financially supportive of the Facility while considering the possibility of reorganization under Chapter 11. However, DSS has stated that its willingness to postpone the exercise of its rights ends once patients' welfare is jeopardized by the operations of the Facility as demonstrated by the DPH reports appended to this motion.

24. The Trustee has also analyzed whether there is a reasonable prospect that the Facility could be sold within a reasonable time and, thereby, realize any benefit for the bankruptcy estate and its creditors. After such due consideration, the Trustee has concluded that no such prospect exists.

25. In addition to the national challenges of securing credit to acquire any

business, specific problems exist in the nursing home marketplace. There is an excess of nursing home beds in Connecticut. Presently, there are 229 facilities and 28,196 nursing facility beds in Connecticut. A February 2010 occupancy survey identified 26,070 filled beds, and 2,126 vacant beds in the state. This vacancy exists despite the fact that there has been an overall decline of more than 3,000 licensed beds in the state since 2005. The development of alternatives to nursing facility care by both the public and private sectors, including home care, adult day services, continuing care communities and assisted living facilities, has greatly contributed to the drop in demand for nursing home care. In addition, recent federal and state initiatives are focused on diverting and moving more patients from nursing homes and keeping them in the community. In the past 18 months, despite extensive and prolonged efforts to sell nursing homes in receivership, state court receivers closed two homes in Connecticut and two homes closed voluntarily.

26. Furthermore, a survey of the nursing homes in a 10 mile radius of the Facility, performed on April 10, 2010 by DSS, found 254 empty beds. This high vacancy rate indicates that competition for new patients is very high. The inability of the Debtor to secure admissions was demonstrated by the Debtor's decision prior to the appointment of the Trustee to accept the admission of illegal aliens from a local hospital who are

ineligible for any source of public payment and admitting patients who required intravenous therapy when the Facility was not authorized to provide such services. The recent adverse findings by the DPH were generated in part by the results of the Debtor's admission of patients whose complicated health care conditions were far beyond the level of services historically provided at the Facility and beyond the developed skill set of its staff.

27. The Debtor is obligated to correct the numerous violations of state and federal regulatory requirements set forth in attached reports. In the event of any acquisition of the Facility, the new owner would inherit this obligation. Any buyer would have to enter into a pre-licensure consent order with DPH requiring achievement of compliance within a short time frame as a condition of licensure, as well as a commitment to make certain physical plant improvements. Equally important, any buyer would inherit the highly negative quality of care history of the facility with state and federal regulators. This significantly impacts the marketability of the facility including the ability of a new owner to bring in professional staff willing to work in a facility with a very negative care reputation.

28. The Facility also has significant physical plant problems. As noted by the

patient care ombudsman in her report last month:

The West Rock Health Care Center is an old building which does not appear to have been upgraded to any extent over the decades. The grounds are poorly kept and the perimeter of the property is surrounded by a barbed wire-topped chain link fence. The interior of the building is equally depressing, with cinderblock walls, no color or pleasant aesthetics of any sort. Once past the reception area and through the locked door, there is little to give the building a feeling of a home; it is devoid of personal or homelike touches. The facility is not inviting or hospitable inside or out. Rather than a home for aging and disabled individuals, West Rock has the "look and feel" of a minimum security correctional facility.

29. This is important to note both from a quality of life standpoint for the residents, their families and visitors, and the staff, as well as from a business-marketing standpoint if future consumers are to be attracted to this nursing home.

30. DPH has indicated that there may be physical plant violations as well that have not yet been cited due to the need to address direct care problems at the facility.

31. The physical plant problems at the nursing home will have to be corrected and brought into full compliance with regulatory requirements by a new licensee adding to the expense of acquisition. Clearly, the physical plant of the Facility will not attract new admissions especially Medicare covered patients who are typically admitted for short term rehabilitative stays and who generate the highest reimbursement rate per diem.

32. A significant portion of the population at the Facility has a co-morbid

behavioral diagnosis. The perception and reputation of the Facility as having a disproportionate share of residents with behavioral conditions further impairs the ability to sell the Facility.

33. Thus, considering the foregoing, the Trustee has concluded that there exists no reasonable prospect that she could sell the Facility and realize any benefit for the bankruptcy estate and its creditors.

34. In the event of a wind-down and the termination of the operation of the Facility, DSS has agreed to exercise its statutory authority under Conn. Gen. Stat. § 17b-340 to adjust the rates referenced therein to reimburse the Trustee and the bankruptcy estate to the extent necessary to pay for the reasonable and appropriate costs incurred by the Trustee and the bankruptcy estate and arising after the Trustee's appointment in the continued operation of the Debtor and the Facility, and arising from the wind-down and termination of the Debtor's operations. Such costs include the Trustee's own fees and costs, as well as the fees and costs of the professionals she retains and employs in this case. As a condition for such agreement, DSS required and the Trustee seeks from this Court an order limiting the use of such advances and reimbursements to these specified purposes, and providing further that no entity—including, but not limited to, all secured, unsecured and administrative

creditors in this case—shall have any right, title, interest or claim against the proceeds of such advances and reimbursements other than for and to the extent of the purposes specified and allowed by this Court.

35. Through this structure, the bankruptcy estate should ultimately incur no net cost associated with the continued operations of the Debtor and the Facility, and the winding down and termination of the Debtor's operations. But by terminating the Debtor's operations, the Trustee will relieve the bankruptcy estate of the continued losses arising from the Facility and preserve for the bankruptcy estate and its creditors the Debtor's other assets including, but not limited to, its causes of action.

36. In winding-down and eventually terminating the operations of the Debtor at the Facility, the Trustee shall comply with all state and federal laws and regulations affecting the health, care and welfare of the residents.

37. Thus, good business reasons justify the wind-down and termination of the Debtor's operations, on the terms and conditions set forth herein, and, therefore, the Trustee respectfully requests that this Court, pursuant to Bankruptcy Code § 363(b)(1), authorize her to wind-down and terminate the operations of the Debtor at the Facility.

WHEREFORE, the Trustee respectfully requests that this Court enter an order authorizing the wind-down and termination of the Debtor's nursing home operations pursuant to Bankruptcy Code § 363(b)(1), on the terms and conditions set forth herein, and granting such other and further relief as may be just and proper.

Dated at Bridgeport, Connecticut, this 23rd day of April, 2010.

BARBARA H. KATZ, CHAPTER 11
TRUSTEE FOR THE BANKRUPTCY
ESTATE OF NEW HAVEN HEALTH
CARE, INC. D/B/A WEST ROCK HEALTH
CARE FACILITY

/s/ Stephen M. Kindseth
Stephen M. Kindseth (ct14640)
Zeisler & Zeisler, P.C.
558 Clinton Avenue
Bridgeport, CT 00605
Tel. 203-368-4234
Fax 203-367-9678
Email: skindseth@zeislaw.com
Her Attorneys