BEFORE THE MARYLAND HEALTH CARE COMMISSION

IN THE MATTER OF	*	
ST. MARY'S LONG TERM CARE, LLC	*	
BLUE HERON NURSING AND REHABILITATION CENTER	*	**Docket No. 13-18-2348**

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RESPONSE OF CHESAPEAKE SHORES TO APPLICANT'S EXCEPTIONS TO RECOMMENDED DECISION

Pursuant to COMAR 10.24.01.09B and the scheduled established by the Reviewer, LP Lexington Park, LLC d/b/a Chesapeake Shores ("Chesapeake Shores"), an interested party to this review, submits this response to the Exceptions to Recommended Decision filed by St. Mary's Long Term Care, LLC, d/b/a Blue Heron Nursing and Rehabilitation (the "Applicant"). Chesapeake Shores submits that the Applicant's Exceptions are without merit, and the Recommended Decision should be adopted by the Commission.

INTRODUCTION

The Applicant seeks to establish a new, 70,000 square foot comprehensive care facility in St. Mary's County with 90 nursing home beds at a cost of approximately $13 million.[1] The facility is proposed to be located in St. Mary's County in Callaway, between and in close proximity to two longstanding, existing St. Mary's County nursing homes: Chesapeake Shores, a 117-bed nursing home in Lexington Park, and St. Mary's Nursing Center ("SMNC"), a 160-bed nursing home in Leonardtown.[2] As noted in the Recommended Decision (at 4, 7-8, 37), both Chesapeake Shores and SMNC have experienced low occupancy rates in recent years and

[1] The proposed new facility would also include 30 assisted living units, for a total project cost of $17.35 million.
[2] Both facilities were recognized by the Reviewer as interested parties in this review. DI #34.

reduced their bed complements as a result, while at the same time making substantial physical plant improvements in their facilities.[3]

The Reviewer recommends that the Commission deny the Application because the project is not needed and fails to meet other applicable standards and criteria including the availability of more cost effective alternatives, financial viability and impact on existing providers. As a backdrop to these specific findings, the Reviewer analyzed population trends in St. Mary's County as well as the trends in bed occupancy in St. Mary's County in the past few years, noting that utilization of the two existing nursing homes has not increased with the growing elderly population in the County. Recommended Decision at 6. As shown in Table 2 in the Recommended Decision (page 7), there was a steady, uninterrupted decline in nursing home patient days in St. Mary's County from 2008 to 2013. While the unaudited data from 2014 shown in Table 2 reflects an increase in patient days, 2014 patient days were still 8% lower than in 2007. Between them, Chesapeake Shores and SMNC have sixty fewer beds in operation now than they did in 2007. Recommended Decision, at 4.

With regard to need, the Reviewer determined that the Application is inconsistent with the Commission's need projection in St. Mary's County through 2016 of 14 beds, as published in the Maryland Register on October 3, 2014. Recommended Decision, at 4-5. The Reviewer determined that this is the applicable need projection in this review because the published need projection as of the filing of the letter of intent (showing net need of 192 beds) contained computational errors that were corrected in the need projection published on October 3, 2014, errors which caused the prior need projection to significantly overstate need.

[3] Chesapeake Shores has maintained eight temporarily delicensed beds (out of its total capacity of 125 beds) and SMNC permanently delicensed 20 beds (out of its prior total capacity of 180 beds). Recommended Decision at 6-7.

The Reviewer did ***not***, however, simply end the analysis of need there. He thoroughly considered the information supplied by the Applicant in attempt to demonstrate that the project is needed, but he found that information unpersuasive and insufficient under the applicable State Health Plan (SHP) standard, particularly in light the recent history of declining demand for nursing home beds in St. Mary's County despite an increase in the elderly population in the same period. Recommended Decision, at 35-37.

The Reviewer also found that constructing a new, $13 million facility is not the most cost-effective way to meet the modest (14-bed) need recognized in the Commission's published need projection. The Reviewer found that the existing facilities, having responded to declining demand in recent years by reducing bed capacity while making investments in physical plant improvements at the same time, can easily "flex upward" to accommodate an additional 14 beds if and when there is a demand for them. Recommended Decision, at 37-38.

Further, the Reviewer found that BHNRC had not established financial viability given the recent declining demand for beds suggesting that there will be insufficient volume to support a third nursing home in St. Mary's County. Recommended Decision, at 44. Diluting declining demand for nursing home beds across a larger bed supply, the Reviewer found, will negatively impact the existing providers by causing poorly occupied facilities with high unit costs, exceeding the level of obtainable revenue largely fixed by government payers. Recommended Decision at 47.

The Reviewer did not make a finding concerning the Disclosure standard (COMAR 10.24.08.05A(8)), but describes three areas of concern regarding the Applicant's owners. Recommended Decision at 31-32. The first arises from the guilty plea of a co-owner of

Fundamental Long Term Care Holdings LLC ("FLTCH"), the upstream owner of the Applicant, to perjury in a legal battle for control of a portfolio of nursing homes.[4] Although this fact was not disclosed in the original Application, the Reviewer concluded that it had eventually been disclosed in response to a completeness question from Staff, and also noted the representation by the Applicant that the co-owner who pled guilty (Grunstein) has since sold his ownership interest to Forman (who then became the majority owner of FLTCH).

The Recommended Decision also notes concern about the history of legal proceedings involving the applicant's principals beyond this perjury plea, including a 2010 settlement for $14 million with the U.S. Government and several states by Forman (majority owner of FLTCH) and Grunstein along with other entities of which they were principals under involving claims of an alleged kickback scheme.

Even closer to this matter, the Recommended Decision describes recently-settled Federal bankruptcy court litigation arising from the 2006 transaction in which FLTCH (the Applicant's upstream parent) acquired control of the Applicant's immediate parent Trans-Health, Inc. Baltimore. The defendants in the case include FLTCH and Trans-Health, Inc.-Baltimore, as well as Fundamental Administrative Services ("FAS") (a FLTCH subsidiary to be a service provider for the Applicant in St. Mary's County), Forman (majority owner of FLTCH) and Grunstein (former owner of FLTCH). The plaintiffs claim that this 2006 transaction was fraudulent by transferring liabilities of previously-affiliated company (Trans-Health Management, Inc., or

[4] FLTCH is now known as Hunt Valley Holdings LLC. Recommended Decision, at 21.

"THMI") to a shell company that later lost more than $2 billion in empty chair verdicts to families who claimed relatives died of neglect in the chain's nursing home. [5]

As noted in the Recommended Decision, after a trial, the judge issued a "tentative" ruling with findings of fact upon which he sent the parties to mediation.[6] Recommended Decision, at 21. That ruling describes the 2006 transaction as a "carefully orchestrated sham transaction that left THMI stripped of all of its assets but still liable for the potential [wrongful death] cases" and concludes that "under the facts of this case, the Court would find that FAS and possibly THIB [Trans-Health, Inc.-Baltimore] and FLTCH are the mere continuation of THMI and that the 2006 transaction was a fraudulent effort to avoid the liability of a predecessor corporation."[7]

As noted in the Recommended Decision, a settlement was subsequently reached. The Judge's Memorandum Opinion accepting the settlement reflects that, under the settlement, the "Fundamental Parties" (including FLTCH, Trans-Health, Inc.-Baltimore, FAS, Forman and Grunstein) agreed to pay $18.5 million. Exhibit 2, at 12. [8]

Chesapeake Shores recognizes that a finding under the Disclosure Standard may not have been necessary in light of the findings under other standards. Whether or not these matters give rise to a violation of the "letter" of the Disclosure Standard, Chesapeake Shores submits that they

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[5] The organizational chart of the Applicant is attached to the Recommended Decision as Appendix B. The Applicant stated in response to a completeness question that THMI was sister company to its immediate parent (Trans-Health Inc. – Baltimore) from 2003 and 2006. DI#15, at 1. Copy attached as Exhibit 1 hereto.

[6] The Judge explained that he was telling the parties "what I would most likely rule if I were to enter definitive findings today" and that a "tentative ruling on what my findings of fact would be closes the gap on the ultimate outcome of the case and increases the chance of a mediated settlement." A full transcript of the ruling was attached as Exhibit 1 to DI#60.

[7] See Exhibit 1 to DI#60, at 46, 62.

[8] The Judge's Memorandum Opinion is filed in the docket of the Federal court proceeding so it is a matter of public record. Accordingly, the Commission may take official notice of the amount of the settlement from that Opinion. Rochvarg, *Maryland Administrative Law*, §6.13 at 81-82 (2011) (" [A]n agency may take official notice of a fact that is proper under judicial notice. Judicial notice covers facts that are generally known and commonly accepted. ") See also Maryland Rule of Evidence 5-201 (judicial notice proper as to facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

nevertheless give rise to serious concerns regarding the suitability of the Applicant to operate a nursing home in Maryland.

RESPONSE TO EXCEPTIONS

1. Need (COMAR 10.24.08G(3)(b), 10.24.08.05B(1)

a. The Applicable Need Projection

The Reviewer correctly ruled that the corrected 2016 bed need projection published by the Commission in the October 3, 2014 Maryland Register (showing 2016 net bed need in St. Mary's County to be 14 beds) is applicable to this review. The corrected need projection explicitly superseded the previous need projection published in the April 19, 2013 Maryland Register, which contained computational errors (detailed in the Recommended Decision) causing it to erroneously project a need for 192 additional beds in St. Mary's County in 2016.

Notably, the Applicant does ***not*** argue that the previous need projection (192 beds) was computed correctly under the need methodology in the State Health Plan. To the contrary, the Applicant did its own calculation of the need projection under the State Health Plan methodology and was only able to generate a net need for ***23 beds***, still a small fraction of the 192 net bed need projected in the April 19, 2013 Maryland Register.[9] Accordingly, there is ***no dispute*** that the prior published need projection was grossly overstated.

[9] The Applicant's alternative calculation does not, as it suggests, generate "continuing uncertainty" about what the correct need projection should be. As explained in the Recommended Decision (at 26), the Applicant did not demonstrate a computational error in the need projection published on October 3, 2014 to generate the 23-bed need projection. Rather, the Applicant's calculation of the need projection departs from the need methodology as currently set forth in the State Health Plan and thus would entail amending the methodology to generate this level of bed need. COMAR 10.24.08.07K(3) only permits revisions in the need projection between updates in order to incorporate inventory changes and correct data or computational errors. Accordingly, the Reviewer concluded that the need projection could not be revised based on the Applicant's calculation. Chesapeake Shores submits that this

Instead, the Applicant argues that the corrected need projection cannot govern this review under COMAR 10.24.08.05A(1) and .07K(4). Subsection .08.05A(1) states that "the bed need in effect when the Commission receives a letter of intent for the application will be the need projection applicable to the review." Subsection 08.07K(4) likewise states that "published projections and Commission inventories in effect at the time of submission of a letter of intent will control projections of need used for that Certificate of Need review."

However, COMAR 10.24.08.07K(3) on which the Reviewer relied operates as an exception to the general rule that the need projection in effect when a letter of intent was filed will apply to the review of the application. That section provides that "a need projection will not be revised during the interim other than to incorporate inventory changes or to correct errors in the data or computation." The need projection published on October 3, 2014 incorporated inventory changes and corrected computational errors, as permitted under subsection .08.07K(3).

That subsection .08.07K(3) allows the correction of computational errors in a need projection to be applied to a pending application is supported by COMAR 10.24.01.08E, which governs when modifications to CON applications may be filed. It states that modifications to an application to "to respond to relevant changes in the State Health Plan review criteria, policies ***or need projections***" are permitted at any time. The Applicant's contention that the need projection in effect when a letter of intent is filed is set in stone for purposes of the review of that application is inconsistent with allowing an applicant to modify its application at any time to respond to changes in the need projection.

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decision was correct, but since the Applicant is seeking almost ***four times*** the number of beds its own calculation produced, any "uncertainty" surrounding this issue is immaterial to the result in this matter.

It is well settled that regulations (like statutes) must be harmonized if possible and an interpretation of one provision that nullifies another provision should be avoided. *Farmers & Merchants Bank v. Schlossberg*, 306 Md. 48, 61 (1986). Further, regulations should be interpreted where possible to avoid unreasonable results, or results inconsistent with the overall structure and purpose of the regulatory scheme. *Gales v. Sunoco*, 440 Md. 358, 377 (2014).

Applying these settled rules of construction here, there is only one way to construe all four provisions (.01.08E(2), .08.05A, .08.07K(3) and .08.07K(4)) .together so as to harmonize and give effect to all of them, and achieve a result that is not unreasonable or inconsistent with the purpose of health planning. Under that construction, the ***general rule*** (as stated in .subsections 08.05A and 07K(4)) is that the need projection in effect at the time the letter of intent is filed will govern the review of the subsequently filed application. That general rule is subject to the ***exception*** set forth in subsection .08.07K(3) which allows an interim revision of a need projection to incorporate inventory changes and to correct errors in the data or computation of the need projection. Subsection 01.08E(2) comes into play if an interim revision is made under .08.07K(3), which allows the applicant to modify the application at any time to take the revision into account. This is the only interpretation that gives effect to all of these provisions, and avoids a result plainly inconsistent with health planning principles.[10]

The Applicant attempts to harmonize subsection .08.07K(3) with subsections .08.05A and .08.07K(4) by suggesting that "interim" refers only the period between CON reviews, not during a CON review. However, the plain meaning of "interim" is the "intervening time," and

[10] This construction is also consistent with the settled rule that when two provisions, one general and one specific, appear in conflict, the specific provision will be regarded as exception to the general one. *Id.* at 63. Subsection .08.07K(3) is more specific than 08.05A(1) and .08.07k(4),, so it must be read as an exception to the general rule that the need projection in effect when the application is filed will govern.

nothing in the language of subsection .08.07K(3) limits the intervening time to only the period outside of the review of a CON application. The Applicant also suggests that the subsection on which the Reviewer relied to apply the corrected need projection in this review (.08.07K(3)) has no application to a CON review because it is part of a section (.08.07K) that relates only to the need methodology and the performance of updates to need projections thereunder, whereas subsection .08.05A is a specific provision that controls the review of an application. However, section .08.07K includes subsection (4) (which repeats the general rule that the need projection in effect at the time the letter of intent is filed applies to the review of the application). This demonstrates that section.08.07K covers both the need methodology and the review process, and is ***not*** limited to the need methodology as asserted by the Applicant.

Further, the Applicant's interpretation of the regulations gives rise to an unreasonable result. As the Court of Appeals explained in *Kaczorowski v. City of Baltimore*, 309 Md. 305 (1987), when construing a statute or regulation that is susceptible of more than one meaning, consideration should be given to "the consequences resulting from one meaning rather than another" and a construction adopted "which avoids an illogical or unreasonable result or one which is inconsistent with common sense." Under the Applicant's interpretation of the regulations, the Commission could be compelled to approve a massive number of new beds in a market with only minimal need for new beds.[11] Under the correct interpretation, the one taken by the Reviewer, data or computational errors in a need projection can always be corrected, even in the course of a CON review, to ensure that the objectives of the health planning statute are

[11] The Applicant suggests that there would not be an unreasonable result here because it is seeking only 90 beds, not the 192 beds under the prior need projection. First, 90 beds is still a huge number of beds to be introduced into a market with 277 beds currently and one that has seen consistent, multi-year declines in utilization. Second, the fact that the Applicant reduced its demand is immaterial to the legal interpretation issue presented. The important consideration is that, under the Applicant's argument, it would have been entitled to seek as many as 192 beds and the Commission would have no choice but to find the application consistent with the Commission's need projection.

carried out. *See Doctors Hospital v. Maryland Health Resources Planning Commission*, 65 Md. App. 656 (1986) ("the Commission is responsible for promoting an entire health care system in which the efficiency and appropriateness of existing facilities must be considered.").

Additionally, to interpret the regulations to require the application of a need projection that grossly overstates need would put the regulations at odd with the Maryland Court of Special Appeals decision in *Perini Services v. Maryland Health Resources Planning Commission*, 67 Md. App. 189, *cert. den.*, 307 Md. 261 (1986). As described in the Recommended Decision, there, the Court held that:

> If the SHP bed availability methodology projects a need for additional resources, but other factors substantially indicate no such need under COMAR, we hold the Commission ***must not ignore that information***. [The appellant's] argument eliminates the Commission's discretion, judgment and expertise, and instead advocates a mechanical approach to allocated critical health care services. This pure mathematical formula produces a sterile bed projection without regard to changing events in health care delivery.

The Applicant's interpretation of the regulations would prohibit the Commission from applying the corrected need projection and require the Commission to apply the need projection in effect when it filed its letter of intent – a need projection that grossly overstates need. In doing so, the Commission would be ignoring information that indicates that there is ***not*** a need for 192 beds in St. Mary's County through 2016, and that there is instead only a very modest (14-bed) need. This would be plainly inconsistent with law as stated in *Perini*. A construction of a statute or regulation that renders it inconsistent with law must be avoided in favor of an interpretation that is consistent with law. *District Land Corp. v. Washington Suburban Sanitary Comm'n*, 266 Md. 301, 312 (1972) ("It is well established that where two constructions of statutory language are possible, the Courts will prefer the construction which will result in the legality and effectiveness of the statutory provision being construed, rather than to adopt a construction which would make

such provision illegal or nugatory."); *see also Swarthmore Co. v. Kaestner*, 258 Md. 517, 525-27 (1970); *Groh v. County Commissioners of Washington County*, 245 Md. 441, 445-46 (1967).

The Applicant suggests that the Reviewer's interpretation of subsection .08.07K(3) to allow him to apply the corrected need projection here nullifies subsections .08.05A and .08.07K(4). This is incorrect. Those provisions continue to apply to prohibit the application of a revision to the need projection in a CON review if the revision is ***not*** generated by a data or computational error or inventory update. In fact, this is why the Reviewer determined he could not apply the 23-bed need projection calculated by the Applicant in this review -- it did not correct errors in the data or computation of the need projection.

Finally, even if (as argued by the Applicant) subsection .08.07(3) does not by its terms apply in the context of a CON review and subsection .08.05A stands alone to require that the need projection "in effect" when the letter of intent is filed apply to the review, the result is the same. The need projection in effect when the letter of intent was filed was explicitly superseded with the corrected need projection published in the July 25, 2014 Maryland Register, which was, in turn, superseded and replaced with the 14-bed need corrected need projection published in the October 3, 2014 Maryland Register. Being "superseded" means that it no longer exists for any purpose and has been replaced with the corrected projection. *See Black's Law Dictionary* (9th ed. 2009) ("supersede" means to "annul, make void, or repeal by taking the place of"); *e.g.*, *Health-Chem Corp v. Baker*, 915 F.2d 805 (2d Cir. 1990) (new agreement expressly superseding the previous agreement has the effect of extinguishing the previous agreement); *City of Los Angeles v. Gurdane*, 59 F.2d 161163 (9th Cir. 1932). Thus, the corrected projection ***is*** the bed

need projection in effect at the time the application was filed, and the original projection is null and void.[12]

b. Need

The Applicant argues that the Reviewer simply engaged in a "mechanical" application of the corrected need projection in concluding that the Applicant has not demonstrated the need for the project. This is incorrect. The Reviewer did not simply end the analysis of need upon concluding that the corrected need projection applies. To the contrary, he thoroughly considered the information presented by the Applicant on this issue, but concluded that it was insufficient and unpersuasive to meet the Applicant's burden of proof to demonstrate need under the SHP standard.

The Applicant attempted to demonstrate a need for 115 new beds in St. Mary's County. Under the SHP standard (.08.05B(1)(a)), the Applicant was required to submit data to demonstrate need including but not limited to data regarding "demographic changes in the target population; utilization trends for the past five years; and demonstrated unmet needs of the target population." The Reviewer found the data supplied by the Applicant on population growth unpersuasive, in part because population growth is already taken into account in the Commission's need projection, but also because the Applicant lumped the 65+ population into one group rather than the smaller groups (65-74, 75-84, 85+) required by the need methodology. By lumping all these groups together, the Reviewer found that the Applicant "obscures the

[12] The Applicant repeatedly refers to its "reliance" on the prior need projection. The Applicant's "reliance" on the prior need projection is not relevant to whether the Commission may apply the corrected need projection to this review under its regulations, and *Perini* recognizes that the Commission has no discretion to ignore the error in the prior projection and to decide to apply that overstated prior projection in this review. The Applicant has not asserted that the Commission is equitably estopped from applying the corrected need projection to the application, nor is there any basis for equitable estoppel to apply against a government agency in this circumstance.

differences in projected demand among these elderly age bands, which are substantial." Recommended Decision, at 26. Further, the cohort in which the nursing home use rate is the highest (85+) is projected to grow at a slower rate between 2010 and 2020 than it did between 2000 and 2010. The Reviewer concluded that the Applicant "has not shown any demographic changes that are not already accounted for in the Chapter's need methodology and the data that it submitted is not as specific or targeted to a nursing home target population as the data used in the Chapter." Recommended Decision at 26.

Likewise, the Reviewer found that the Applicant had not submitted data on utilization trends in the last 5 years to demonstrate need as required by the Standard. Instead, it simply calculated a county use rate for the population 65 and over based on one year of data (2011) and multiplied that rates by the projected population for 2020. Considering the downward trend in nursing home use at the State and jurisdictional level, the Reviewer concluded (at 26) that he could not accept the Applicant's use of one year data as "valid representation of likely demand for beds in St. Mary's County" and that the Applicant had not met its burden to demonstrate need as required by the standard.

The Applicant's Exceptions do not provide a basis to reach a different conclusion. The Applicant simply continues to rely on its calculation of 115 beds based on data from one year. The Applicant cites the same population trends as noted by the Reviewer, but those trends are accounted for in the need methodology and need projection so they introduce nothing new into the analysis. The Applicant acknowledges but makes no meaningful response to the Reviewer's criticism of its lumping together all of the 65+ population contrary to the methodology in the State Health Plan, suggesting (without demonstrating) that the disparity in use rates would be the same if proper cohorts were used.

The Applicant argues that lower nursing home use rates in St. Mary's County than the state as a whole "suggest" that the need for beds in St. Mary's County will be higher than current usage indicates. Similarly, the Applicant states – without any support whatsoever -- that lower use rates and lower occupancy rates in St. Mary's County demonstrate that the "two existing, older, St. Mary's County facilities are not sufficiently meeting community needs and that there is a need for a third, modern, CCF equipped to handle high acuity patients with complex medical needs in a setting with greater numbers of private rooms, private baths with showers, co-located with assisted living units." Exceptions at 16. The Applicant goes on to suggest (again without support) that low use rates and occupancy rates are due to outmigration of patients to receive services in other jurisdictions. Exceptions at 17.

The Applicant has presented no evidence whatsoever in this review that the existing facilities are not sufficiently meeting community needs for nursing care, or that St. Mary's County residents are leaving the County for nursing home care for any reason, let alone in significant enough numbers that would explain the low use rates and occupancy rates in St. Mary's County. Further, as noted in the Recommended Decision, the St. Mary's County's rate of retention of County residents is above the State median retention rate (thus its outmigration rate is lower).[13]

Moreover, contrary to its Exceptions, the Applicant did not commit to providing any specialized, high-acuity services in St. Mary's County. The list of services in its Application is explicitly qualified by stating that the services will be provided only "***as the market demands***."

[13] Having based its 115-bed need calculation on just one year of data, and having presented no data to support its claim regarding outmigration, it is surprising that the Exceptions would criticize the Recommended Decision for relying on outmigration data from only one year (2009) In any event, it is the Applicant that claims that outmigration is the reason for low usage and occupancy rates, so it is the Applicant who bears the burden of proof, a burden which it has failed to sustain.

DI#4, at 8. The Applicant ***itself*** is not even persuaded that there is a demand for the type of services that the Applicant speculates patients are leaving the County to receive; if it were, it would not have qualified its commitment to providing those services in its application. The Applicant baldly asserts that there is a demand for these specialized services amongst St. Mary's County residents; but presented no data to support that assertion. The existing facilities provide a full range of comprehensive care services and there is no basis in the record to conclude that they are not meeting the need for nursing home services in St. Mary's County. [14]

The Applicant relies on the 2008 Commission decision approving the Point Lookout application, suggesting that applicant's new programs were held to be a valid consideration in finding need for the project. This reliance is misplaced. First, the Applicant here has not committed to any new programs, as discussed above. Second, the Point Lookout application was based on a 124 bed published need projection in effect at that time. Here, the applicable need projection does not support the project and the Applicant has not otherwise demonstrated need through utilization data as required by the standard. Even if the Applicant had committed to new specialized programs in St. Mary's County, that alone is not enough to demonstrate need under the SHP.

The Applicant also argues that the Commission's decision on the Point Lookout application is relevant here. Specifically, it asserts that, in that decision, the Commission held that the occupancy level of the existing facilities (which did not meet the occupancy threshold in the SHP) was not a barrier to the issuance of the CON, quoting the decision referring to the long term pattern of population growth in St. Mary's County and the new programs that the applicant

[14] Neither has assisted living units, but the Applicant is free to establish an assisted living facility without a CON if it believes there is a demand for additional assisted living in St. Mary's County.

in that review promised to bring to the County. Again, the Applicant's reliance on the Point Lookout decision is misplaced. A significant factor in the Commission's decision that the occupancy threshold was not a barrier to issuing the CON was the "condition" of Chesapeake Shores at that time which the Reviewer found "may be a factor in depressing demand for its beds...." See Point Lookout Decision at 24. At the time of that decision (2008), the facility now known as Chesapeake Shores had recently been acquired by its current owner, and the facility had experienced survey deficiencies in several previous years. Under its current ownership and following two major renovation projects since the last case, no such factor is present in this case. After conducting site visits to each, the Reviewer found that he was generally favorably impressed with what he saw at both facilities. The Reviewer also notes (on page 37), the percentage of respondents to the MHCC's Nursing home Family Satisfaction Survey who said they would recommend the nursing home to others was higher for both Chesapeake Shores and SMNC than the Maryland average.[15] The Reviewer also notes (at page 37-38) that each facility had a lower number of survey deficiencies than the statewide average, and that it was apparent that both facilities had undergone renovations and upgrades and additional renovations are ongoing.

Additionally, while the decision in Point Lookout referred to a long term pattern of population growth in St. Mary's County, in the several years following that decision, no corresponding pattern of growth in nursing home utilization trends in St. Mary's County has materialized. As the Recommended Decision found (on page 27), notwithstanding population growth in the county during that period: "from 2008 through 2013, historical trends in St. Mary's County ***showed a steady, uninterrupted decline in nursing home patient days***" and,

[15] Chesapeake Shores achieved an overall rating of four out of five stars by CMS in its Nursing Home Compare tool.

while there was a 4% increase in patient days in 2014, patient days in 2014 were still 8% lower than in 2007."

2. Availability of More Cost Effective Alternatives (COMAR 10.24.01.08G(3)(c)

The Reviewer also correctly found the availability of more cost-effective alternatives to meeting the relatively modest need for additional nursing home beds in St. Mary's County under the need projection than constructing a new, 70,000 square-foot 90-bed nursing home at a cost of nearly $13 million. He found that two existing nursing homes can easily meet that need at little or no capital cost if and when this level of need materializes, in the case of Chesapeake Shores by relicensing up to 8 temporarily delicensed beds, and in the case of SMNC, by using "creep" beds available under the Commission's regulations. Recommended Decision, at 37, 48.

In excepting to this finding, the Applicant argues that the Reviewer, in effect, compared apples to oranges by comparing its proposed project to the existing nursing homes because of the level of services the Applicant suggests it will provide which are not provided by the existing facilities. As described above, however, the Applicant has explicitly qualified its "commitment" to providing any specialized services not already being provided by Chesapeake Shores and SMNC to be limited to what the "market demands." It presented no data on market demand upon which to conclude that there is a demand for the services it argues will differentiate it from the two existing nursing homes.

The Applicant also suggests that the Reviewer did not make a side by side comparison of the three alternative required by the regulation. While the regulation states that the Commission will compare the alternatives, there is nothing that requires the kind of "side by side" comparison that the Applicant asserts, as if this were a comparison between three capital projects designed to

meet the projected need. Here, the comparison made by the Reviewer is between a $13 million capital investment proposed by the Applicant versus allowing the existing providers to meet the minimal level of need if and when it materializes by reintroducing beds for which they already have the physical capacity at little or no capital cost. The Reviewer also took into account the patient satisfaction and quality scores of the two existing providers, as well as his site visit to the existing facilities. In the absence of a commitment by the Applicant to providing specialized services beyond those being provided by the existing nursing homes and/or market data showing that there is a demand for those services, there was no reason to do a level of service comparison that the Applicant suggests is required.

The Applicant argues that the Reviewer erred by requiring the Applicant to demonstrate that it was the "most effective" alternative whereas the standard refers to the existence of "more cost effective alternatives." This is simply another way of saying the same thing, particularly when only two alternatives are presented. The Reviewer compared the cost effectiveness of two alternatives; his statement that the Applicant's proposal is not the "most" cost effective proposal of the two, is simply another way of saying it would be more cost-effective for the health care system to meet the minimal need for additional beds at the existing facilities.

3. Viability of the Proposal (COMAR 10.24.01.08G(1)(d))

The Reviewer's finding that this standard is not met is well-founded. As the Reviewer explained, the financial viability of the Project is based on the unfounded assumption that its 90 beds will operate at over 95% occupancy. Unrealistic in almost any context, that assumption is particularly unrealistic, the Reviewer found, in St. Mary's County in light of the steady decline in occupancies at the existing nursing homes in recent years. The Reviewer also considered the

margins of the existing facilities in recent years to further support the conclusion that the Applicant's assumptions as to financial performance are unfounded.

The Applicant's argument in exception to this finding again hinges on the claim that it should not be compared to the existing facilities because they offer "more limited services" than the Applicant will provide. As discussed above, the Applicant has not committed to providing services beyond the services provided at the existing facilities; it will only do so if the market demands, and it presented no market data to show that the demand exists.

4. Impact on Existing Providers

The Reviewer found (at 47) that the project would have little or no impact on charges to consumers since Medicare and Medicaid are the primary payors, but that the project will have a significant negative impact on the existing facilities' unit costs of providing nursing home services, creating a likelihood of "significant adverse impact on the health care delivery system in the County.." As noted in the Recommended Decision, before it the need projection was corrected to be minimal, the Applicant conceded that the project would have a "substantial impact" on existing providers if the projection did not support the need for additional beds. DI#28, p. 19. Now, the need projection is for minimal beds, so the result is the same.

The linchpin of the Applicant's argument in exception to this finding is again the appsupposed specialized services it will provide that it argues will mean it will offer additional services and not impact existing providers. Again, the Applicant has not committed to providing services beyond the services provided at the existing facilities; it will only do so if the market demands, and it presented no market data to show that the demand exists.

It should also be noted that the proposed project would adversely impact existing facilities because of staffing limitations. As detailed in Chesapeake Shores Interested Party Comments (DI#60), Chesapeake Shores competes with a variety of other health care facilities and providers for clinical staff, including SMNC, Charlotte Hall (a nursing home more than twice the size of Chesapeake Shores), an acute care hospital and several large physician practices located in the County. Its medical director and its psychiatrist both commute more than 60 miles to Chesapeake Shores, and its attending physician/pulmonologist commutes 40 miles. Chesapeake Shores regularly encounters long delays in filling positions despite offering competitive compensation packages.[16] The staffing proposed by the Applicant would necessarily be at the expense of Chesapeake Shores, both in terms of its being able to continue to fill positions and in terms of increased staffing expenses due to the increased competition for limited staff. Given the existing difficulties in clinical and therapy staff recruitment, there can be no reasonable dispute that the demand for a massive amount of additional direct care positions generated by the Applicant would increase the costs and charges of Chesapeake Shores.

CONCLUSION

For the reasons stated above Chesapeake Shores requests that the Commission adopt the Recommended Decision of the Reviewer in this matter and deny the Application for a certificate of need in this matter.

[16] On the clinical side, for example, it took Chesapeake Shores more than six months to fill an Assistant Director of Nursing position, 3 months to fill an RN supervisor position, and two months to fill a MDS position. The problem is also experienced with therapy positions. Chesapeake Shores filled an Occupational Therapy position and a certified occupational therapy assistant position that had been open for more than a year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2015, a copy of the foregoing Response was sent via electronic mail and First Class Mail, postage prepaid, to the following:

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Marta D. Harting

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Fundamental Long Term Care, Inc.,

Debtor.
_____/

Case No. 8:11-bk-22258-MGW
Chapter 7

Estate of Juanita Jackson, *et al.*,

Plaintiffs,

v.

General Electric Capital Corporation, *et al.*,

Defendants.
_____/

Adv. No. 8:13-ap-00893-MGW
(consolidated)

MEMORANDUM OPINION ON MOTION TO COMPROMISE[1] AND MOTIONS FOR PERMANENT INJUNCTIVE RELIEF[2]

"Everything has to come to an end, sometime."[3] After nearly 11 years of litigation, including at least 27 lawsuits and 15 appeals before 13 different courts and 17 judges in 5 states, this Court finally considered the merits of every claim for that relief six probate estates[4] and the chapter 7 trustee in this case had against 16 defendants they claim are responsible for more than $2 billion in empty-chair verdicts against Trans Health Management, Inc. ("THMI"), the Debtor's wholly owned subsidiary, and THMI's former corporate parent, Trans Health Care, Inc.

[1] Doc. Nos. 1591, 1595 & 1596.

[2] Adv. Doc. Nos. 1052, 1055 & 1058.

[3] L. Frank Baum, The Marvelous Land of Oz (1904).

[4] The six probate estates are the Estate of Juanita Jackson, the Estate of Elvira Nunziata, the Estate of Joseph Webb, the Estate of James Jones, the Estate of Opal Sasser, and the Estate of Arlene Townsend (the "Probate Estates").

("THI").[5] At the conclusion of the trial on the merits of those claims, which involved nearly 100 hours of testimony and more than 3,000 exhibits, the Court tentatively ruled in favor of the Trustee and Probate Estates on one claim for successor liability and sent the Probate Estates, the Trustee, and the parties who were potentially liable on that claim (along with anyone else who was interested) to mediation.[6] The mediation in this case produced two separate compromises, which the parties have now asked the Court to approve, that will bring nearly $20 million into the bankruptcy estate.

But there is one catch: the only way the settlement works is if the Court puts an end to all the claims that were or could have been litigated here. The proposed settlement is conditioned on this Court entering an order barring the non-settling Defendants (who either prevailed at the dismissal or summary judgment stage or at trial) from suing the settling Defendants. That would not be fair and equitable to the non-settling Defendants because the Probate Estates intend on

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[5] This bankruptcy case and the main adversary proceeding were exceedingly complex. The Court had nearly 80 days of hearings in this case. The issues raised in those hearings resulted in 18 reported decisions: *In re Fundamental Long Term Care, Inc.*, 2012 WL 4815321 (Bankr. M.D. Fla. Oct. 9, 2012); *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 492 B.R. 571 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 493 B.R. 613 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 493 B.R. 620 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 494 B.R. 548 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 500 B.R. 140 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 501 B.R. 770 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 501 B.R. 784 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 508 B.R. 224 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 509 B.R. 387 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 509 B.R. 956 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 512 B.R. 690 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 352 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 857 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 874 (Bankr. M.D. Fla. 2014).

[6] The Probate Estates and Trustee named 16 defendants. One defendant—Rubin Schron—prevailed at the dismissal stage. Three more defendants—General Electric Capital Corporation ("GECC"), Ventas Realty Limited Partnership, and Ventas, Inc. (collectively, "Ventas")—prevailed on summary judgment. The Court tentatively ruled in favor of seven more defendants—Edgar Jannotta; GTCR Golder Rauner, LLC; GTCR VI Executive Fund, LP; GTCR Fund VI, LP; GTCR Partners, VI, LP; GTCR Associates VI, LP (collectively, the "GTCR Group"); and THI Holdings, LLC ("THI Holdings")—at trial. The Court will be entering a final judgment in favor of those seven defendants. The Court tentatively ruled that the remaining five defendants—Leonard Grunstein; Murray Forman; Fundamental Administrative Services, LLC ("FAS"); Fundamental Long Term Care Holdings, LLC ("FLTCH"); and THI of Baltimore, Inc. ("THI-Baltimore")—may be liable under a successor liability theory. That claim is resolved by one of the proposed compromises that is the subject of this opinion.

pursuing claims against them even though the non-settling Defendants ultimately prevailed in this proceeding, and the proposed bar order would preclude them from pursuing indemnification, contribution, or other claims against the settling Defendants. In the end, allowing the Probate Estates to relitigate claims arising out of the same nucleus of facts as those in this case would destroy the $20 million compromise, nullify the efforts by this Court and other courts over the last four years, and subject the non-settling Defendants to added cost and expense. Under the Anti-Injunction Act,[7] this Court has authority to enjoin the Probate Estates from pursuing claims against the non-settling Defendants in order to aid its jurisdiction and give finality to its orders and judgments in this case. Accordingly, the Court will approve the proposed compromises and bar orders conditioned on the entry of a final, nonappealable order enjoining the Probate Estates from pursuing any claims—whether in state court or federal court—arising out of the nucleus of facts set forth in the adversary complaint in this case.

Background

Over ten years ago, the Estate of Juanita Jackson—one of the six Probate Estates—filed the first of six lawsuits against THI and THMI for negligence or wrongful death.[8] Two more cases—by the Estate of Nunziata and the Estate of Jones—were filed in late-2005 and early-2006.[9] Another two cases—by the Estate of Webb and the Estate of Sasser—were filed in mid- to late-2006. The sixth case—by the Estate of Townsend—was filed in January 2009. All six of the Probate Estates were represented by Wilkes & McHugh.

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[7] 28 U.S.C. § 2283.

[8] Before March 2006, THI owned a number of subsidiaries that operated nursing homes throughout the United States. THMI, which was a THI subsidiary at the time, provided administrative support for the nursing homes operated by the other THI subsidiaries.

[9] Technically, THI was not named as a defendant in the *Nunziata* case.

The lawsuits against THI and THMI were initially being defended by lawyers retained by THI under an indemnification agreement or what has been described as a "course of dealing."[10] Although THI filed for receivership in 2009, THI's state court receiver continued defending THMI against the claims filed by the Probate Estates. The THI Receiver believed it was necessary to defend THMI to keep the Probate Estates from obtaining a judgment against the company and then attempting to collect that judgment out of THI's receivership estate. But when Wilkes & McHugh advised the THI Receiver that its clients would not be pursuing claims in the receivership, the THI Receiver instructed counsel defending THI and THMI in the state court cases to withdraw their representation.[11]

About three months after the lawyers for THI and THMI withdrew, the Estate of Jackson obtained a $110 million empty-chair verdict against THI and THMI and then initiated proceedings supplementary against 16 parties—including the Debtor—to collect on that judgment.[12] In the proceedings supplementary, the Jackson Estate detailed an alleged bust-out scheme whereby all of the assets belonging to THI and THMI were fraudulently transferred to third parties.[13] The Debtor was allegedly one of the recipients of some of those assets. And

[10] Doc. No. 105 at 5; Doc. No. 109 at 17; Doc. No. 204 at 9–10; Doc. No. 318 at 27–29; Doc. No. 373 at 59; Doc. No. 402 at 127–29; Doc. No. 599 at 124.

[11] The facts surrounding the withdrawal of counsel for THI and THMI is set forth in more detail in this Court's memorandum opinion overruling the Debtor's objection to the Estate of Jackson's proof of claim. *In re Fundamental Long Term Care, Inc.*, 500 B.R. 140, 142-45 (Bankr. M.D. Fla. 2013).

[12] Initially, the Estate of Jackson moved to implead GECC and Schron. Later, the Jackson Estate moved to implead Ventas, Grunstein, Forman, FAS, FLTCH, THI-B, the GTCR Group, Jannotta, Troutman Sanders, LLP, and Concepion, Sexton & Martinez.

[13] Copies of the motions to implead the 16 parties were filed with the district court when a number of those parties attempted to remove the proceedings supplementary to district court. Dist. Ct. Case No. 8:10-cv-2937-VMC, Doc. No. 1-1; Dist. Ct. Case No. 8:11-cv-1314-SDM, Doc. No. 6-1.

because it failed to respond to the proceedings supplementary, a $110 million judgment was entered against the Debtor.[14]

At that point, the Jackson Estate made a strategic decision to force the Debtor into this involuntary chapter 7 bankruptcy case.[15] Presumably, the Jackson Estate figured the expansive powers of a chapter 7 trustee would aid it in identifying and recovering assets that had previously belonged to THMI. So the Jackson Estate filed its involuntary chapter 7 petition on December 5, 2011, and when the Debtor again failed to respond, an order for relief was entered on January 12, 2012.[16]

The Jackson Estate likewise opted, again for strategic reasons, not to force THMI—perhaps the more natural target—into bankruptcy. The strategic reason for not forcing THMI into bankruptcy was fairly apparent. Once THMI was put into bankruptcy, the automatic stay would preclude the five other Probate Estates, who were likewise represented by Wilkes & McHugh, from moving forward on their wrongful death claims. In fact, two of the cases filed by the other Probate Estates were set for trial just a couple of months after the Jackson Estate forced the Debtor into bankruptcy.[17] Surely, the other Probate Estates did not want a bankruptcy case to slow down any momentum that was building in state court.

By this time, the parties to the *Jackson* proceedings supplementary—who have at times been referred to as the "targets" by the parties to this case and the Court—could see the writing on the wall: the Probate Estates intended on obtaining large jury verdicts against THI and THMI and attempting to collect them from the targets, many of whom could be considered "deep

[14] Doc. No. 1; Claim No. 2-1.

[15] Doc. No. 1.

[16] Doc. No. 6.

[17] The *Nunziata* case was set for trial January 9, 2012. The *Webb* case was set for trial February 10, 2012.

pockets."[18] Complicating matters for the targets was the fact that the lawyers for THI and THMI in the actions brought by the Probate Estates had previously withdrawn. To make a long story short, the targets decided to provide a defense for THI and THMI as an outer firewall to any liability to the Probate Estates. In an effort to ensure the remaining cases did not go undefended, the targets entered into a settlement agreement with the THI Receiver on January 5, 2012.[19]

Under the January 2012 agreement, FAS—one of the targets—agreed to defend THI, the THI Receiver, and the THI receivership estate from any claims arising out of the negligence or wrongful death cases filed by the Probate Estates.[20] FAS agreed to deposit $800,000 in escrow to fund the costs of that defense. GECC—one of THI's lenders who was also a target—likewise agreed to contribute up to $200,000 toward the defense costs.[21] FAS fairly immediately delegated the duty to defend THI back to the THI Receiver, and the THI Receiver immediately set out to retain counsel for THI and THMI.

Newly retained counsel for THMI attempted to appear on the company's behalf on the morning of trial in the case filed by the Nunziata Estate.[22] But the court in that case would not let counsel appear. Likewise, the court in the case filed by the Webb Estate would not let newly retained counsel appear for either THI or THMI. Because the state courts would not let newly retained counsel appear on behalf of THI and THMI, both of those cases proceeded to empty-chair trials, and the juries ultimately returned more than $1 billion in verdicts combined.[23]

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[18] The "targets" are all the Defendants in this proceeding.

[19] Doc. No. 1598-1.

[20] *Id.* at ¶ 9.1.

[21] *Id.*

[22] Again, THI was not a defendant in *Nunziata.*

[23] The verdict in *Nunziata* was $200 million; the *Webb* verdict was $900 million.

Armed with a $100 million claim against the Debtor, and more than a $1 billion in liability against THMI, the Chapter 7 Trustee began investigating and pursuing potential fraudulent transfer, alter ego, and other related claims against the targets arising out of a purported "bust-out" scheme. According to the Trustee, THI Holdings, LLC (THI's corporate parent) and its primary shareholder, the GTCR Group, conspired to allow THI's two primary secured lenders—GECC and Ventas—to loot THI and THMI to repay $75 million in loans before THMI's assets were transferred to the "Fundamental Entities"—which included FLTCH, FAS, THI-B, Forman, Grunstein, and Schron—for far less than their fair market value.[24] To complete the alleged bust-out scheme, THMI's liability-ridden shell was transferred to the Debtor (a sham entity created for the sole purpose of acquiring THMI's liabilities), and THI was allowed to slowly go out of business before being put into a state court receivership.[25]

Two of the targets—FAS and FLTCH—decided to take a proactive (perhaps aggressive) approach to the Trustee's strategy. In particular, FAS and FLTCH decided to file a declaratory judgment action in New York seeking a declaration that any fraudulent transfer or alter ego claims THMI may have against them were time barred and, in the event they were not, that they were not liable to THMI under either theory.[26] The Trustee immediately sought to enjoin the New York declaratory judgment action because it interfered with her administration of this bankruptcy estate. After the Court agreed with the Trustee's request and enjoined the New York

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[24] The purported "bust-out" scheme is set forth in *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 367-71 (Bankr. M.D. Fla. 2014).

[25] Technically, the claims the Trustee was pursuing belonged to THMI, which was not in bankruptcy. But the Court had ruled that the Trustee, as the representative of THMI's sole shareholder (the Debtor), had the right to control THMI. *In re Fundamental Long Term Care, Inc.*, 2012 WL 4815321, at *8 (Bankr. M.D. Fla. Oct. 9, 2012). District Judge James S. Moody, Jr., who presided over one of the appeals in the main bankruptcy case, ordered this Court to determine whether the Debtor and THMI should be treated as the same entity under any legal or equitable theory. Doc. No. 1291.

[26] Adv. No. 11-ap-01198, Adv. Doc. No. 1, Ex. 1.

declaratory judgment action, FAS and FLTCH asked the Court to enjoin actions taken by the Probate Estates outside of bankruptcy court based on what could loosely be described as a "what is good for the goose is good for the gander" theory.

It turns out, while this bankruptcy case had been pending, the Probate Estates had been pursuing fraudulent transfer and alter ego claims—claims virtually identical to those being pursued by the Trustee in this case—in state court proceedings supplementary. The Estate of Jackson, of course, had initiated its proceedings supplementary before this case was filed. But it continued to litigate the fraudulent transfer claims against the targets after the order for relief was entered. More than seven months after the order for relief in this case, the Webb and Nunziata Estates moved to implead Rubin Schron, among others, and actually obtained a default judgment against him in the *Nunziata* case. All of the proceedings supplementary being pursued by the Probate Estates arose out of the alleged bust-out scheme.

FLTCH and FAS argued persuasively that the actions by the Probate Estates interfered with the Trustee's administration of the estate as much as their New York declaratory judgment action did. And in fact, the Trustee acknowledged that any recoveries by the Probate Estates on any judgment against THI—including in the proceeding supplementary—should flow through the bankruptcy estate:

> What [the Fundamental entities] are really driving at is a substantive determination by this Court that funds collected by the creditors in their pursuit of claims against THI are property of the estate. It's a 541 declaratory judgment action.
>
> I don't conceptually have a problem with that result because I think it's the best thing for the estate for all the money to flow through to the bankruptcy estate. It's my belief that that's what should happen, it's my belief that's what will happen, but if this Court wants absolute certainty with that issue, the way to tee it up properly, without making sort of an off-the-cuff decision, is to require someone to file a dec. action.

> If you want me to file it, I'll file it. If you want the targets to file it, they can file it. But the real question is not whose court should things be litigated in. The real question is whose funds are they? Are they property of the estate or are they non-property of the estate? And that determination requires an adversary proceeding, I believe, and requires the creditors to be joined to that adversary proceeding.[27]

The Court agreed that all of those issues needed to be hashed out in one proceeding involving all of the parties. And the Court concluded that proceeding could only take place in this Court, which has jurisdiction over property of the estate wherever located,[28] because the proceeding necessarily involved property of the estate or the question of whether certain property belongs to the estate. Besides, the district court had instructed this Court to determine whether the Debtor and THMI should be treated as the same entity. Not to mention, it was the Probate Estates that chose this forum in the first place. So the Court required a single proceeding—involving the Trustee, the creditors, and the targets—for resolving any fraudulent transfer, alter ego, and other related claims.

To accomplish that goal, the Court enjoined the Probate Estates from pursuing any proceedings supplementary or other collection efforts that implicated property conceivably belonging to the bankruptcy estate.[29] The Probate Estates had also filed a civil rights claim against some of the targets. Since that action did not involve the recovery of property of this estate, the Court had no basis for enjoining that action, although it did direct the Probate Estates to request that action be stayed because it involved similar factual issues. In fact, all of the

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[27] Adv. No. 11-ap-01198, Adv. Doc. No. 62 at 42–43.

[28] 28 U.S.C. § 1334(e).

[29] *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147, 160 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 501 B.R. 770, 784 (Bankr. M.D. Fla. 2013).

proceedings outside of this Court remained stayed pending the outcome of the main adversary proceeding ultimately filed by the Probate Estates.

The main adversary proceeding was initiated when the Probate Estates filed a two-count complaint for declaratory judgment in this proceeding.[30] In Count I, the Probate Estates sought a declaration that THI and the Fundamental Entities were liable for the judgments against THI and THMI under a successor liability theory. In Count II, the Probate Estates sought a declaration that the Defendants were all liable for the judgments against THI and THMI under a veil-piercing theory. The Trustee later intervened in that proceeding and added one count to substantively consolidate the Debtor and THMI.[31] The Probate Estates and the Trustee later sought leave to amend their complaint and intervention complaint, respectively, to file all of their claims together in one joint complaint.

The initial joint complaint (really an amended complaint)—which was 228 pages long and contained 1,201 numbered paragraphs—included 22 counts.[32] The 22 counts in the complaint could be broken down into 8 different claims for relief: one count for substantive consolidation by the Trustee, two counts for breach of fiduciary duty, four counts for aiding and abetting a breach of fiduciary duty, one count for successor liability, two counts for piercing the corporate veil, three counts for alter-ego liability, eight counts for fraudulent transfer, and one count for conspiracy to commit a fraudulent transfer. Some of the claims in the adversary complaint were brought solely by the Probate Estates,[33] while others were brought by the Probate

[30] Adv. Doc. No. 1.

[31] Adv. Doc. Nos. 12, 16 & 36.

[32] Adv. Doc. No. 109.

[33] For example, the amended complaint included claims by the Probate Estates for breach of fiduciary duty (Count III), aiding and abetting breach of fiduciary duty (Counts V & VII), and fraudulent transfer (Count XIV & XV). Adv. Doc. No. 109.

Estates and Trustee collectively.[34] The Probate Estates and Trustee later amended their complaint to reassert claims that had been dismissed and assert new claims for abuse of process, conspiracy to commit abuse of process, negligence, and to avoid a post-petition transfer.[35]

The parties ultimately went to trial on claims for substantive consolidation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, successor liability, fraudulent transfer, and conspiracy to commit fraudulent transfer,[36] and after the conclusion of two weeks of live testimony and hours of reviewing deposition videos and transcripts in chambers, the Court announced tentative findings of fact and conclusions of law.[37] As part of those tentative findings of fact and conclusions of law, the Court announced that it would likely enter final judgment against the Trustee and Probate Estates on all of their claims except for the substantive consolidation and successor liability claims.[38] The Court announced that it was inclined to substantively consolidate the Debtor with THMI and rule that the Trustee and Probate Estates were entitled to recover on the judgments against THMI from one or all of FLTCH, FAS, Forman, and Grunstein under a successor liability theory.[39]

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[34] *Id.* For example, the Probate Estates and Trustee jointly asserted claims for successor liability (Count VIII), piercing the corporate veil (Counts IX-XIII), and fraudulent transfer (Counts XVI-XXII)

[35] Adv. Doc. 289.

[36] After the Court dismissed the claims set forth in the second amended complaint filed by the Probate Estate and the Trustee, the parties filed a restated second amended complaint that included only the counts that remained pending after the Court's rulings on the various motions to dismiss. Adv. Doc. No. 620.

[37] Adv. Doc. No. 1019.

[38] *Id.*

[39] *Id.*

The Court then ordered the Probate Estates, Trustee, FLTCH, FAS, Forman, and Grunstein to mediation. The Court also permitted others to participate in mediation.[40] The mediation apparently took place over several days during the early part of February 2015. And as it turns out, the mediation was successful, resulting in two compromises totaling nearly $20 million: an $18.5 million compromise among the Trustee, Probate Estates, and the "Fundamental Parties"[41] and a $1.25 million compromise between the Trustee and Quintairos, Prieto, Wood & Boyer.[42]

On February 23, 2015, the Trustee filed an expedited motion to approve the compromise with the Fundamental Parties.[43] Under the terms of that compromise, the Fundamental Parties will pay the Trustee $18.5 million.[44] Of that amount, $14.5 million will be paid within ten days of the compromise being approved.[45] The remaining $4 million will be paid over time, with the final payment due on July 1, 2018.[46] In exchange, the Trustee and Probate Estates will dismiss all of the pending claims or actions against the Fundamental Parties and give the Fundamental

[40] It appears that Christine Zack, the law firm of Quintairos, Prieto, Wood & Boyer, and Kristi Anderson all participated in the mediation in some respect.

[41] The "Fundamental Parties" refers to FLTCH, THI-B, FAS, Forman, Grunstein, Zack, and Fundamental Clinical Consulting.

[42] The Trustee had sued the Quintairos firm for malpractice and breach of fiduciary duty in state court. That action was removed to federal court. The Trustee later filed an adversary complaint against the Quintairos firm in this Court.

[43] Doc. No. 1591, Ex. 1.

[44] *Id.* at ¶ 1.

[45] *Id.*

[46] *Id.*

Parties a general release.[47] As is common in bankruptcy, the settlement agreement also contains a bar order.[48]

Under the terms of the bar order, third parties—such as the non-settling Defendants that prevailed in this proceeding—are barred from asserting claims against the Fundamental Parties that arise out of or relate to the claims the Fundamental Parties were released from. In particular, the bar order would bar claims by other Defendants in this adversary proceeding—namely, the GTCR Group, GECC, Ventas, and Rubin Schron—for indemnification and contribution. The parties' compromise is expressly conditioned on entry of the proposed bar order.

A week later, the Trustee filed a supplemental term sheet setting forth the terms of the compromise with the Quintairos firm.[49] Under the Quintairos settlement, the law firm agrees to pay the Trustee $1.25 million within 14 days.[50] As with the Fundamental Parties' settlement, the Trustee and Probate Estates will dismiss all of the pending claims or actions against the Quintairos firm and give the firm a general release.[51] Also like the settlement with the Fundamental Parties, the Quintairos settlement includes a proposed bar order precluding any third parties from suing the firm.[52]

The GTCR Group, GECC, Ventas, THI Receiver, and Schron have all objected to the proposed compromises.[53] The primary thrust of those objections relates specifically to entry of

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[47] *Id.* at ¶¶ 3 & 5-8.

[48] *Id.* at ¶ 13.

[49] Doc. No. 1596, Ex. 1.

[50] *Id.* at ¶ 1.

[51] *Id.* at ¶¶ 2 & 3.

[52] *Id.* at 5.

[53] Doc. Nos. 1598, 1600, 1601, 1602 & 1606.

the proposed bar order in favor of the Fundamental Parties.[54] The objecting parties all point out that the proposed compromise expressly contemplates that FAS, one of the settling parties, will abandon its defense of the pending state court cases and that the Trustee and Probate Estates will continue pursuing claims against them, either in this forum or another one. The end result of this compromise, according to the objecting parties, will be that the Probate Estates will seek to hold the objecting parties liable for billions of dollars of unjust (and essentially undefended) jury verdicts, and the objecting parties will lose their only recourse in case that happens—an indemnification or contribution claim against FAS. Three of the objecting parties—the GTCR Group, GECC, and Ventas—say that their objections to the proposed compromise (really the bar order) would become moot if the Court enjoined the Probate Estates from pursuing claims against them outside of this forum.[55]

Conclusions of Law

The *Justice Oaks* factors are likely met

The Court should only approve a compromise if it is fair and equitable and in the best interests of the estate.[56] In considering whether that is the case, the Court looks to the *Justice Oaks* factors.[57] Those factors are: (i) the probability of success in the litigation between the settling parties; (ii) the difficulties, if any, to be encountered in collection; (iii) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and,

[54] The objections are principally directed at the compromise with the Fundamental Parties. But the arguments raised by those objections seem to apply to the compromise with the Quintairos firm. And at a March 4, 2015 hearing on the proposed compromises, the GTCR Group alluded to the fact that it objects to the Quintairos compromise for the same reasons it objects to the settlement with the Fundamental Parties.

[55] Adv. Doc. Nos. 1052, 1055 & 1058.

[56] *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1990).

[57] *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir.1990).

(iv) the paramount interests of the creditors and a proper deference to their reasonable views.[58] None of the objecting parties have really argued that the proposed compromises with the Fundamental Parties and Quintairos do not satisfy *Justice Oaks*.

In fact, all of the factors weigh in favor of approving the compromises. The first factor is not particularly relevant as to the compromise with the Fundamental Parties because the Court has already tentatively ruled that at least some of the Fundamental Parties will be liable under a successor liability theory. Of course, there is still an open question of which Fundamental Parties will be liable and for how much. The real issue as to the Fundamental Parties is the extraordinary difficulty of collecting on any final judgment this Court enters and the litigation involved and the expense and delay necessarily attending those collection efforts. The settlement with the Fundamental Parties avoids all of that and brings $18.5 million into the estate—$14.5 million immediately, and the rest within three years. While the Probate Estates and Trustee likely would not face the same collection problems on their claims against the Quintairos firm, the claims themselves are much more uncertain.[59] Plus, all of the creditors in this case (really the Probate Estates) approve of both compromises, which the Court must give deference to. The only question is whether the Court should approve the bar order, which both compromises are conditioned on.

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[58] *Id.*

[59] This Court recently dismissed negligence (legal malpractice) and breach of fiduciary duty claims against the Quintairos firm. Adv. No. 8:13-ap-01176, Adv. Doc. No. 90 at 106-08. That ruling is subject to a pending motion for reconsideration. Adv. No. 8:13-ap-01176, Adv. Doc. No. 89. The Court is aware that District Judge Mary S. Scriven denied the Quintairos firm's motion to dismiss legal malpractice and breach of fiduciary duty claims by THMI in a removed state court case. Dist. Ct. Case No. 8:12-cv-1854-MSS, Doc. No. 82 at 8-11.

The bar order is only fair and equitable if
the Court grants the permanent injunctive relief

As this Court has explained before in this case, bar orders are permissible under appropriate circumstances. The Eleventh Circuit has expressly held that Bankruptcy Code § 105, which provides that bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code, is ample authority for entry of a bar order.[60] Numerous courts have recognized that bar orders are generally permitted where they are fair and equitable.[61] But as the Court pointed out in refusing to approve a bar order as part of a previous settlement in this case, the Court must consider whether the bar order is fair and equitable *to the parties being enjoined*.[62]

Standing alone, the proposed bar order in this case is not fair and equitable to the parties being enjoined (principally the objecting parties). The compromise expressly states that the Probate Estates intend to pursue claims against the enjoined parties in the state court actions. Making matters worse, at least from the enjoined parties' perspective, the proposed compromise expressly contemplates that FAS will withdraw from and refuse to defend the state court actions, as it is required to do under the January 2012 settlement agreement. And now, the enjoined parties will be barred from suing FAS for breaching its obligations under the January 2012 agreement or seeking indemnification or contribution from FAS in the event they are somehow found liable in the state court actions. In fact, the bar order here is virtually identical to one this Court rejected last year in this case.[63]

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[60] *Munford v. Munford, Inc. (In re Munford)*, 97 F.3d 449, 454-55 (11th Cir. 1996).

[61] *See, e.g., In re GunnAllen Fin., Inc.*, 443 B.R. 908, 915 (Bankr. M.D. Fla. 2011) (discussing factors to be considered in entering bar orders).

[62] *In re Fundamental Long Term Care, Inc.*, 515 B.R. 352, 359 (Bankr. M.D. Fla. 2015).

[63] *Id.* at 357-59.

Last year, the Trustee entered into a proposed compromise with the THI Receiver.[64] As part of that compromise, the THI Receiver would pay the Trustee $750,000 and withdraw its defense of the state court actions on behalf of THI and THMI, and in exchange, the Trustee would release the THI Receiver from any claims and seek a bar order prohibiting any parties from suing the THI Receiver, the receivership estate, and certain law firms retained by the THI Receiver for claims arising out of or related to this bankruptcy case and the negligence cases.[65] FAS, along with the other enjoined parties here, vehemently objected to the bar order.[66]

According to FAS, the THI Receiver would have breached his obligations under the January 2012 agreement by withdrawing his defense of THI and THMI in the negligence cases.[67] Withdrawal of THI's defense—indeed withdrawing its appeal in one of the cases alone—would have resulted in more than $1 billion in liability against the company, which, in turn, would have been used as a starting point to pursue FAS and the other enjoined parties. Absent the bar order, FAS and the other enjoined parties would have been able to look to the THI Receiver in the event they were held liable for the billions of dollars of judgments against THI. Because of the

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[64] *Id.* at 357-58.

[65] *Id.*

[66] Doc. Nos. 1490, 1506, 1509, 1511, 1512 & 1513. FAS characterized that settlement as

> merely a continuation of the [Probate Estates'] strategy to obtain massive judgments against undefended entities, with the object of collecting these judgments from innocent third parties that lack an initial voice in the contest on the merits. In this instance, the Trustee is willingly along for the ride, despite a clear conflict in purportedly "representing" THMI's interests, not because the Trustee has any facts or information that THMI or THI should actually be saddled with massive judgments for underlying tort claims (when all objective evidence is to the contrary), but instead merely to enhance potential litigation damages for those very same creditors.

Doc. No. 1512 at 1-2.

[67] To his credit, counsel for FAS, in arguing for the bar order here, acknowledged arguing against the previous bar order in favor of the THI receiver. ("In fact, I think I may have spoken eloquently on that issue myself in opposition to that compromise. The irony is not lost on me, Your Honor.")

bar order, however, FAS and the other enjoined parties, some of whom had contributed more than a million dollars to THI's defense, would be precluded from looking to the THI Receiver.

This Court ruled that the bar order was not fair and equitable to the enjoined parties because it deprived FAS and the enjoined parties of a right they specifically bargained for—namely, the right to defend THI as an outer "firewall" to protect against their own liability to the Probate Estates.[68] The liability of the enjoined parties was necessarily contingent on THI's liability. If THI was not liable, then the enjoined parties could not be. That is why the enjoined parties bargained for the THI Receiver to assign the duty to defend THI to FAS and agreed to advance $1 million in defense costs. Under the earlier compromise, the THI Receiver had essentially agreed to unilaterally destroy the outer "firewall" by withdrawing THI's defenses.[69]

How is this compromise and bar order any different? At least under the earlier compromise, FAS had the right to argue to the state courts that it had the right to defend those cases under the January 2012 agreement even if the THI Receiver refused to.[70] But under the January 2012 agreement, only FAS has the right to defend the state court actions.[71] None of the other enjoined parties has the right to do so. So the enjoined parties here will lose the outer firewall just like they would have under the earlier compromise.

To be sure, nothing under the new compromise would prevent the enjoined parties from defending themselves on direct claims against them. For instance, the GTCR Group, GECC, Ventas, and Schron could defend themselves if the Probate Estates sought to add them as the real party in interest in any of the state court cases. The problem, from the enjoined parties'

[68] *In re Fundamental Long Term Care, Inc.*, 515 B.R. at 360-61.

[69] *Id.*

[70] Doc. No. 1598-1 at ¶ 9.1.

[71] *Id.*

perspective though, is that they will barred from bringing an indemnification or contribution claim against FAS, the only party that arguably engaged in wrongful conduct.

If this Court were considering the bar order in isolation, it cannot conceive of any reason to deviate from its prior ruling. And that could potentially doom both compromises because they are contingent on entry of a bar order (although the wording of the compromise allows the Fundamental Parties to waive the bar order requirement on their own behalf). But this Court is not considering the bar order in isolation. As part of their objections, three of the enjoined parties—the GTCR Group, GECC, and Ventas—have argued that their objections to the bar order would be moot if the Court essentially made permanent its temporary injunction.[72] If this Court granted the request for permanent injunction, the bar order would, in fact, be fair and equitable.

The reason for that is plain: if the Probate Estates cannot continue pursuing the enjoined parties, then it makes no difference whether the outer firewall remains in place. Likewise, the enjoined parties have no need to assert indemnification or contribution claims against FAS or the other Fundamental Parties. So the Court concludes the existence of the permanent injunction would save the proposed bar order. Because the Trustee and Probate Estates object to the permanent injunction, however, the question this Court must really decide is whether it has the authority to grant that relief.

The Court concludes it has authority to grant permanent injunctive relief

As an initial matter, the Court cannot help but note the seeming irony in the Probate Estates' argument that this Court lacks jurisdiction to grant permanent injunctive relief.[73] The

[72] Adv. Doc. Nos. 1052, 1055 & 1058.

[73] The Trustee has also forcefully argued in opposition to the injunction. Adv. Doc. No. 1059. The Trustee's objection, however, is somewhat curious. It is unclear why the Trustee objects to the proposed injunctive relief. It

Probate Estates raised a jurisdictional objection to the temporary injunctive relief previously sought by the GTCR Group and others. That objection was not so much that this Court did not have jurisdiction over enjoining the Probate Estates' proceedings supplementary, although, in fairness, the Probate Estates did raise concerns that the Court did not have jurisdiction over actions to remedy individual rights. Rather, when it came to the proceedings supplementary, the Probate Estates were concerned that subject-matter jurisdiction would be used by the targets as a "get out of jail free" card to avoid an unsuccessful outcome in the adversary proceeding here:

> As subject-matter jurisdiction can never be conferred by agreement or waived, the [Probate Estates] have concerns that the targets, who since their first appearance have done nothing but delay the progression of this bankruptcy case, will raise a lack of subject-matter jurisdiction after this Court's resolution of the [Probate Estates'] state and federal actions.[74]

In many respects, that is precisely what the Probate Estates are doing now. On the one hand, this adversary proceeding has been successful for the Probate Estates. Because of the compromises, $20 million will be coming into the bankruptcy estate. On the other hand, this proceeding at one point involved over 30 counts against 16 different Defendants and ended with a tentative finding in the Probate Estates' favor on 1 count. Counsel for the Probate Estates opened his closing argument by saying that, to paraphrase, his fear was ending up with a judgment against only FAS—and that is essentially what happened.[75]

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would seem the Trustee has no interest in whether the Probate Estates are permitted to pursue claims in state court. If anything, the Trustee presumably should support the request for injunctive relief if it would resolve the only objections to the nearly $20 million in settlements. In any event, the Court will focus on the Probate Estates' objection since they are the parties who will potentially be enjoined.

[74] Adv. No. 8:13-ap-00929, Doc. No. 7 at ¶ 2.

[75] Adv. Doc. No. 1011 at 9-10 (" . . . in spite of the fear I have that we're going to get a judgment against FAS and not anyone else . . . .").

It appears that the Probate Estates would now like to disregard all of the unfavorable rulings along the way to that less-than-desirable outcome. They would like to be free to pursue claims this Court has already adjudicated after a two-week trial. They also would like to be free to pursue claims against parties that were disposed of at the pleading or summary judgment stage. But the Probate Estates' arguments that this Court lacks jurisdiction to prevent them from relitigating those (and other) claims are misplaced.

The Probate Estates spend the bulk of their time refuting this Court's jurisdiction under § 105.[76] For starters, they argue the Court cannot enjoin them from pursuing claims outside of this Court under § 105 because those claims are not property of the estate.[77] After all, THI has not been substantively consolidated into the Debtor, nor has THI been determined to be the alter ego of or successor to the Debtor.[78] Putting aside that substantive objection, the Probate Estates argue the request for permanent injunction is not procedurally proper because GTCR and GECC failed to file a separate adversary proceeding seeking permanent injunctive relief or satisfy the traditional non-bankruptcy requirements for injunctive relief.[79] But this Court's authority to enter permanent injunctive relief does not derive solely from § 105.

Instead, this Court has authority to issue injunctive relief under the All Writs Act.[80] Under the All Writs Act, federal courts—including this one—"may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of

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[76] Adv. Doc. No. 1060.

[77] *Id.* at 1-2.

[78] *Id.*

[79] *Id.* at 5-9.

[80] 28 U.S.C. § 1651(a).

law."[81] Although the All Writs Act, by its terms, only refers to "writs," the Eleventh Circuit has recognized that it "codifies 'the long recognized power of courts of equity to effectuate their decrees by injunctions or writs of assistance.'"[82] The Court's authority under the All Writs Act, however, is circumscribed by the Anti-Injunction Act.[83]

The Anti-Injunction Act prohibits a federal court from enjoining state court proceedings except in three specific instances:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[84]

If an injunction falls within one the three exceptions set forth in the Anti-Injunction Act, then it is authorized under the All Writs Acts.[85] So this Court may enjoin any state court proceedings if it has expressly been authorized by Congress, if it is necessary to protect this Court's jurisdiction, or if it is necessary to protect or effectuate this Court's judgment.

The Probate Estates argue, with some persuasiveness, that the injunction proposed here has not been expressly authorized by Congress. While the Probate Estates rightfully concede that § 105 is express authorization by Congress for this Court to enjoin a state court proceeding under the right circumstances, they argue that the authority under § 105 has never been extended to bar a claim that did not have a direct and immediate connection to property of the estate or the

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[81] *Id.*

[82] *Burr & Forman v. Blair*, 470 F.3d 1019, 1026 (11th Cir. 2006); *see also Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993) (explaining that the All Writs Act "also empowers federal courts to issue injunctions to protect or effectuate their judgments").

[83] 28 U.S.C. § 2283.

[84] *Id.*

[85] *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 701 F.3d 669, 675 (11th Cir. 2012); *Burr & Forman*, 470 F.3d at 1027-28.

estate's administration.[86] But after confidently declaring that none of the three exceptions under the Anti-Injunction Act apply, they only address the first one and ignore the second two.[87]

The proposed injunction is necessary to aid this Court's jurisdiction

Over twenty years ago, the Eleventh Circuit explained that an injunction is necessary to aid a federal court's jurisdiction when a state court's exercise of jurisdiction over a case would "seriously impair the federal court's flexibility and authority to decide that case."[88] Generally, a federal court's flexibility and authority would be seriously impaired in only one of two situations: in a state court proceeding removed to federal court or in an in rem proceeding where the federal court obtains jurisdiction before the state court does.[89] But the Eleventh Circuit has recognized a third situation where federal courts may issue an injunction to aid its jurisdiction: when a federal court has retained jurisdiction over complex, in personam lawsuits.

The Eleventh Circuit first recognized this "complex litigation" scenario in *Battle v. Liberty National Life Insurance*.[90] That case involved complicated and protracted class-action litigation between a funeral insurance provider and certain policy holders. The parties litigated the case for seven years—in state and federal court—before reaching a settlement that affected the rights of 300 funeral home owners and 1 million policyholders.[91] After the district court entered a final judgment under the settlement, three sets of policy holders filed class-action

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[86] Adv. Doc. No. 1060 at 10 (citing *In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 827-28 (Bankr. S.D. Ohio 1998); *In re Cont'l Airlines*, 203 F.3d 203, 217 (3d Cir. 2000)).

[87] *Id.* (arguing that "[n]one of the exceptions to the Anti-Injunction Act apply here").

[88] *Wesch*, 6 F.3d at 1470.

[89] *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233 (11th Cir. 2006).

[90] 877 F.2d 877 (11th Cir. 1989).

[91] *Id.* at 880.

lawsuits in state court based on claims involving the same issues that were resolved as part of the settlement.[92] The district court in *Battle* enjoined the plaintiffs from pursuing claims that were substantially similar to those that were settled as part of the federal court action.[93]

On appeal, the Eleventh Circuit upheld the district court injunction under the "in aid of jurisdiction" exception to the Anti-Injunction Act. In doing so, the *Battle* court rejected the notion that the "in aid of jurisdiction" exception applies only to in rem cases.[94] According to the *Battle* court, that in rem requirement is not binding because it was only the opinion of three justices in *First Vendo Co. v. Lektro-Vend Corp.*[95] Even if the "in aid of jurisdiction" requirement only applied to in rem proceedings, the Eleventh Circuit reasoned that the litigation in that case was virtually equivalent to an in rem proceeding.[96]

In particular, the *Battle* court noted that the district court judgment resolved seven years of litigation over complicated antitrust issues.[97] The case involved several weeks of court hearings, 2,300 pages of hearing transcripts, 200 exhibits, and 200 depositions (totaling 18,000 pages of deposition transcripts).[98] And resolution of the case affected 1 million policyholders and 300 funeral home owners.[99] More importantly, allowing the plaintiffs to pursue nearly identical

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[92] *Id.*

[93] *Id.*

[94] *Id.* at 881-82.

[95] *Id.* (discussing *First Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977)).

[96] *Id.*

[97] *Id.* at 880-81.

[98] *Id.*

[99] *Id.*

claims in state court would have destroyed the settlement and threatened to waste the years of time and effort the district court devoted to the case:

> Any state court judgment would destroy the settlement worked out over seven years, nullify this court's work in refining its Final Judgment over the last ten years, add substantial confusion in the minds of a large segment of the state's population, and subject the parties to added expense and conflicting orders. This lengthy, complicated litigation is the "virtual equivalent of a res."[100]

Four years later, the Eleventh Circuit reached a similar conclusion in *Wesch v. Folsom.*[101] *Wesch* involved an Alabama congressional redistricting plan administered by a three-judge court. After the three-judge court entered a final judgment approving a redistricting plan, a class-action lawsuit was filed in Alabama state court asserting substantially the same claims as those asserted in district court.[102] The *Wesch* Court upheld a district court injunction barring the plaintiffs from pursuing substantially similar redistricting claims in state court because the district court had "invested a great deal of time and other resources in the arduous task of reapportioning Alabama's congressional districts," and all of that effort would have been wasted if the state court redistricting case was allowed to proceed.[103]

Although it does not involve a class action lawsuit, the facts of this case are highly analogous to those in *Battle*. Here, what started off as 6 negligence or wrongful death lawsuits has morphed into 25 lawsuits (including adversary proceedings) and 15 appeals before 11 different courts and 17 judges in 5 states over a total of 11 years. In this Court, alone, there have been at least 78 days of hearings resulting in at least 18 reported decisions. The main adversary

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[100] *Id.* at 882 (quoting *Battle v. Liberty Nat'l Life Ins. Co.*, 660 F. Supp. 1449, 1457 (N.D. Ala. 1987)).

[101] 6 F.3d 1465, 1470-72 (11th Cir. 1993).

[102] *Id.* at 1468-69.

[103] *Id.* at 1471.

complaint filed by the Trustee and Probate Estates, which was nearly 300 pages and more than 1,200 numbered paragraphs, alleged more than 30 claims for relief against 16 parties,[104] and the trial in that proceeding involved nearly 100 hours of testimony (live or video deposition testimony submitted for review in chambers) and more than 3,000 trial exhibits.

All of that led to basically a $20 million settlement that hinges on one thing: finality. The Court cannot approve the compromise if the Probate Estates are allowed to continue pursuing claims—many of which have already or could have been litigated here—against GTCR, GECC, Ventas, Schron, and the other objecting parties because the objecting parties will be barred from seeking indemnification or contribution from FAS and the other Fundamental Parties under the compromise. But FAS and the other Fundamental Parties understandably will not agree to the compromise if they do not get a bar order. The only way the settlement works is if the Court puts an end to all the claims that were or could have been litigated here.

For all of those reasons, this case falls squarely within the Eleventh Circuit's decision in *Battle*. This Court and others have devoted years of time and effort to exceedingly complex litigation that has resulted in a $20 million settlement. Allowing the Probate Estates to go back to state court or elsewhere to litigate claims arising out of the same nucleus of acts threatens to destroy the $20 million compromise (there will be none without the injunction), nullify the efforts by this Court and other courts over the last four years, and subject parties who have prevailed in this proceeding to added cost and expense. Accordingly, this Court has the authority to enter an injunction to aid its own jurisdiction.

[104] Adv. Doc. Nos. 1, 289 & 620.

The proposed injunction also is necessary to protect this Court's prior judgments

An injunction is appropriate under the "relitigation exception" to the Anti-Injunction Act—i.e., to protect this Court's prior judgments—where state law claims would be precluded by the doctrine of res judicata:

> In a sense, the relitigation exception empowers a federal court to be the final arbiter of the res judicata effects of its own judgments because it allows a litigant to seek an injunction from the federal court rather than arguing the res judicata defense in state court.[105]

But for the "relitigation exception" to apply, the objecting parties must make a strong and unequivocal showing that the Probate Estates are seeking to relitigate claims that would be barred by the doctrine of res judicata.[106]

To determine whether res judicata bars the claims the Probate Estates seek to relitigate, the Court must look to Florida law.[107] Under Florida law, res judicata bars subsequent litigation where there is an identity of (i) the thing sued for; (ii) the cause of action; (iii) the persons and parties to the actions; and (iv) the quality or capacity of the person for or against whom the claim was made.[108] Ordinarily, res judicata would bar the Probate Estates from relitigating any claims that were actually litigated and any claims that could have been litigated but were not.

But this Court's authority to issue an injunction under the "relitigation exception" is slightly narrower that traditional notions of res judicata. In *SFM Holdings, Ltd. v. Banc of America Securities*, the Eleventh Circuit held that the broad view of res judicata—i.e., res judicata bars claims that were actually litigated or could have been—is not consistent with the

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[105] *Burr & Forman v. Blair*, 470 F.3d 1019, 1030 (11th Cir. 2006); *Wesch*, 6 F.3d at 1470.

[106] *Burr & Forman*, 470 F.3d at 1030 & n.30.

[107] *Id.* (explaining that "[w]hen determining whether claim preclusion is appropriate, federal courts employ the law of the state in which they sit").

[108] *Heney v. Windsor Corp.*, 777 F. Supp. 1575, 1576-77 (M.D. Fla. 1991).

Anti-Injunction Act.[109] Under the "relitigation exception," only claims presented to and decided by this Court may be enjoined. So this Court can only enjoin the Probate Estates from pursing the same claims they alleged in the complaint and that the Court disposed of at the dismissal or summary judgment stage or at trial.

Conclusion

Under the Eleventh Circuit's binding precedent in *Battle* and *Wesch*,[110] it is unmistakable that this Court has the authority to enjoin the Probate Estates from future litigation either to aid its jurisdiction or to protect its judgments. The "relitigation exception" to the Anti-Injunction Act only authorizes this Court to enjoin the Probate Estates from pursuing any claims that were actually litigated in this adversary proceeding. But the Court's authority under the "in aid of jurisdiction" exception is broader, permitting this Court to enjoin any litigation arising out of the nucleus of facts set forth in the adversary complaint in this proceeding. If the Court does not enjoin the Probate Estate from relitigating those claims, the Trustee will lose a $20 million compromise, the efforts of this Court and others over the last four years will be nullified, and the non-settling Defendants will be forced to incur added cost and expense litigating claims they already prevailed on.

Early on in this proceeding, this Court observed that the facts alleged in the Probate Estates' adversary complaint had all the making of a "legal thriller" and that it was ultimately up to this Court to determine whether the allegations were mostly the work of fact or fiction.[111] Well, after hearing hundreds of hours of testimony and reviewing thousands of exhibits, the

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[109] 764 F.3d 1327, 1336 (11th Cir. 2014).

[110] The Eleventh Circuit's decision in *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012) likewise supports the Court's decision here.

[111] *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 365 (Bankr. M.D. Fla. 2014).

Court tentatively made that determination. This Court will approve the proposed compromises and bar orders conditioned on the entry of a final, nonappealable order enjoining the Probate Estates from pursuing any claims arising out of the nucleus of facts set forth in the adversary complaint in this proceeding.[112] The Probate Estates are free to appeal any of this Court's orders. They are likewise free to litigate their negligence claims against the THI Receiver in the *Jones* and *Sasser* cases and complete the new trial in *Webb*. But they are enjoined from (i) pursuing any pending proceedings supplementary; (ii) litigating their civil rights claim against the GTCR Group, GECC, and Ventas; and (iii) pursuing any claims against the GTCR Group, GECC, Ventas, and Schron as "real parties in interest" in the *Townsend*, *Jones*, or *Sasser* cases.[113] In short, there will be no sequel.

DATED: March 20, 2015.

Michael G. Williamson
United States Bankruptcy Judge

Attorney Gabor Balassa is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.

[112] The scope of that injunction will not preclude the Probate Estates (or any other party) from prosecuting an appeal of any order entered by this Court.

[113] In *Townsend*, the Townsend Estate obtained a $1.1 billion verdict against THI. After the trial, the Townsend Estate attempted to add the non-settling Defendants to the judgment as the "real parties in interest." The Sasser and Jones Estates similarly attempted to add the non-settling Defendants as defendants in those state court actions—albeit before judgment—based on the same "real party in interest" theory. All three of those cases have been removed to this Court. In the Court's view, the "real party in interest" theory, which is based on the January 5 settlement agreement, is completely without merit. In any case, it is essentially the same as several of the claims asserted here just recast under a different name, and even if it is somehow distinct, that claim could have been litigated here.

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EXHIBIT 2

Blue Heron Nursing and Rehabilitation Center Responses to 2nd Completeness Questions Received 12/6/13
And
Information re: Project Modification

1. **Regarding the response to Question #1 and Exhibit 1, please respond to the following:**
   a. **Is St. Mary's Healthcare Realty, LLC a wholly owned subsidiary of Mary's Healthcare Holdings, LLC? If the answer is no, describe the ownership relationship and identify the other owners and their ownership share.**

Yes, St. Mary's Healthcare Realty, LLC is a wholly owned subsidiary of St. Mary's Healthcare Holdings, LLC.

   b. **Please provide a more legible copy of the organizational chart for St. Mary's Healthcare Realty, LLC.**

Please see attached Exhibit 1. In addition to the organizational chart for St. Mary's Healthcare Realty, LLC, this Exhibit also includes a revised organizational chart related to Fundamental Long Term Care Holdings, LLC.

   c. **Exhibit 1 indicates that THI of Baltimore, Inc. is a subsidiary of Fundamental Long Term Care Holdings, LLC. Did or does THI of Baltimore have a relationship with either Trans Healthcare, Inc. or Trans Health Management? Please explain.**

THI of Baltimore, Inc. has never been in the same chain of ownership as Trans Healthcare, Inc. and/or Trans Health Management, Inc. (i.e. it has never been a direct or indirect parent or subsidiary of either company) and currently has no affiliation with either entity. From 2003 until March 28, 2006, THI of Baltimore, Inc. was a sister company of Trans Healthcare, Inc. During this timeframe, both entities were wholly owned by THI Holdings, LLC. During the same time period, Trans Health Management, Inc. was a wholly owned subsidiary of Trans Healthcare, Inc. Despite the common

ownership during the 2003 - 2006 timeframe, THI of Baltimore, Inc. and its subsidiaries on one hand, and Trans Healthcare, Inc. and its subsidiaries on the other, were separately capitalized and operated. Please see attached Exhibit 2.

d. It has come to MHCC staff s attention that Rubin Schron prevailed in court on his effort to exercise an option to acquire a one-third ownership interest in Fundamental Long Term Care Holdings, LLC and the nursing homes it operates. Please discuss the status of this action by Mr. Schron and any related company. Explain why the organization chart for St. Mary's Long Term Care does not reflect Mr. Schron's ownership particularly at the Fundamental Long Term Care Holdings level.

The actions involving Mr. Schron have been voluntarily dismissed with prejudice. Mr. Schron himself never had any claim to any ownership interest in Fundamental Long Term Care Holdings, LLC, and as a result of the termination of the litigation, no company related to Mr. Schron has any such claim. Accordingly, no such ownership interests are reflected in the organizational charts.

e. Please provide an organizational chart that shows the ownership structure of nursing homes owned by Messr Forman and Grunstein. If Mr. Schron has an ownership interest in Fundamental Long Term Care Holdings, LLC submit an organizational chart for all nursing homes in which he has an ownership interest.

The organizational charts for those nursing home operating entities in which Mr. Forman and/or Mr. Grunstein currently have an indirect ownership interest are attached as Exhibit 3. Mr. Schron does not have an ownership interest in Fundamental Long Term Care Holdings, LLC. See response to Question 17(a) related to Mr. Grunstein's interests.

2. Regarding the response to Question #2b, please provide a copy of the agreement of sale and purchase between St. Mary's Healthcare Realty, LLC and St. Mary's Nursing Home, LLC. This application will not be docketed without documentary proof of site control or evidence of an option to purchase or lease

Exhibit 2

Chart: 2003-3/28/2006

2003 -3/28/2006