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April 22, 2008

**Via Facsimile & Regular Mail**

Gary W. Herschman, Esq.  
Sills, Cummis, Epstein & Gross  
The Legal Center  
One Riverfront Plaza  
Newark, New Jersey 07102-5400

Re: Sale of the Assets of Pascack Valley Hospital  
Association

Dear Mr. Herschmann:

By correspondence dated February 29, March 11 and March 18, 2008, you notified us of the proposed sale by Pascack Valley Hospital Association ("PVHA"), a New Jersey nonprofit corporation, of its real estate, furniture, fixtures and equipment to HUMC/Touro LLC, ("HUMC/Touro") a joint venture of Hackensack University Medical Center and Touro University College of Medicine.

In your letters, you advised that PVHA was currently in liquidation under Chapter 11 of the Bankruptcy Code, after incurring serious financial difficulties over the last couple of years. PVHA began the orderly curtailment of hospital services from September through November last year, and ceased to operate as a licensed acute care hospital on November 21, 2007. In this regard, by letter dated December 28, 2007, the New Jersey Department of Health and Senior Services ("DHSS") issued a certificate of need authorizing PVHA to close as an acute care hospital.

PVHA filed for Chapter 11 Bankruptcy on September 24, 2007. HUMC/Touro, submitted the highest and best bid for the real



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estate owned by PVHA at an auction conducted by the Bankruptcy Court on February 27, 2008. HUMC\Touro's bid for the real estate only, was \$45 million. Its bid did not include the medical equipment, supplies, furniture and other personal property ("FFE") located at the former PVHA facility. The FFE was subsequently sold to HUMC/Touro in a separate Bankruptcy Court auction for \$2,550,000.

You seek our concurrence with your view that review by the Attorney General and the Commissioner of the Department of Health and Senior Services under the Community Health Care Assets Protection Act, N.J.S.A. 26:2H-7.10, et seq. ("CHAPA"), does not apply to the sale of the assets of PVHA and that the Attorney General has no objection to the sale under her common law duty to oversee the disposition of the assets of charitable corporations.

#### **I. Application of CHAPA to the Sale of the Assets of PVHA**

The opening sentence of CHAPA makes it clear that CHAPA applies only to the acquisition - - including the transfer of substantial assets - - of a licensed New Jersey hospital:

. . . a nonprofit hospital licensed pursuant to P.L. 1971, c. 136 (C. 26:2H-1 et seq.) shall satisfy the requirements of this act before applying to the Superior Court of New Jersey for approval prior to entering into a transaction that results in the acquisition of the hospital as defined in this act. (Emphasis added).  
N.J.S.A. 26:2H-7.11.

The statute does not define a "hospital." However, it incorporates by reference the licensure of hospitals under the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq. The hospital licensure regulations, N.J.A.C. 8:43G-1.2, in turn define a "hospital" as:

an institution, whether operated for profit or not, whether maintained, supervised or controlled by an agency of the government of the State or any county or municipality or not, which maintains and operates facilities for the diagnosis, treatment or care of two or more non-related individuals suffering from illness, injury or deformity and where emergency, out-patient, surgical, obstetrical, convalescent or other medical and nursing care is rendered for periods exceeding 24 hours.

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It follows that the physical assets of a facility (predominantly the real estate and fixtures) -- (i) which has been closed pursuant to a certificate of need, (ii) which is no longer operating as a licensed hospital, and (iii) where surgical, obstetrical, convalescent or other medical and nursing care is no longer being rendered - - do not constitute a licensed hospital within the meaning of CHAPA.

Further, although the Certificate of Need Letter allows PVHA the ability to seek to "re-activate" the hospital's license within two years, you have advised us that: (i) this right is not being transferred in connection with the transaction; (ii) PVHA intends to dissolve shortly following the liquidation of its assets, and has no intention whatsoever to re-activate the hospital's license; and (iii) any possible future transfer of PVHA's right to re-activate the hospital license under the Certificate of Need letter will not occur without obtaining all required approvals.

By letters dated March 7 and March 13, 2008, HUMC\Touro's counsel confirmed that the purchasers intended to use the assets for the operation by HUMC of a satellite emergency department ("SED") which would be a satellite of, and operated in conjunction with, HUMC's emergency department in Hackensack. HUMC has filed an application with DHSS for a license to operate an SED at Pascack. Touro intends to use a portion of the premises to operate a new medical school in September, 2009. Touro has applied to the Liaison Committee on Medical Education for accreditation as a medical school. The joint venture is currently negotiating with Care One, a corporation which provides long-term acute care services, for 11,000 square feet of the real estate.

Because the facility will no longer be used as an acute care general hospital and because the asset transfer occurred under the auspices of the Bankruptcy Court, a substantial number of the CHAPA factors will not be pertinent to the consideration of this transaction.

Further, since DHSS already terminated PVHA's license, the Commissioner's role in CHAPA is virtually negated in these circumstances.

Based upon an analysis of the facts and circumstances of this case, we are of the view that CHAPA does not apply to the sale of PVHA's assets.

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## II. Application of the Attorney General's Common Law Duty To Oversee the Activities of Charitable Corporations to the Transfer of the Assets of PVHA

CHAPA does not limit the Attorney General's existing authority to review transactions under current law. N.J.S.A. 26:2H-7.14. As such, although we do not believe CHAPA review is mandated, our common law duty to oversee the disposition of the assets of charitable corporations is applicable to this transaction.

There are several issues involved in the sale of the assets of PVHA that require the review of the Attorney General relating to her oversight role over charitable corporations. These issues include, inter alia, whether the directors of the charitable corporation exercised reasonable care in the performance of their duties concerning the proposed sale; whether any conflict or duality of interest was disclosed; whether there is fair valuation for the disposition of any assets; and, whether the proceeds from the sale of the charitable assets will be used for appropriate purposes.

You advised us that over the last 12-24 months, PVHA experienced significant adverse financial problems resulting from a confluence of events, including, among other things, decreasing patient volume and services. The deteriorating financial condition of PVHA ultimately led to it filing a Chapter 11 bankruptcy petition.

You further advised that Cushman and Wakefield made substantial efforts to market the sale of PVHA's assets to interested parties. The bidding process conducted at the February 27, 2008 auction afforded a full, fair and reasonable opportunity for qualified bidders to make competing bids for PVHA's assets and, in fact, spirited bidding ensued. The public auction commenced with the highest written bid of \$35 million. After over three hours of back-and-forth bidding, the final bid was \$45 million. In a separate auction, the FFE was sold to HUMC\Touro for a final bid of \$2,550,000.

The Court's Order approving the sale on March 18, 2008 states, among other things, that: (i) the ultimate purchase price is fair and reasonable consideration for the assets; (ii) the winning bidder is a good faith purchaser under the Bankruptcy Code; and (iii) the asset purchase agreement was entered into in good faith after arms'-length negotiations by the parties.

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As such, the auction, which was conducted under the supervision and oversight of the Bankruptcy Court, the prior efforts of Cushman and Wakefield, and the ensuing open and competitive bidding process which culminated in the highest and best offer - - all demonstrate that the process leading up to the asset sale was conducted in a fair and reasonable manner.

Further, although prior negotiations did occur between HUMC and PVHA, neither the winning bidder nor the back-up bidder is affiliated with PVHA or any of PVHA's current or former officers and trustees.

You advised that the proceeds from the asset sale will become a part of the assets of PVHA's bankruptcy estate and ultimately will be disbursed to PVHA's creditors in accordance with the Bankruptcy Code. It is anticipated that all of the net proceeds, after payment of Chapter 11 administrative costs, will be paid to the bondholders, whose outstanding secured debt exceeds \$80 million."

In its Orders Authorizing the sale of the real estate and the FFE of PVHA, the Bankruptcy Court made a number of determinations, including, in pertinent part, the following:

1. Proper, timely and sufficient notice of the sale Motion and the hearing thereon was provided pursuant to the Bankruptcy Rules 2002 and 6004.
2. A reasonable opportunity to object or to be heard with respect to the relief proposed herein has also been afforded to all interested persons;
3. The sale Motion and the auction conducted pursuant thereto afforded a full, fair and reasonable opportunity for any entity to make a competing bid for the assets. The sale and auction process conducted by the debtor was non-collusive, fair and reasonable, and conducted in good faith;
4. The Debtor has advanced sound and sufficient business justification, and it is a reasonable exercise of its business judgment, to: sell the PVHA assets on the terms and conditions set forth in the Asset Purchase Agreement; and consummate all transactions contemplated by the Real Estate

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## Purchase and Sale Agreement.

5. The Real Estate and Purchase Agreement: (a) was proposed and entered into in good faith after arm's length negotiations by the parties; and (b) provides the highest or otherwise best offer received for the PVHA assets. The consideration provided by the Buyer pursuant to the Asset Purchase Agreement constitutes reasonably equivalent value and consideration for the PVHA assets.

It appears that the issues we would ordinarily examine in our review of a transfer of the charitable assets of a non-profit corporation were suitably considered in the procedures used by the Bankruptcy Court to arrive at a buyer and a purchase price.

Thus, in this case, where CHAPA review, which mandates Superior Court participation, has been deemed to be inapplicable, a second layer of judicial review of this transaction under the common law, in addition to that already provided by the Bankruptcy Court, would appear redundant.

In conclusion, based upon the conduct of the asset sale under the auspices of the Bankruptcy Court and the Court's findings and conclusions set forth in the Orders, and in reliance on the statements of facts and representations made in the letters from counsel for the seller and buyer outlining the circumstances leading up to the asset sale, establishing the purchase price for the assets and advising how the proceeds will be used, there are sufficient grounds for us to conclude that we have no objection to the sale of the assets of PVHA to HUMC/Touro, provided that, within three months from the date of this letter, PVHA provides this Office with an accounting of donor restricted funds or other endowment funds currently held by PVHA.

Our response is confined to the facts and circumstances as described. Our response is limited to the sale of the assets of PVHA under the auspices of the Bankruptcy Court and should not be construed as a comprehensive approval of any other proposed transaction involving the transfer of the charitable assets of any of PVHA's affiliates, including, in particular, the disposition of the assets of Well Care Group, Inc., or any of their affiliates, including any charitable foundation associated with PVHA.

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Please advise us in the event that there is any material modification in regard to the proposed sale.

Sincerely yours,

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

By: 

Jay A. Ganzman  
Deputy Attorney General

c: New Jersey Appleseed  
Robert Gilson, Director  
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