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April 21, 2010

Mr. Charles N. Raimi
Deputy General Counsel
Detroit Medical Center ("DMC")
Legal Affairs
4707 St. Antoine, Suite W514
Detroit, MI 48201

RE: Proposed Acquisition of Detroit Medical Center by Vanguard Health Systems ("Vanguard")

Dear Mr. Raimi,

You have asked our firm to review the above referenced acquisition and issue an opinion regarding the legality of the acquisition under Michigan law. Specifically, you have asked us to review the proposed transaction in light of the 1996/1997 opinions issued by the Circuit Court for the County of Ingham in *Frank J. Kelley, Attorney General of the State of Michigan v Michigan Affiliated Healthcare Systems, Inc. and Columbia/HCA Healthcare Corporation* (File No. 96-83848-CZ, Honorable James R. Giddings) ("HCA Litigation").

HCA LITIGATION

The HCA Litigation involved a complaint filed in 1996 under my direction and supervision as Attorney General for the State of Michigan. The complaint attacked a proposed **joint venture** between the for profit Columbia/HCA Healthcare Corporation ("HCA") and the non-profit Michigan Affiliated Healthcare Systems, Inc., ("Ingham Medical"). In Count II of the complaint, the State, through my office, contended that the joint venture between Ingham Medical and HCA would result in the use and diversion of charitable assets for non-charitable purposes, in violation of Section 301 of Michigan's Non-Profit Corporation Act (MCL 450.2301(5)).

Judge Giddings granted summary disposition in favor of HCA on eight of the ten counts in the complaint, however with respect to Count II, Judge Giddings agreed with the State of Michigan and held that the proposed joint venture violated Section 301.

The proposed transaction reviewed by Judge Giddings in the HCA Litigation, contemplated a transfer of Ingham Medical's facilities and assets to a limited partnership. The limited partnership would be owned 50% by the for profit HCA and 50% by Ingham Medical. HCA would manage the day-to-day hospital operations and one-half of the profits would be distributed to Ingham Medical, the other half to HCA. Although there would be equal ownership, the hospital was to be operated as a for profit entity. As Judge Giddings indicated in his 1997 Opinion and Order on HCA's Motion for Reconsideration, "**it is these features that are fatal . . . to defendant's case.**"

In short, the structure proposed by Ingham Medial and HCA contemplated the inevitable and continual use of the charitable assets held by Ingham Medical for non-charitable purposes. Importantly Judge Giddings acknowledged as follows at pages 5 and 6 of his initial 1996 ruling:

> **I have no doubt that this corporation could sell all of its assets for fair consideration to a profit-making entity . . they could do that.**

FACTS

Our review of the Letter of Intent signed by DMC and Vanguard ("LOI") indicates that DMC is selling all of its assets to Vanguard. Vanguard is not attempting to take advantage of any continued non-profit or charitable status. DMC will continue as a totally separate entity, but solely for the necessary, separate and distinct purpose of owning and managing its restricted donor assets.

In short, the proposed transaction is an entire sale and acquisition of the assets of DMC by Vanguard for consideration. The consideration for the DMC system assets includes the payment by Vanguard of all of DMC's outstanding bonds and other long term indebtedness and the assumption of all other DMC liabilities. The fair market value of the consideration for the transaction will be reviewed by Michigan's Attorney General. If the transaction is consummated, DMC will be solely owned and operated by Vanguard. Vanguard also has made a commitment to keep all hospitals open for ten years and has agreed to spend approximately $850 million to upgrade the hospitals in the DMC system. For continuity purposes, it is also our understanding that most of the DMC management team will remain in place.

DISCUSSION

The key statutory provision reviewed by Judge Giddings in the HCA Litigation and the provision applicable to the proposed DMC-Vanguard transaction is Section 301 of Michigan's Non-Profit Corporation Act, MCL 450.2301(5). Section 301 provides as follows:

> This Act shall not be deemed to permit assets held by a corporation for charitable purposes to be used, conveyed or distributed for non-charitable purposes.

Michigan courts have considered the charitable nature of corporations primarily in the context of tax exemption or tort liability. The courts have developed a bright line test that does not tolerate or recognize an operational mixture of charitable and non-charitable purposes. The corporation is either operated for a non-profit charitable purpose or it is not. However, based on our research, no Michigan reported decision has ever prohibited a non-profit charitable corporation from selling its unrestricted assets for fair market value.

In *Michigan Sanitarium and Benevolent Assoc v Battle Creek*, 138 Mich 676 (1904), the Supreme Court considered charitable status in the context of property tax exemption. The Supreme Court determined that the sanitarium would be considered a charity and exempt from tax, because it collected only what was needed for its successful maintenance and no more. Similarly, *Bruce v Henry Ford Hospital*, 254 Mich 394 (1931), considered the charitable nature of an organization in the context of tort liability and confirmed that whether a hospital operates for a charitable purpose depends on whether the hospital is maintained for gain or profit or not:

> The test which determines whether a hospital is charitable or otherwise is its purpose, that is, whether it is maintained for gain, profit, or advantage, or not. And the question of whether a hospital is maintained for the purpose of charity or for that of profit is to be determined, in case the hospital is incorporated, not only from its powers as defined in its charter but also from the manner in which it is conducted.

Although in *Parker v Port Huron Hospital*, 361 Mich 1 (1960), the Supreme Court overruled the provision of tort immunity to charitable hospitals mandated by *Bruce*, it did not abandon the core test utilized by *Bruce* to determine whether a corporation was to be considered organized for a charitable purpose. See also *Wexford Medical Group v City of Cadillac*, 479 Mich 192 (2006) and *Guardiola v Oakwood Hospital*, 200 Mich App 524 (1993).

With respect to the HCA Litigation, the court recognized that if the joint venture was permitted to operate, Ingham Medical's core charitable assets would be mingled with non-charitable assets and used by the joint venture to earn a profit. In short, while clinging to its preferential charitable/non-profit status, the hospital would now be utilizing its assets to turn a profit. It would be using assets held for charitable purposes to be used for non-charitable purposes, in violation of Section 301. Such a hybrid is not permissible.

OPINION

Based on our review of the LOI and the facts surrounding the proposed Vanguard acquisition, it is our opinion that the proposed complete sale of the assets of DMC does not violate Section 301 of Michigan's Non-Profit Corporation Act and does not conflict with the ruling in the HCA Litigation. Subject to the review by the State of Michigan Attorney General of the fair market value of the consideration for the acquisition, it is our opinion that the proposed transaction comports with Michigan law. In contrast to the proposed joint venture involved in the HCA Litigation and that transaction's inherent use and diversion of charitable assets for non-charitable purposes, DMC's transaction falls within the "complete sale" exception identified by Judge Giddings in his 1996/1967 rulings.

DMC's transaction represents an entire transfer and sale of all of the non-restricted assets to Vanguard. The acquisition represents a complete clean break from DMC's previous non-profit/charitable status and the transfer of sole operation and control to a new unrelated entity. Accordingly, subject to the Michigan Attorney General's review of the fair market value of the purchase price, it is our opinion that Vanguard's acquisition of the DMC has been structured in a fashion which is lawful and proper under Michigan law.

Sincerely,

Frank J. Kelley

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