

STATE OF VERMONT  
GREEN MOUNTAIN CARE BOARD

In re: Acquisition of Burlington Labs )  
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 ) Docket No. GMCB-014-16con  
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**DECISION, ORDER, AND EMERGENCY CERTIFICATE OF NEED**

Introduction

On August 19, 2016, the Green Mountain Care Board received a Letter of Intent and Request for Emergency Review regarding the acquisition of Burlington Labs, a diagnostic testing facility headquartered in Burlington, by Burlington Labs Acquisition, LLC (the Applicant). At its public board meeting on August 24, 2016, the Board determined that there was a factual basis for conducting an emergency review of the project under 18 V.S.A. § 9440 and GMCB Rule 4.000, § 4.303. The Applicant thereafter filed a Certificate of Need (CON) application with supplemental materials.<sup>1</sup>

For the reasons outlined below and subject to the conditions contained herein, we approve the application.

Findings of Fact

1. Burlington Labs Acquisition, LLC seeks to purchase the assets and continue the operations of Burlington Labs, a diagnostic testing facility headquartered in Burlington that serves patients suffering from opiate and other substance addictions and supports patients in treatment for chronic pain. Applicant's Proposed Findings of Fact (Proposed Findings) at 1, ¶ 1.
2. Burlington Labs employs 183 people in six states, including 137 employees in Vermont, and operates walk-in patient services in Barre, Bennington, Burlington, Middlebury, Morrisville, Rutland, St. Albans, and Springfield. A location in White River Junction was planned to open in late 2016. *Id.* at ¶ 2; Letter of Intent at 2.
3. Burlington Labs serves a critical need in Vermont's efforts to combat substance abuse. Between January and August 2016, Burlington Labs served 2,347 patients and performed 40,941 drug tests. Proposed Findings at 1, ¶ 3.
4. The Vermont health care centers served by Burlington Labs include Howard Center, Gifford Health Care, Twin River and Barre, and Lund Family Center. In addition, Burlington Labs offers onsite collection services to treatment centers, sober houses, and medical offices. *Id.* at 4.

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<sup>1</sup> The materials referenced throughout this document are available on the Board's website, <http://gmcbboard.vermont.gov/con>, unless deemed confidential under Vermont law.

5. Under its current ownership, Burlington Labs is struggling financially and lacks sufficient cash to meet its ongoing payroll and trade debt obligations. It is in default with numerous contracts and has trade debt of approximately \$3.7 million, much of which is overdue. Its current monthly expenses exceed monthly revenue by approximately \$400,000. Letter of Intent at 3.

6. Burlington Labs is in default of its bank loan with KeyBank NA, and is indebted to the bank under a \$2 million demand note and a \$2,894,600 SBA-guaranteed term note, resulting in an outstanding debt to KeyBank NA of \$4,894,600, plus accrued interest. *Id.*

7. The Medicaid Fraud & Residential Abuse Unit (MFRAU) of the Vermont Attorney General's Office has been in negotiations with Burlington Labs since May 2016 as a result of its investigation related to the overstatement of Medicaid claims filed by Burlington Labs during 2015. Since March 25, 2016, Vermont Medicaid has been withholding approximately 50% of the payments that would otherwise have been paid to Burlington Labs. *See* Letter from Jason Turner, Office of the Attorney General (Aug. 24, 2016). The Applicant estimates that under a settlement agreement, Burlington Labs will pay to the State approximately \$6.5 million in damages. Letter of Intent at 2-3.

8. Since May 2016, Burlington Labs contracted with Dorman & Fawcett, a consulting and financial advisory and turnaround firm located in Quechee, Vermont, to provide assistance on cash flow management. Dorman & Fawcett has assessed Burlington Labs' financial outlook and is serving as its chief recovery officer. Transcript (Aug. 24, 2016) (TR) at 13.

9. Beginning in June 2016, an investor group (Investor Group) led by James H. Crook has provided financial assistance to Burlington Labs. Mr. Crook was employed by IDX Systems Corporation (IDX) for 25 years in executive operating roles, including as its President and CEO. Mr. Crook is a private equity investor in several health care IT companies and serves on multiple related boards. Letter of Intent, Exhibit A.

10. On June 30, 2016, Mr. Crook provided a secured loan to Burlington Labs of \$800,000 to enable it to meet its payroll obligations and pay its most critical suppliers and vendors. Since that date, Mr. Crook advanced an additional \$585,000 to assist Burlington Labs in meeting its financial obligations, most all of which has been spent. Letter of Intent at 3; Proposed Findings at 3, ¶ 18.

11. Mr. Crook requested that University of Vermont Health Network (UVHN) become a minority participant in the Investor Group. UVHN views this project as an important component of its population health management initiatives in Vermont. *Id.* at ¶ 19.

12. On August 18, 2016, the Applicant formed as a limited liability company under the laws of Delaware for the purpose of purchasing Burlington Labs. The Applicant will be capitalized with equity investments totaling \$4.5 million. Its owners will consist of the Investor Group, the current owners of Burlington Labs, and UVHN. Application, § 1.

13. Initially, the breakdown of ownership units will result in the Investor Group holding the majority of ownership (approximately 62%) with Burlington Labs and UVHN owning 23% and

15%, respectively. The breakdown will be subject to dilution based on (1) the issuance of discount units to Mr. Crook in consideration of the pre-closing loans extended by him to Burlington Labs, (2) issuance of equity incentive units to officers and employees as approved by the Board, and (3) future issuance of membership units. *Id.*

14. UVHN is expected to provide loans to the Applicant in the amount of \$3 million to \$5 million. A portion of the loan amount is planned to be convertible into preferred units in the second calendar quarter of 2018, estimated at an additional 10%. *Id.*

15. Mr. Crook credibly testified that the transfer of Burlington Labs must happen quickly, and that even “30 days is too long.” TR at 14. The media attention, in large part focused on the State’s Medicaid investigation, has created anxiety among employees, creditors, the Attorney General’s Office, patients, and the treatment centers. *Id.* The persons asked to serve as Burlington Labs’ Board members expected the transfer would close on August 29, 2016, and are now “waiting in the wings” for the transaction to occur. Mr. Crook testified that he cannot continue to allocate resources to Burlington Labs if the transaction does not quickly move forward. *Id.* at 16-17.

16. By purchasing Burlington Labs, the Applicant will provide it with new leadership and governance. The Applicant will put in place a Board of Directors that includes Mr. Crook who will serve as Chair, Christopher Powell who will serve as Chief Executive Officer, John A. Kane who will serve as Chair of the Audit and Finance Committee, and Todd Keating, an executive with UVHN. Christopher Powell has extensive experience in health care IT and worked alongside Mr. Crook in executive positions at IDX. John A. Kane has extensive business leadership and management experience, including serving as Senior Vice President, Chief Financial Officer and Treasurer for IDX. Initially, the Board was to include Michael Casarico, founder of Burlington Labs; the Applicant has confirmed that Mr. Casarico will not be a member of the Board. Letter from Attorney Wohl (Aug. 31, 2016).

17. The Applicant expects to continue to engage Dorman & Fawcett for a period of two or three months following the closing to assist with operational and financial management matters. Stephen Barraclough, a principal with Dorman & Fawcett, will serve in a senior advisory role during this period. Application at 2.

18. The Applicant will refinance the loan held by KeyBank NA, concurrent to the transfer of Burlington Labs, on terms no less favorable than those on the current loan. *Id.* The Applicant will assume Burlington Labs’ trade obligations of approximately \$3.7 million. Letter of Intent at 3.

19. The Applicant is pursuing a settlement with the Vermont Office of Attorney General regarding the allegations that Burlington Labs overbilled Medicaid in 2015. The Applicant has included in its budget projections approximately \$6.5 million for an expected settlement. Application at 2.

20. The Applicant plans to continue the services currently conducted by Burlington Labs, using the same or equivalent lab testing procedures, specimen collection procedures, and

proprietary methods. The Applicant will evaluate its business over time to determine the appropriate location and relocation of collection centers, and intends to move the Barre center to Montpelier, likely close one center in New York and one in Massachusetts that are underutilized, reopen a recently closed center in Enosburg, and evaluate plans to open a center in White River Junction. Application at 3.

21. The Applicant intends to initially retain substantially all of the employees of Burlington Labs, but states that there may be workforce reductions in the future “in order to put the business on more solid financial footing going forward.” Proposed Findings at 2, ¶ 10.

22. The Applicant has provided financial projections which include payments for a settlement with the State over inaccurate Medicaid billing and debt servicing to KeyBank NA, Burlington Labs’ senior lender. Although using historical revenue and expense information does not produce financial projections that show a positive margin by the close of 2017, the Applicant is working on and has drafted a revised expense model so that it will break-even by the end of 2017. Application at 3.

23. Mr. Crook spoke to the Board at its public meeting on August 24, 2016. He explained that he does not make short-term loans to businesses as a “banker,” but became involved in this transaction because he wants to do “something that matters” to curb the epidemic of opiate abuse, has an opportunity to prevent the loss of approximately 140 Vermont jobs, and believes his team can provide the “right resources” to save a “very important asset” in Vermont, notwithstanding the difficulty of the challenge. TR at 9-10.

24. The Board has received letters of support from Spectrum Youth and Family Services, Howard Center, Turning Point Center of Addison County, the Commissioner of the Vermont Department of Health Dr. Harry Chen, United Way of Northwest Vermont, and Burlington Mayor Miro Weinberger, each referencing the need for maintaining the services provided by Burlington Labs. In addition, the Board received a letter of support from David Epstein, Managing Principal of truexcellins, one of Burlington Labs’ creditors.

### Conclusions of Law

As an initial observation, in conducting our review of this CON we were struck by the gravity of Burlington Labs’ financial situation, the commitment of the Applicant to ensure that these services and jobs crucial to our State will not be lost, and the acute need for these services as a tool to help address Vermont’s drug epidemic. While we recognize that the grant of emergency review is rare and should be used sparingly, we are convinced that this CON request requires swift intervention and the Board’s expeditious decision.

Vermont law outlines the criteria an applicant must meet before a CON will issue. First, the application must be consistent with the Health Resource Allocation Plan (HRAP), which identifies needs in Vermont’s health care system, resources to address those needs, and priorities for addressing them on a statewide basis. 18 V.S.A. § 9437(1). We find that this project is consistent with the relevant HRAP standards and therefore satisfies the first criterion. *See* HRAP Standard 4.4 (application should explain how project is consistent with the Department of

Health's recommendations concerning effective substance abuse treatment); *see also* Vermont Department of Health Letter of Support (Aug. 24, 2016) ("The types of testing . . . that a laboratory such as Burlington Labs provides is critical for entities providing treatment for substance use disorder to ensure client compliance with treatment objectives.")

We further conclude that the Applicant has satisfied the second criterion requiring that the project's cost is reasonable, can be sustained by the applicant, will not increase costs of care, and that less expensive alternatives are not available or appropriate. *See* 18 V.S.A. § 9437(2). Clearly, Burlington Labs cannot continue to operate if it remains on the same financial path that it is currently on. *See, e.g.*, TR at 24 (Mr. Crook confirms that Burlington Labs is "going down" without financial intervention). Mr. Crook has made a sizeable personal investment in this ailing business not as a banker, but as an investor and community member seeking to financially resurrect a business with a social mission in which he believes. Finding ¶ 23. He has assembled an impressive group of investors and will install new leadership and governance, including a Board of Directors whose members collectively possess many years of expertise in finance, health care, and in operating and managing complex businesses. Findings ¶¶ 9, 11, 15. The investors have agreed to capitalize the business and refinance the KeyBank NA loan, now delinquent, execute a settlement with the State of Vermont relating to Medicaid payments, and ensure that its trade debt is paid. Findings ¶¶ 18, 19. These factors, along with our review of financial information provided to us by the Applicant, demonstrate that the Applicant can sustain the financial burden of this project, and intends to utilize an expense model that will achieve financial solvency for Burlington Labs, rather than seek to grow revenues through higher charges to its patients.

We also find that there is no alternative that can or will provide, under the time constraints presented here, uninterrupted access to these essential services within the State. The Applicant has articulated both its willingness and ability to financially support Burlington Labs on an ongoing basis, which includes assuming its substantial liabilities. We have heard from and know of no other entity willing or capable of purchasing and sustainably operating Burlington Labs, at a time when it is failing financially to the extent we see here.

We also conclude that the Applicant has met the third criterion, under which it must demonstrate that there is an "identifiable, existing, or reasonably anticipated need" for the project. 18 V.S.A. § 9437(3). Our State is undeniably experiencing a crisis in substance abuse and addiction, even receiving national media attention for the extent of the problem.<sup>2</sup> Since 2013, heroin- and fentanyl-related deaths have spiked. Vermont Department of Health, *Data Brief: Vermont Drug-Related Fatalities 2010-2015* (updated July 12, 2016). Currently, Burlington Labs operates clinics across Vermont, provides services to numerous treatment centers, and has in 2016 alone conducted approximately 41,000 drug tests and served over 2,000 individuals. Findings ¶¶ 1, 2, 3. The need for its services is indisputable, and is bolstered by the letters of support we have received and by the compelling testimony proffered by Mr. Crook expressing his reasons for taking on this challenging task. We easily find that the Applicant has satisfied this criterion.

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<sup>2</sup> For example, Rolling Stone magazine featured an article in April 2014 about heroin addiction in Vermont; similar reports appeared in publications such as the New York Times, Politico, and on national television news.

The Applicant has also demonstrated that it has met the remaining relevant criteria.<sup>3</sup> The project will improve the quality of health care by ensuring that there is no interruption in needed services for patients whose adherence to a substance abuse treatment plan may be precarious, without regular testing and monitoring. 18 V.S.A. § 9437(4) (project must improve the quality of health care or provide greater access for Vermonters, or both). The Applicant does not offer other services that may be impacted by the project. 18 V.S.A. § 9437 (5) (project cannot have undue adverse impact on other services provided by applicant).

Finally, although we conclude that this project serves the public good for reasons already discussed, we condition this CON on the completion and execution of a settlement agreement relating to inaccurate Medicaid claims reporting, consistent with the Attorney General's position outlined in its August 26, 2016 letter to the Board. *See* Letter from Jason Turner, Office of the Attorney General (Aug. 26, 2016). This Board will not independently assess the merits or interfere with the outcome of the State's Medicaid investigation, nor would it be appropriate for it to do so. Given the Applicant's assurances that the matter will be settled and that it will reimburse the State for any damages incurred, we anticipate that our conditional approval will not impede this transaction.

Based on the above, we approve the Applicant's request for a Certificate of Need, which shall issue upon the execution of a settlement agreement with the State of Vermont, Office of the Attorney General, concerning allegations of inaccurate or improper Medicaid claims reporting. Once issued, the Certificate of Need will be subject to the conditions outlined in ¶ 2 A-I, below.

#### CONDITIONS

1. A Certificate of Need shall not issue until the Applicant has met the following condition:
  - A. The Applicant shall execute a settlement agreement with the State concerning allegations of inaccurate Medicaid claims reporting and provide this Board with written confirmation of such settlement from the Vermont Office of Attorney General, which includes a statement that such Office does not oppose the transfer which is the subject of this CON.
2. Once Condition 1 is met and the Certificate of Need issues, it shall be subject to the following terms and conditions:
  - A. The Applicant shall comply with the scope of the project as described in the Application and other materials it has submitted to the Board relevant to this project. This Certificate of Need is limited to the project and activities described therein.

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<sup>3</sup> Because this is an emergency transfer of existing clinical services, two statutory criteria are not relevant to our decision. *See* 18 V.S.A. §9437(7) (applicant must consider availability of transportation services); 18 V.S.A. §9437(8) (applications for the purchase of new health care IT must conform with Vermont's Health Information Technology plan).

- B. The project as described in the Application shall be fully implemented within ninety (90) days of the date of this Certificate of Need or the Certificate of Need shall become invalid and deemed revoked.
- C. Noncompliance with any provision of this Certificate of Need or applicable ordinances, rules, laws and regulations shall constitute a violation of this Certificate of Need and may be cause for enforcement action pursuant to 18 V.S.A. §§ 9445, 9374(i), and any other applicable law.
- D. This Certificate of Need is not transferable or assignable and is issued only for the premises and entity named in the Application.
- E. If the Applicant contemplates or becomes aware of a potential or actual nonmaterial change, as defined in 18 V.S.A. § 9432(12), or a material change as defined in 18 V.S.A. § 9432(11), to the scope or cost of the project described in its Application and as designated in this Certificate of Need, it shall file a notice of such change immediately with the Board. The Board shall review the proposed change and advise the Applicant whether the proposed change is subject to review.
- F. The Applicant shall file two implementation reports with the Board at three-month intervals, the first of which shall be filed three months after the date of this Certificate of Need. The implementation reports shall include information and analysis demonstrating that the project is in conformance with its scope as described in the Application, and must identify any changes to the financing of the project.
- G. The Board may, after notice and an opportunity to be heard, make such further orders as are necessary or desirable to accomplish the purposes of this Certificate of Need, and to ensure compliance with the terms and conditions of this Certificate of Need.
- H. All reports, notices, forms, information or submissions of any kind required to be submitted to the Board as a condition of this Certificate of Need shall be signed by the Applicant and verified by the chief executive officer, or by his or her designated representative.
- I. The conditions and requirements contained in this Certificate of Need shall remain in effect for the duration of the reporting period defined in paragraph F, above.

**SO ORDERED.**

Dated: September 1, 2016 at Montpelier, Vermont

s/ Alfred Gobeille )  
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s/ Cornelius Hogan )  
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s/ Jessica Holmes )  
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s/ Betty Rambur )  
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s/ Allan Ramsay )

GREEN MOUNTAIN  
CARE BOARD  
OF VERMONT

Filed: September 1, 2016

Attest: s/ Janet Richard  
Green Mountain Care Board  
Administrative Services Coordinator