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89 Main Street, Third Floor City Center
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**Re: Docket No. GMCB-010-15con, Proposed Ambulatory Surgical Center
Confidentiality Request for Personal Financial Information**

Dear Donna:

Pursuant to Green Mountain Care Board ("GMCB") Rule 4.403(3), the applicant in the above matter, ACTD LLC, hereby requests leave to provide the response to Question 16 and part of the response to Question 17 of Questions 006 posed on August 25, 2016 confidentially to the GMCB. The questions ask for the names of all investors in the Green Mountain Surgery Center and their personal financial information. This is protected confidential information that is exempt from public disclosure under 1 V.S.A. § 317(c)(7) and (9).

1. Applicant's Response to Question 16 is exempt from public disclosure.

Question 16 asks for the following information:

16. Provide the name, percentage of ownership interest, and amount of initial capital investment in the ASC for each member of ACTD, LLC. In addition, for each member provide a description of all relevant experience in owning, operating, or being employed by ASC(s) or other health care facility(s). Include the names(s) and location(s) of the ASC(s) or health care facility(s).

GMCB Rule 4.403(3) states as follows:

3. Materials included in the record are public records, pursuant to 1 V.S.A. § 317, unless specifically exempted. In the event an applicant or other person submitting materials into the record believes them to be exempt from public inspection:
 - (a) Such person shall request a written determination from the Board as to whether the materials constitute a public record;
 - (b) The request shall include a detailed description of the material at issue and a legal justification for the protection of the material;
 - (c) The person seeking to protect the material from public disclosure shall bear the burden of establishing such material is not a public record; and
 - (d) Within fifteen (15) business days, or sooner or later upon cause shown, the Board shall issue a decision whether such materials are subject to public inspection under applicable

law. If the materials are deemed not subject to disclosure, they will be treated as confidential and unavailable for public review.

Under Vermont's Access to Public Records Law, 1 V.S.A. §§ 315-320, "personal documents relating to an individual" and "information in any files relating to personal finances" are exempt from public inspection and copying. 1 V.S.A. § 317 (c)(7). Question 16 requests the identities of the investors in ACTD LLC, their investments in the entity, and their medical employment history. The question asks for personal information about private citizens, including their financial information, and therefore the request fits squarely within the personal documents exemption.

Application of the personal document exemption requires a fact-specific determination that balances the public interest in disclosure against the harm to the individual. *Kade v. Smith*, 2006 VT 44, ¶ 14; *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 109 (1993). *Trombley* involved a public records request for all documents relating to the school board's consideration and rejection of teacher grievances. In that case, the Court discussed the nature of the "right to privacy" and the need to weigh it against an examination of the public interest in disclosure. "[W]e must construe the term "personal documents" in a limited sense to apply only when the privacy of the individual is involved. Thus, it covers personal documents only if they reveal "intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." (Citations omitted) Consistent with legislative intent, we must also examine the public interest in disclosure." *Trombley*, at 110.

In the present action, invasion of the investors' "right to privacy in their personal and economic pursuits," 1 V.S.A. § 315, will have grave consequences. There is a real risk of the investors' loss of employment if their identity as ASC investors is made public. If the investors are currently employed by a hospital, disclosure of their investment in ACTD LLC may cost them their employment. If the investors are independently employed physicians and the hospitals find out they have invested in the ASC, the hospitals could adversely affect the physicians' credibility and make it difficult for them to schedule and perform their surgical procedures, essentially cutting off their livelihood. A physician who is unable to get his/her patients scheduled for surgery quickly loses patients. Public disclosure could also adversely affect any chance of a hospital job offer in the future.

The information sought will also subject the investors to "embarrassment, harassment, disgrace or loss of employment or friends." *Trombley*, at 110. Knowing where, with whom, and in what amount an individual invests money is not a public matter because it can lead to embarrassment, derision for either being wealthy or poor, greedy or stupid, and potential loss of friends. "Why did you only invest \$XX and not more?" "Couldn't you afford a larger investment?" "Why didn't you invest in XX when my brother was trying to raise money?" "I can't believe UVMCM doesn't meet your needs." And so on. The potential scenarios in which the motives, the financial resources, and the decision-making of the investors could be questioned or criticized are endless, and they implicate an individual's right of privacy in personal and economic pursuits.

In contrast to the investors' right of privacy in their personal and financial affairs, there is no public interest in making public the investors' identities and investments in the Applicant. It is the Applicant's financial wherewithal to support the project, not the identity of its investors and the amount they invested, that is germane to the Certificate of Need ("CON") application.

The investors were described in ACTD LLC's Application as follows:



ACTD LLC was formed in the fall of 2014 with a community-based mission to provide Vermonters with a low-cost, high-quality option to access needed outpatient surgical procedures by obtaining a CON to own and operate the Green Mountain Surgery Center, a multi-specialty ambulatory surgery center in Chittenden County. The largest equity owners of the company are Amy Cooper and Dr. Thomas Dowhan, who are primarily responsible for planning the project, in consultation with local physicians.

Ms. Cooper is the Executive Director of HealthFirst Inc., Vermont's independent physician association. Prior to her involvement with HealthFirst, Ms. Cooper served for three years as a management consultant to health care providers and insurers as an associate at L.E.K. Consulting in Boston. She then transitioned to working in the e-commerce industry, holding positions at Barnes & Noble and Amazon.com, before co-founding her own consumer-internet company. Ms. Cooper holds a Masters of Business Administration from the Wharton School at the University of Pennsylvania, and graduated with a Bachelor of Arts, magna cum laude, from Harvard College. Ms. Cooper moved to Vermont with her husband and three young daughters in 2013.

Dr. Thomas Dowhan is board certified in Ophthalmology and a graduate of UVM College of Medicine. He completed his residency at University of Medicine and Dentistry of New Jersey / Robert Wood Johnson College of Medicine (Formerly Rutgers University). He is presently in solo Ophthalmology Practice at St. Albans Eye Center, with a satellite office in Essex Junction, Vermont. Dr. Dowhan is a member/manager of The Eye Surgery Center, currently Vermont's only ambulatory surgery center. Dr. Dowhan is also President of the Franklin County Medical Society and serves on the board of directors of HealthFirst, Inc. He has been practicing in Vermont and performing surgeries at Northwestern Medical Center for 15 years. Since its opening, Dr. Dowhan has also been performing surgeries at the Eye Surgery Center.

In addition, ACTD LLC has seven minority owners. Six are local physicians, the majority of whom intend to perform surgery at Green Mountain Surgery Center should this CON be awarded. The other minority owner is a Chittenden County resident who works full time in the health care field. The company expects to add additional minority owners, anticipated to consist of local physicians, upon approval of this Application.

Application, page 14.

In addition to this information, ACTD LLC has disclosed the projected financing of the project, and produced a local bank's commitment letter (with the names of the personal guarantors redacted) for its debt financing. See Application, section 1.D, "Facility Design, Lease Provisions and Project Cost" and ACTD LLC Response to GMCB Questions 005, Exhibit 2. ACTD LLC explained in Section III of the Application why its financial condition will sustain any financial burden likely to result from completion of the project. See 18 V.S.A. § 9437(2)(A), Application p. 58. The Application and all but two of ACTD LLC's responses¹ to the GMCB's questions have been publicly posted or made available to the public on

¹ Confidentiality was requested and granted for two of the questions ACTD LLC has been asked to date. Those questions asked for historic utilization information that would reveal the identities of the sixteen physicians who support the project and provided utilization data to support the Applicant's projections. The GMCB agreed that the data was exempt from public disclosure under 1 V.S.A. § 317(9), but determined that it was relevant to the positions of the interested parties (Northwestern Medical Center and the Vermont Association of Hospitals and Health Care Systems) and required them to sign a confidentiality agreement.



the GMCB's website. Given all the available information on the Applicant and the project, the public, including the interested parties, does not have an additional, legitimate interest in knowing the identities of the Applicant's investors, the size of their investments, or their health employment history.

In *Kade*, the Court cited with approval the U.S. Supreme Court's decision in *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), which explained, in balancing an individual's privacy interest against the public interest in disclosure in a case involving the Freedom of Information Act, that a two-part analysis is necessary: "the public interest sought to be advanced" must be "a significant one, an interest more specific than having the information for its own sake. Second...the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *Favish*, at 172; *Kade* at 559.

The public does not have a significant interest in knowing who is an ACTD LLC investor and the size of their investment. Knowing who the investors are and the size of their share in the Applicant will not advance any public interest in the GMCB's CON decision. None of this information is necessary for members of the public to weigh in on and either oppose or support the project.

Given all the harms that could befall a private person who invests in an LLC, the balance tips in favor of the confidentiality of the personal information sought by question 16. The information is not public. It is exempt from disclosure, except to the GMCB, under 1 V.S.A. § 317(c)(7).

Also, 1 V.S.A. § 317(9) exempts "trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its owner an opportunity to obtain business advantage over competitors who do not know it or use it...." The personal records requested in Question 16, especially the identity of the investors and amount they invested in ACTD, LLC, is information that is privately held, kept confidential by both the Applicant and its investors, and could give the ASC's or the investors' competitors, primarily the hospitals and the physicians they employ, an edge by knowing who supports the ASC enough to invest in it.

That edge could be exploited as hospital operating rooms and procedure rooms are the only surgery and procedure venues under the current system. Hospitals control the scheduling of this important resource, and the Applicant fears they could make it more difficult for its investors to schedule their surgeries. The fear of retaliation has been recognized in CON proceedings previously as genuine and has provided a basis for confidentiality under 1 V.S.A. § 317(9). See the CON proceeding involving Vermont's only ASC approved to date, the Vermont Eye Surgery and Laser Center, LLC, Docket No. 05—58-H, in which the identity of the physicians who contributed to the Application was determined to be exempt from disclosure under the Access to Public Records Act. ("[T]he 4-5 physicians [the Eye Center] are working with, other than Dr. Larson. . . wish to remain anonymous at this time as they fear retaliation from FAHC. The Commissioner has agreed to maintain confidentiality." Letter from Jennifer Garson to John Wellborn, dated October 10, 2006). Also see the decision on January 11, 2016 in the present action to keep information responsive to question 4, Q 001, confidential under 1 V.S.A. § 317(c)(9).

While Applicant ACTD LLC understands that the investor information may have bearing on the financial viability of the Applicant and its proposed Green Mountain Surgery Center, Question 16 asks for private information that the investors and the Applicant have taken care to keep confidential so those investors will not be retaliated against. Because the hospitals have a virtual monopoly over surgery and procedure



rooms in Vermont and control the scheduling, and because they are also interested parties in this proceeding, we are specifically requesting that we provide the information exclusively to the GMCB for its review, that the information not be provided to any of the interested parties, and that the information is not public. Having access to this information serves no legitimate public purpose, yet keeping it confidential provides a competitive advantage for the investors, who would otherwise be fearful of retaliation.

2. Applicant's Response to Part A of Question 17 is exempt from public disclosure.

Question 17 states, in part:

17. Provide a list of owners in the ASC who are physicians (sic) investors or investors in a position to make referrals to the ASC. For each:

- (a) Provide the terms of investment to verify that it is not based on referrals and that there are no loans by such investors;

The arguments articulated above regarding Question 16 are equally applicable to this question. While the identities of the physician investors and whether they have loaned ACTD LLC money may be relevant to the GMCB's CON decision, the information is not relevant to the public and is not necessary for the public to weigh the merits of the Applicant's CON request. The question calls for information that is both protected business information in the nature of a trade secret that could destroy a competitive advantage if it were made public, and personal (and personal financial) information that could cause loss of livelihood and employment. Balancing the public interest in having this information against the private individual investor's right to privacy weighs definitively in favor of confidentiality.

For the reasons stated above, we ask that the GMCB declare that the Applicant's responses to Question 16 and 17(a) are not public documents and are exempt from disclosure under 1 V.S.A. § 317(c)(7) and (9).

Please let me know if there are any questions.

Sincerely,



Eileen Elliott, Esq.

cc: Judy Henkin, Esq., General Counsel, Green Mountain Care Board
Lauren Layman, Esq., Vermont Association of Hospitals and Health Systems
Anne Cramer, Esq., Vermont Association of Hospitals and Health Systems
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