

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

IN RE:

CASE NO. 16-50740

PROGRESSIVE ACUTE CARE, LLC, et. al.

CHAPTER 11

Debtor

Jointly Administered

MOTION TO APPOINT TRUSTEE

NOW INTO COURT, through undersigned counsel, come the DeAnna W Jensen Living Trust Dated Jan 26, 2012 (Dr. Wade Jensen, Trustee), Dan Kensinger, Ray Sherman, Steve Stokesbary, Steve Meyer, Grant Shumaker, and Tom Jacobson, all of whom are Unit Holders of the Debtors (herein referred to as "Equity Investors") who invested a material amount of the \$8 million equity capital in the Debtor since inception. The Equity Investors move the Court to appoint an independent trustee and authorize that trustee to conduct a full investigation of the financial affairs and disclosures of Debtors' management and Business First Bank, among other matters. As indicated by the information included in this motion and exhibits, such investigation is required to uncover actions that will impact the Debtors' ultimate distribution of assets, to recover proceeds from causes of action against Debtors' management and Board, and to independently evaluate the actions of the Debtor and its management before and during this bankruptcy proceeding.

1.

On May 31, 2016, Progressive Acute Care, LLC and its subsidiaries and affiliates Progressive Acute Care Avoyelles, LLC, Progressive Acute Care Oakdale, LLC and Progressive

Acute Care Winn LLC (collectively with Progressive Acute Care, LLC, "PAC" or "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Despite the objections of multiple PAC creditors, on August 31, 2016, the Court approved a revised sale transaction process (Docket 290), which the Equity Investors oppose, for PAC's final three operating hospitals requiring only a \$500,000 cash downpayment to be paid by the purchaser and a speculative \$10,050,000 non-recourse note as proceeds, among other transaction details. Importantly, in approving such sale transaction provisions the Court left the post-sale distribution of estate assets and sale proceeds to be determined in the future:

"IT IS FURTHER ORDERED that nothing in this Order shall be deemed an admission, acknowledgement, or allowance of the validity, extent, rank, or priority of any liens, claims, or interests that may attach to the proceeds of the Sale, and any and all rights, claims, defenses, and other challenges of the Debtors, the Official Committee of Unsecured Creditors, or any other parties-in-interest with respect to the validity, extent, rank, or priority of such liens, claims or interests are hereby expressly preserved." Order approving sale procedure, Docket 290.

2.

After two consecutive years of profitable operations by PAC and its three original operating hospitals in 2011 and 2012, PAC management and inside Board members Mike Hurlburt, Wayne Thompson and Daniel Rissing, supported by outside Board members, undertook a process to evaluate and acquire the assets of Dauterive Hospital of New Iberia, LA from Hospital Corporation of America ("HCA"), a large national publicly traded for-profit health care company and PAC CFO Wayne Thompson's previous employer. The acquisition, which was ultimately closed in April 2013, was so unsuccessful that it was the single most significant

reason for PAC's bankruptcy filing herein. This acquisition placed the Equity Investors at risk of losing their entire invested capital, even after PAC's prior profitable operations leading up to the Dauterive acquisition.

3.

In order to fund the Dauterive acquisition, PAC was required to undertake a highly leveraged debt structure in the form of a new \$20+ million Business First Bank loan in addition to raising additional equity of \$3 million in a new Series B Preferred Unit offering. The undersigned Equity Investors purchased a material amount of the Series B Preferred Units in PAC's April, 2013 securities sale. Additionally, to entice the Equity Investors to purchase the new Series B Preferred units, PAC inside management and Board members Mike Hurlburt, Wayne Thompson, and Daniel Rissing agreed to guarantee \$3 million in Business First Bank debt. Business First Bank also agreed to a loan provision that required that each of these inside management members be retained or the bank could claim default, thereby placing Business First Bank in a decision making role with potential lender liability in the PAC management and Board activities.

4.

Upon information and belief, in connection with PAC's 2013 Series B Preferred Unit offering, PAC inside management members, as overseen by outside Board members, knowingly misrepresented critical information provided to the Equity Investors in violation of the requirements of Securities and Exchange Commission Rule 10(B)5. Among other violations, the Equity Investors believe both the Dauterive projected and historical financial information included in both the "Due Diligence Report" and "Private Placement Memorandum" (Exhibit A),

provided to Equity Investors to evaluate their potential investment in the new Series B Preferred Units, were knowingly misrepresented by PAC inside management members Mike Hurlburt, Wayne Thompson and Daniel Rissing with oversight by PAC's outside Board members. Specifically, led by CFO Wayne Thompson and Mike Hurlburt, the historical Dauterive 2013 EBITDA was represented to be \$2.4 million along with the further representation that "Dauterive Hospital has been profitable the last two years. Additionally, HCA has historically retained DSH/UPL Medicaid supplemental funds of approximately \$900K annually on the division's books, which means Dauterive is generating well in excess of \$3M in EBITDA currently." (Exhibit A). Additionally, CFO Thompson represented to PAC Equity Investors projected Dauterive EBITDA of between \$6.5 million to \$7.3 million from 2014 to 2016, respectively, which would turn out to be wildly reckless and optimistic. During the period of PAC's Dauterive acquisition, Business First Bank debt diligence and Series B Preferred Unit equity offering, it should be noted that CFO Thompson was representing himself prominently on PAC's website as a licensed CPA and certified fraud auditor when in fact his CPA license was either revoked or terminated. In reality, the only validly licensed CPA on the PAC Board of Directors overseeing the integrity of PAC's accounting and disclosures to investors was PAC outside director Dan Newell, who also represented PAC's largest shareholder, the Harmony Funds of Sioux Falls, South Dakota.

5.

After the Equity Investors were prompted to invest in the new Series B Preferred securities offering based on these believed misrepresentations and violations of SEC Rule 10(B)(5), the realities of the Dauterive Hospital operations and financial performance became

immediately revealed in periods after the April 2013 acquisition closing. In fact, as shown in PAC management's first post-Dauterive year-end report to Equity Investor's (see Exhibit B), PAC acting Chairman Mike Hurlburt indicated to Equity Investors in a February 11, 2014 email "As you will see, we are in default of one of the bank covenants (equity) and as such the bank has suspended dividend distribution until we are in compliance." The post-Dauterive acquisition first year PAC debt default was a direct result of PAC management drastically missing its Dauterive EBITDA year-one projections by well over 50%.

6.

Even after PAC was in default of its Business First Bank debt covenants as early as February 2014, over two years prior to PAC's bankruptcy filing in this case, Business First Bank chose not to call the insider management guarantees of \$3 million which could have provided critical additional liquidity for PAC's business success. Even as of September, 2016, PAC's Board members Newell, Genoff and Case, PAC's advisors SOLIC, and Business First Bank have yet to recover the \$3 million of insider guarantee proceeds as one of the critical elements that enticed the Equity Investors to invest in PAC's Series B Preferred Unit offering. Incredibly, in the same February 11, 2014 investor update report coinciding with the period of post-Dauterive year one debt defaults, PAC reported to investors that PAC's return on investment on an "accrual basis" was over 150% (Exhibit B). In reality, Dauterive Hospital never met CFO Thompson's projections as the actual performance of Dauterive Hospital continued at an astoundingly poor level as evidenced three years later in Mike Hurlburt's June 14, 2016 update to the Equity Investors (Exhibit C): "As reflected in the below cash flow exhibit, Dauterive Hospital's cash flow from operations was -\$6.1M in 2015 highlighting the liquidity challenges that Dauterive

Hospital created for all of PAC. For 2014, cash flow from operations for Dauterive Hospital was -\$4.7M.” This enormous negative cash flow can be contrasted with CFO Thompson’s positive EBITDA projections of \$6.5 million and \$6.9 million in 2014 and 2015, respectively, in the Series B Preferred Unit equity offering documents (Exhibit A).

7.

Despite PAC’s post-Dauterive debt default in the first year with the full knowledge of PAC’s full Board and the continued Dauterive performance disasters, as evidenced by a June 20, 2013 email (Exhibit D) less than 60 days after the Dauterive acquisition closing, PAC inside management (with the knowledge and support of PAC’s outside Board members) made a substantially increased compensation proposal one of their first post-Dauterive actions (see, Exhibit D). Management attempted to justify the salary increases based on the increased revenue and size of operations brought about by the ultimately unsuccessful Dauterive acquisition.

8.

PAC inside management, as overseen by outside directors, continued to mislead the Equity Investors after the Dauterive acquisition. On April 14, 2015 (less than 14 months prior to PAC’s bankruptcy filing in this case), Acting Chairman Mike Hurlburt sent a misleading email and supporting letter to Equity Investors (Exhibit E) stating relative to hiring SOLIC Capital Advisors, “This is a good thing for PAC, our investors, medical staffs, employees and communities—strengthening our ability to meet the changing health care landscape” and “Dear PAC Investors, . . . Let me be clear, PAC is not winding down but rather we are preparing to strengthen our position to be better partners for our physicians, associates and communities. This is truly an exciting time for us.” However, Hurlburt’s misrepresentations were quickly proven

untrue as early as October 6, 2015, through an email he was required to provide to investors highlighting the unsuccessful attempted sale of Dauterive Hospital to Prime Health Care, by stating, "After much discussion with Prime Health Care and after their preliminary diligence visit, we mutually agreed to let our LOI with Prime terminate" followed by then updating the investors on the ultimate economically unsuccessful sale of Dauterive Hospital to competitor Iberia Medical Center. (Exhibit F). Contrary to Hurlburt's statements in April 2015, a very distressing time was on the immediate horizon for PAC and the Equity Investors in late 2015 and early 2016 with PAC's imminent bankruptcy filing.

9.

Despite PAC inside management having material conflicts of interest due to their post-Dauterive personal guaranties to Business First Bank, PAC inside management, as well as PAC's outside directors, brought undue pressure on the Equity Investors on May 18, 2016 to vote in favor of the PAC Bankruptcy. On information and belief, the conflicted nature of each inside PAC management member in attempting to avoid their collective \$3 million Bank First Bank debt guarantee obligation (on top of the potential outside director liabilities for their actions both before and after the PAC bankruptcy) prompted the collective Board and management group to pressure the Equity Investors to support and vote for PAC's bankruptcy filing. At the meeting on the vote, the PAC management presented no alternatives other than Chapter 11. The Equity Investors were not represented by counsel at the May 18, 2016 meeting. It was the fiduciary obligation and duty of each PAC director at that critical time to protect the Equity Investors to the best of their ability, not preserve their own individual interests in avoiding personal

exposures presented by both the debt guarantees in the case of the PAC inside management members and the actions of the PAC outside directors throughout PAC's existence.

10.

Only after the bankruptcy vote did Mike Hurburt and the PAC Board attempt to address the material conflict related to inside management's debt guarantee, concocting a veiled attempt to provide a superficial compensating governance procedure again involving SOLIC, Steffes and PAC's "independent directors" Newell, Genoff and Case. In Mike Hurlburt's June 14, 2016 bankruptcy update to the Equity Investors (Exhibit C), Hurlburt represented: "Because of the personal guarantees and the potential conflicts of interest of the management board members, responsibilities either pre or concurrent with bankruptcy have been reviewed by the Board and counsel and any issue, including matters dealing with our lending institution, are reviewed and managed by independent directors, outside legal counsel and our financial advisor. All matters with the Business First Bank, our primary lender, are being led by SOLIC Capital Advisors, Steffes, Vingiello & McKenzie, LLC and subject to approval of the Bankruptcy Court."

11.

Upon information and belief, the Equity Investor's interests and the PAC bankruptcy estate have not been appropriately represented by any of these parties. The PAC management and board, with their fiduciary obligations to the Equity Interests and the estate, have inappropriately represented the interests of the Equity Interests and the estate. The most illuminating evidence of these fiduciary shortfalls is the fact that as of September, 2016, the PAC management has still not contributed their \$3 million guarantee obligation to PAC nor has the

PAC Board pursued any actions whatsoever against PAC inside management or Business First Bank.

12.

Pursuant to Bankruptcy Code Section 1104(a),

[a]t any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

13.

Here, the appointment of a Chapter 11 trustee is appropriate because of the misrepresentation and overly optimistic projections of the financial condition of the Debtors by PAC management, duress and/or undue pressure used by PAC management and the board to force the equity unit owners to vote in favor of this bankruptcy proceeding, the failure of the board or management to pursue causes of action and collection of the guaranties against PAC management, and the conflicts of interest PAC management has as a result of the guaranties.

14.

Given these facts, the Equity Investors now face the horrific prospect of total investment loss unless this Court allows appropriate recovery mechanisms to be implemented in this case.

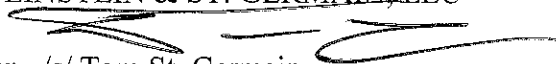
Without the appointment of a trustee, the continued management of the liquidation of PAC assets will potentially be misguided, the bankruptcy estate assets will potentially not be fully recovered or maximized and the distribution of assets may be legally inappropriate and unfair.

WHEREFORE, The Equity Investors pray that the Court appoint a trustee to oversee all aspects of this case, including the discretion to (i) undertake any and all necessary forensic civil and criminal investigations of PAC inside management and Business First Bank activities contributing to the downfall of PAC and the destruction of the value of the Equity Investors' interests, (ii) liquidate and distribute PAC estate assets and (iii) vigorously pursue any and all causes of action against Business First Bank and the PAC management and Board.

Date: September 26, 2016

Respectfully Submitted,

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