

PROPOSED TRANSACTION BETWEEN
MASCOMA COMMUNITY HEALTHCARE, INC.
AND
HEALTHFIRST FAMILY CARE CENTER, INC.

July 5, 2023

I. Introduction

On April 24, 2023, Mascoma Community Healthcare, Inc. (“MCH”) submitted to the Director of Charitable Trusts notice of a proposed transaction involving HealthFirst Family Care Center, Inc. (“HealthFirst”). Under the proposal, MCH will lease its building and equipment and transfer its operations to HealthFirst during the lease term. Because the proposed transaction involves the transfer of control of 25 percent or more of MCH’s assets, it constitutes an “acquisition transaction” and is subject to the review of the Director of Charitable Trusts under RSA 7:19-b. *See* RSA 7:19-b, I (a).

A. The Parties

i. Mascoma Community Healthcare, Inc.

MCH was established as a New Hampshire nonprofit corporation in 2014 by 10 residents of the Canaan area. MCH is a charitable organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. The purpose of MCH is, among other things:

- (a) To provide outpatient primary health and dental service in underserved areas for medically underserved populations as a community clinic.
- (b) To develop, promote, and manage health and dental care facilities, services, and programs with emphasis on comprehensive health care, preventive medicine and health maintenance.
- (c) To work to keep the cost of healthcare affordable for all people in the communities it serves.
- (d) To educate the public in the principles of health protection and promote other projects in the interest of the public’s health...¹

In 2017, MCH opened the Mascoma Community Health Center in Canaan, New Hampshire (“Health Center”). The development of the Health Center was financed by a loan from the United States Department of Agriculture (“USDA”) which holds a mortgage on the Health Center and the land. The Health Center has 10 employees, including 3 health care providers, and it serves approximately 5,500 patients from communities in the Mascoma Valley (Dorchester, Orange, Grafton, Canaan, Enfield, Lebanon, Rumney, and Danbury). MCH currently offers at the Health Center various health care services, including general family medicine, pediatrics, gynecology, geriatric

¹ *See* Articles of Agreement, May 8, 2014 (available at on the Secretary of State’s website at <https://quickstart.sos.nh.gov/online/BusinessInquire/FilingHistory?businessID=530386>).

care, lab services, sports injury management, and wellness programming. In the past, MCH also offered primary care dental services, but ceased offering those services when its dental provider departed MCH in July 2022. Despite attempts to recruit a dental provider, MCH has been unable to fill the position.

ii. HealthFirst Family Care Center

HealthFirst was established as a New Hampshire nonprofit corporation in 1996 for the purpose of providing “primary health care and related prevention, educational and human services to the residents of the Greater Franklin/Twin Rivers region of New Hampshire.”² HealthFirst has been designated by the U.S. Department of Health and Human Services’ Health Resources and Service Administration (“HRSA”) as a Federally Qualified Health Center (“FQHC”). Health First has locations in Laconia and Franklin. Its service area includes 23 rural communities, including Alexandria, Andover, Ashland, Belmont, Bridgewater, Bristol, Center Harbor, Danbury, Franklin, Gilford, Gilmanton, Groton, Hebron, Hill, Laconia, Meredith, Moultonborough, New Hampton, Northfield, Salisbury, Sanbornton, Sandwich, and Tilton.

HealthFirst currently employs approximately 70 clinical and nonclinical workers and offers, among other services and programs, adult and senior primary care, pediatric and adolescent primary care, women’s health, behavioral health, substance misuse treatment, lab services, family planning, immunizations, nutrition, and other wellness programming. As an FQHC, HealthFirst receives grant funding from the federal government, enhanced Medicare and Medicaid reimbursement, medical malpractice coverage under the Federal Tort Claims Act, and drug pricing discounts for pharmaceutical products under the 340B Drug Discount Program.

B. The Proposed Transaction

MCH experienced financial challenges even before the COVID pandemic. Approximately 29% of its patients are covered by Medicaid or Medicare, 11% take advantage of MCH’s sliding scale for lower income patients, and approximately 27% are underinsured or uninsured. The reimbursement rates have not been sufficient to cover the cost of delivering the services MCH offers. As a result, over the years, MCH’s operating expenses and debt service expenses have exceeded its operating revenue. Its financial situation was exacerbated as a result of the pandemic. It has relied on grant funding and charitable donations to sustain its operations.

MCH recognized the benefits of status as an FQHC and believed that achieving such status would address the financial challenges it experienced. Despite the fact that MCH designed its governance and operation of its health center to meet FQHC requirements, its applications to HRSA for an FQHC or FQHC Look-Alike designation

² See Articles of Agreement, April 23, 1996 (available on the Secretary of State’s website at <https://quickstart.sos.nh.gov/online/BusinessInquire/FilingHistory?businessID=65123>).

have not been accepted. MCH's current application has been on a HRSA waiting list since 2019.

In 2019, MCH entered into discussions with HealthFirst about a collaboration, and in early 2020, both parties met with representatives of the Charitable Trusts Unit of the Attorney General's office ("CTU") to discuss a proposed change of control transaction. Weeks later, the New Hampshire Governor declared a State of Emergency due to the COVID-19 pandemic, and as a result of the uncertainty surrounding the pandemic, the parties decided not to immediately pursue the transaction. They nevertheless maintained contact with one another and renewed their discussions about a collaboration in 2022.

Between 2020 and 2023, MCH failed to comply with certain federal and state financial reporting requirements. On August 15, 2022, the Internal Revenue Service ("IRS") automatically revoked MCH's tax exemption due to its failure to file a Form 990 return for 3 consecutive years. In addition, for two years, MCH failed to file annual reports with the Charitable Trusts Unit pursuant to RSA 7:28, and as a result, MCH was "not in good standing" with the Charitable Trusts Unit. In March 2023, the IRS reinstated MCH's tax exemption, and in April 2023, the Charitable Trusts Unit reinstated MCH's "good standing" status after it filed its delinquent annual reports.

Under the terms of the proposed transaction, MCH will transfer the operations of the Health Center to HealthFirst pursuant to an Operations Transfer Agreement ("OTA") and will lease to HealthFirst the Health Center premises and equipment. MCH is not in a position to sell the Health Center to HealthFirst because of its debt obligations to the USDA. During the term of the leases, HealthFirst will operate the Health Center as an FQHC site of service. HealthFirst will offer all of the health and wellness services MCH currently offers, but in addition, will offer other service and programs, including behavioral health, substance use treatment, women's health, and the 340B drug discount program.

By operating the Health Center as an FQHC site of service, HealthFirst will be able to take advantage of the benefits of an FQHC, including the higher Medicaid reimbursement rates. The budget projections submitted to the Charitable Trusts Unit by HealthFirst demonstrate that within two years, the Health Center no longer will be operating at a deficit.

The following is a summary of some of the significant terms of the OTA and leases:

1. Transfer of Operations: HealthFirst will operate the Health Center as an FQHC unless it determines in good faith in the future that continued operation of the Health Center as an FQHC is not financially feasible.

2. Employees: HealthFirst will offer to hire all of MCH's active employees,³ provided that they meet HealthFirst's hiring standards.
3. Term of the Operations Transfer: The term of the operations transfer will begin on or about July 1, 2023, and will terminate automatically upon termination of the lease agreements or on a date to which the parties mutually agree.
4. Lease of Health Care Facility: The term of the lease of the Health Center begins on July 1, 2023 (subject to contingencies) and will expire on June 30, 2033. Unless terminated sooner or unless HealthFirst gives written notice of termination 180 days prior to the termination date, the lease will be renewed automatically for additional 10-year terms. HealthFirst has the right to terminate the premises lease at any time after the first year of the term upon 180 days' notice to MCH. HealthFirst will pay MCH monthly rent of \$25,626, which will increase annually by 2% or the percentage change in the Consumer Price Index, whichever is greater. HealthFirst will also pay the Health Center's property taxes or payment in lieu of taxes, liability insurance, and certain other costs.
5. Purchase Option for Health Care Facility: At any time during the lease term, HealthFirst can elect to purchase the Health Center, subject to court and regulatory approval. The purchase price would be the sum of MCH's outstanding indebtedness plus transaction costs.
6. Equipment Lease: The term of the equipment lease is 5 years, and monthly rent is \$750. At the end of the 5-year term, MCH will convey the equipment to HealthFirst for \$1.00.
7. Probate Court Approval: The obligations set forth in the OTA are subject to the approval of the Probate Court.

II. Review by the Charitable Trusts Unit

A. Overview

RSA 7:19-b requires that the Director of Charitable Trusts of the Attorney General's office review acquisition and change of control transactions involving healthcare charitable trusts and determine compliance with the statute's provisions. The Charitable Trusts Unit has 180 days within which to conduct its review, it must accept public comment, and it may hold a public hearing. *See* RSA 7:19-b, IV (a).

Because of MCH's financial condition, the Charitable Trusts Unit expedited the review process. The Charitable Trusts Unit requested and obtained additional information, met with members of the board of directors of MCH, met with the CEO, CFO, and chair of the board of HealthFirst, reviewed the video of MCH's public listening session, and spoke with other stakeholders and health care policy experts. In accordance with RSA 7:19-b, IV (b), the Charitable Trusts Unit also provided notification about the proposed transaction to the Commissioner of the Department of Health and Human

³ The interim Executive Director of MCH, who accepted the position on a temporary basis, will not seek the position as director of the Health Center when it is operated by HealthFirst.

Services and the Insurance Commissioner and invited them to provide input or advice. Both provided helpful input.

In conducting its review, the Charitable Trusts Unit has considered the Notice, information and documentation submitted to and obtained by the Charitable Trusts Unit, and the information shared by the parties. After considering all of the evidence, the Charitable Trusts Unit has determined that the Notice complies with RSA 7:19-b and will take no action to oppose the transaction, subject to the representations and conditions set forth in this report.

B. The Standards in RSA 7:19-b, II

RSA 7:19-b, II requires that a governing body of a health care charitable trust ensure that a change of control transaction complies with seven minimum standards. The following sets forth the Charitable Trusts Unit's analysis and conclusions with respect to each of the standards.

i. *RSA 7:19-b, II (a): Permitted by Law*

RSA 7:19-b, II (a) provides:

The proposed transaction is permitted by applicable law, including, but not limited to, RSA 7:19-32, RSA 292, and other applicable statutes and common law;

Under the proposed transaction, MCH would lease the Health Center and transfer its operations to HealthFirst. While HealthFirst would continue to operate the Health Center as a health clinic in a substantially similar form as MCH, the lease and transfer of operations is not expressly authorized by MCH's charitable purpose because MCH no longer will provide the health care services. MCH's change of purpose and the change in the administration of MCH's charitable assets require judicial approval under the doctrines of *cy pres* and deviation. *See* RSA 547:3-d, I; RSA 547:3-c; *see also Trustees of Protestant Episcopal Church v. Danais*, 108 N.H. 344 (1967) (holding that the court had the authority to permit deviation from trust terms); *Souther v. Schofield*, 95 N.H. 379 (1949) (holding that court could order deviation from trust terms where the circumstances may not have been known or anticipated by the settlor and compliance would impair the trust purposes).

On June 8, 2023, MCH filed a Verified Petition for *Cy Pres* and Deviation Relief. This no-action report is subject to the condition that the Probate Court approves the Petition.

ii. *RSA 7:19-b, II (b) Due Diligence*

RSA 7:19-b, II (b) provides:

Due diligence has been exercised in selecting the acquirer, in engaging and considering the advice of expert assistance, in negotiating the terms and

conditions of the proposed transaction, and in determining that the transaction is in the best interest of the health care charitable trust and the community which it serves;

The standard set forth in RSA 7:19-b, II (b) is consistent with the board's fiduciary duties under common law to "act in good faith and in a manner the fiduciary reasonably believes to be in the best interests of the charity in light of its purposes." *See Restatement of Charitable Nonprofit Organizations* §§ 2.01, 2.02 (2021). The determination as to whether a board properly exercised its fiduciary duty of care requires the assessment of a number of factors, including the complexity and importance of the decision. *Id.* at 2.03, cmnt. b (4) (cited in *Report of the Attorney General, Charitable Trusts Unit Regarding the Governance of LRGHealthcare*, April 21, 2022⁴ ("Report of the CTU"). In making major decisions that could substantially impact the organization's ability to carry out its mission, the board should consult with outside experts. *See* Report of the CTU, pp. 20–21.

The MCH board determined after consulting with other FQHCs and based on the expertise and experience of its members that becoming an FQHC-designated facility was in the best interests of MCH in light of its purpose: to provide health and dental services in underserved areas for medically underserved populations. *See* Articles of Agreement, May 8, 2014. Without the designation, the Health Center was not financially sustainable. In addition, designation as an FQHC could provide certain services and programs not available to rural health centers like MCH, including the 340B drug discount program. Because MCH could not achieve the FQHC or FQHC Look-Alike designation on its own, and continuing as a rural health center is not financially feasible, it is in the best interests of MCH in light of its purpose to enter into a transaction that would allow an FQHC to bring health care and dental services to the community.

In 2018, the MCH board explored affiliations with HealthFirst, Ammonoosuc Community Health Services in Littleton, New Hampshire, and Springfield Medical Care Systems, Inc. in Springfield, Vermont.⁵ According to HealthFirst's CEO, HealthFirst was looking for opportunities to expand, and it recognized that it could help to address a community need by operating in Canaan. MCH appears to have exercised due diligence in selecting the "acquirer." HealthFirst is well-managed and financially stable and appears to be committed to expanding health care and dental services and programs in the Mascoma Valley.

According to the *Dartmouth-Hitchcock Community Needs Assessment FY 2022* submitted with the Notice, the priority health needs for Canaan and the surrounding area included the availability of mental health services, affordability of health care, improved

⁴ The Report is available on the Attorney General's website at: <https://www.doj.nh.gov/charitable-trusts/documents/report-lrch-governance.pdf>.

⁵ In late 2018, Springfield Medical Care Systems, Inc. experienced changes in its leadership due to serious financial struggles that ultimately led to bankruptcy. The organization is now known as "North Star Health" and is an FQHC. Ammonoosuc Community Health Services did not pursue a merger or affiliation with MCH.

resources for healthy eating, and alcohol and drug use prevention, treatment, and recovery. *See* Notice, Appendix H. The proposed transaction includes elements that would help to address these priority health needs. HealthFirst “offers a sliding fee discount program such that patients pay for services based on their ability to pay, and no patient is denied services based on their ability to pay.” *See* Notice, Appendix P (The Statement of HealthFirst Regarding Furtherance of HealthFirst Mission Post-Operations Transfer). In addition, HealthFirst has committed to providing the health care services that MCH currently offers and expanding its services and programs to include behavioral health and substance use treatment. *Id.* The comments that the Charitable Trusts Unit received from members of the community and other stakeholders pertaining to the proposed transaction were uniformly positive.

One issue considered by the Charitable Trusts Unit was whether the MCH board acted with an appropriate level of urgency in seeking a partner in light of its financial condition. MCH has experienced deficits for many years and was on the verge of filing a notice of change of control transaction in 2020, but ultimately, did not file a notice until 2023. A delay due to the uncertainties caused by the COVID-19 pandemic is understandable, but it appears that even though MCH continued its discussions with HealthFirst over the years, it did not engage legal counsel until December 2022 or January 2023.⁶ By the time MCH retained lawyers to provide the board with advice and prepare the transactional documents, MCH’s financial situation was critical, and it became necessary to seek an expedited review from the Charitable Trusts Unit and the probate court.

While the MCH board appears to be committed to MCH’s mission, it is troubling that MCH lost its tax-exempt status with the IRS and its good standing status with the Charitable Trusts Unit due to MCH’s inattention to federal and state filing requirements. These failures may well have jeopardized MCH’s eligibility for grants and donations. The board’s failure to ensure that MCH complied with the law constitutes a breach of its fiduciary duties. *See* RSA 7:28, VI.

In the meeting with members of the MCH board, the board appeared to be knowledgeable about the particulars of the proposed transaction with HealthFirst and the benefits of entering into it. However, the minutes of the board meetings do not reflect robust discussions about the benefits and drawbacks of the transaction. Based on the minutes, it appears that the board members were given little advance notice to consider and discuss the terms of the OTA and lease agreements. For example, when one board member raised a concern about the language in a lease agreement, the board nevertheless voted to proceed with the documents as written because time was of the essence.

⁶ RSA 7:19-b, II (b) requires that the board exercised due diligence “in engaging and considering the advice of expert assistance.” In the Notice, MCH identified Ammonoosuc Community Health Services and HealthFirst as two experts engaged by the board. These organizations may have been helpful to MCH leaders in navigating the world of FQHCs, but these potential affiliation partners were not “experts” engaged by the board to provide it with assistance in reviewing the proposed transaction.

The MCH board should have retained lawyers or other experts to assist the board in a more timely manner and should have given board members the opportunity to provide more input regarding the terms of the transaction. In addition, the board should have paid more attention to ensure that MCH had complied with all applicable state and federal laws. It is clear, however, that the MCH board acted in good faith with respect to the transaction involving HealthFirst and reasonably believed that the decision that it made to enter into the proposed transaction with HealthFirst was in the best interests of the organization in light of its purpose. The Charitable Trusts Unit finds that the board substantially complied with the standard set forth in RSA 7:19-b, II (b), subject to the terms and conditions set forth in this report.

iii. RSA 7:19-b, II (c) Conflicts of Interest

RSA 7:19-b, II (c) provides:

Any conflict of interest, or any pecuniary benefit transaction as defined in this chapter, has been disclosed and has not affected the decision to engage in the transaction;

The Notice includes an *RSA 7:19-b, III Standards Certification* signed by all of the members of the MCH board. *See* Notice, Appendix O. The Certification contains the statement “no conflict of interest exists that would affect the decision to enter into the Transaction, and the Transaction does not constitute or establish any pecuniary benefit transaction as defined in RSA Chapter 7.” *Id.* The Charitable Trusts Unit has no reason to believe that the statement in the certification is inaccurate and therefore finds that the standard set forth in RSA 7:19-b, II (c) has been met, subject to the representations and conditions contained in this report.

iv. RSA 7:19-b, II (d) Fair Value of Transaction

RSA 7:19-b, II (d) provides:

The proceeds to be received on account of the transaction constitute fair value therefor;

MCH included with its Notice an Opinion of Value from a real estate broker in West Lebanon, New Hampshire to demonstrate that the lease values were consistent with market rates. The Charitable Trusts Unit has no reason to question the valuation, and it finds that the standard set forth in RSA 7:19-b, II (d) has been met.

v. RSA 7:19-b, II (e) Use of Charitable Assets

RSA 7:19-b, II (e) provides:

The assets of the health care charitable trust and any proceeds to be received on account of the transaction shall continue to be devoted to charitable

purposes consistent with the charitable objects of the health care charitable trust and the needs of the community which it serves;

Under the terms of the proposed transaction, the assets of MCH will continue to be used in accordance with MCH's current mission. As discussed above, MCH has filed a probate court petition, seeking the court's permission to allow it to amend its purpose and allow HealthFirst to lease the Health Center.⁷ The proceeds of the leases will be used to pay the USDA loan and support MCH's amended charitable mission. The Charitable Trusts Unit finds that the standard set forth in RSA 7:19-b, II (e) has been met, subject to the conditions set forth in this report, including probate court approval of MCH's Petition for *Cy Pres* and Deviation.

vi. RSA 7:19-b, II (f) Control of the Proceeds

RSA 7:19-b, II (f) provides:

If the acquirer is other than another New Hampshire health care charitable trust, control of the proceeds shall be independent of the acquirer;

The proposed reorganization does not involve a non-New Hampshire health care charitable trust, and RSA 7:19-b, II (f) therefore is inapplicable.

vii. RSA 7:19-b, II (g) Notice and Hearing

RSA 7:19-b, II (g) provides:

Reasonable public notice of the proposed transaction and its terms has been provided to the community served by the health care charitable trust, along with reasonable and timely opportunity for such community, through public hearing or other similar methods, to inform the deliberations of the governing body of the health care charitable trust regarding the proposed transaction.

On Saturday, April 1, 2023, at 9:00 a.m.,⁸ MCH held a listening session regarding the proposed transaction at the Health Center. Approximately 28 people attended in person, and approximately 26 people attended via videoconference, including some members of the MCH board and representatives of HealthFirst.⁹ Mike Samson, the acting Executive Director and a former board member, explained the transaction and answered many of the questions. The HealthFirst CEO and CFO also answered questions and explained their plans for the Health Center. The questions raised during the listening

⁷ HealthFirst is in the process of amending its articles of agreement to expand its purpose to allow it to operate a health center in the Mascoma Valley.

⁸ Because of technical issues, the listening session did not start on time.

⁹ Some members did not attend the listening session, and they did not watch the video afterward. As a result, when they voted on the transaction, they did not have the benefit of the input from the community.

session were thoughtful and helpful, and the public comments made during the session regarding the transaction were positive.

In addition to holding a listening session, MCH distributed and posted on its website written materials regarding the proposed transaction. Some of the representations made by MCH in those materials were not supported by the language in the OTA or the leases. For example, one flyer distributed by MCH states that “Mascoma patients would have proportional representation on the HealthFirst Board of Directors guaranteeing local input on all decisions.” Such proportional representation is not included in any of the transaction documents.¹⁰ In addition, the same flyer states that “becoming an FQHC” will “assure that Mascoma Community Health Center will offer accountable, affordable and sustainable health, mental, and dental care *for decades*” (emphasis supplied). Under the OTA, however, HealthFirst can terminate the lease as soon as 1 ½ years after it begins, and once the lease is terminated, the Health Center no longer would house an FQHC.

The MCH board members clearly are passionate about and committed to ensuring access to quality and affordable health and dental care in the community. They are devoted to the mission, and they intend to support the Health Center, regardless of whether MCH is involved in the provision of those services. HealthFirst leadership likely would appreciate their support. However, it will be important to clearly define the roles and responsibilities of MCH’s board members with respect to operations at the Health Center, so that there will be no role confusion in the future.

The Charitable Trusts Unit finds that the standard set forth in RSA 7:19-b, II (g) has substantially been met, subject to the terms and conditions of this report.

III. Conclusions and Determination

After reviewing the evidence, the Charitable Trusts Unit concludes that MCH has substantially complied with the minimum standards for changes of control set forth in RSA 7:19-b, II. However, the Charitable Trusts Unit’s decision to take no action to oppose the proposed transaction is subject to the following representations and conditions:

A. Representations

1. **Completeness of the Notice and Plan of Reorganization:** MHC and HealthFirst represent that the statements and documents made or provided in the Notice and the documents and information thereafter submitted to the Charitable Trusts Unit are true and correct and that the transaction will be implemented in accordance with the Notice.

¹⁰ While an FQHC must ensure that 51% of its board is composed of patients, and the HealthFirst CEO informed the Charitable Trusts Unit that he intends to propose to the HealthFirst board that Mascoma area have equal representation on the board to those in Franklin and Laconia, the HealthFirst board has not yet voted on the proposal.

2. Conflicts of Interest: There are no conflicts of interest or pecuniary benefit transactions involving directors or officers of MCH or HealthFirst contemplated as part of the proposed transaction.

B. Conditions

1. Within 90 days of the closing of the transaction, members of the MCH board shall participate in board training regarding their fiduciary responsibilities under state and federal law. New members of the MCH board shall participate in such training within 90 days after assuming a board position.
2. MCH must obtain New Hampshire Probate Court approval of its Petition for *Cy Pres* and Deviation. After obtaining such approval, MCH shall amend its articles of agreement to reflect its new purpose as approved by the Probate Court and shall update and file with the Charitable Trusts Unit amended bylaws.
3. HealthFirst shall amend its articles of agreement to reflect its expanded purpose.
4. HealthFirst shall revise its bylaws to include the requirement for its board of directors to contain at least three (3) representatives from the communities served by MCH in compliance with the HRSA board composition requirements applicable to FQHCs.
5. Within 60 days of the closing of the transaction, the members of the boards of directors of MCH and HealthFirst shall participate in a training session to clarify their respective roles and responsibilities with respect to the Health Center.
6. Section 4.3 of the Operations Transfer Agreement (which prohibits MCH's board members from competing against HealthFirst) shall not prohibit physician board members or other medical professional board members from continuing to practice in the area.
7. In the event that HealthFirst exercises its right to purchase the Health Center, MCH shall provide advance notice to the Director of Charitable Trusts and shall seek probate court approval. This condition shall not be construed to require notice of a change of control transaction in accordance with RSA 7:19-b.

This no further action report concerns the review of the Charitable Trusts Unit pursuant to RSA 7:19-b and does not implicate the jurisdiction of any other bureau of the New Hampshire Department of Justice which may also have a role in reviewing this proposed transaction.