

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

IN RE: FOREST PARK MEDICAL CENTER AT FRISCO, LLC <p style="text-align: center;">DEBTOR.</p>	§ § § § § § § § § § §	CHAPTER 11 CASE NO. <u>15-41684</u> - BTR HEARING DATE & TIME: September 23, 2015 at 1:30 p.m.
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**DEBTOR'S APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE
EMPLOYMENT, RETENTION AND DESIGNATION OF MICHAEL S. MILLER AS
CHIEF RESTRUCTURING OFFICER AS OF THE PETITION DATE**

TO THE HONORABLE CHIEF JUDGE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE:

The debtor and debtor in possession in the above-captioned case (the "Debtor") files this application (the "Application") for entry of an order authorizing the Debtor to employ, retain and designate Michael S. Miller ("Mr. Miller") as the Debtor's Chief Restructuring Officer ("CRO") as of September 22, 2015 (the "Petition Date"), pursuant to that certain engagement letter by and among the Debtor and Mr. Miller, and all addendums thereto (the "Engagement Letter"), a copy of which is attached hereto as Exhibit "A" and incorporated by reference. In support of this Application, the Debtor submits the Affidavit of Mr. Miller in Support of the Debtor's Chapter 11 Petition and Requests for First-Day Relief, (the "Miller Affidavit") filed contemporaneously herewith.¹ In further support of this Application, the Debtor respectfully states as follows:

**I.
STATUS OF THE CASE AND JURISDICTION**

¹ Any defined terms not otherwise defined herein shall be ascribed the meaning contained in the Miller Affidavit.
**DEBTOR'S APPLICATION FOR ENTRY OF AN
ORDER (I) AUTHORIZING THE EMPLOYMENT AND RETENTION
OF AP SERVICES, LLC AND (H) DESIGNATING MARK HERBERS AS CHIEF
EXECUTIVE AND RESTRUCTURING OFFICER NUNC PRO TUNC TO MAY 19, 2015 – PAGE 1**

1. On September 22, 2015, the Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in the possession of its property and is operating and managing its business as debtor and debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. No request for a trustee or examiner has been made and no creditors' committee has yet been appointed in this case. This Court has jurisdiction over this Application under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2). Venue of these proceedings and this Application is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested are Sections 363(b) of the Bankruptcy Code and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 2014 of the Local Rules of Bankruptcy Procedure of the United States Bankruptcy Court for the Eastern District of Texas (the "Local Rules").

II. **BACKGROUND**

A. General.

4. The Debtor is a doctor-owned Texas limited liability company that owns and operates a 54-bed state-of-the-art medical facility, including 30 private rooms, 14 family suites, and 10 intensive care rooms (the "Hospital") in Frisco, Texas. The Hospital is a luxury medical facility located at 5500 Frisco Square Boulevard in Frisco, Texas, off of the Dallas North Tollway and Main Street. It is currently minimally staffed for an average daily census of 1-3 inpatients per day and up to 200 outpatients per month, but has a fully staffed maximum capacity of 54 inpatients per day and 1,000 outpatients per month. The Debtor's leased facility is

comprised of over 136,759 useable square feet and is situated on approximately 4.7 acres. Approximately 159 employees work at the Hospital, including 100 full-time employees and 59 part-time employees.

5. The Debtor offers a range of surgical services, including, but not limited to, pediatric, bariatric, brain, orthopedic, pain management, plastics and reconstructive, spine, and neurosurgery. The Hospital's back office services and employees are contracted through FPMC Services, LLC ("Shared Services"). Shared Services manages all revenue for the Debtor, as well as six other affiliates and is owned in equal parts by those seven entities for which it performs these services.

B. Pre-Petition Secured Lender.

Pre-Petition Financing

6. On or about October 10, 2012, the Debtor entered into that certain *Loan and Security Agreement*, dated as of October 10, 2012, by and between the Debtor and Texas Capital Bank ("TCB"), as such may have been amended and/or supplemented from time to time (the "Line of Credit Agreement"). The Debtors currently owe approximately \$2,500,000.00 under the Line of Credit Agreement, secured by essentially all of the Debtor's assets ("Line of Credit"). The Line of Credit matured on or about December 31, 2014, with an additional extension to April 1, 2015. Around the time of the December 31, 2014 maturity date, the Debtor learned that TCB would not be renewing the Debtor's Line of Credit nor providing further extensions of credit beyond the extended maturity.

7. In addition, the Debtor is also indebted to TCB under that certain *Master Equipment Lease* dated May 30, 2012 (the "Master Equipment Agreement") for certain of the Debtor's equipment. The Debtor is indebted to TCB in the approximate amount of \$5.5 million

secured by the Debtor's assets. The remainder of the equipment is leased through various parties, including General Electric Capital Corporation, Karl Storz, Commerce Bank and Olympus Corporation.

8. The Line of Credit was critical to the management of the Debtor's operations. Currently, based upon a trailing three (3) months ending in July 2015, the Debtor generates approximately \$3,400,000.00 a month in revenue, and has operational expenses of approximately \$4,300,000.00 a month (not including restructuring costs and debt service obligations). As such, the Debtor does not generate sufficient revenue to operate the Hospital and to service their debt unless the number of patients exceeds recent levels.

Landlord and DIP Financing

9. The Debtor leases the real property and fixtures on which the Hospital operates, from Sabra Texas Holdings, L.P. ("Sabra") pursuant to the terms of that certain *Lease Agreement* dated December 6, 2010, which was thereafter amended pursuant to that certain *First Amendment to Lease Agreement* dated as of October 22, 2013 (the "Lease") assigning the Lease from FPMC Frisco Realty Partners, LP to Sabra. The Lease is for an initial term of 20 years, accruing rent in the amount of \$842,290.00 per month for the Hospital and the parking structure, to increase every calendar year over the term of the Lease by 3%.

10. Sabra has offered the Debtor debtor-in-possession ("DIP") financing in the approximate amount of \$18,500,000.00, available in draws and accruing interest at a 5% interest rate, payable monthly in arrears ("DIP Financing"). The DIP Financing would mature upon the occurrence of certain events, including the conversion of this Case, dismissal of this Case, the sale of substantially all of the Debtor's assets, the revocation of the Debtor's license to operate,

or the expiration of 35 days after the filing of a Petition if a final order approving the DIP Credit Facility has not been entered by the Bankruptcy Court.

11. Prior to the Petition Date, the Debtor anticipated that without continuing liquidity, the value of its assets would rapidly diminish and would more than likely require the Debtor to close down the Hospital and liquidate its assets.

C. Reorganization Efforts.

12. The Debtor's operations were developed based upon an "out-of-network" model. This model relied upon higher reimbursement rates as an out-of-network facility. However, prior to the Petition Date, the Debtor determined that it would be unable to sustain the level of revenue needed to operate by operating solely out of network. Consequently, it attempted to increase its revenues by entering into network contracts with various insurance providers. Although being "in network" with various insurance providers would result in discounted reimbursement rates, it was thought that being in network would increase the volume of procedures at the Hospital and thus increase revenues. However, the reduced rates that the insurance providers contracted for were too low for the Hospital to schedule enough procedures to reap any financial benefit from the contracts.

13. The Debtor engaged Juniper Advisory, LLC for assistance to pursue a sale of the Hospital to a purchaser in June, 2014. Despite many possible purchasers performing due diligence and even one offer for purchase, (such offer included a purchase of the real estate owned by Sabra and Sabra was unwilling to sell the real estate at the proposed purchase price) the Debtor was unable to close a sale.

14. In addition to seeking a potential purchaser, the Debtor's Management Company, Vibrant Healthcare Frisco, LLC, ("Management Company") also sought and located a

replacement revolving lender who would pay off the TCB Line of Credit and provide up to an additional \$6.5 million in additional availability based upon the amount of the Debtor's accounts receivable. However, this demand note, bearing 15% interest, provided a decreasing amount of liquidity due to the Debtor's declining accounts receivable balance while the Debtor worked to resolve obstacles to closing such as intervening lawsuits, a delay in signing a new management contract and Sabra's impending eviction of the Debtor from its leased space. Ultimately, this financing never closed.

15. Finally, to address the increasingly exigent financial and operational issues, the Debtor retained Deloitte CRG ("Deloitte") on September 11, 2015. Deloitte is retained to assist the Debtor to, among other things, create short-term budgets, negotiate appropriate waivers and forbearances, and assess the Debtor's available assets and options by which to improve.

16. In Chapter 11, the Debtor has an opportunity to quickly evaluate whether a plan of reorganization or a sale of the Debtor's assets will provide for the most recovery to the Debtor's creditors. This would avoid further deterioration of the Debtor's business, would preserve over one hundred jobs, and would achieve maximum values for all creditors. In order to evaluate the strategies set forth herein, and maximize values for all creditors, including unsecured creditors, the Debtor was forced to commence this Chapter 11 case.

III. **RELIEF REQUESTED**

17. The Debtor seeks the entry of an Order authorizing Debtor to employ, retain and designate Michael S. Miller as the Debtor's Chief Restructuring Officer.

18. The Debtor is currently governed by an eight-member Board of Managers (the "Board") made up of the following doctors: Dr. Guy Culpepper, Dr. Brian Borgfeld, Dr. Ricardo

Meade, Dr. Jeff Catorini, Dr. Colin Pero and Dr. Robert Wyatt. In addition, two members of GlendonTodd Capital, LLC (“GlendonTodd”), Todd Furniss and Mary Hatcher, also with the Management Company and Vibrant Healthcare Frisco Holdings, LLC (“Managing Member”), also serve on the Board.

19. Each of the members of the Board own or represent ownership interests in the Debtor. In addition, certain of the members represent interests in several of the Forest Park Center facilities, including the Dallas location, which owns a direct ownership interest in the Debtor. Finally, GlendonTodd is also working with the Management Company, which is owed a significant balance as of the Petition Date.

20. These interrelated interests held and represented by the Board members creates an inherent conflict of interest for those members, making it difficult for each of them to clearly act only in the best interest of the Debtor, especially in light of the relatively low probability of a full recovery to unsecured creditors and more than likely, no recovery to equity.

21. Due to these issues, and other concerns specific to these creditors, Sabra and TCB have specifically required that, in particular, Mr. Miller is appointed as the Debtor’s CRO. TCB has required it as a condition to their agreement to the First-Day Motions, including the agreed closure of the Debtor’s account at TCB holding their collateral. More importantly, Sabra has required it as a condition of extending the DIP Financing.

22. Mr. Miller, a Senior Vice President with Deloitte who will act as CRO for the Debtor, has more than 30 years of experience in healthcare administration and finance through various hospital administrative and executive roles. He holds a Bachelor of Science from University of Texas at Arlington, and a Master of Business Administration from the University of Dallas. He has previously served as CEO, CFO, COO and CRO for a variety of hospitals,

long-term acute care hospitals, skilled nursing, rehabilitative units, psychiatric units, ambulatory care clinics, and durable medical care. He has extensive experience examining the finances and operations of hospitals, particularly in the distressed setting.

23. The Debtor has selected Mr. Miller because of his experience and reputation for providing restructuring advisory services in healthcare cases and large, complex Chapter 11 cases such as this one. Furthermore, as a result of the pre-petition work performed on behalf of the Debtor, Mr. Miller has acquired significant knowledge of the Debtor and its business and is now very familiar with the Debtor's financial affairs, debt structure, operations, and related matters. Likewise, in providing prepetition services to the Debtor, Mr. Miller has worked closely with the Debtor's management and its other advisors. Accordingly, Mr. Miller has the experience and expertise, and specific relevant knowledge regarding the Debtor that will assist him in providing effective and efficient services in this Chapter 11 case. The Debtor submits that the retention of and the designation of Mr. Miller as CRO on the terms and conditions set forth herein are necessary, appropriate, and in the best of the Debtor's estate, creditors, and all other parties-in-interest, and should be granted in all respects.

IV. SERVICES TO BE PROVIDED

24. Mr. Miller will provide the ordinary course duties of a Chief Restructuring Officer to do the following:

- Manage the Debtor's Chapter 11 case, including, without limitation, sole management and oversight of any sale of the Debtor's assets and development of a Disclosure Statement and Plan of Reorganization, with no reporting responsibilities to the Debtor's Board.
- Managing the "working group" professionals who are assisting the Debtor in the reorganization process or who are working for the Debtor's various stakeholders to improve coordination of their

effort and individual work product to be consistent with the Debtor's overall restructuring goals.

- Assist in obtaining and presenting information required by parties-in-interest in the Debtor's bankruptcy process including official committees appointed by the United States Bankruptcy Court for the Eastern District of Texas.
- Provide assistance in such areas as testimony before this Court on matters that are within the scope of this engagement and within his area of testimonial competencies.
- Assist with such other matters as may be requested that fall within Mr. Miller's expertise and that are mutually agreeable.

Such professional services are necessary to the Debtor's restructuring efforts and in the ongoing operation and management of the Debtor's businesses while subject to Chapter 11 of the Bankruptcy Code.

V.
NO DUPLICATION OF SERVICES

25. The services provided by Mr. Miller will complement, and not duplicate, the services to be rendered by any other professional retained in this Chapter 11 case.

VI.
MILLER'S DISINTERESTEDNESS

26. To the best of the Debtor's knowledge and except to the extent disclosed herein and in the Miller Declaration: (a) Mr. Miller has no connection with the Debtor, its creditors, or other parties-in-interest, or the attorneys or accountants of the foregoing, or the Office of the United States Trustee for the Eastern District of Texas (the "U.S. Trustee") or any person employed in the Office of the U.S. Trustee; and (b) does not hold any interest adverse to the Debtor's estate. Although the Debtor respectfully submits that the retention of Mr. Miller is not governed by section 327 of the Bankruptcy Code, the Miller Declaration discloses certain connections with creditors, equity security holders, and other parties-in-interest in this Chapter 11 case. All of these matters, however, are unrelated to this Chapter 11 case. As represented by

Mr. Miller, these matters do not represent an interest materially adverse to the Debtor's estate or otherwise create a conflict of interest regarding the Debtor or this Chapter 11 case. Thereby, the Debtor submits that Mr. Miller is a "disinterested person" as that term is defined by Section 101(14) of the Bankruptcy Code.

27. To the extent that any new relevant facts or relationships bearing on the matters described herein during the period of Mr. Miller's retention are discovered or arise, Debtor submits that Mr. Miller will use reasonable efforts to file promptly a supplemental declaration.

VII.
PROFESSIONAL COMPENSATION AND EXPENSE REIMBURSEMENT

28. Mr. Miller, as a Senior Vice President of Deloitte, is accepting this engagement in conjunction with the Debtor's engagement of Deloitte as its financial advisor, and both of those engagements are conditioned upon the ability to be retained in accordance with Deloitte's customary terms and conditions of employment. Mr. Miller seeks to be compensated for his services as CRO, and reimbursed for the out-of-pocket expenses he incurs in accordance with his customary billing practices, as set forth in the Engagement Letter (the "Fee and Expense Structure") with Deloitte. The Fee and Expense Structure includes Deloitte as the Debtor's financial advisor, which includes Mr. Miller's hourly rate at \$500.00.

29. In the event that changes occur with respect to the anticipated scope, assumptions, and/or personnel requirements, including those due to unforeseen events, the parties shall meet in good faith and agree to a revised fee arrangement.

30. In the normal course of business, Mr. Miller may periodically adjust his billing rates. Changes in applicable hourly rates will be noted on the invoices for the first time period in which the revised rates became effective.

31. Mr. Miller, along with all other Deloitte professionals, will submit monthly invoices in accordance with any interim compensation procedures approved by this Court or the fee application procedures of the Bankruptcy Code.

32. The Fee and Expense Structure is consistent with and typical of compensation arrangements entered into by Mr. Miller and other comparable professionals that render similar services under similar circumstances. The Debtor believes that the Fee and Expense Structure is reasonable, market-based, and designed to compensate Mr. Miller fairly for his work and to cover fixed and routine overhead expenses.

33. According to Deloitte's books and records, during the 90 day period prior to the Petition Date, it received retainers and payments totaling \$85,000.00 in the aggregate for professional services performed and expenses incurred, which were applied to amounts due for services rendered and expenses incurred prior to the Petition Date (the "Retainer"). Mr. Miller's current estimate is that Deloitte incurred fees in excess of \$135,000 (the "Pre-petition Billings"). Deloitte has agreed that any portion of the Pre-petition Billings, currently approximately \$50,000, not paid will be written off. Accordingly, the Debtor does not owe Deloitte or Mr. Miller any sums for pre-petition services.

IX.
BASIS FOR RELIEF

34. The Debtor seeks to employ, retain and appoint Mr. Miller as CRO pursuant to section 363 of the Bankruptcy Code.

35. Under applicable case law, in this and other jurisdictions, if a debtor's proposed use of its assets pursuant to section 363(b) of the Bankruptcy Code represents a reasonable exercise of the debtor's business judgment, such use should be approved. *See, In re UAL Corp.*,

443 F.3d 565, 571 (7th Cir. 2006); *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *see also In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (noting that courts have applied the "sound business purpose" test to evaluate motions brought pursuant to section 363(b) of the Bankruptcy Code); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.").

36. The decision to retain and employ Mr. Miller as CRO should be authorized because it is a sound exercise of the Debtor's business judgment. Mr. Miller is well qualified and equipped to assist in CRO duties. Mr. Miller, in his capacity as CRO, will provide services that are in the best interests of all parties-in-interest in this Chapter 11 case.

X.
NO PRIOR REQUEST

37. No previous request for the relief sought herein has been made to this Court or any other court.

XI.
NOTICE

38. Notice of this Application has been given by e-mail, facsimile, overnight delivery, and/or courier to the Master Service List including the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the Eastern District of Texas; (b) the Office of the Texas Attorney General; (c) the Office of the United States Attorney General; (d) Texas Department of State Health Services; (e) Texas Capital Bank; (f) Sabra Texas Holdings, L.P.; and (g) each of the Debtor's twenty (20) largest unsecured creditors. The Debtor

submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests that this Court enter an order granting the relief requested in this Application and such other and further relief as may be just and proper.

Dated: September 22, 2015.

Respectfully submitted,

/s/ William L. Medford

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served upon the parties listed on the attached service list via e-mail, facsimile, overnight delivery, and/or courier on this 22nd day of September, 2015.

/s/ William L. Medford

William L. Medford