

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:

MIAMI INTERNATIONAL MEDICAL CENTER,
LLC d/b/a THE MIAMI MEDICAL CENTER,

Case No.: 18-12741-LMI
Chapter 11

Debtor. _____/

CLIFFORD ZUCKER, AS LIQUIDATING TRUSTEE
OF THE MIAMI MEDICAL CENTER, LLC
LIQUIDATING TRUST,

Adv. Pr. No.: _____

Plaintiff.

v.

NAAMAN ABDULLAH; JAMES ADAMSON;
STEPHEN ALEX; LUIS R. ALLENDE-RUIZ;
BEVERLY ARROYO; ALAN BEHR; GEORGIY
BRUSOVANIK; PETER COLE; JOHN FOU DRAY;
JON FRIESEN; DAVID L. GALBUT; CHRISTIAN
GONZALEZ; DAVID HENSLEY; LEE HUNTLEY;
JONATHAN HYDE; RAYMOND KELLY; SHEILA
KNOEPKE; AREN LALJIE; GREG LAROCQUE;
DANIEL LEVIN; JEFF MASON; ROBERTO MIKI;
JIM MORSE; TIMOTHY O'BRIEN; MARY RYAN;
MICHAEL REED; DAN SAALE; MONA SABAGH;
GLENN SALKIND; JOHN SCHARIO; ANDRE KEVIN
STANDEFER; JAVIER VIZOSA; MARTY WINSLOW;
LENORA WOOLSEY; SHANE ZAMANI; and JOHN
DOES 1-25,

Defendants. _____/

ADVERSARY COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Clifford Zucker, as Liquidating Trustee (the "Plaintiff" or "Liquidating Trustee") of The Miami Medical Center Liquidating Trust (the "Liquidating Trust") in the above-captioned case of Miami International Medical Center, LLC d/b/a The Miami Medical Center



(the "Debtor" or "MIMC"), by and through undersigned counsel, files this adversary complaint (the "Complaint") against Naaman Abdullah; James Adamson; Stephen Alex; Luis R. Allende-Ruiz; Beverly Arroyo; Alan Behr; Georgiy Brusovanik; Peter Cole; John Foudray; Jon Friesen; David L. Galbut; Christian Gonzalez; David Hensley; Lee Huntley; Jonathan Hyde; Raymond Kelly; Sheila Knoepke; Aren Laljie; Greg Larocque; Daniel Levin; Jeff Mason; Roberto Miki; Jim Morse; Timothy O'Brien; Mary Ryan; Michael Reed; Dan Saale; Mona Sabagh; Glenn Salkind; John Schario; Andre Kevin Standefer; Javier Vizosa; Marty Winslow; Lenora Woolsey; Shane Zamani (collectively, the "Individual Defendants"); and John Does 1-25 to recover damages and other relief caused by their breaches of their fiduciary duties and aiding and abetting of the same. In support thereof, the Liquidating Trustee alleges as follows:

PRELIMINARY STATEMENT

1. The Debtor was formed to develop and operate a hospital in Miami, Florida.
2. The Debtor became insolvent and failed due to the Individual Defendants' gross mismanagement, which included their failure to fulfill their responsibilities to oversee and monitor the Debtor's affairs, their failure to ensure that the Debtor was adequately capitalized, and their approval of the Debtor's acquisition of an insurmountable mountain of debt based on faulty projections supplied by the NueHealth Entities¹ which held a significant ownership interest in the Debtor.

¹ The NueHealth Entities include, but are not limited to; Astoria Property Company, LLC f/k/a Nueterra Properties Group, LLC; Benefit Management, LLC; NMFLP, LLC; NueHealth Equity Co., LLC, f/k/a NueHealth Equity Holders, LLC; NueHealth Holdings, LLC a/k/a NueHealth LLC; NueHealth Management Services, LLC, f/k/a Nueterra Healthcare Management, LLC; NueHealth Miami, LLC; Nueterra Capital, LLC, f/k/a Nueterra Metaholdings, LLC; Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC; Nueterra Healthcare Re; and Nueterra Holdings Management, LLC.

3. At a certain point, the Individual Defendants knew, or should have known, that the Debtor would become insolvent and fail unless ameliorative actions were taken.

4. Yet, the Individual Defendants consciously disregarded this risk and failed to take appropriate action, allowing the Debtor to take on more and more debt based on projections that they knew, or should have known, were unrealistic, unattainable, and simply dated.

5. Moreover, the Individual Defendants failed to adequately consider the transactions and actions in which the Debtor engaged, failed to make a good faith effort to implement and monitor any oversight or information reporting system, which was particularly important due to the influence of the NueHealth Entities, and consciously disregarded the best interests of the Debtor by causing or permitting the Debtor to enter into, or otherwise ratify, conflict of interest transactions with certain of the NueHealth Entities that did not benefit, and were unfair to, the Debtor.

6. As a direct and proximate result of the foregoing, the Debtor failed, leaving the Debtor's creditors with tens of millions of dollars of unpaid claims.

7. Under these circumstances, it would be appropriate to find the Individual Defendants liable for the breaches of fiduciary duty and oversight failures that caused and deepened the Debtor's insolvency.

8. This is an action by the Liquidating Trustee to obtain this relief for the benefit of the Debtor's creditors.

PARTIES, JURISDICTION, AND VENUE

9. Clifford Zucker is the Liquidating Trustee of the Miami International Medical Center, LLC Liquidating Trust established by the First Amended Liquidating Chapter 11 Plan

Proposed by the Debtor (the "Plan") in the Debtor's chapter 11 case, Case No. 18-12741-LMI (the "Main Case").

10. Naaman Abdullah, M.D. was a member of the Board of Managers of the Debtor, and also a physician with the Debtor.

11. James Adamson was a healthcare investor and a member of the Board of Managers of the Debtor, as well as an employee of one of the NueHealth Entities.

12. Stephen Alex, M.D. was a member of the Board of Managers of the Debtor.

13. Luis R. Allende-Ruiz was the Chief Operating Officer of the Debtor, as well as an employee of one of the NueHealth Entities.

14. Beverly Arroyo was a member of the Board of Managers of the Debtor.

15. Alan Behr was the Chief Financial Officer of the Debtor.

16. Georgiy Brusovanik, MD was a member of the Board of Managers of the Debtor and a physician with the Debtor.

17. Peter Cole was the Finance Manager of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC, and was in charge of obtaining bank financing on behalf of and for the Debtor.

18. John Foudray was a member of the Board of Managers of the Debtor as well as Chief Executive Officer of Astoria Property Company, LLC f/k/a Nueterra Properties Group, LLC.

19. Jon Friesen was a member of the Board of Managers of the Debtor as well as President and Chief Financial Officer of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC.

20. David L. Galbut, MD was a member of the Board of Managers of the Debtor.

21. Christian Gonzalez, MD was a member of the Board of Managers of the Debtor.

22. David Hensley was the Director of Business at Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC and was in charge of obtaining revenue cycle related agreements and/or contracts on behalf of and for the Debtor.

23. Lee Huntley was a Chief Executive Officer of the Debtor, as well as an employee of one of the NueHealth Entities.

24. Jonathan Hyde, MD was a member of the Board of Managers of the Debtor and a physician with the Debtor.

25. Raymond Kelly was a member of the Board of Managers of the Debtor and CNO of the Debtor.

26. Sheila Knoepke was the Vice President of Supply Chain of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC and was in charge of obtaining vendor service agreements on behalf of and for the Debtor.

27. Aren Laljie was a member of the Board of Managers of the Debtor.

28. Greg LaRocque was the Director of HIS of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC and was in charge of procuring IT agreements and contracts on behalf of and for the Debtor.

29. Daniel Levin, MD was a member of the Board of Managers of the Debtor.

30. Jeff Mason was CEO of the Debtor.

31. Roberto Miki, MD was a member of the Board of Managers of the Debtor and a physician with the Debtor.

32. Jim Morse was the Vice President of Finance for Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC and NueHealth Holdings, LLC a/k/a NueHealth LLC and was in charge of financial oversight on behalf of and for the Debtor.

33. Timothy O'Brien was a member of the Board of Managers of the Debtor as well as President of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC.

34. Mary Ryan was the Director of Imaging of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC and was in charge of procuring imaging services and related vendor contracts on behalf of and for the Debtor.

35. Michael Reed was a member of the Board of Managers of the Debtor and a consultant of Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC.

36. Dan Saale was a member of the Board of Managers of the Debtor as well as CFO of Nueterra Capital.

37. Mona Sabagh was a member of the Board of Managers of the Debtor.

38. Glenn Salkind, MD was a member of the Board of Managers of the Debtor, and at one time, a physician with the Debtor.

39. John Schario was a member of the Board of Managers of the Debtor as well as acting CEO of the Debtor and President of the Community Hospital Division at Nueterra Equity Partners, LLC f/k/a Nueterra Holdings LLC.

40. Andre Kevin Standefer was a member of the Board of Managers of the Debtor.

41. Javier Vizosa, MD was a member of the Board of Managers of the Debtor and a physician with the Debtor.

42. Marty Winslow was the Director of Reimbursement at Nueterra Equity Partners,

LLC f/k/a Nueterra Holdings LLC and was in charge of negotiating payor contracts on behalf of and for the Debtor.

43. Lenora Woolsey was a member of the Board of Managers of the Debtor as well as Director of Clinical Operations of Nueterra Equity Partners, LLC d/b/a NueHealth.

44. Shane Zamani, MD was a member of the Board of Managers of the Debtor and a physician with the Debtor.

45. John Does 1-25 are individuals or entities that are affiliated with the Debtor or named defendants, engaged in the misconduct alleged herein, aided or abetted such misconduct, and/or engage in related misconduct causing damage to the Debtor and its creditors. The existence and identities of John Does 1-25 are not yet known but may be revealed during discovery and/or as this matter proceeds.

46. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334.

47. This is a proceeding arising in or related to a case under title 11 pursuant to 28 U.S.C. § 157(a), and the Liquidating Trustee consents to the entry of a final order and judgment by the Bankruptcy Court pursuant to Fed. R. Bankr. P. 7008(a).

48. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

FACTS COMMON TO ALL COUNTS

A. The Debtor's Formation, Ownership, and Bankruptcy

49. According to the Debtor's records, the Debtor was established as a Florida limited liability company in November 2013 for the purpose of owning and operating a regional acute care hospital that would provide a limited suite of medical services. MIMC's members were comprised of: (i) Miami Hospital Holdings, LLC ("MHH"), which owns approximately sixty-

nine percent (69%) of MIMC's membership interests; and (ii) individual physicians and physician groups, which collectively own approximately thirty-one percent (31%) of MIMC's remaining membership interests.

50. MHH is owned equally by Children's Health Ventures, Inc., a for-profit investment arm of Variety Children's Hospital d/b/a Nicklaus Children's Hospital ("VCH") and NueHealth Equity Co., LLC.

51. On March 9, 2018 (the "Petition Date"), the Debtor commenced the Main Case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), with this Court.

52. On January 15, 2019, this Court entered an order approving the Plan. *See* Main Case ECF #s 469 and 475. Pursuant to the Plan, the Liquidating Trustee has the authority to bring this action on behalf of the Liquidating Trust.

53. In the *Declaration in Support of First Day and Expedited Motions* [Main Case ECF #12] (the "First Day Declaration"), the Chief Executive Officer of the Debtor acknowledges that one of the reasons for the Debtor's chapter 11 filing was liquidity constraints. *See* First Day Declaration, at ¶ 24.

B. The Hospital Property and Lease

54. According to the First Day Declaration, "[t]he land and building housing the Hospital (the "Property") was acquired by the Debtor in early 2014, and then sold to HC-5959 N.W. 7th Street, LLC ("HC-5995"), on April 21, 2014." *See* First Day Declaration, at ¶ 12.

55. According to the First Day Declaration, "[o]n April 30, 2014, the Debtor entered into that certain Amended and Restated Lease Agreement with HC-5959 (the "Lease") pursuant to which the Debtor agreed to lease the Property from HC-5959." *See id.*

56. Per the Second Amendment to Amended and Restated Lease Agreement, dated June 24, 2016, the Lease has an incremental interest rate of 8.5% and was set to mature in July 2030. The minimum lease payments required by the Lease thus totaled approximately \$141 million.

57. In 2016, the Debtor's financial advisors described the Lease as a "capital lease" that was entered into pursuant to a sale leaseback transaction.

58. According to the Debtor's Lease,

Landlord purchased the Property and the Building (each as defined below) from Tenant pursuant to that certain Purchase Agreement, dated as of April 21, 2014, by and between Tenant, as seller, and Landlord, as purchaser ("Purchase Agreement"), and as contemplated under the Purchase Agreement, Landlord wishes to lease the Leased Premises back to Tenant, for the purpose of Tenant making certain improvements thereto, and leasing the same from Landlord, as further set forth herein.

59. The Debtor did in fact enter into an Asset Purchase Agreement and Real Estate Purchase and Sale Agreement with Metropolitan Health Community Services Corporation on or around December 30, 2013 (the "APA"). Contemporaneous records of the NueHealth Entities reflect that the transaction closed on or about April 30, 2014, with the effective date of May 1, 2014. Pursuant to the APA, the Debtor purchased, *inter alia*, the Property, for \$46 million.

60. The Debtor then assigned the Property, among other things, to HC-5959.

61. In April 2014, at the time the Debtor signed the Lease, the Debtor had no operations and no financial track record to share with its landlord, HC-5959. Indeed, the first capital contribution to the Debtor was made one month later, in May of 2014.

C. The Debtor's Remodel Plan and the Related Financing

62. According to an article from Medical Tourism Magazine, in 2014, the Debtor, through its owners, was advertising that it intended to cash in on wealthy tourists from Latin America and an emerging medical tourism market in South Florida. The NueHealth Entities spoke about a "multifaceted remodel plan" whereby, among other things, the NueHealth Entities would renovate the nearly 50-year old hospital to create "an upscale environment similar to a boutique hotel" while also providing "more services, more technology, better accessibility and more convenient, streamlined processes[.]"

63. According to an article from South Florida Business Journal, part of the NueHealth Entities' plan to create "an upscale environment similar to a boutique hotel" included shutting down the emergency room at the hospital campus that served the local community and instead "focus[ing] on obstetrics and elective surgeries."

64. Additionally, according to an article from the Medical Tourism Magazine, the NueHealth Entities announced that the hospital would no longer participate in Medicare and Medicaid.

65. Upon information and belief, the NueHealth Entities advertised that the Debtor would be able use the corporate partners' insurance payor contracts and the favorable negotiated reimbursement rates in such contracts.

66. The South Florida Business Journal confirmed that the owners of the Debtor "invested [in MIMC] in hopes to bring South Florida a unique and differentiated care model with high quality and outstanding patient outcomes[.]"

67. The NueHealth Entities advised that they would close MIMC for renovations prior to reopening as a boutique surgical center without an emergency room.

68. During this "ramp up" phase that included renovations and other preparations to open the hospital, from approximately May 2014 through early 2016, capital contributions amounted to less than \$3 million from the NueHealth Entities.

69. In fact, even through the end of 2016, capital contributions remained under \$6 million from these corporate "partners":

	Capital Contributions		
	VCH²	NueHealth Entities	Total MHH
2014	\$2,200,000	\$2,200,000	\$4,400,000
2015	\$0	\$0	\$0.00
2016	\$748,000	\$748,000	\$1,496,000
	\$2,948,000.00	\$2,948,000.00	\$5,896,000.00

70. With necessary start-up costs and liquidity needs well in excess of capital contributions, the Individual Defendants used debt instead of cash to fund the Debtor at this critical time.

71. Indeed, by the end of 2016, MIMC's outstanding loan balances totaled over \$50 million. This debt included a purported loan from MHH with an outstanding balance of \$10.5 million, a line of credit with MidFirst Bank ("MidFirst") with an outstanding balance of \$11.509

² These contributions were actually made by an entity affiliated with VCH, Children's Health Ventures, Inc. ("CHV").

million, and a term note with MidFirst with an outstanding balance of \$28.6 million. This collective \$50 million in debt was exclusive of the nearly \$80 million owed under the Lease.

72. The debt was incurred because the \$14.0 million in capital contributions through the end of 2016 (including only \$5.9 million from CHV and NueHealth entities) was not sufficient to fund, among other things, renovations and other ramp up costs. Indeed, MIMC had to enter into a certain loan agreement (the "Loan Agreement") with MidFirst on August 4, 2015 for approximately \$40 million (as amended, the "Loan"), consisting of a revolving promissory note in the amount of \$11.2 million (the "Revolving Note") and a promissory note in the amount of \$28.8 million (the "Term Note," and together with the Revolving Note, the "Notes"). The Loan was intended to provide funding not only for "tenant improvements," but also for equipment purchases and working capital.

73. The Loan was secured by substantially all of MIMC's assets.

74. At the time MIMC entered into the Loan Agreement with MidFirst, MIMC had not yet opened its doors to the public.

75. Nueterra Holdings, LLC a/k/a Nueterra Metaholdings, LLC was obligated to execute a Limited Guaranty Agreement with MidFirst, whereby Nueterra Holdings would be a limited guarantor on the Loan.

76. The Limited Guaranty Agreement provided that "the extension of credit to the Borrower [MIMC] by the Lender pursuant to the Agreement, will be beneficial to the Guarantors"

77. The Limited Guaranty also stated:

[I]n connection with the extension of credit by the Lender to the Borrower, the Lender is relying, in part, on the creditworthiness of

the Guarantors [including Nueterra Holdings, LLC]; and [] this Guaranty Agreement is executed and delivered to the Lender by the Guarantors to induce the Lender to extend credit under the Notes pursuant to the [Loan] Agreement, and [is] in satisfaction of a material condition precedent thereto

78. As a condition precedent to the Loan, MidFirst required financial statements, projections, tax returns, and audited financial statements and filed tax returns for each year thereafter.

79. Upon information and belief, the NueHealth Entities provided the Individual Defendants with inaccurate and inflated financial projections and data to satisfy these requirements and obtain the Loan.

80. The Individual Defendants knew or should have known that these projections were unrealistic and unattainable, yet they used them to both obtain the Loan and approve the Debtor's activities thereafter.

81. In fact, from as early as February 2015, the Debtor's financial performance consistently failed to meet the projected performance due to expenditures and delays that the Individual Defendants should have taken, but failed to take, into account.

82. In February 2015, for example, the Debtor was reporting a shortfall that decreased anticipated cash flow to negative \$1.247 million as of the Debtor's opening date.

83. The March 2015 Board of Managers Minutes state: "When Nueterra designed this facility it was based on their typical hospital opening. Management is testing every assumption to get a good clean projection for the pro-forma." Unfortunately, the Individual Defendants did not test every assumption, nor did they create a "good clean projection for the pro-forma" at any

point in time during Debtor's operations, as evidenced by the August 2016 Board of Managers Minutes which confirm: "Physician projections are from 3 years ago. "

84. On July 2, 2015, the Individual Defendants prepared and reviewed a cash flow summary demonstrating that due to delays, and without a capital call, which the Individual Defendants adamantly opposed at the time, the Debtor would have to draw \$1.3 million from its line of credit before opening and \$8.9 million during the 90 days thereafter to fund payment delays.

85. Upon information and belief, the Individual Defendants' opposition to making a capital call emanated from the NueHealth Entities, which held a substantial membership interest in the Debtor and so would have had to come up with a substantial portion of the capital required if a call was made.

86. In August 2015, construction delays, which are fairly common, pushed back the date that the Debtor could service its first patient to January 4, 2016, at the earliest, resulting in the need for even more capital, which the Individual Defendants would secure by permitting the Debtor to take on even more debt.

87. In October 2015, John Foudray announced that the Debtor had experienced a year-to-date loss of \$4.4 million, completely exhausted the capital raised from its investors, and had to draw an additional \$2.8 million on its line of credit due to the delay in opening.³ By the end of October, the YTD loss reached \$5.2 million.

88. The very next month, November 2015, the Individual Defendants discussed the financial implications of pushing back the date that the Debtor could service its first patient yet

³ Notably, it was in or around this same month that the Individual Defendants approved the \$1.5 million development fee to one of the NueHealth Entities discussed below.

again, and noted that it would require an additional \$4.9 million because the hospital was fully staffed and paying rent, even though it had not even opened yet.

89. As a result, the Individual Defendants approved an increase of the Debtor's line of credit by an additional \$8.4 million, which would bring the line of credit to a total of \$19.6 million and extend the Debtor as far as possible by December 2015.

90. It was only at this point that the Individual Defendants dropped their opposition to the idea of making a capital call.

91. Upon information and belief, the foregoing transactions and courses of action were proposed by the NueHealth Entities and relayed and approved by the Individual Defendants, at least some of whom were dominated or controlled by, and/or had a financial interest in, the NueHealth Entities.

92. Upon information and belief, the Individual Defendants did not have, and knew or should have known that they did not have, sufficient information or knowledge about these transactions or courses of action to properly consider them and decide whether they were actually in the best interests of the Debtor.

93. Yet, none of the Individual Defendants made any good faith effort to implement or monitor any oversight or information reporting system.

94. As a result, all of the transactions and conduct in which the Debtor engaged during this critical period, including the foregoing debt transactions and actions taken pursuant to the faulty projections provided by the NueHealth Entities, as well as the conflict of interest transactions described below, were presented and approved by the Individual Defendants without adequate information, knowledge, or oversight.

D. The Debtor's Opening and Financial Difficulties

95. The hospital reopened in February 2016 as a 67-bed facility after millions of dollars were spent on rent, staff, and renovations. Indeed, the Debtor spent over \$40 million on equipment and "tenant improvements" on a building that it did not own.

96. Notwithstanding the infusion of \$47 million into the Debtor's business in 2015 alone (in debt only, since there were no capital contributions whatsoever this year), from May 2014 through December 2015, operating cash flow totaled nearly negative \$7 million, and MIMC had a capital deficit of approximately \$4.8 million.

97. When the Debtor finally commenced hospital operations, its capital account deficit increased from negative \$4.8 million at 12/31/2015 to negative \$10.6 million at 3/31/2016. These figures were remarkably lower than what was projected by the NueHealth Entities.

98. The Individual Defendants allowed the hospital to commit to full operational expenses with very little cash on hand (only \$279,093 in cash was reported as of March 31, 2016) and a \$10.6 million capital deficit, notwithstanding that the Debtor (i) did not have payor contracts in place at that time, (ii) was unable to use the NueHealth Entities' payor contracts, and (iii) did not have an operational AHCA license.

99. Moreover, even though the Debtor could not see any patients without the proper licensing and could not collect payment without the payor contracts, the Individual Defendants decided to bring on a number of employees with guaranteed forty-hour work weeks. These employee costs were incurred for approximately 6-12 months without the Debtor being able to provide any services and bring in any income to cover such expenses.

100. Upon information and belief, the NueHealth Entities also proposed, and the Individual Defendants agreed, to establish a physical therapy arm of the hospital under the NueHealth Entities' affiliated company, PT Partners, LLC. Notwithstanding that the Debtor, by and through the Individual Defendants, permitted PT Partners, LLC to bill services through the Debtor's tax ID number and the Debtor's hospital-based payor contracts (to the extent some were available and in use), the Debtor received no revenue from the services rendered by PT Partners, LLC.

101. Although there were capital contributions in 2016 totaling \$3.9 million (with less than 40% collectively coming from the corporate partners, including the NueHealth Entities), this would not fully address the Debtor's negative capital position as of the end of 2015 or its cash needs in 2016. The Debtor's negative capital position was exacerbated as the Debtor sustained a net loss of approximately \$32 million in 2016.

102. Upon information and belief, some of these losses were attributable to the Individual Defendants' failure to cause the Debtor to hire a hospital billing coder to ensure appropriate billing for no less than 18 months.

103. Due to the limited capital infusion and the \$32 million loss, the Debtor's capital deficit increased from approximately negative \$4.8 million at December 31, 2015 to over \$32 million at December 31, 2016.

104. The April 25, 2016 Board of Managers Minutes state:

TMMC still has short term cash needs of \$3.5 to \$5 million and both Nueterra and MCH have been working on ways to avoid another cash call to the physician investors. Management went back to Mid First Bank to ask for an increase in unrestricted LOC to \$14.7 million but they are requiring Nueterra and MCH to sign additional \$5 million dollar guarantees each in order to increase the

unrestricted loan. Unfortunately MCH is unable to sign an additional \$5 million guaranty for this increase. Another option would be to offer MCH Preferred Stock Units allowing TMMC to raise \$5 million. That would place the preferred stock owners in a preferred placement versus a standard shareholder. Meaning they would be paid back first at a return of about 10% and would be paid an annual coupon. The Preferred Stock option is difficult for Nueterra while the \$5 million bank guaranty agreement is difficult for MCH. Timing is critical, TMMC has \$1 million left on the unsecured line of credit, and therefore, we have got to put that extra component of financing in place quickly. TMMC was supposed to generate \$2 million in net revenues in March and only generated approximately \$500,000 in net revenue while the expenses continue. At this point management is recommending a Standard Preferred Stock option as the quickest solution. The bank will increase their unsecured debt form, but it is contingent on both Nueterra and MCH giving a 100% guarantee each. Discussion ensued regarding the pros and cons of these options. MCH stated that their proposal for preferred equity would likely have conversion privileges. Concerns were raised by the physicians regarding the potential dilutive effect of the preferred stock with conversion rights. A motion was made, seconded and passed approving the Board to move forward with a term sheet for preferred stock options with MCH.

105. The May 2016 Board of Managers Minutes state:

Alan Behr presented the financial statements for the month ending March 31, 2016. He noted that Net Patient revenue was \$1,142,920 compared to a budget of \$9,141,106. Total cases compared to budget are significantly off. The income statement compared to budget reflects a staffing plan changes adjustment to volume, an estimated savings of \$65,000 per pay period. Building lease are late fees, maintenance costs are under budget since the facility is new. Equipment lease that was delayed until May for payment and our Liability Insurance payment was delayed for 2 months and is reflected on the March Financial Statement. The operating deficit for the month was offset by the capital call, line of credit and equipment loan. The capitalization for the utility expense in the February report is still under review.

106. The June 2016 Board of Managers Minutes state: "TMMC needs a cash infusion to meet the expenses for the month of June. The burn rate for expenses is about \$2.6 million and

with rent it is \$3.3 million. TMMC will not breakeven from a cash flow standpoint until December when we are doing 850 cases. Management will ask the physicians to reconfirm their volume and schedule a Member's Meeting to review the Convertible Loan within the next 10 days."

107. The July 2016 Board of Managers Minutes state:

Alan Behr presented the financial statements for the month ending May 31, 2016. He outlined the key indicators for May. Total inpatient and outpatient cases for the month were 123. Accounts receivable and cash collections were delayed due to systems issues. It has only been in the last 60 days that we have been able to get the bills out. BCBS payments have been delayed due to improper forms loaded on their part but this has been resolved now. We have also engaged a firm, Direct RX, to review zero balance claims on a contingency basis to determine if our out of network claims have been paid correctly. Nuehealth has worked with DirectRX in the past. Supply costs as a result of implant costs due to high volume in orthopedic and spine cases. Salary continues to decrease as we flex to volume. Net Patient revenue was \$2,981,883 compared to a budget of \$5,503,552 for a \$2.5M unfavorable variance due to not meeting the case volume budget. The unfavorable variance was somewhat mitigated by a higher estimated reimbursement per case due to the mix of cases. As a result of the cash shortfall from operations, we borrowed \$1,250,000 from the line of credit in order to pay expenses. We are limited on the amount we can draw as it is based on our 80% net accounts receivable.

108. The Individual Defendants knew the Debtor was being capitalized with extensions of credit by unsecured creditors due to the Debtor's lack of initial capitalization, yet they did not make, and in fact opposed, adequate capital calls.

109. On October 11, 2017, HC-5959 called a default on MIMC under the terms of the Lease based upon MIMC's failure to pay rent due thereunder.

110. Days later, on October 25, 2017, MidFirst called a default on the Loan based upon: MIMC's failure to cure certain nonpayments, MIMC's default under the Lease, and a material adverse change (the decision to close the hospital).

111. Without adequate capital for the Debtor's operations to get fully down the runway and take off with solvent operations, on October 30, 2017, a mere 20 months after opening, MIMC suspended all patient services.

112. Notably, significant payments on account of borrowings were authorized by the Individual Defendants in Q2 of 2017 through Q1 of 2018 totaling \$11.5 million, most, if not all of which were used to pay down debt guaranteed by the NueHealth Entities at a time when the business was failing and shutting down.

E. The Conflict of Interest Transactions

113. The Individual Defendants knew the extent and progression of the Debtor's negative working capital, but continuously and systematically failed to properly oversee or manage the affairs of the Debtor until it was too late.

114. In fact, the situation was exacerbated by the Individual Defendants' decision to approve, without sufficient information or knowledge, several conflict of interest transactions that did not inure to the benefit of the Debtor, or where there were more favorable alternatives for the Debtor. These transactions resulted in no less than \$7 million in payments from the Debtor to the NueHealth Entities between 2014 through 2018. In fact, the Debtor's records reflect ACH transfers to the NueHealth Entities in excess of \$24 million during this time period. During the same period of time, the NueHealth Entities made only \$9.22 million in capital

contributions to the Debtor, and most of the capital contributions came late and were provided simply to cover the debt service on guaranteed loans.

115. Moreover, the Debtor did not receive reasonably equivalent value for the \$7 million in payments to the NueHealth Entities. In fact, some or all of the NueHealth Entities that were parties to these transactions breached the terms thereof.

116. Certain of the Individual Defendants that approved these transactions had an indirect financial interest in, and improperly benefitted from, them by virtue of their affiliation with the NueHealth Entities.

117. Some of these conflict of interest transactions include the following:

- i. The Astoria Property Company, LLC f/k/a Nueterra Properties Group, LLC Transaction

118. On or about April 30, 2014, the Debtor entered into a Real Estate Development Agreement (the "Real Estate Development Agreement") with Astoria Property Company, LLC f/k/a Nueterra Properties Group, LLC ("Astoria").

119. The purpose of the Real Estate Development Agreement was to provide for the development of a 145,000 square foot hospital facility for the Debtor at the Property.

120. Under the Real Estate Development Agreement, Astoria was obligated to assist the Debtor in managing the development, subdivision, construction, design and the permit and approval process for the development of the Debtor's hospital facility. In addition, the Real Estate Development Agreement provided, *inter alia*, that:

- (i) Astoria shall assist the Debtor in acquiring the Property from HC-5959, and would oversee the closing of a land purchase agreement with respect to same;

- (ii) Astoria shall assist the Debtor with the identification and retention of design professionals and the prime contractor to perform the design and construction services for the development of the hospital;
- (iii) Astoria shall prepare estimates of construction costs for the development of the hospital for the Debtor's review and approval;
- (iv) Astoria shall coordinate the design professionals' preparation of, *inter alia*, documents depicting the schematic plan for development of the hospital, a site plan, basic floor plans, and exterior elevation drawings reflecting design;
- (v) Astoria shall coordinate the design professionals' preparation and submission of construction drawings and specifications for the development of the hospital;
- (vi) Astoria shall provide, with the assistance of the design professionals, oversight, management and administration services relative to the prime contractor for the development of the hospital in order to manage same in accordance with the latest approved estimate of construction cost, the latest approved development schedule and the final construction drawings and specifications;
- (vii) Astoria shall visit the hospital site at a reasonable frequency in order to monitor the progress of the development of the hospital;
- (viii) Astoria shall develop and implement a system for review and process of "Change Orders";

- (ix) Astoria shall monitor the progress of the development of the hospital and make recommendations for changes in the work on the basis of field conditions, improved quality, cost savings or time savings;
- (x) Astoria shall observe the prime contractor's final testing and start-up of utilities, operational systems, equipment and close-out activities;
- (xi) When Astoria deems prime contractor's work or a designated portion thereof substantially complete, Astoria shall arrange for the design professionals and the prime contractor to prepare a list of incomplete or unsatisfactory items and a schedule for their completion;
- (xii) Astoria shall submit to the Debtor, on a monthly basis, a written report of the progress of the construction, including, but not limited to, the financial status of the project.

121. For its services under the Real Estate Development Agreement, Astoria was entitled to a "Developer's Fee", which was calculated as the total of the following: "(a) Basic development fee, calculated as the "Total Project Costs" (defined to mean the actual total cost of the Project, involving making improvements to the Site and the existing hospital building, but not including the costs of acquiring the Site or the existing buildings, or the development fee hereunder), multiplied by five percent (5%). ... [and] (d) Reasonable additional service fees, if additional services other than the Services described herein are requested by [the Debtor] and [Astoria] agrees to provide such services in writing."

122. The Real Estate Development Agreement was signed by Daniel R. Tasset, "Chairman of Nueterra Equity Partners, LLC as Initial Manager", on behalf of the Debtor, and by John Foudray, Senior Vice President of Real Estate Development, on behalf of Astoria.

123. On or about October 16, 2015, the Real Estate Development Agreement was changed by amendment to reflect an increased development fee for Astoria due to an increase in the "Total Project Costs" from \$34,334,403 to \$43,372,701.

124. The "Amendment to Real Estate Development Agreement" was signed by John Schario, as "Chairman", on behalf of the Debtor, and by John Foudray on behalf of Astoria.

125. Upon information and belief, the Individual Defendants authorized the Real Estate Development Agreement in contravention of the Debtor's Operating Agreement, specifically the provision regarding the prohibition on the acquisition of services with a member of the Debtor or affiliate of a member of the Debtor "without such transaction first being approved by a majority of the members of the Board of Managers excluding any member of the Board of Managers who, by himself or herself or through an Affiliate, will provide such [] services or otherwise enter into the transaction with the [Debtor], but which must include at least one Board Member appointed by Class 1 Members other than VitalMD Group Holding, LLC ...
."

126. Astoria filed a proof of claim in the Debtor's Main Case, Claim No. 120, alleging a claim of \$29,325.42 as of March 9, 2018 pursuant to the Real Estate Development Agreement.

127. Upon information and belief, Astoria received over \$2 million from the Debtor between 2014 and 2016 on account of the Real Estate Development Agreement.

128. Upon information and belief, Astoria failed to meet many of its obligations under the Real Estate Development Agreement, including, but not limited to: (i) Astoria did not successfully assist the Debtor in acquiring the Property from HC-5959; (ii) Astoria did not prepare proper estimates of construction costs for the development of the hospital; (iii) Astoria failed to properly oversee, manage, and administer services relative to the development of the hospital; and (iv) Astoria failed to develop and implement a system for review and process of "Change Orders".

ii. The Benefit Management, LLC and Nueterra Holdings, LLC Transaction

129. Benefit Management, LLC and Nueterra Holdings, LLC were parties to a May 2, 2016 bond, authorized by the Individual Defendants, that was security for the Debtor's utility services provided by Florida Power & Light Company (FP&L) by virtue of a General Contract of Indemnity between Travelers Casualty and Surety Company of America, St. Paul Fire and Marine Insurance Company and Benefit Management, LLC and Nueterra Holdings, LLC. FP&L made a claim on the bond for the payment of prepetition utility services incurred by the Debtor. As indemnitors, Benefit Management, LLC and Nueterra Holdings, LLC paid such claim in the amount of \$61,934.64.

130. Upon information and belief, there is no obligation on the part of the Debtor to repay Benefit Management, LLC or Nueterra Holdings, LLC for such amounts paid. Notwithstanding, Benefit Management, LLC filed proof of claim number 121 in the Debtor's Main case in the amount of \$61,934.64.

iii. The Nueterra Equity Partners, LLC Transaction

131. On or about April 1, 2014, the Debtor entered into a Development and Management Agreement (the "Development and Management Agreement") with Nueterra Equity Partners, LLC ("Nueterra Equity"), which agreement was approved and/or ratified by the Individual Defendants.

132. Pursuant to the Development and Management Agreement, the Debtor retained Nueterra Equity to manage "Developer Services", including, *inter alia*:

- (i) Sales and Syndication;
- (ii) Banking/Finance/Cash Management/Accounting;
- (iii) Marketing;
- (iv) Human Resources;
- (v) Licensure;
- (vi) Medical Staff;
- (vii) Secure Ancillary Services;
- (viii) Secure Purchased Services;
- (ix) Equipment Procurement;
- (x) Supply and Materials Management;
- (xi) Business Office;
- (xii) Management Information Systems;
- (xiii) Insurance; and
- (xiv) Business Planning.

133. Upon information and belief, Nueterra Equity failed to meet its Developer Services obligations under the Development and Management Agreement.

134. The Board of Managers approved a \$1.5 million development fee allegedly due to Nueterra Equity for "the time allocated by Nueterra staff and resources on site and behind the scenes to the successful completion of the project" at an October 2015 Board of Managers meeting.

135. In addition to a "Development Fee", the Development and Management Agreement provided that Nueterra Equity was entitled to reimbursement of costs "incurred in connection with the organization, due diligence, negotiation, acquisition, development, improvements, and financing of the Facility and related assets, whether incurred before or after the closing of the Offering, and all such costs and expenses incurred by each Service Provider in connection with the performance of its duties hereunder."

136. At that same October 2015 meeting, John Foudray advised that the construction was not completed at the hospital building. Additionally, board member Alan Behr advised that for the month of September 2015, the hospital had a loss of \$638,000 and a year to date loss of \$4.4 million, and the \$10.1 million capital raised from investors was exhausted. The Board was also advised that as a result of the hospital's delayed opening, there was an additional \$2.2 million which was unforeseen, causing an anticipated draw of \$2.8 million on the Debtor's line of credit before opening.

137. At an August 2017 Board of Managers meeting, members of the Board alleged delays and "mismanagement" of accounts receivable collections.

138. At an October 2017 Board of Managers meeting, members of the Board alleged that the Debtor did not need such a large facility, that the debt incurred by the Debtor was excessive, and that certain business planning, including the inclusion of an OB program at the hospital and failure to sublet spaces at the facility, was inadequate.

139. At the same meeting, members of the Board also alleged that surgery centers are operated more efficiently and economically than the Debtor.

140. Notwithstanding, the Individual Defendants stayed the course, leading the Debtor further and further into the red.

141. Upon information and belief, the Development and Management Agreement is signed by the same person for the Debtor, Nueterra Equity, and MHH.

142. Upon information and belief, the Development and Management Agreement was executed in contravention of the Debtor's Operating Agreement.

143. As of March 9, 2018, Nueterra Equity alleged in proof of claim number 122 in the Main Case that it is owed \$5,666,316.01 from the Debtor (\$1.5 million for "Development Fee," \$3,040,452.01 for "Management Services", and \$1,125,864.00 for "Payroll Advance Expenses") pursuant to the Development and Management Agreement.

144. Notwithstanding that under the Development and Management Agreement, the "Management Services" and the "Personnel Services", including payroll advances, were to be provided by MHH, the relevant proof of claim was filed by Nueterra Equity with respect to such amounts allegedly due and owing.

iv. The Debt Financing Transactions

145. Many decisions made by the Individual Defendants were based on the benefits that would inure to the NueHealth Entities, rather than the best interest of the Debtor.

146. For example, the Debtor's board minutes reflect that the MidFirst Bank financing may not have been the best financing transaction for the Debtor, but MidFirst was offering the best deal for the NueHealth Entities at the time.

147. On April 1, 2015, Peter Cole, Manager of Nueterra Global Finance, circulated to the Board of Managers a memorandum entitled "Line of Credit and Equipment / TI Loan", in which Nueterra recommended that MIMC accept the proposals from MidFirst Bank regarding an equipment / tenant improvement loan, as well as the line of credit. In this memorandum, Mr. Cole states, among other things: "MidFirst Bank did back the corporate guarantees down to roughly 44% of the loans (versus 50% previously) for each Nueterra and Miami Children's Hospital."

148. The April 2015 Board of Managers Minutes state: "Lee Huntley provided a financial update for the board members. John Schario also provided an update on the lines of credit which were also sent electronically prior to the Board meeting with the current options for TMMC. Initially Siemens was not the best proposal, but did retract some of the restrictions which made their package more desirable than MidFirst. The terms are slightly better and TMMC will save some money on the Line of Credit. A motion was made, seconded and passed accepting the finance report and authorizing execution of the lines of credit as summarized in the attached documents."

COUNT I:
BREACH OF FIDUCIARY DUTIES AGAINST THE INDIVIDUAL DEFENDANTS AND
JOHN DOES 1-25

149. The Plaintiff realleges each and every allegation preceding this paragraph as if fully set forth herein.

150. At the times of the culpable actions of the Individual Defendants described herein, the Debtor was insolvent on a balance sheet and equitable basis.

151. The Board of Managers and officers of the Debtor, including parties employed by the NueHealth Entities, such as certain of the Individual Defendants, owed fiduciary duties of care, loyalty and/or good faith and fair dealing to the Debtor and its creditors.

152. The Individual Defendants, by virtue of their positions as Managers of the Board and/or officers of the Debtor, were bound to oversee the high-level operations of the Debtor, including with respect to the preservation of capital necessary to maintain operations.

153. The Individual Defendants materially breached their respective fiduciary duties by, among other things, failing to ensure that the Debtor was adequately capitalized, even as early as February of 2015; using an excessive and grossly disproportionate amount of debt to fund the Debtor's development and operation of the hospital, even after it became abundantly clear that the Debtor's plans for development and operation were unattainable; using inflated and unrealistic projections that did not account for obvious construction and contract delays to secure this debt; opening and staffing the hospital without payor contracts or any meaningful source of revenue; failing to adjust the Debtor's projections and plans for development and operation until it was too late; and approving conflict-of-interest transactions that did not benefit, or were otherwise unfair to, the Debtor.

154. The Individual Defendants were acutely aware of the Debtor's liquidity issues and undercapitalization at all relevant times. Yet, they turned a blind eye and continually approved the Debtor's mounting accumulation of debt that they knew, or should have known, the Debtor could not, and would never be able to, pay back.

155. The Individual Defendants materially breached their fiduciary duties by failing to take steps to preserve and protect the Debtor in the face of imminent and severe risk. They made decisions, took actions, and failed to take certain actions that only added to the Debtor's mounting debts, without any reliable information or data to suggest that incurring such further debts could or would, reasonably help turn the Debtor into a solvent, let alone profitable, entity.

156. In sum, the Individual Defendants materially breached their fiduciary duties by failing to (i) act as a reasonably prudent person in the same position would have under the same circumstances and (ii) take the most basic conventional steps necessary to preserve and protect the Debtor until after any value the Debtor could have possibly had was permanently lost.

157. The breaches of fiduciary duties by the Individual Defendants proximately caused the incurring of debt (and ultimately failure of the Debtor) well beyond an amount that the Debtor could ever afford to pay back in an amount to be proven at trial.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter a final judgment against the Individual Defendants, jointly and severally:

- A. awarding any and all applicable damages to the Debtor for the breaches of fiduciary duty by the Individual Defendants;
- B. awarding attorneys' fees and costs to the Liquidating Trustee; and
- C. granting the Liquidating Trustee such other and further relief as this Court deems just and proper.

COUNT II:
AIDING AND ABETTING BREACH OF FIDUCIARY DUTIES AGAINST THE
INDIVIDUAL DEFENDANTS AND JOHN DOES 1-25

158. The Plaintiff realleges each and every allegation preceding this paragraph as if fully set forth herein.

159. The Individual Defendants owed the Debtor fiduciary duties, including the duty of care and duty of loyalty.

160. The Individual Defendants breached these fiduciary duties.

161. The Individual Defendants knew of and substantially assisted or encouraged each other's breaches of fiduciary duty by, among other things, proposing, approving, and failing to object to the grossly negligent and/or reckless conduct by which the fiduciary duties were breached.

162. The breaches of fiduciary duties and the aiding and abetting of these breaches of fiduciary duties by the Individual Defendants proximately caused the incurring of debt (and ultimately failure of the Debtor) well beyond an amount that the Debtor could ever afford to pay back in an amount to be proven at trial.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter a final judgment against the Individual Defendants, jointly and severally:

- A. awarding any and all applicable damages to the Debtor for the breaches of fiduciary duty and aiding and abetting of these breaches of fiduciary duty by the Individual Defendants;
- B. awarding attorneys' fees and costs to the Liquidating Trustee; and
- C. granting the Liquidating Trustee such other and further relief as this Court deems just and proper.

**COUNT III:
BREACH OF FIDUCIARY DUTIES UNDER CAREMARK DOCTRINE AGAINST THE
INDIVIDUAL DEFENDANTS AND JOHN DOES 1-25**

163. The Plaintiff realleges each and every allegation preceding the first count of this complaint as if fully set forth herein.

164. The courses of action and transactions that caused the Debtor to fail and its insolvency to deepen were proposed or advocated by the NueHealth Entities.

165. These transactions and courses of action were presented through and to the Individual Defendants without sufficient information or knowledge to enable the Individual Defendants to properly consider them and decide for themselves whether they were actually in the Debtor's best interests.

166. The Individual Defendants had a duty to properly consider and decide for themselves whether the proposed transactions and course of action were in the best interests of the company, but they could not and, therefore, systematically failed to comply with this duty because they were not provided with sufficient information or knowledge.

167. The Individual Defendants knew or should have known this but failed to make a good faith effort to implement or monitor any oversight or information reporting system.

168. The Individual Defendants did not, for example, install a finance committee, which would have assisted with their responsibility to oversee and monitor the Debtor's financial resources.

169. The implementation and monitoring of an oversight and information reporting system would have ensured that any proposed transactions and courses of action, whether proposed by the NueHealth Entities or otherwise, were sufficiently presented to the Individual

Defendants and that the Individual Defendants were fulfilling their duties to give their genuine, informed consideration of any such proposed transactions and courses of action before approving them.

170. The Individual Defendants knew they had a duty to give their genuine, informed consideration of all proposed transactions and course of action before approving them, and they knew or should have known that they could not give such consideration to the transactions and courses of action that caused the Debtor to fail and its insolvency to deepen because they were not presented with sufficient information, but they utterly failed to even attempt to assure that a reasonable information and reporting system was in place.

171. They simply approved and allowed each other to approve every action and transaction the NueHealth Entities put in front of them without sufficient information or knowledge.

172. The Individual Defendants thus acted in bad faith and failed to comply with their obligations under the *Caremark* doctrine.

173. As a direct and proximate result, the Debtor incurred debt well beyond an amount that the Debtor could ever afford to pay back and ultimately failed.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter a final judgment against the Individual Defendants, jointly and severally:

- A. awarding any and all applicable damages to the Debtor for the breaches of fiduciary duty by the Individual Defendants under the *Caremark* doctrine;
- B. awarding attorneys' fees and costs to the Liquidating Trustee; and
- C. granting the Liquidating Trustee such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

174. The Plaintiff hereby demands a trial by jury on all claims and issues triable by such, and requests in regard to this demand that the reference to the Bankruptcy Court not be withdrawn, if at all, unless and until discovery and all pre-trial motions and matters, including case dispositive motions, are disposed of and otherwise adjudicated by the Bankruptcy Court. The Plaintiff specifically consents to a jury trial before the Bankruptcy Court.

Dated: March 3, 2020

PORZIO, BROMBERG & NEWMAN, P.C.

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