

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Scott H. Richardson, Director of the South
Carolina Department of Insurance,

Petitioner,

vs.

Guardian Healthcare, Inc.,

Respondent.

C. A. No. 2010-CP-40- _____

**CONSENT ORDER
COMMENCING
REHABILITATION
PROCEEDINGS & GRANTING
AN INJUNCTION &
AUTOMATIC STAY OF
PROCEEDINGS**

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JAMES H. W. McBRIDE
CLERK OF COURT
RICHLAND COUNTY

This matter comes before me pursuant to the South Carolina Insurer's Rehabilitation and Liquidation Act, S.C. Code Ann. §§ 38-27-10 *et seq.* Petitioner seeks an order appointing him as Rehabilitator of Guardian Healthcare, Inc., (Respondent) for purposes of rehabilitation into runoff. Respondent has been notified of Petitioner's intent and consents to rehabilitation into runoff as set forth more fully below.

The Court, having reviewed the pleadings of record and otherwise being fully informed in the premises, finds:

1. This Court is the proper venue for this proceeding pursuant to S. C. Code Ann. §§ 38-27-60(f) & 310 (2002).
2. Petitioner is the duly appointed Director of Insurance (Director) for the State of South Carolina with such powers, duties and responsibilities as are prescribed under the insurance laws of this state to the Director for Respondent licensing, delinquency and receivership matters, and is specifically authorized to file a petition for rehabilitation pursuant to S.C. Code Ann. § 38-27-310 (2002).

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3. Respondent is a South Carolina domestic insurance insurer that holds a certificate of authority under the provisions of S.C. Code Ann. § 38-5-30 (2002). The Department granted Respondent a license to transact business as an insurer on May 2, 2007. Respondent is a single-state domestic insurer, which is privately owned. Respondent is also granted an annual contract by the U.S. Department of Health & Human Services Centers for Medicare & Medicaid Services (CMS). Respondent markets Medicare Advantage products in South Carolina.

4. Respondent is subject to the dual regulation of the state and federal government. The Department has regulatory jurisdiction over the Respondent pursuant to, inter *alia*, Chapters 3, 5, 9, 13 and 71 of Title 38 of the South Carolina Code of Laws 1976, as amended. The Department licenses the Respondent to act as an insurer in South Carolina and monitors its financial condition. Respondent is also subject to the regulatory jurisdiction of CMS. CMS approves the rates for the product, product benefits, the provider network and provides all guidelines for the sale of the Medicare Advantage product. CMS issues annual contracts to insurers to market Medicare Advantage products.

5. Set forth below are the grounds that would justify an order for a formal delinquency proceeding against Respondent under Chapter 27 of Title 38 of the South Carolina Code. Moreover, these grounds constitute an emergency such that the delay in the entry of such an order will endanger the interests of Respondent's policyholders, creditors and the public. All requirements of S.C. Code Ann. §§ 38-27-310 (2002) authorizing the relief requested herein are satisfied.

6. Respondent is privately-owned; some shareholders are physicians. Respondent is

licensed in South Carolina and only writes Medicare Advantage health insurance products in this state.

7. S.C. Code Ann. § 38-9-10 (2002) requires Respondent to maintain capital of at least \$600,000 and surplus of not less than \$150,000. That Code section permits the Director to initiate delinquency proceedings against Respondent if its surplus falls below that minimum amount. That section also requires the Director to initiate delinquency proceedings if Respondent's minimum capital becomes impaired.

8. On March 12, 2010, the 2009 Annual Statement of Respondent was received in the Department. That Annual Statement showed total capital and surplus in the amount of <\$6,787,726>, an amount which placed the total capital and surplus of Respondent below the minimum required by S.C. Code Ann. § 38-9-10 (2002).

9. The Department informed the Respondent on March 17, 2010 that an immediate capital infusion was necessary and that Respondent had to provide evidence by April 16, 2010 that the Respondent had received an \$8,000,000 infusion of capital; otherwise, the Department might commence regulatory action against the Respondent.

10. On March 26, 2010, Respondent informed the Department that it had found an investor (a physician in Florida), who was willing to invest \$8,000,000 into Respondent by purchasing shares of Respondent's stock. Respondent was notified that since this transaction would result in a change in control of Respondent, the person acquiring the stock would need to file a Form A – Statement Regarding the Acquisition of Control or Merger with a Domestic Insurer with the Department.

11. On March 29, 2010, Respondent was notified that the Department would

immediately commence its review of the Form A so that, if approved, the \$8,000,000 infusion could immediately take place. Respondent was informed that the capital had to be infused no later than April 30, 2010.

12. By letter dated April 5, 2010, the Department informed Respondent that until notified otherwise it was prohibited from engaging in certain acts without the express written consent of the Department. The Department received the Form A dated April 8, 2010 and commenced its review of the transaction.

13. On April 20, 2010, the Director approved the acquisition of control of Respondent by Sunil Gupta, M.D. and Thomas H. Huling through New England Consulting Group, LLC, a Rhode Island limited liability company. On April 22, 2010, Respondent informed the Department that it expected the \$8,000,000 to be infused by April 30, 2010.

14. On May 2, 2010, Respondent informed the Department that it did not meet the April 30, 2010 deadline to show evidence of the \$8,000,000 infusion, but that it was in the final steps of opening a new account to have the monies wired into the account by the close of business on May 3, 2010. Respondent submitted an affidavit from the investor indicating that the infusion would be made by May 19, 2010. The capital infusion was not received from the investor by the established deadlines and Respondent was placed under an order of Confidential Supervision by the Director.

15. As reported by Respondent, bank balances at September 30, 2010 were \$1,836,339 with estimated unpaid claims reported and unprocessed totaling \$9,758,643 (excluding IBNR) and outstanding payables of \$86,407 thus a negative cash position of (\$7,835,897.) On a weekly basis, since early July 2010, unpaid claims have continued to be

between \$9 million and \$11 million. Actuarial estimates for September 30, 2010 for incurred but not reported (IBNR) claims are approximately \$27 million. Accordingly, Respondent had a negative cash position at September 30, 2010 of more than <u>\$25,000,000</u>.

16. Respondent is dependent on new monthly premium revenue to pay past incurred claims; however, that revenue flow ends with contract year ending December 31, 2010, with no more incoming revenue. Premium revenue coming in for the month October is \$14,431,430. For November and December approximately \$28,000,000 premium will materialize if the CMS contract remains in force; however, claims unpaid will likewise increase. Administrative expenses have been running approximately \$5 million per quarter.

17. On or about August 31, 2010, CMS denied Respondent's appeal of the denial of its contract for 2011.

18. S.C. Code Ann. § 38-27-310 sets forth the grounds upon which an insurer may be placed into rehabilitation, including but not limited, to when the insurer is in a condition which the further transaction of business would be hazardous financially to its policyholders, creditors or members of the public and/or when the majority of the board of directors entitled to vote request or consent to rehabilitation. Pursuant to this section of the Code, the Director may apply by petition to the Circuit Court for an order authorizing him to rehabilitate Respondent.

19. S.C. Code Ann. § 38-27-310 authorizes the Rehabilitator to take the action he deems necessary or appropriate to reform the insurer and protect policyholders, creditors and the public.

20. Since March 2010, Respondent's Board of Directors has been seeking proposals from various investors for the purpose of infusing the necessary capital. On October 4, 2010, it

received an offer from an A-rated insurer (Interested Party) to assume Respondent's Medicare Advantage policies and certain liabilities associated therewith as of October 1, 2010. Based upon the outstanding IBNR, Respondent has a negative surplus position. The Interested Party has offered to make a cash contribution of \$4,000,000 to address liabilities prior to October 1, 2010. It is not willing to assume liabilities prior to October 1, 2010. Additionally, it is anticipated that the transaction may include the following:

a. The Assumption Agreement will provide for the transfer and assignment by novation to the Interested Party all of Respondent's rights, title and interest in the policies, other assets, licenses, etc., as defined in the Assumption Agreement as of the Effective date.

b. The liabilities prior to the Effective Date will be retained by Respondent or assigned to a Liquidating Trust or Claims Fund, whichever is most practical and efficient.

c. Any agreements executed will be subject to the approval of CMS, the Rehabilitator and this Court.

d. The Interested Party will provide transition services via an agreement between the applicable parties.

21. Time is of the essence. CMS is in the midst of open enrollment with its other contractors. If this transaction is not consummated by October 15, 2010, Respondent will lose the asset considered most valuable by the Interested Party: the enrollees.

22. With the entry of this Order by this Court, the Rehabilitator proposes to place Respondent into rehabilitation for purpose of running off its liabilities prior to October 1, 2010. The Rehabilitator will complete negotiations for the assumption of all of Respondent's assets and liabilities as of October 1, 2010 by the Interested Party for a contribution in an amount not less

than Four Million Dollars (\$4,000,000). The remaining liabilities will be assigned to a Claims Fund or Liquidating Trust. The \$4,000,000 contribution will be used to administer and pay claims prior to October 1, 2010. The Interested Party will also forward to that Fund or Trust recoveries and adjustments on claims net agreed upon expenses.

23. Creditors will be provided information as to how to file claims with the Fund or Trust upon the filing with this Court of the Rehabilitation Plan.

24. In light of the financial issues described above, Respondent is in such condition to be hazardous financially to its creditors and the public. This transaction provides some potential relief for Respondent's creditors. If this transaction is not consummated within the timeframes outlined, the Petitioner will have little alternative but to convert this action to a liquidation proceeding where there will be little, if any, relief for Respondent's creditors. In light of the hazardous financial position of Respondent and the statutory and enrollment requirements of CMS, the proposed transaction described generally herein appears to be in the best interests of Respondent, its policyholders and creditors.

25. The Board of Directors of Respondent has authorized each of its officers to consent to an Order of Rehabilitation and the signature of any said officer on this document shall constitute said written consent to its filing with the Court.

26. Respondent consents to the facts set forth herein only for the purposes of obtaining this Consent order to place Respondent into rehabilitation for purposes of runoff. Respondent reserves the right to contest these facts in any other proceeding or action.

27. The Court has jurisdiction over this matter.

IT IS THEREFORE ORDERED THAT:

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1. PURSUANT TO S.C. Code Ann. §§ 38-27-310 and 38-27-320 (2002), Petitioner and his successors in office are appointed Rehabilitator for the purposes of rehabilitation of Respondent.

2. PURSUANT TO S.C. Code Ann. § 38-27-330 (2002), Petitioner and his successors shall have all the powers and responsibilities set forth under that section to assist him or his designee as Rehabilitator, including but not limited to:

a) Conducting the business of Respondent and taking all steps, as the Court may direct, toward the removal of the causes and conditions which have made this Order necessary and taking such further action as the Rehabilitator deems necessary or appropriate to reform and revitalize Respondent.

b) Taking immediate possession of all the property, assets and estate, and all other property of every kind whatsoever and wherever located, belonging to Respondent.

c) Applying for any restraining orders, preliminary and permanent injunctions, and other orders considered necessary pursuant to S.C. Code Ann. Section 38-27-70.

d) Employing and authorizing the compensation of legal counsel, actuaries, accountants, consultants and other assistants as it deems necessary, and authorize the payment of the expenses of these proceedings and the necessary incidents thereof, as approved by the Court, to be paid out of the funds or assets of Respondent that are in the possession of the Rehabilitator or that come into his possession.

e) Imposing, if, within the Rehabilitator's sole judgment, it is determined to be necessary, a moratorium on the payment of claims with consideration given to hardship exceptions, whereby claims meeting certain established criteria would be paid at a pre-

determined percentage or amount. In establishing such procedures, the Rehabilitator shall be fully informed as to coverage issues and how claims will be handled in the future. If the Rehabilitator implements a hardship procedure, approved by the Court, it shall be detailed and carefully documented, and shall include an appeal process. These procedures must include a complete description of the information that needs to be submitted by the policyholder requesting the hardship payment and the methodology utilized to evaluate that information.

(f) If it appears to the Rehabilitator that there has been criminal or tortious conduct or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agent, broker, employee, or other person, pursuing all appropriate legal remedies on behalf of the insurer.

3. In the event the Rehabilitator determines that runoff, reorganization, consolidation, conversion, reinsurance, merger or other transformation of Respondent is appropriate, the Rehabilitator is directed to prepare a plan to effect such changes and submit the plan to this Court for consideration.

a. Any rehabilitation plan containing the provisions described herein must provide at least a ten calendar day objection period;

b. Reasonable notice of the plan must be provided to all potential claimants of the Respondent.

4. The Rehabilitator has the power under S.C. Code Ann. §§ 38-27-450 and 38-27-460 to avoid fraudulent transfers.

5. PURSUANT TO S.C. Code Ann. § 38-27-320(b) (2002), the Rehabilitator or his designee shall file with the Court, on no less than a semi-annual basis, accountings for the

receivership estate and the Claims Fund or Liquidating Trust.

6. Upon petition by the Rehabilitator stating that this transaction could not be consummated and further efforts to rehabilitate Respondent would be useless, this Court will consider entry of an Order of Liquidation of Respondent without further notice or hearing.

NOTICE OF AUTOMATIC STAY

Notice is hereby given that pursuant to S.C. Code Ann. § 38-27-70 (2002), the Court grants an automatic stay applicable to all persons and proceedings, other than the Rehabilitator, which shall be permanent and survive the entry of the Order and which prohibits:

- 1) The transaction of further business;
- (2) The transfer of property;
- (3) Interference with the Rehabilitator or with a proceeding under Chapter 27 of Title 38 of the Code;
- (4) Waste of the insurer's assets;
- (5) Dissipation and transfer of bank accounts;
- (6) The institution or further prosecution of any actions or proceedings;
- (7) The obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets, or its policyholders;
- (8) The levying of execution against the insurer, its assets, or its policyholders;
- (9) The making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of the insurer;
- (10) The withholding from the Rehabilitator of books, accounts, documents, or other records relating to the business of the insurer; or

(11) Any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of any proceeding under Chapter 27 of Title 38 of the South Carolina Code.

This Court retains jurisdiction of this cause for the purpose of granting such other and further relief as from time to time may be necessary and appropriate.

AND IT IS SO ORDERED.

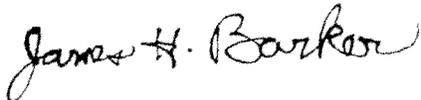


The Honorable Alison R. Lee
Chief Administrative Judge
Fifth Judicial Circuit

This 12th day of October, 2010
Columbia, South Carolina.

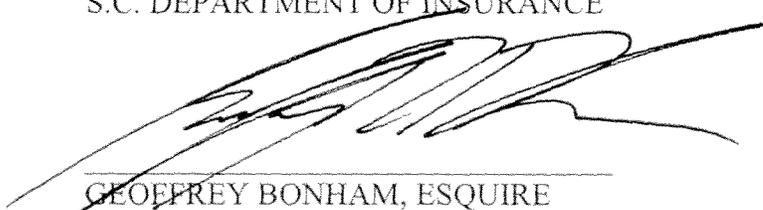
WE CONSENT:

GUARDIAN HEALTHCARE, INC.



Dr. JAMES H. BARKER
AUTHORIZED REPRESENTATIVE

SCOTT H. RICHARDSON, DIRECTOR
S.C. DEPARTMENT OF INSURANCE



GEOFFREY BONHAM, ESQUIRE
ASSOCIATE GENERAL COUNSEL
ONE OF THE ATTORNEYS FOR PETITIONER