



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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David J. Margules, Esquire
Ballard Spahr LLP
919 N. Market Street, 11th Fl.
Wilmington, DE 19801

R. Judson Scaggs, Jr., Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
Wilmington, DE 19801

Re: *Accountable Care Associates, Inc. v. Gaziano*
C.A. No. 10530-VCN
Date Submitted: January 28, 2015

Dear Counsel:

I write to supplement my comments at the end of Friday's telephonic argument. The basic elements required to support a temporary restraining order (colorable claim, irreparable harm, and favorable balance of the equities) are present.

If the dispute between ACA and the Defendants were merely a commercial (debt) matter, interim relief would not be warranted. ACA has not been paying for CareScreen services, and the Defendants should not be required to provide any services for free. What distinguishes this action is the fiduciary duty (or

conversion of a corporate opportunity) aspect which calls into question the validity of ACA's debt obligation. Further complicating the analysis are the arguably distressed financial positions of parties on both sides.

The Defendants insist that the relief sought by ACA must be assessed as a mandatory injunction. ACA seeks to prevent the discontinuance of CareScreen services by Defendants. In a sense, the relief is mandatory: if one cannot stop providing a service, then it would seem that the party must continue to provide the service. The answer to this debate may be found in *E.I. du Pont de Nemours and Co. v. Bayer CropScience L.P.*¹

Interim injunctive relief is committed to the Court's discretion. The harm to the Defendants from a temporary restraining order preventing them from discontinuing delivery of CareScreen services to ACA would be minimal. The problems the Defendants have been experiencing with payment would be ameliorated under the terms of a temporary restraining order. Defendants would

¹ 958 A.2d 245 (Del. Ch. 2008). There, the Court concluded that an order enjoining the Defendant from taking any action discontinuing delivery under a supply agreement was not a mandatory injunction. *Id.* at 251 n.17.

continue to provide the services that they have been providing (and providing without an immediate threat of cessation).

Although ACA's claim is colorable, it depends upon ACA's fiduciary allegations which may not survive a probability of success on the merits analysis. The irreparable harm to ACA from the cessation of CareScreen services and a balancing of the equities favor interim relief; a temporary restraining order is warranted. Ultimately, the decision to grant this relief turns upon the Court's perception that it would not be imposing any material and immediate burden on the Defendants.

The temporary restraining order is attached. It likely will need revision. I ask that counsel confer to determine if they can agree on any necessary changes.

One issue is the amount of the bond, which I have attempted to tie to an approximate monthly cost that includes three fees. The amount is somewhat greater (but not much greater) than perhaps the best estimate of monthly cost, but that difference reduces, to an extent, the risk that ACA's payments will not be

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promptly made.² If a shorter period for payment can be established, perhaps the amount of the bond could be reduced. On the other hand, if a month expires and payment has not been made, an increase in the amount of the bond will likely become necessary.

In light of the foregoing, a prompt schedule needs to be established for a preliminary injunction hearing, and counsel are requested to confer on that schedule.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

² One month was chosen over two months. The bond amount is substantially less than the anticipated billing for two months, but a two-month timeframe would also have been reasonable.