

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT
OF THE TRIAL COURT
Civil Action No. 2484CV00824

ADAM OWENS, ALVIN WALKER,
Petitioners,

v.

EDGAR P. BENJAMIN HEALTHCARE CENTER,
Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' EX PARTE PETITION
FOR THE APPOINTMENT OF A RECEIVER**

The Court should immediately appoint a temporary receiver to take over the management of Respondent Edgar P. Benjamin Healthcare Center (“Respondent” or “Facility” or “the Benjamin”) to protect the health and welfare of more than 70 patients and residents. The Facility is at risk of dangerous understaffing because Respondent has missed payroll on numerous occasions over the past several months and is currently in the process of reducing staffing even further. The Facility is also without critical and essential supplies because it is not paying its vendors. Medical supplies are lacking, and medical equipment has not been ordered or serviced, leading to life-threatening conditions for residents and patients. Utility arrearages amount to

hundreds of thousands of dollars. The Facility’s dysfunction and disarray demonstrate the urgency of receivership.

The residents and patients are at high risk. Appointing a temporary receiver for the Facility will substantially reduce the life-threatening harm and danger the residents are enduring. A temporary receiver would be able to control the Facility’s funds and ensure payments to staff, mitigating staff shortages. A receiver would also be able to ensure adequate payment to vendors, helping to alleviate the current mismanagement, where even medical supplies are not being purchased and equipment is not being repaired. Should closure of the facility be necessary, the receiver would be able to ensure an orderly process that minimizes harm to residents and patients. A receiver would restore trust, confidence, and competence. A receiver would also work in close coordination with State officials to stabilize the Facility.

FACTUAL BACKGROUND¹

Respondent is a non-profit corporation and the holder of a license issued by the Massachusetts Department of Public Health (“DPH”) to operate a skilled nursing facility located at 120 Fisher Avenue, Boston, Massachusetts 02120. *See* Sellstrom Aff. ¶ 2, Ex. A.

The Benjamin was first created in 1927 and was originally known as Resthaven Nursing Home. Sellstrom Aff. ¶ 2, Ex. A.² It was founded by Edgar P. Benjamin, a noted attorney and

¹ In support of the Petition, Petitioners have filed affidavits from the following individuals: Petitioner Adam Owens (“Owens Aff.”); Petitioner Alvin Walker (“A. Walker Aff.”); Guardian Velma Brinson (“Brinson Aff.”); Director of Nursing Marise Colsoul (“Colsoul Aff.”); Director of Admissions Leslie Joseph-Henderson (“Joseph-Henderson Aff.”); Medicaid Specialist Katherine Blicher (“Blicher Aff.”); Activities Director Helen Walker (“H. Walker Aff.”); State Representative Liz Miranda (“Miranda Aff.”); and Attorney Oren Sellstrom (“Sellstrom Aff.”). The affidavits are incorporated in this brief by reference.

² *See also* Edgar P. Benjamin Healthcare Center, “About Us,” *available at* <https://epbhc.org/about/> (last visited Mar. 27, 2024).

philanthropist who donated the facility to the community as a charitable corporation.³ It is the only longstanding nursing home of its kind in New England created to serve Black elderly and frail residents. Today, the vast majority of its residents continue to be people of color, and it is highly valued by the diverse families of Mission Hill and Roxbury.⁴ As a longstanding and historical Black nursing facility, it is an anchor institution in the community.⁵ Approximately 70 residents and patients are currently at the Benjamin. *See* Joseph-Henderson Aff. ¶ 1.

The Facility was placed into receivership in the late 1980s, stabilized, and moved out of receivership in the 1990s.⁶ Its Administrator at the time, Myrna Wynn, helped establish the Benjamin as a premier nursing home and rehabilitation center, demonstrating the high effectiveness of receivership, specifically at the Benjamin. Today, the ongoing mismanagement of the Facility requires the same remedy: receivership.⁷

Since approximately 2014, the Administrator and Executive Director of the Benjamin has been Tony Francis (“Administrator”). Under Mr. Francis’ management, and particularly over the past twelve (12) to eighteen (18) months, the Facility has experienced significant deficiencies that place the residents at grave risk. The Facility has submitted a Voluntary Notice of Closure

³ *Id.*

⁴ *Id.* (noting “service to culturally diverse populations”); *see also* Miranda Aff. ¶ 2.

⁵ Courts have found that the “unique characteristics” of the resident population are relevant for judicial relief. *Att’y Gen. v. M.C.K., Inc.*, 432 Mass. 546, 561 (2000) (granting receivership and noting impact on “Chinese-speaking population”).

⁶ *See* Elected Officials Call For Action On Benjamin Healthcare Center, BAY STATE BANNER, Mar. 20, 2024, *available at* <https://www.baystatebanner.com/2024/03/20/elected-officials-call-for-action-on-benjamin-healthcare-center/>

⁷ Receivers have been appointed in other area healthcare and skilled nursing facilities as well. *See, e.g., Cap. Fin., LLC v. 22 Maple St., LLC*, 295 F. Supp. 3d 19 (D. Mass. 2018) (receivership justified).

on February 12, 2024, with a proposed closing date of July 1, 2024. *See* Sellstrom Aff. ¶ 3, Ex. B. A Draft Closure and Resident Relocation Plan has been submitted to DPH. *Id.* ¶ 4, Ex. C.

The threats to patients are many. Most alarmingly, on numerous recent occasions, the Facility has been unable to make payroll. In November 2023, for example, staff went without pay for weeks on end. Health insurance premiums went unpaid as well, so that employees were unable to access their health insurance. *See* Joseph-Henderson Aff. ¶¶ 8-14; Colsoul Aff. ¶ 12; Blicker Aff. ¶ 19; H. Walker Aff. ¶ 14.

As a result of this failure to make payroll, the Facility has experienced significant problems with understaffing. When paychecks are missed, per diem staff begin “calling out”—that is, not showing up for work for the day. *See* Joseph-Henderson Aff. ¶¶ 8-14; Colsoul Aff. ¶ 15; H. Blicker Aff. ¶ 21. At one point during an extended period of non-payment in November 2023, there were only two nurses and one certified nursing assistant (CNA) for the entire facility, approximately one-third of the normal staffing level. Joseph-Henderson Aff. ¶ 9.

After weeks without payment, employees were finally paid in late November. However, weeks later, the Facility again missed payroll and additional periods of under-staffing occurred. *See* Colsoul Aff. ¶ 14; Blicker Aff. ¶ 16.

This under-staffing leads to extremely dangerous conditions for residents. Leslie Joseph-Henderson, the Director of Admissions and a longtime (24 year) employee of the Benjamin, describes “chaotic situations, where we do not know on any given day how many staff we will have.” Joseph-Henderson Aff. ¶ 9. Employees in the business office are called upon to perform the tasks of certified healthcare professionals (CNAs). Blicker Aff. ¶ 23.

When insufficient staff are available, those staff that remain are unable to provide patients with necessary medications, such as insulin⁸ and blood pressure medicine,⁹ in the manner prescribed. *See* Joseph-Henderson Aff. ¶ 10; Blicher Aff. ¶ 24; Colsohl Aff. ¶ 19 (“With a lack of adequate staff, medication delivery is delayed which means life or death for residents and could lead to additional medical conditions and complications.”). Similarly, staff are unavailable to attend to patients who may be experiencing medical emergencies. *See* Joseph-Henderson Aff. ¶ 12. Residents try to get out of their beds themselves, risking falls—a significant health problem for seniors that can lead to further injury, disability, deterioration, and even death. *Id.*¹⁰ This creates a dangerous loop, as under-staffing exacerbates medical conditions, which compounds the need for more resources and support.

Other services are also severely curtailed when inadequate staff are available because they are not being paid by Respondent. Meal service and scheduled psychosocial activities are delayed or missed. This is extremely harmful for an elderly population who need adequate nutrition and activities to prevent deteriorating physical, mental, and emotional conditions. *See*

⁸ Medical research confirms that “insulin as a unique, life-saving medication and the experience or threat of being without insulin as a life-threatening emergency.” Samantha Willner, et al., “‘Life or death’: Experiences of insulin insecurity among adults with type 1 diabetes in the United States,” *SSM Population Health* (2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7352063/> (last visited Mar. 28, 2024) (discussing medical concerns surrounding disruptions in insulin access).

⁹ Continuity of care and adherence to medication regimen is necessary to control high blood pressure and reduce the risk of a stroke or a heart attack. *See, e.g.*, Lisa Rapaport, “Skipping Blood Pressure Pills May Raise Heart Failure Risk,” *Reuters* (Aug. 25, 2015), available at <https://www.reuters.com/article/idUSKCN0QU23Q/> (last visited Mar. 28, 2024).

¹⁰ Falls are the leading cause of injury and death among Americans age 65 and older. Centers for Disease Control and Prevention (CDC), available at <https://www.cdc.gov/injury/features/older-adult-falls/index.html> (last visited Mar. 28, 2024).

Joseph-Henderson Aff. ¶ 14; Blicher Aff. ¶ 24; Colsoul Aff. ¶¶ 18, 29 (confirming that at least 20 patients have experienced significant weight loss from December 2023 to March 2024).

In addition to serious and ongoing problems with meeting payroll, the Benjamin has not paid vendors, leading to compromised care for patients and residents. Basic care items are not available. Equipment is in disrepair. For example, some residents need colostomy bags because their colons do not function normally. *See* Joseph-Henderson Aff. ¶ 16; Colsoul Aff. ¶ 31. The Facility recently ran out of colostomy bags because they had not been ordered. Joseph-Henderson Aff. ¶ 16. With no ability to otherwise collect fecal matter, staff had to wrap an elderly resident in a towel to prevent feces from going everywhere and fouling the room. Joseph-Henderson Aff. ¶ 16.

“Call light” technology—typically, a bedside mechanism or button—serves as a communication tool for residents to request assistance from care providers.¹¹ By providing residents with the ability to request immediate assistance, the call light system is an indispensable resource and intervention for patient-focused care. In her affidavit, however, Director of Nursing Marise Colsoul describes how approximately 10 patients’ call lights are currently non-functioning at the Facility. Colsoul Aff. ¶ 30. As she states: “A delayed response to medical emergencies could lead to severe injury or even death for residents. Staff have been requesting replacement cords for call lights since December 2023 to no avail.” *Id.* The risk to residents and patients from non-functioning call lights cannot be overstated. Residents who are

¹¹ *See, e.g.*, “Falls Prevention Efforts – Use of Call Light,” University of Michigan School of Nursing, available at <https://www.youtube.com/watch?v=uz2o36iA9hc> (last visited Mar. 27, 2024) (instructional video for patient use of “call lights”).

experiencing medical emergencies, particularly in the nighttime, have no way to call staff for help when they need it. The threat of injury and even death is real and ongoing. *Id.*

Other equipment is broken or in disrepair, including wheelchairs and “hoyer lifts”—machines used to help seniors with mobility challenges to get out of bed or to navigate the bathroom.¹² Joseph-Henderson Aff. ¶ 18; H. Walker Aff. ¶ 10 (“I understand that the vendor that repairs and provides wheelchair maintenance is no longer working with the Benjamin due to non-payment.”). This creates dangerous conditions. *Id.* When hoyer lifts are broken, or have not been adequately serviced due to unpaid vendor bills, the risk is that residents will fall out of the medical lifts, creating an imminent risk of severe injury. *Id.* (“It is very important that hoyer lifts are serviced regularly because otherwise they can malfunction when patients are in mid-air and patients can fall to the floor. However, our hoyer lift has not been serviced because the company that does that has not been paid.”).

Nutrition is deteriorating at the Benjamin, where the Director of Nursing reports that a dietician is no longer on-site at the Facility on a regular basis. Colsoul Aff. ¶ 27. Weekly risk assessment meetings—designed “to monitor residents and assess weight loss, wounds, and identify potential medical issues”—have not been held since January 2024. *Id.* ¶ 28. At least 20 patients have experienced significant weight loss from December 2023 to March 2024. *Id.* ¶ 29. Without regular on-site intervention from a professional with expertise in nutrition, the Facility cannot meaningfully address the dietary health needs of elderly and sick people.¹³

¹² “Five Factors to Consider When Selecting a Medical Lift for Your Healthcare Facility,” available at <https://www.youtube.com/watch?v=DxCTLyaboj8> (last visited Mar. 27, 2024) (containing images of “hoyer lifts” and explaining typical uses).

¹³ Medical research confirms that “nursing facilities must prioritize the development and support of systems to provide appropriate and adequate feeding assistance to residents.” Victoria Hammer Castellanos, “Food and Nutrition in Nursing Homes,” *Generations: Journal of the*

Security at the Facility has also experienced alarming gaps. Whereas the Facility once had a full-time security guard, there are now times when the front desk is unattended due to under-staffing. Blicker Aff. ¶ 25. This increases the risk that unauthorized people can enter the building, placing both residents and staff at risk. The danger is real: staff report specific instances where unauthorized visitors have made their way to residents' floors, intimidating and threatening those in the building. *Id.* ¶ 26. This serious security breach compromises the integrity of the Facility and jeopardizes human lives. *Id.* (“This is an enormous risk and a terrible position to put senior citizens in.”). The Facility has irresponsibly compromised the safety of residents, patients, and staff.

Despite serious challenges, the Facility continues to receive significant income and revenue, including for patient care from various sources such as public and private insurance (approximately \$720,000/month). Blicker Aff. ¶ 10. The Facility also receives rental income from a charter school that leases a floor of the building (at least \$75,000/month). *Id.* In 2021, the Facility received \$1,622,636 in Paycheck Protection Program (PPP) support from the federal government.¹⁴ As recently as 2022, as a result of an influx of revenues brought on by pandemic relief funding, the Facility was flush with cash. *Id.* ¶ 28. As a longtime employee who has been working in healthcare finance for three decades testifies: “From my role in the business office, I

American Society on Aging (2004) (last visited Mar. 28, 2024), available at <https://www.jstor.org/stable/26555326>.

¹⁴ On January 23, 2021, through Rockland Trust Company, the Benjamin received a PPP loan of \$1,622,636. The loan was fully forgiven providing the Facility with an infusion of cash. *See* U.S. Government, Pandemic Oversight, available at <https://www.pandemicoversight.gov/ppp-simple-search-landing?pfilters=%5B%7B%22column%22%3A%22Borrower%22%2C%22operand%22%3A%22IN%22%2C%22values%22%3A%5B%22EDGAR+P.+BENJAMIN+HEALTHCARE+CENTER+THE%22%5D%7D%2C+%7B%22column%22%3A%22Borrower+city%22%2C%22operand%22%3A%22IN%22%2C%22values%22%3A%5B%22Boston%22%5D%7D%5D> (last visited Mar. 27, 2024).

believe that mismanagement on the part of the Administrator has played a large role in the current state of the Benjamin—and that the current state of affairs places residents at grave risk.”

Id. ¶ 11.

There are numerous red flags concerning the current management of the Facility—starting with the fact that it has gone from having substantial revenue to not paying staff for weeks at a time, payroll being the most basic function that an Administrator must meet. Other significant concerns about the current Administration include:

- Apparent “loans” made by the Administrator to the Facility with Board-approved re-payment terms of 12% interest (Joseph-Henderson Aff., Ex. A (Petition to the Massachusetts Attorney General), Exs. A, D);
- Investments of the Facility’s funds in questionable cryptocurrency exchanges that have lost significant amounts of money (approximately \$100,000) (*Id.*, Ex. L);
- A Board of Directors, which is charged with providing oversight and governance, that has declined from approximately 12 people in 2014 to only 3-4 people after Mr. Francis’ arrival. Today, the Board of Directors is down to just 3 people (one of whom is Mr. Francis), *see* Sellstrom Aff. ¶ 5, Ex. D (Secretary of the Commonwealth Business Entity Summary) with reports of the removal of Board members who have raised concerns about financial improprieties. Joseph-Henderson Aff., Ex. A (Petition to Attorney General), Ex. C.

- At the same time, a sharp rise in the Administrator’s salary as reported in the Benjamin’s publicly available IRS tax forms: from 2015 to 2021, the Administrator’s reported salary quadrupled from at least \$156,181 in 2015 to at least \$628,592 by 2021. Sellstrom Aff., ¶¶ 6-7, Exs. E, F (IRS Form 990s).
- Enormous past due amounts on utilities totaling hundreds of thousands of dollars. Joseph-Henderson Aff., Ex. A (Petition To Attorney General), Ex. L.

Moreover, the situation is getting worse. As Director of Admissions Joseph-Henderson states, “I am extremely concerned that all of these problems are going to get worse very quickly if something is not done about it.” Joseph-Henderson Aff. ¶ 21. She details how both housekeeping staff and kitchen staff have been given notice just within the last week, raising yet more concerns about the quality and consistency of patient care. *Id.* ¶ 28 (“When housekeeping gets cut, spills and other liquids stay on the floor and that dramatically increases the risk of falls—which can be deadly for seniors.”).

In addition, and contrary to DPH procedures, the Administrator has begun trying to transfer residents without the consent of their guardians.¹⁵ Brinson Aff. ¶ 9. In her affidavit, Velma Brinson, a 20-year veteran guardian and current guardian of several residents of the Facility, describes being informed on March 12, 2024 that three of her residents were being transferred out the following day. *Id.* “It is my understanding that no transfers are supposed to

¹⁵ Courts have found an “increased risk of illness and death from involuntary transfers.” *Att’y Gen. v. M.C.K., Inc.*, 432 Mass. 546, 561 (2000).

be happening at this time, since [DPH] has not formally approved the closure plan—but in any event, they definitely should not be occurring without involvement of the guardian.”

Respondent’s cumulative, ongoing operational issues have created a disruptive environment that adversely impacts resident care and safety.

ARGUMENT

Legal Standard

This Court has broad authority to appoint receivers under the law and as an equitable remedy.¹⁶ Under G.L. c. 111, § 72M, the Superior Court “shall appoint a receiver” if the Court determines that an emergency exists. “Emergency” is defined as “a situation or condition which presents immediate danger of death or serious physical harm to patients....” *Id.* The Court shall appoint a receiver “immediately, on an ex parte basis” if it appears that there are grounds for such appointment “and that immediate appointment is necessary to prevent harm to the residents.” *Id.* § 72N. A receivership’s purpose is to “safeguard the health, safety and continuity of care to residents and to protect them from the adverse health effects and increased risk of death caused by abrupt or unsuitable transfer.” *Id.*; *see also Attorney General v. M.C.K., Inc.*, 432 Mass. 546, 560 (2000) (receivership established protecting Chinese-speaking residents and patients in Union Square Nursing Center). Where an emergency is alleged, “[t]he court shall issue a short order of notice” and set the matter for hearing within five (5) days. G.L. c. 111, § 72N.

¹⁶ As a matter of law, the appointment of a receiver is expressly authorized under G.L. c. 111, § 72M, and Massachusetts courts have also recognized that a receivership is an “equitable remedy.” *See, e.g., Charlette v. Charlette Bros. Foundry*, 59 Mass. App. Ct. 34, 45 (2003).

A petition may be brought by a resident or guardian of a resident, if he or she has petitioned the Attorney General or DPH to seek a receivership, but no such action has been commenced within five (5) days. *Id.* Here, Petitioner Adam Owens is the husband and guardian of a resident at the Facility. *See* Owens Aff. ¶ 1. Mr. Owens' wife came to reside at the Benjamin after suffering a massive stroke. *Id.* ¶ 2. Petitioner Alvin Walker is the son of a resident at the Facility. *See* A. Walker Aff. ¶ 1. Mr. Walker's mother has resided at the Benjamin since 2023. *See id.* ¶ 2. On or about February 27, 2024, Petitioner Owens, Petitioner Walker, and 32 other family members, residents, guardians, and staff of the Facility petitioned the DPH and the Attorney General seeking a receivership. *See* Owens Aff. ¶ 3; Walker Aff. ¶ 3; Joseph-Henderson Aff. ¶ 2 (Ex. A). More than five (5) days have elapsed, and neither DPH nor the Attorney General has commenced action.¹⁷

The Ongoing Emergency at The Facility

As set forth in the Factual Background, the evidence demonstrates that the current dysfunction at the Facility presents an immediate threat of harm to the residents. The facility already lacks vital services and supplies and is in imminent danger of losing others. A receiver is necessary: (a) to protect the immediate health and safety of the Facility's residents and patients by ensuring that they receive the care and support they need; (b) to protect the health and safety of the residents and patients during the coming weeks by taking measures to ensure that the Facility retains adequate vendors and staff; and (c) to ensure the implementation of orderly and safe closure of the Facility and resident transfers over the coming months, if closure is necessary.

¹⁷ As required by statute, *see* G.L. c. 111, § 72N, Petitioners have served a copy of the Petition on DPH.

The appointment of a receiver would address these issues and ensure the health and safety of more than 70 residents and patients of the Facility. Without a receiver, there is an imminent danger to residents at the Facility of serious physical harm and death. Respondent is unable to provide adequate supervision and care to its residents to ensure their health, safety and welfare. Receivership is necessary to prevent harm to residents and patients. The immediate appointment of a receiver is warranted.

The Proposed Receiver

Petitioners have proposed that the Court appoint Attorney Joseph D. Feaster, Jr., as receiver for the Facility. Attorney Feaster has longstanding ties to the community, a wealth of relevant experience, and has deep expertise having previously served for five years as a receiver for the Roxbury Comprehensive Community Health Center. A copy of Attorney Feaster's professional profile is attached as Exhibit G to the Sellstrom Affidavit. Attorney Feaster is ready, willing, and able to accept the appointment if made by the Court. Sellstrom Aff. ¶ 8. Attorney Feaster also understands the "unique characteristics" of the residents and patients. *M.C.K.*, 432 Mass. at 561.

Appointing a receiver will allow the receiver to access payments previously made to the Respondent and, if necessary, to work with insurers such as MassHealth and other payors to receive funds to help ensure that the residents of the Facility receive the care they need and deserve. With the Court's order, the receiver will have authority to access funds in the Facility's bank accounts that contain MassHealth and other Facility funds to pay for care for the residents and patients.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Court appoint Attorney Joseph D. Feaster, Jr. as receiver for the Respondent, pursuant to G.L. c. 111, § 72M.

Dated: March 29, 2024

Respectfully submitted,

/s/ Oren M. Sellstrom _____

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