

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

**LINDA A. WATTERS, COMMISSIONER,
MICHIGAN DEPARTMENT OF LABOR
AND ECONOMIC GROWTH, OFFICE OF
FINANCIAL AND INSURANCE
SERVICES,**

Petitioner,

Case No. 05-1472-CR
Hon. William E. Collette

-vs-

ULTIMED HMO OF MICHIGAN, INC., a
Michigan health maintenance organization,

Respondent.

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**RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR CONVERSION
TO LIQUIDATING RECEIVERSHIP AND DECLARATION OF INSOLVENCY**

Respondent, Ultimed HMO of Michigan, Inc. ("respondent"), by its attorneys, **Tillman & Tillman, P.C.**, says as follows for its Response in Opposition to Petition for Conversion to Liquidating Receivership and Declaration of Insolvency:

1. Respondent continues its efforts to obtain an appropriate cash infusion, which would be used for the purpose of satisfying respondent's *legitimate* liabilities as required by the Michigan Insurance Code of 1956, MCLA 500.1101 et seq. ("Insurance Code").

2. Toward that end, the Michigan Department of Labor & Economic Growth, Office of Financial & Economic Services (“OFIS”) has *overstated* the amount of respondent’s current liabilities. Specifically, on p. 7 of OFIS’s Deputy Rehabilitator’s Report and Recommendation (“OFIS’s Report”), OFIS asserts that “the current estimate of [Ultimed] reported liabilities” is as follows:

Claims Payable	\$3,500,000.00
Trades Payable	143,367.00
CVS PlusCare	1,822,139.00
Rite Aid PlusCare	<u>1,467,645.00</u>
Total Reported Liabilities:	\$6,923,151.00

See OFIS’s Report, attached to its Petition as Exhibit A, at p. 7.

3. However, such amount is significantly overstated.

4. Specifically, in Section IV, ¶ 6 of OFIS’s May 3, 2004 Order of Supervision (“Order of Supervision”), the Michigan Insurance Commissioner provided “[w]ithin 30 days of this Order, Ultimed shall execute plans to move the Wayne County business out of [Ultimed].” (emphasis added). See attached Exhibit B.

5. Fully all of the amounts representing Ultimed’s liability to “CVS PlusCare” and “Rite Aid PlusCare” – totaling \$3,279,784.00 – represents alleged liabilities Ultimed incurred in the Wayne County business. See Affidavit of Mr. Harley K. Brown, attached hereto as Exhibit C.

6. Subsequently, as ordered by the Insurance Commissioner, Ultimed proceeded to transfer the Wayne County business *out* of the HMO. Accordingly, on December 18, 2003, Ultimed and Community Health Plan, Inc. (“CHP”) executed a Memorandum of Understanding, in which Ultimed agreed to assign its Wayne County business to CHP (all of which arose out of the June 1997 Provider Contract between Ultimed and Urban Hospital Care Plus (“UHCP”), and

the October 2003 and April 2004 Adult Benefit Waiver Program (“ABW”) Agreements between Ultimed and Wayne County Patient Care Management System, and in which CHP agreed to assume Ultimed’s liabilities for such Wayne County business.¹ See attached Exhibit D. In addition, on May 14, 2004, Ultimed and CCCP executed an Assignment and Assumption Agreement which effectuated, *inter alia*, the transfer from Ultimed to CCCP of the Wayne County business and Ultimed’s assets and liabilities associated therewith. See attached Exhibit E.

7. Subsequently, on November 3, 2004, in Enforcement Case No. 04-2878, OFIS issued a Notice of Opportunity to Show Compliance (“NOSC”) against Ultimed, in which it alleged, *inter alia*, that Ultimed was in violation of MCLA 500.1341(2) because “[Ultimed] did not obtain the Commissioner’s approval before the effective date of the transfer (of Ultimed’s Wayne County business to CCCP) before . . . January 1, 2003.” See Count II, ¶¶ 5-8, of OFIS’s November 3, 2004 NOSC, attached hereto as Exhibit F.

8. Subsequently, OFIS tacitly approved Ultimed’s transfer of its former Wayne County business to CCCP. Specifically, in February 2005, Ultimed and OFIS entered into a Stipulation in which OFIS’s staff “approve[d] the Stipulation and recommend[ed] that the Commissioner enter [a] Consent Order,” upon which on March 3, 2005 the Insurance Commissioner entered a Consent Order which expressly provided that “Count II of the [NOSC] is dismissed.” See attached Exhibit G.

9. A consent judgment (or order) or settlement agreement is binding on the parties, and is not appealable. Espinoza v Thomas, 189 Mich App 110 (1991).

¹ CHP was the predecessor to Community Coordinated Care Plan, Inc. (“CCCP”), whose Articles of Incorporation were filed March 18, 2004.

10. Because both (a) Ultimed and OFIS intended that their stipulation (concerning OFIS's dismissal of its challenge to Ultimed's transfer of its PlusCare and ABW liabilities to CCCP) would indeed bind them, and (b) their intent is reflected in the Consent Order, the doctrine of collateral estoppel prohibits OFIS from subsequently imputing such liability back to Ultimed. American Mutual Liability Ins Co v Michigan Mutual Liability Co, 64 Mich App 315 (1975).

11. In Michigan, "collateral estoppel" means simply that when an issue of fact has once been determined by a valid and final judgment (or order), that issue cannot again be litigated between the same parties in any future lawsuit. Local 98 v Flamegas Detroit Corp, 52 Mich App 297 (1974).

12. Accordingly, having previously approved Ultimed's transfer to CCCP of its Wayne County business, including the liabilities incurred therein, OFIS is collaterally estopped from *reversing* that approval, and imputing such liability back to Ultimed. American Mutual and Local 98, *supra*.

13. Accordingly, the approximately \$6.9 million of Ultimed's liabilities (as estimated by OFIS) *overstates* Ultimed's legitimate liabilities by \$3,279,784.00 –fully 47% of Ultimed's current reported liabilities (as estimated by OFIS).

14. In other words, OFIS's calculations concerning the amount of Ultimed's current liabilities are overstated by a factor of *almost two (2)*.

15. Accordingly, extrapolating from OFIS's own calculations (corrected as appropriate), the *legitimate* amount of Ultimed's current liabilities is only \$3,643,367.00, as

follows:

Claims Payable	\$3,500,000.00
Trades Payable	<u>143,367.00</u>
Total	\$3,643,367.00

16. Assuming *arguendo* that OFIS's estimate of Ultimed's reported assets of \$927,928.00 is accurate, the *corrected* amount of Ultimed's negative net worth would be reduced to - \$2,715,439.00, calculated as follows:

Ultimed's Estimated Reported Assets	\$ 927,928.00
Ultimed's Estimated Liability	<u>- 3,643,367.00</u>
Negative Net Worth	- \$ 2,715,439.00

17. As previously set forth, Ultimed continues its efforts to obtain an appropriate cash infusion, which would be used for the purpose of satisfying its legitimate liabilities as required by the Insurance Code. The genesis of the deficit between Ultimed's assets and liabilities was an adverse decision rendered by the Wayne County Circuit Court in DMC, et al v Urban Hospital Care Plus, et al, Wayne County Circuit Court Case No. 03-317433-CK, which was affirmed by the Michigan Court of Appeals on December 13, 2005. In that action, the Wayne County Circuit Court rendered summary disposition for the four (4) plaintiff hospital systems and against Ultimed on a disputed genuine issue of material fact, in which the Court entered an order awarding the four (4) hospitals at least \$5 million, which exceeded, by at least \$2,607,610.40, Ultimed's admitted liability thereto of \$2,392,389.60. Obviously, such overpayment had significant consequences for Ultimed's subsequent net worth, including its ability to remain in compliance with the net worth requirements set forth by the Insurance Code.

18. While Ultimed continues its appellate remedies therein, it also believes that the State of Michigan should join Ultimed's efforts to obtain recovery of the overpayment made to the hospitals, which was at least \$2,607,610.40.

19. Furthermore, the *form* of OFIS's proposed Order for Liquidating Receivership and Declaration of Insolvency ("proposed Order") is defective in a number of material respects, and as a result should not be entered as submitted. Specifically, in ¶ 9 of the proposed Order, OFIS suggests that the proposed Order include the following provision:

"9. Pursuant to MCL 500.8106(1) and (2), all officers, managers, directors, trustees, owners, employees, agents, parents, subsidiaries, and affiliates of Ultimed, or any other persons or entities having authority over or in charge of any segment of Ultimed's affairs, including but not limited to *Harley Brown, Advance Medical Enterprises, Inc., Advance Medical Security, Inc., Ulticare, Inc., Community Health Care Providers, Inc. d/b/a United Community Hospital, Community Care Partners, Inc. and Community Coordinated Care Plan, Inc.*, shall fully cooperate with the Liquidator and Special Deputy Liquidators. As used, in this paragraph, 'person' shall include a person who exercises control directly or indirectly over the activities of Ultimed through a holding company or other affiliate. Among other things, full cooperation requires:

- a. Prompt replies to any inquiry by the Liquidator or Special Deputy Liquidators, including a written reply when requested;
- b. Providing the Liquidator and Special Deputy Liquidators with immediate, full, and complete possession, control, access to, and use of all books, accounts, documents, and other records, information, or property of or pertaining to Ultimed in his, her, or its possession, custody, or control;
- c. Providing the Liquidator and Special Deputy Liquidators with full and complete access to and control of all assets, documents, data, computer systems, security systems, buildings, leaseholds, and property of or pertaining to Ultimed; and
- d. Providing the Liquidator and Special Deputy Liquidators with full and complete access to all legal opinions, memoranda, letters, documents, information, correspondence, legal advice, and any other attorney-client privileged and/or attorney work product materials relating to Ultimed or the operation of Ultimed and its business, provided to or from Ultimed's in-house or outside counsel by or to Ultimed, its officers, managers, directors, trustees, owners, employees, agents, parents, subsidiaries, or affiliates.

- e. Not obstructing or interfering with the Liquidator or Special Deputy Liquidators in the conduct of this Liquidation proceeding or any investigation incidental thereto. MCL 500.8106(2).” (emphasis added).

A copy of OFIS’s proposed Order is attached hereto as Exhibit H.

20. OFIS’s proposed ¶ 9 is *similar* to the language of MCLA 500.8106(1) and (2), but does not track the statutory provision *verbatim*. Specifically, there is no basis to include a specific reference to Mr. Harley K. Brown, Advance Medical Enterprises, Inc., Advance Medical Security, Inc., Ulticare, Inc., Community Health Care Providers, Inc. d/b/a United Community Hospital, Community Care Partners, Inc. and/or Community Coordinated Care Plan, Inc., as such specific references are unnecessary, in that MCLA 500.8106(1) as OFIS has made no showing that those seven (7) persons/entities are owners or agents of Ultimed, or “persons with authority over or in charge of any segment of [Ultimed]’s affairs.” In other words, any order entered by this Court should track the statutory language *verbatim*, without any verbose or unnecessary references made therein, in an effort to avoid confusion and to effectuate the statutory intent. For the Court’s ease of reference, a copy of the statutory language of MCLA 500.8106 is attached hereto as Exhibit I.

21. Similarly, ¶ 11 of OFIS’s proposed Order provides as follows:

“11. Pursuant to MCL 500.1805(1)(b), (c), (d), and (k), during the pendency of this Liquidation proceeding and unless the Court, after notice, orders otherwise: (a) Ultimed; (b) *its owner, Harley Brown; and (c) its affiliates, Advance Medical Enterprises, Inc., Advance Medical Security, Inc., Ulticare, Inc., Community Health Care Providers, Inc. d/b/a United Community Hospital, Community Care Partners, Inc. and Community Coordinated Care Plan, Inc.* are enjoined from:

- a. Transferring any property, including but not limited to any data, books, records, information, accounts, moneys, real property, personal property, or other assets, belonging or owed to Ultimed;

- b. Interfering with the Liquidator, Special Deputy Liquidators, or this Liquidation proceeding;
- c. Wasting any assets belonging or owed to Ultimed;
- d. Dissipating or transferring any bank accounts belonging to or containing funds owed to Ultimed; and
- e. Taking any other action that might lessen the value of Ultimed's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of this Liquidation proceeding." (emphasis added).

See attached Exhibit H. For the Court's ease of reference, the language of MCLA 500.8105 is attached hereto as Exhibit J.

22. Although it should go without saying, Ultimed is the *only* entity over whom this Court has jurisdiction, as Ultimed is the *only* entity regulated by the Insurance Code, and placed into rehabilitation, pursuant to this Court's January 25, 2006 Order Placing Ultimed HMO of Michigan, Inc. Into Rehabilitation, Approving the Appointment of Special Deputy Rehabilitator and Providing Injunctive Relief ("Rehabilitation Order"). See attached Exhibit K.

23. Accordingly, this Court has no jurisdiction over any of the following persons (as that term is used in OFIS's proposed Order):

- a. Mr. Harley K. Brown;
- b. Advance Medical Enterprises, Inc.;
- c. Advance Medical Security, Inc.,
- d. Ulticare, Inc.,
- e. Community Health Care Providers, Inc. d/b/a United Community Hospital;
- f. Community Care Partners, Inc.; and
- g. Community Coordinated Care Plan, Inc.

24. Given that none of the above persons/entities are parties to this proceeding, this Court lacks jurisdiction to enjoin them from engaging in any activities otherwise permitted by Michigan law. MCR 2.111(B)(1).

25. A Complaint must reasonably inform the defendant of the nature of the cause of action. Ewing v Heathcott, 348 Mich 250 (1957). Clearly, Ultimed is the only defendant in this action. As a result, it would be a denial of due process to the non-parties referenced in OFIS's proposed Order for this Court to enter a liquidation order concerning them.

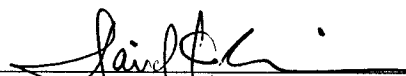
26. Similarly, ¶ 12 of OFIS's proposed Order would require each of the non-party persons/entities to provide the liquidator with notice of their assets, and subsequently tender possession of such assets to the liquidator. See attached Exhibit H, ¶ 12(a) and (b).

27. Rather, any specific reference to the non-party persons/entities in the proposed liquidation Order should be made only after OFIS demonstrates that such persons/entities indeed possess or control Ultimed's assets.

THEREFORE, respondent Ultimed HMO of Michigan, Inc. respectfully requests that this Honorable Court deny the Petition for Conversion to Liquidating Receivership and Declaration of Insolvency.

Respectfully submitted,

Tillman & Tillman, P.C.

By: 

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Attorneys for Respondent

Dated: March 30, 2006

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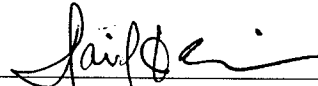
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PROOF OF SERVICE

David K. Tillman certifies that on March 30, 2006, he served a correct copy of Respondent's Response in Opposition to Petition for Conversion to Liquidating Receivership and Declaration of Insolvency upon the following by enclosing a copy of said pleading in an envelope addressed to him and depositing it, postage pre-paid, into a receptacle of the U.S. Postal Service in Detroit, Michigan:

Christopher L. Kerr, Esq.
Assistant Attorney General
Department of Attorney General, Insurance &
Banking Division
P.O. Box 30212
Lansing, MI 48909

Signature

A handwritten signature in black ink, appearing to read "David K. Tillman", written over a horizontal line.

David K. Tillman