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December 27, 2017

Ontario County Industrial Development Agency
Canandaigua, New York

The Bank of New York Mellon, formerly known as The Bank of New York, as Trustee
New York, New York

KeyBank National Association
Syracuse, New York

Moody's Investors Service Inc.
New York, New York

Re: Ontario County Industrial Development Agency
Variable Rate Civic Facility Revenue Refunding Bonds, Series 2003B
(The Frederick Ferris Thompson Hospital Civic Facility)

Ladies and Gentlemen:

We have acted as Bond Counsel to the Ontario County Industrial Development Agency (the "**Issuer**"), in connection with the payment and defeasance of its outstanding \$12,800,000 Variable Rate Civic Facility Revenue Refunding Bonds, Series 2003B (The Frederick Ferris Thompson Hospital Civic Facility) (the "**Bonds**"), issued under an Indenture of Trust, dated as of July 1, 2003 (the "**Indenture**"), by and between the Issuer and The Bank of New York Mellon, formerly known as The Bank of New York, as trustee thereunder (the "**Trustee**").

Unless otherwise defined herein, capitalized terms used herein have the meanings given to them in the Indenture.

THE OPINION REQUESTED

You have requested our opinion as to whether the deposit of, or any payment to holders of the Bonds from, proceeds received from the sale of Refunding Bonds (as hereinafter defined) would constitute an avoidable preference under Section 547 of Title 11 of the United States Code, 11 U.S.C. §101 et seq. (the "**Bankruptcy Code**") in the event that The Frederick Ferris Thompson Hospital (the "**Hospital**"), any member of the Hospital, any Guarantor (as defined in the Indenture) or the Issuer were to become a debtor in a case under the Bankruptcy Code.

EXAMINATION OF AND RELIANCE UPON DOCUMENTS, SUMMARY OF THE TRANSACTION AND ASSUMPTIONS

A. Documents

In delivering this opinion we have examined and relied on the following documents (the "**Documents**"):

(i) the Indenture;

(ii) the "Letter of Instructions to The Bank of New York Mellon As To Refunding and Defeasance of the Ontario County Industrial Development Agency Variable Rate Civic Facility Revenue Refunding Bonds, Series 2003B (The Frederick Ferris Thompson Hospital Civic Facility) dated December 27, 2017 (the "**Letter of Instructions**");

(iii) a Verification Report of The Arbitrage Group, dated December 27, 2017, confirming the accuracy of the arithmetical computations contained in certain tables which establish the adequacy of the moneys and direct non-callable obligations of the United States of America deposited with the Escrow Agent to pay, when due, the redemption price of, and interest due and to become due until the Redemption Date thereof on the Bonds;

(iv) the Certificate of the Trustee, attached as <u>Exhibit B</u> to the Letter of Instructions; and

(v) the Termination of Hospital Lease, Termination of Nursing Home Lease, Termination of Lease, Termination of Sublease, Termination and Discharge and Pledge of Assignment, each dated December 27, 2017.

We have also examined the originals or certified, portable document format, photostatic or facsimile copies of such records and other documents existing on December 27, 2017, as we have deemed relevant and necessary as the basis for the opinion set forth below. In such examination, we have assumed with your permission the legal capacity of all natural persons, the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified portable document format, photostatic or facsimile copies and the authenticity of the originals of such copies.

As to documents and actions of parties other than the Issuer, we have assumed with your permission the due execution and delivery, pursuant to due authorization, of the Documents by each such party thereto, that each such party has the full power, authority and legal right to enter into and perform its obligations under each such Document to which it is a party, that each such Document constitutes the valid and legally binding obligations of each such party, enforceable against such party in accordance with its terms, and that all necessary consents, approvals, authorizations, registrations, declarations and filings (governmental or otherwise) and all other conditions precedent with respect to the legal and valid execution and delivery of, and performance under, the Documents by each party thereto have been made or satisfied or have occurred and are in full force and effect.

As to various questions of fact material to the opinion expressed herein, we have relied upon the representations in the Documents which, with your permission we have assumed without independent verification to be true, and upon certificates of public officers.

B. Assumed Facts

The Issuer was created pursuant to and in accordance with the provisions of Title 1 of Article 18-A of the General Municipal Law of the State of New York, as amended, and Chapter 533 of the Laws of 1971 of the State of New York, as the same may be amended from time to time (collectively, the "**Act**"), and is empowered under the Act to undertake the providing of projects of a character such as the Facility in order to further the Public Purposes of the State. The Issuer previously issued its Variable Rate Civic Facility Revenue Refunding Bonds, Series 2003B (The Frederick Ferris Thompson Hospital Civic Facility), originally issued in the aggregate principal amount of $12,800,000 (the "**Bonds**" as previously defined) pursuant to the terms of a certain Indenture of Trust, dated as of July 1, 2003 (as previously defined, the "**Indenture**").

The Issuer issued the Bonds for the purpose of providing funds for the refinance of certain facilities of the Hospital located in Canandaigua, New York (the "**Facility**"), and the Facility is currently leased by the Hospital to the Issuer pursuant to a Hospital Lease Agreement, dated as of July 1, 2003 (the "**Hospital Lease**"), by and between the Hospital, as lessor, and the Issuer, as lessee. In turn, the Facility is currently subleased by the Issuer to the Hospital pursuant to a Lease Agreement, dated as of July 1, 2003 (the "**Lease Agreement**").

The Issuer assigned to the Trustee, as security for the Bonds, certain of its rights in the Lease Agreement, pursuant to a Pledge and Assignment with Acknowledgment thereof by the Hospital, dated as of July 1, 2003 (the "**Pledge and Assignment**"). As security for the Bonds, the Hospital, F. F. Thompson Continuing Care Center, Inc. (the "**Nursing Home**") and The F.F. Thompson Foundation, Inc. (the "**Foundation**"), executed a Guaranty Agreement, dated as of July 1, 2003 (the "**Guaranty**"), in favor of the Trustee and Issuer. As a condition and as an inducement for the Issuer to issue, execute and deliver the Series 2003B Bonds, the Issuer, the Trustee and the Hospital entered into a certain Environmental Compliance and Indemnification Agreement, dated as of July 1, 2003 (the "**Environmental Compliance and Indemnification Agreement**"), with respect to the Facility. The Bonds are further secured by a gross revenue pledge of the Hospital (the "**Pledge**"), among other things, under the Indenture.

On the date hereof, the Hospital exercised its right under Section 5.5 of the Lease Agreement and Section 2.05(a)(i) of the Indenture to prepay an amount sufficient to all of the outstanding Bonds in the amount of $9,000,000. Pursuant to the terms of the Indenture and the Lease Agreement, the Hospital has notified the Issuer and the Trustee, among others, that it has elected to terminate the Lease Agreement and related documents and defease the Bonds as of the date hereof. Accordingly, the Issuer sent the Letter of Instructions to the Trustee instructing the Trustee to comply with the requirements of Section 10.01 of the Indenture with respect to the payment of the Bonds. Pursuant to Article X of the Indenture, the Issuer has caused or will cause the Hospital to deposit with the Trustee sufficient moneys (the "**Deposit**") which, together with other moneys, if any, which may have already been deposited with the Trustee, shall be sufficient to pay, when due, the principal of and interest on the Bonds. All charges and expenses of the Issuer, the Trustee and all other appropriate Persons, and all other amounts required to be paid under the Indenture and the Lease Agreement with respect to the Bonds, have been paid in full or have had payment provided for, and all amounts remaining in any fund established pursuant to Section 5.01 of the Indenture or otherwise held by the Trustee for the account of the Issuer and the Hospital, with respect to the Bonds, under the Indenture or the Lease Agreement, have been paid to the Issuer, the Trustee, the Hospital, and/or other appropriate Persons, as the case may be, pursuant to the terms of the Indenture or the Lease Agreement.

In connection with the above-described prepayment election by the Hospital, the Ontario County Local Development Corporation (the "**LDC**"), at the request of the Hospital, has authorized the issuance of its Revenue Refunding Bonds, Series 2017 (The Frederick Ferris Thompson Hospital Project) (hereinafter referred to as the **"Refunding Bonds")** for the purpose of making a loan to the Hospital to, among other things (i) pay or provide for the payment of the outstanding principal amount of the Bonds and (ii) pay costs of issuance of the Refunding Bonds. The proceeds realized from the sale of the Refunding Bonds (the "**Proceeds**" or the "**Escrowed Assets**"), have been delivered (the "**Transfer**") to the Trustee, to be held in trust (the "**Trust Fund**") for the purpose of paying when due and in full the redemption amount of the Bonds at their respective maturity dates (the **"Redemption Amount"**), all as provided in the Letter of Instructions and otherwise in accordance with Article X of the Indenture ("the **Redemption**").

The Letter of Instructions is irrevocable. As provided in the Letter of Instructions, the Hospital is not entitled to realize any surplus Escrowed Assets that might exist in the Trust Fund, if any, after the Escrowed Assets have been used to pay when due and in full the Redemption Amount of the Bonds, as such funds must be paid over to the trustee in connection with the Refunding Bonds.

This opinion letter relied upon the accuracy of the following additional assumptions, each of which has been, with your permission, assumed by us to be true:

1. None of the Issuer, the LDC or the Hospital has, and will not have, dominion, possession or control of the Proceeds, the Trust Fund or the Escrowed Assets.

2. None of the Issuer, the LDC or the Hospital has a right to demand that the Trustee turn over to it any of the Escrowed Assets.

3. The only right that either Hospital or the Issuer has, in the Escrowed Assets or the Trust Fund, is for the Trustee to transfer the balance of the Escrowed Assets remaining on deposit with the Trustee in the Trust Fund, if any, after the payment in full of the Redemption Amount of the Bonds and all other requirements of the Letter of Instructions have been satisfied, to the Trustee under the Indenture.

4. At the time of the Transfer, neither the Hospital nor the Issuer was insolvent as that term is defined in Section 101(32) of the Bankruptcy Code.

5. The Escrowed Assets were not delivered to the Trustee with the actual intent to hinder, delay, or defraud any entity to which the Hospital or the Issuer was or will become indebted.

6. Neither the Trustee nor any Bondholder is an insider of the Hospital or the Issuer as the term "insider" is defined in §101(31) of the Bankruptcy Code;

7. The sale of the Refunding Bonds was undertaken solely for the purpose of allowing the Issuer, the LDC and the Hospital to make the Transfer and, thereby, to pay in full at their respective maturity dates the Redemption Amount of the Bonds.

8. All written instructions, if any, which the Hospital is required to give to the Issuer and/or the Trustee pursuant to the Indenture or the Letter of Instructions in order to establish the trust containing the Escrowed Assets have been given.

9. Immediately prior to the Transfer, the fair and realizable value of the collateral securing the Bonds exceeded the amount of the obligations remaining to be paid on the Bonds.

10. All of the Escrowed Assets in the Trust Fund are within at least one of the following categories: (1) Proceeds, (2) funds that have been in the possession of the Trustee for more than 90 days, or (3) funds that are subject to the Pledge, and thus are part of the collateral subject to duly perfected and unavoidable security interests and liens created by the Indenture.

11. The liens and security interests of the Trustee in the collateral securing the Bonds were, at the time of the Transfer, properly perfected in accordance with applicable law and had been so perfected at least 90 days prior to the Transfer.

ANALYSIS

A. Section 550 of the Bankruptcy Code

Section 550 of the Bankruptcy Code authorizes trustees and debtors-in-possession to recover, inter alia, avoidable preferential payments and other avoidable transfers. The Bankruptcy Code maintains a separation of the concepts of (a) avoiding a transfer (under Section 547 and the other avoidance determination provisions in the Bankruptcy Code) and

(b) recovering the property in question. Congress did this by placing the provisions for actual recovery (including specific limitations thereon) from the initial transferee and subsequent transferees in a separate section, Section 550.

B. Section 547 of the Bankruptcy Code

The preference avoidance provisions of Federal bankruptcy law are contained in section 547 of the Bankruptcy Code (11 U.S.C. § 547). Section 547 of the Bankruptcy Code provides, in relevant part, that five elements must be met in order to avoid a transfer as preferential:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
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> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
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> (3) made while the debtor was insolvent;
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> (4) made--
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> (A) on or within 90 days before the date of the filing of the petition; or
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> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
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> (5) that enables such creditor to receive more than such creditor would receive if-
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> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
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> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

As we have assumed, with your permission, that immediately prior to the Transfer, (i) the fair and realizable value of the collateral securing the Bonds exceeded the amount of the obligations remaining to be paid on the Bonds, and (ii) it would not be possible for someone to prove that the Transfer enabled the holders of the Bonds to receive more than such holders would receive (a) if the Hospital or Issuer were hypothetically a debtor in a case under chapter 7 of the Bankruptcy Code, (b) the Transfer had not been made and (c) the holders of the Bonds received payment of the obligations owed to them to the extend provided by the Bankruptcy Code. This is because the Bankruptcy Code permits a secured creditor with a properly perfected and unavoidable lien and security interest in collateral to realize the value of that collateral, which is deemed not to be a preference under Section 547. While the realization of that value may be delayed by the application of the automatic stay found in Section 362 of the Bankruptcy Code, the secured creditor is also entitled to have its interest in the collateral adequately protected. *See* 11 U.S.C. §§362(d)(1) and (d). Accordingly, we believe that the Transfer cannot constitute a recoverable preferential payment under the plain language of 11 U.S.C. § 547(b)(5).

Furthermore, we have assumed, again with your permission, that at the time of the Transfer (1) neither the Hospital nor the Issuer was insolvent, (2) neither the Hospital nor the Issuer was rendered insolvent by the Transfer, (3) the Transfer did not leave either the Hospital or the Issuer with an unreasonably small capital, and (4) at the time of the Transfer neither Hospital nor the Issuer intended to incur or believed that it would incur, debts that would be beyond its ability to pay as such debts mature. All of this is in accordance with the definition of the word 'insolvent' in §101(32) of the Bankruptcy Code. Accordingly, we believe that the Transfer cannot be a recoverable preferential payment under the plain language of 11 U.S.C. § 547(b)(3).

C. Chapter 9 of the Bankruptcy Code

Chapter 9 of the Bankruptcy Code deals with the adjustment of debts of a municipality.[1] While the Hospital is not a municipality, Chapter 9 is relevant to this analysis because the Bonds were issued by the Issuer, which would likely be regarded as a municipality under Chapter 9. Given that the Bonds were issued by a municipality, Section

[1] There are certain very limited circumstances wherein a municipality, as a governmental unit, may become the subject of a Chapter 7 or Chapter 11 case, as set forth with respect to a "governmental unit" in section 101(41) of the Bankruptcy Code, but those circumstances are not relevant to this opinion.

926(b) of the Bankruptcy Code informs the Section 547 preference analysis.[2] Section 926(b) provides in relevant part that:

> (b) A transfer of property of the debtor to or for the benefit of any holder of a bond or note, on account of such bond or note, may not be avoided under section 547 of this title.

In a Chapter 9 proceeding of the Issuer, the "plain meaning" of § 926(b) would appear to foreclose avoidance of the Transfer on the basis that the Transfer is a preference. The legislative history to Section 926(b) makes it clear that the intent was to make the preference provisions of Section 547 inapplicable to bond payments by issuers who are municipalities. H.R. No. 100-1011, 100th Cong., 2nd Sess. at 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 4121. Moreover, were the Hospital to file a petition under the Bankruptcy Code, any claim that the Transfer is a preference should likewise fail, because in fact the Bonds that are the subject of the Redemption are of the Issuer, and were not a bond issuance directly by the Hospital.

D. The Ear-marking Doctrine

Assuming *arguendo* that a bankruptcy court were to find Section 547 applicable, based on the structure of the portion of the Redemption funded by the Proceeds and other Escrowed Assets, the "earmarking" doctrine would appear to provide an absolute defense to a claim that the Transfer, to the extent funded by the Proceeds, was a preference.

The doctrine of earmarking, which is judicially created, is one of the exceptions to the general rule that preferential transfers can be avoided by the bankruptcy trustee or debtor-in-possession. In such situations, the loan funds are said to be "earmarked" and the payment is held not to constitute a voidable preference. *McCuskey v. Nat'l Bank of Waterloo (In re Bohlen Enters. Ltd.)*, 859 F.2d 561, 565 (8th Cir. 1988). The earmarking doctrine has been specifically endorsed by the United States Court of Appeals for the Second Circuit in *Cadle Co. v. Mangan (In re Flanagan)*, 503 F 3d. 171 (2nd Cir. 2007).

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[2] No cases have, as of this date, been published discussing the applicability of Section 926(b).

Early applications of the earmarking doctrine addressed transactions in which the debtor's obligation was secured by a guarantor. *See id.* Where the guarantor paid the creditor on behalf of a debtor, the courts rejected the proposition that the payment could be avoided by the trustee. *Id.* The rationale for such an outcome was that the property transferred belonged to the guarantor and thus the transfer of that property in no way diminished the debtor's estate.[3]

In current application, the earmarking doctrine has been extended beyond the guarantor context. Many courts, including a substantial number of Federal circuit courts of appeal, have held that the earmarking doctrine applies whenever a third party provides funds to the debtor for the express purpose of enabling the debtor to pay a specified creditor, that is, substituting a new creditor for an old creditor.[4]

The requirements for application of the earmarking doctrine are as follows:

1. a new lender and a debtor agree to use loaned funds to pay a specified antecedent debt;
2. the agreement's terms are actually performed;
3. the debtor lacked dispositive control over the transferred funds; and

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[3] *See Nat'l Bank of Newport, N.Y. v. Nat'l Herkimer County Bank*, 225 U.S. 178, 185, 32 S. Ct. 633, 56 L. Ed. 1042 (1912) ("[n]either directly nor indirectly was this payment to the bank made by the [debtor], and the property of [the debtor] was not thereby depleted"). It appears that courts were also mindful that the opposite result would have the inequitable effect of forcing the guarantor to pay the same obligation twice. See *Bohlen*, 859 F.2d at 565.

[4] *See, e.g., Cadle Co. v. Mangan (In re Flanagan),* 503 F.3d 171 (2d Cir. 2007); *Adams v. Anderson (In re Superior Stamp & Coin Co.),* 223 F.3d 1004, 1008 (9th Cir. 2000); *Buckley v. Jeld-Wen, Inc. (In re Interior Wood Prods. Co.)*, 986 F.2d 228, 231 (8th Cir. 1993); In re Smith, 966 F.2d 1527, 1533 (7th Cir. 1992); *Mandross v. Peoples Banking Co. (In re Hartley)*, 825 F.2d 1067, 1070 (6th Cir. 1987); *Coral Petrol., Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1356 (5th Cir. 1986). *But see Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 646-49 (B.A.P. 10th Cir. 2000) (stating that the earmarking doctrine should not be extended beyond guarantor situations); Bohlen, 859 F.2d at 566 (expressing doubt as to whether earmarking doctrine should be extended beyond guarantor situations but ultimately adopting test that allows for application of earmarking doctrine outside that limited context).

4. the transaction viewed as a whole does not diminish the debtor's estate.[5]

The earmarking doctrine applies not only in cases where the new lender pays the old lender with the advanced funds, but also in cases where the debtor receives the advanced funds for a short period of time and then uses them to repay the antecedent debt.[6]

The earmarking doctrine is widely accepted as a valid, absolute defense against a preference claim, primarily because the assets from the third party were never in the control of the debtor and therefore payment of these assets to a creditor in no way diminishes the debtor's estate – it is thus not a preference.[7]

Control is "a key inquiry."[8] Control for preference purposes means "the legal right to use the funds."[9] If a third party lends money to a debtor, and the parties agree that the loan is for the purpose of paying a specific creditor, these funds are "earmarked," i.e., they do not become property of the debtor, and therefore cannot be recovered as a preference.[10]

Form does not trump substance. There is substantial and persuasive case law to the effect that, so long as there is an agreement that the funds will only be used to pay the

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[5] *Superior Stamp*, 223 F.3d at 1008; *In re Heitkamp*, 137 F.3d 1087, 1088-89 (8th Cir. 1998); *Coral Petroleum v. Banque Paribas-London*, 797 F.3d at 1356; *Smyth v. Kaufman*, 114 F.2d 40, 42 (2d Cir. 1940); *McLean Industries, Inc. v. United States*, 162 B.R. 410 (S.D.N.Y. 1993)(*citing Bohlen*, 859 F.2d at 564-67).

[6] *See In re Montgomery*, 983 F.2d 1389, 1395 (6th Cir. 1993); *In re Smith*, 966 F.2d 1527, 1534; *Neponset River*, 231 B.R. at 835 (finding earmarking doctrine not to apply because debtor held funds too long and exercised choice in determining which antecedent debts to pay).

[7] *Coral Petroleum*, 797 F.3d at 1356 (citing cases).

[8] *Superior Stamp*, 223 F.3d at 1008-09.

[9] *Schick v. Hershowitz*, 234 B.R. 337, 343 (S.D.N.Y. 1999)(*citing In re Maple Mortgage, Inc.*, 81 F.3d 592, 596 (5th Cir. 1996)); *In re Newpower*, 229 B.R. 691, 701 (W.D. Mich. 1999) ("control in other words, requires not only the physical means of exercising control, but also the authority to do so").

[10] *Schick*, 234 B.R. at 343 (*citing In re Kelton Motors, Inc.*, 97 F.3d 22, 25 (2d Cir. 1996)).

specific creditor, the debtor does not gain "control" even if the funds are deposited with the debtor for ultimate payment to the creditor, as opposed to being directly paid to the creditor.[11] Likewise, it does not matter that the debtor initiated the request for the loan or identified the creditor to be paid with the loan – that does not constitute control.[12]

The replacement of one creditor for another (the second requirement) without reduction in the estate (the fourth requirement) supports the foundational notion of the doctrine – that where funds are earmarked, no creditor has been preferred.[13] That the transaction did "not diminish the debtor's estate" means that, in the process of replacing one creditor for another, the debtor's assets and net obligations must remain the same in order to prevent diminution of the estate. In other words, as here, both loans must be of the same type – the new creditor cannot be a secured creditor if the original creditor was unsecured.[14]

Here, none of the Hospital, the Issuer or the LDC has control over the portion of the Proceeds transferred to the Trustee and placed in the Trust Fund for purposes of effecting the Redemption. We have assumed, with your permission, that the parties will perform their

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[11] *Superior Stamp*, 223 F.3d at 1008-09 ("the proper inquiry is not whether the funds entered the debtor's account, but whether the debtor had the right to disburse the funds to whomever it wished, or whether their disbursement was limited to a particular old creditor or creditors under the agreement with the new creditor"); *Bohlen*, 859 F.2d at 565 (where guarantor "entrusted the new funds to the debtor with instructions to use them to pay the debtor's obligation to the old creditor, the courts quite logically reached the same result")(citing cases); *Coral Petroleum*, 797 F.2d at 1361 ("the earmarking doctrine does not explicitly distinguish between a situation where a third party pays money to a debtor to pay a creditor from a situation where the third party directly pays the creditor").

[12] *Superior Stamp*, 223 F.3d at 1010 ("it is irrelevant whether the debtor or the lender initiates discussions concerning a loan or proposes a particular creditor as the recipient of the funds, so long as the funds are advanced on the condition that they be used to pay that specific creditor").

[13] *McLean*, 162 B.R. at 421 ("the earmark doctrine generally requires that a new creditor replace the original creditor in order to prevent the estate's assets from diminishing")(citing *In re Trinity Plastics*, 138 B.R. 203, 208 (Bankr. S.D. Ohio 1992)).

[14] "In such situations, an unsecured creditor is replaced with a secured creditor, thus diminishing the amount available in bankruptcy for creditors of the same class." *Superior Stamp*, 223 F.3d at 1008-09, n.3.; *see also International Ventures, Inc. v. Block Properties VII (In re Int'l Ventures, Inc.)*, 214 B.R. 590, 595-96 (Bankr. E.D. Ark. 1997).

obligations under the Documents in accordance with their terms and, accordingly, the Transfer will permit the Proceeds to be used solely for the purpose of satisfying the Bonds. In other words, the Proceeds have been earmarked for that purpose. With regard to the issue of diminution of the estate, there will be no diminution in the bankruptcy estate of either the Hospital or the Issuer, as the value of the collateral securing the Bonds at the time of the Transfer exceeded the amount of the obligations owed on the Bonds, i.e., the Bonds were oversecured at the time of the Transfer.

OPINION

Based upon our examination of such questions of law and statutes as we have considered necessary or appropriate, and subject to the assumptions, qualifications, limitations and exceptions set forth herein, we are of the opinion that application of Proceeds received from the sale of the Refunding Bonds to the Redemption of the Bonds would not constitute an avoidable preference under Section 547 of the Bankruptcy Code the Hospital were to become a debtor in a case under the Bankruptcy Code.

QUALIFICATIONS

The opinion set forth above is limited to the matters expressly set forth herein, and no opinion is implied or may be inferred beyond the matters expressly so stated. The opinion expressed above is based upon the laws and factual circumstances existing on December 27, 2017, and we do not, and expressly disclaim, any obligation to advise you of any changes in applicable law or facts subsequent to December 27, 2017, that may affect such opinion, or to advise you of any change in the law or facts or of any newly discovered information brought to our attention. The opinion expressed above is expressed subject to there being no material change in the law after the date of this opinion letter, and there being no additional facts of which we are not aware which would materially affect the validity of the assumptions and conclusions upon which this opinion is based.

We have assumed throughout this opinion letter (i) that there has been no fraud in connection with the transactions described herein, (ii) the accuracy of the representations and warranties contained in the Documents as to factual matters, and (iii) the accuracy of the assumptions we have made with your permission and as set forth above. Our opinion expressed herein is based upon the assumptions and facts described herein being correct in all material respects at all relevant times, and with the caveat that a court of equity acting within its equitable powers will have discretion to reach any result it deems proper when considering which assets and liabilities are those of a debtor's bankruptcy estate. This opinion letter speaks only as to the ultimate outcome of issues and does not deal with the availability of temporary restraining orders, preliminary injunctions or similar orders pending determination on the merits. Our opinion above assumes that the court's decision is a final order based upon a full evidentiary hearing, and not an interim order. It also assumes that the Trustee and the holders of the Bonds make reasonable efforts to oppose the avoidance and recovery of the Transfer of Proceeds as a preference.

We wish to emphasize that judicial decisions regarding the impact of the Bankruptcy Code on a particular transaction or set of facts, as is the case with the opinion set forth above, are usually made on the basis of an analysis of the facts and circumstances of the particular case. A court's decision regarding the matter upon which we opine herein is based upon the court's own analysis and interpretation of the factual evidence before it, notwithstanding our analysis and conclusions, as well as applicable legal principles and competing equitable considerations. Consequently, our opinion set forth above is our opinion, reached by a reasoned analysis of analogous case law, as to the proper result that would be reached by a court applying the existing legal rules to the facts as properly found (and consistent with the assumptions set forth herein) after appropriate briefing and argument in this difficult area of the law. The opinion expressed herein is our opinion only and is not a guarantee or prediction with respect to any matter stated herein. In addition, we caution that legal opinions on bankruptcy law matters unavoidably have inherent limitations that generally do not exist in respect of other legal issues on which opinions to third parties are typically given. These inherent limitations exist primarily because of the pervasive equity powers of bankruptcy courts, the overriding goal of reorganization to which other legal rights and policies may be subordinated (even though such a subordination would appear to be inconsistent with established legal claims and rights), the potential relevance to the exercise of judicial discretion of future-arising facts and circumstances, and the nature of the bankruptcy process.

Additionally, the opinion expressed above is limited to present existing Federal bankruptcy law under the Bankruptcy Code and to present existing judicial interpretation thereof; a court could elect to depart from same in favor of an altogether different analysis to reach a divergent result. Any Bankruptcy Code analysis must recognize that the power of a court of competent jurisdiction with respect to a Bankruptcy Code case, proceeding or matter is extremely broad. It is simply not possible to predict with certainty the outcome of any future judicial proceeding in which a court is asked to exercise its discretionary equitable powers. As courts of equity, bankruptcy courts have been known to use their equitable powers to promote the goal of reorganization, even at the cost of the enforcement of absolute legal rights. Inherent in these equity powers is broad discretion that may be exercised on the basis of all facts and circumstances presented to the bankruptcy court. Therefore, the conclusions reached herein are subject to and must be considered in light of these broad statutory and equitable powers of the relevant court over a debtor's property, estate, creditors and equity interest holders. The recipient(s) of this opinion letter should take these limitations into account in analyzing the bankruptcy risks associated with this transaction and the extent to which this opinion letter should be relied upon.

Consistent with our statement herein that we express no opinion as to any issue other than the issues specifically addressed herein, and that this opinion letter is further limited in all respects to the facts assumed, we express no opinion as to (i) the availability or effect of a preliminary injunction, temporary restraining order or other such temporary relief affording delay pending a determination on the merits, or (ii) whether the delivery of the Escrowed Assets to the Trustee, or the subsequent use of the Escrowed Assets to pay the Redemption Amount of the Bonds when due at their respective maturity dates, can be avoided, collapsed or recharacterized under any one or more of sections 544, 545, 548, 549 or 550 of the Bankruptcy Code, any other avoidable transfer or turnover law, similar non–bankruptcy law or any other law or theory not expressly addressed herein.

We express no opinion concerning the applicability of provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq., under which affiliated entities may become liable for unfunded pension liabilities of entities under common control with them or the applicability of certain provisions of tax laws or other statutory provisions under which affiliated persons may be made liable for debts of other affiliated persons.

We are members of the Bar of the State of New York. We do not express any opinion with respect to any laws of any jurisdiction other than the Federal bankruptcy laws of the United States of America. Except as otherwise specifically stated herein, we have not made any independent review or investigation of orders, judgments, rules or other regulations or decrees which may be pending or threatened against the Hospital, or any affiliate of the Hospital. Our opinion above is based upon the relevant statutory and common law in effect on the date hereof, and this opinion letter is given as of the date hereof. Thus, all of the foregoing analysis and its conclusions are premised upon, and limited to, the Documents, and the law in effect as of the dates discussed herein. This letter is to be interpreted in accordance with the Special Report by The Tribar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 Bus. Law. 717 (1991).

This opinion letter is limited to the subject matter and conclusions set forth above and has been furnished to you pursuant to your request solely for your use in connection with the transactions effectuated pursuant to the Documents and on the condition that the opinion expressed above may not be (i) published or otherwise communicated by you to any other party, person or entity without our specific prior written consent in each instance, (ii) relied upon by you for any other purpose, or (iii) used in connection with any further or subsequent transaction. No opinion shall be implied or inferred beyond the matters expressly stated herein.

Very truly yours,

NIXON PEABODY LLP

Nixon Peabody LLP