



operate the Hospital issued by the Indiana State Department of Health (“ISDH”) expires **in two days**, on Saturday, December 31, 2022. It will be unlawful – not to mention dangerous to the public – for Franciscan to continue Hospital operations without a license.

Franciscan filed its Notice of Appeal from the Preliminary Injunction on December 28, 2022. That same day, Franciscan also filed a Motion for Stay in the trial court, asking that further proceedings and the Preliminary Injunction be stayed pending this appeal. At approximately 3:00 p.m. on December 29, 2022, the trial court denied Franciscan’s Motion for Stay, leaving Franciscan no choice but to seek this Court’s intervention on an emergency, expedited basis. Given the imminent expiration of its Hospital license and inability to operate, which is set to occur over the long holiday weekend when this Court is closed, Franciscan respectfully requests an emergency, expedited ruling on its Motion for Stay.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. The Very Public Winding Down of Franciscan’s Hospital Operations over the Past 21 Months.**

This appeal arises out of the City of Hammond’s (the “City” or “Hammond”) eleventh hour attempt to unilaterally force Franciscan to keep the Hospital and, in particular, its emergency department, operational and open to the public. Hospitals do not open and close overnight, and the events leading up to Franciscan’s decision to close the Hospital have been a long time coming. Over the course of many months beginning in March of 2021, Franciscan tried to significantly downsize the Hospital in order to keep its emergency department open.

Throughout that process, Franciscan kept the public informed of its plans and progress through press releases. Franciscan was under no legal obligation to keep City officials specifically apprised of its plans. Nor does the City – or any municipality for that matter – have any legal authority to dictate whether a privately-owned and operated hospital stays open.

Unfortunately, the option of keeping the Hospital open proved unsustainable. First, like nearly all hospitals around the country, Franciscan has experienced a substantial shortage of qualified hospital employees in nearly every area of the Hospital. Second, 90% of the patients presenting to the Hospital emergency department did not have life-threatening conditions in need of sophisticated emergency medical treatment. Yet state and federal laws, licensing requirements, and accreditation standards require Franciscan to maintain a broad range of sophisticated – and costly – services in order to operate an emergency department. Third, in-patient admissions at the Hospital had been dropping substantially over time, to the point where it is admitting an average of less than two patients per day and zero patients per day currently. An in-patient census of less than two per day fails to meet the definition of a hospital for state licensing requirements, and fails to meet one of the conditions of participation under Medicare. Accordingly, Franciscan decided to close the Hospital.

In light of Franciscan's decision to close the Hospital, it notified numerous service providers of its intention to terminate or alter their contracts relative to the Hospital. As of December 31, 2022, Franciscan will no longer have contracts in place

to receive services at the Hospital from providers such as American Physician Group (Emergency Medicine Physicians); Superior Ambulance (inter-hospital transfer team); American Heritage (security); its dialysis provider; and Lakeshore Landscaping (ice and snow removal). These are just a sampling of the various service providers necessary to run a hospital safely.

As of December 31, 2022, Franciscan will also be physically unable to provide on-site laboratory and pharmacy services, radiology services, respiratory care services, surgery services, wound care services, dietary services, or any of the necessary support services, including environmental and sanitization services, security, and patient advocacy. If a hospital provides emergency services, it must comply with the emergency services requirements established by the ISDH, Centers for Medicare and Medicaid Services (“CMS”), and its accrediting body, in this case, the Accreditation Commission for Health Care (“ACHC”). CMS and ACHC require emergency services to be integrated with other departments of the hospital, so that the hospital can immediately make available the full extent of its patient care resources to assess and render appropriate care for an emergency patient.<sup>1</sup> Examples of other departments that emergency services must be integrated with include laboratory and diagnostic services. A hospital must provide on-site emergency laboratory services 24/7, which include collection, processing, and provision of results

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<sup>1</sup> See ACHC 20.00.02. See also CMS State Operations Manual, Appendix A: Survey Protocol, Regulations and Interpretive Guidelines for Hospitals, A-1103, available at: [https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap\\_a\\_hospitals.pdf](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf).

to meet a patient's emergency laboratory needs.<sup>2</sup> The ISDH similarly requires the hospital to have laboratory and x-ray services "available at all times."<sup>3</sup> The hospital must ensure that specific radiology personnel requirements are met and that a radiologic technologist is on duty, or available "on call" at all times.<sup>4</sup>

Franciscan can only operate a hospital under a license issued by the ISDH.<sup>5</sup> Franciscan's license for the Hospital expires **in two days**, on Saturday, December 31, 2022. Franciscan is unable to truthfully make the representations necessary to renew its license, including the availability of the services described above and its expectation that it will average at least three in-patients per day. It will be unlawful for Franciscan to continue Hospital operations without a license.

## **II. The City's Eleventh Hour Lawsuit Culminating in the Trial Court's Erroneous Preliminary Injunction.**

The City claims that it has known of Franciscan's plans to close the Hospital since November 3, 2022. *See* Verified Complaint for Temporary, Preliminary, and Permanent Injunction ("Complaint"), ¶ 14. Nonetheless, the City did nothing for six weeks until December 19, 2022, when it filed its Verified "Emergency" Motion for Temporary Restraining Order; Attorney's Temporary Restraining Order Certification; Verified Motion for Preliminary and Permanent Injunction; and, Verified Complaint for Temporary, Preliminary, and Permanent Injunction. The trial

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<sup>2</sup> *See* ACHC 22.00.02. *See also* CMS State Operations Manual, Appendix A: Survey Protocol, Regulations and Interpretive Guidelines for Hospitals, A-0583; and 140 IAC 15-1.5-(a)(1).

<sup>3</sup> *See* 410 IAC 15-1.5-9(a).

<sup>4</sup> *See* ACHC 19.00.10 and 19.00.12.

<sup>5</sup> *See* Ind. Code § 16-21-2-10.

court immediately set the matter for a hearing to take place at 2:30 p.m. CST the next day, December 20, 2022.

Franciscan filed its Verified Response to the City's Request for Preliminary Injunction on December 20, 2022, prior to the hearing set for later that afternoon. At the 2:30 p.m. CST hearing on December 20, 2022, Franciscan objected to an evidentiary hearing on less than 24 hours' notice to Franciscan. The trial court continued the hearing to 9:00 a.m. CST the next morning, December 21, 2022.

The trial court held an evidentiary hearing on the City's Request for Preliminary Injunction on December 21, 2022, and ordered the parties to tender proposed findings of fact and conclusions of law by 9:00 p.m. CST that evening. On December 22, 2022, the trial court entered a Preliminary Injunction<sup>6</sup> that

- “[E]njoins [Franciscan] from closing the emergency department presently operating in downtown Hammond.”
- Requires “[t]he emergency department . . . to remain open and [Franciscan] . . . to take all steps necessary to ensure that the facility in downtown Hammond remains legally licensed and operational.”
- Prohibits Franciscan “from taking steps to diminish or in any way reduce the health care currently provided to patients at the downtown Hammond facility for a period of nine (9) months.”
- Instructs Franciscan “to immediately undertake all necessary efforts to obtain an emergency medical provider for the citizens of Hammond.”

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<sup>6</sup> A true and correct copy of the Preliminary Injunction is attached hereto as Exhibit A. A true and correct copy of the City's Complaint, which was verified and encompassed the City's Request for Preliminary Injunction is attached hereto as Exhibit B. A true and correct copy of Franciscan's Verified Response to the City's Request for Preliminary Injunction is attached hereto as Exhibit C.

### **III. Franciscan’s Appeal and Efforts to Secure a Stay Pending Appeal.**

Franciscan did not receive formal electronic notice of the Preliminary Injunction from the trial court until December 23, 2022. However, Franciscan’s counsel was regularly checking the docket and learned on the afternoon of December 22, 2022, that the trial court had entered its Preliminary Injunction. Franciscan filed its Notice of Appeal from the Preliminary Injunction on December 28, 2022. This was two business days after entry of the Preliminary Injunction, as Indiana state courts, including the trial court and this Court, were closed on December 23 and December 26, 2022.

On December 28, 2022, at 1:56 p.m. CST, Franciscan also filed a Motion for Stay in the trial court, asking that further proceedings and the Preliminary Injunction be stayed pending this appeal. Franciscan expressed to the trial court that “a ruling on [its] Motion for Stay must be imminent, and if not forthcoming by December 29, 2022, Franciscan will have no choice but to seek emergency relief from the appellate court.” *See* Motion for Stay, p. 2. On December 29, 2022, the trial court denied Franciscan’s Motion for Stay, <sup>7</sup> leaving Franciscan no choice but to seek this Court’s intervention on an emergency, expedited basis.

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<sup>7</sup> A true and correct copy of Franciscan’s Motion for Stay in the trial court is attached hereto as Exhibit D. Franciscan is permitted to file a Motion for Stay in this Court, since the trial court “has failed to rule on the motion within a reasonable time in light of the circumstances and relief requested[.]” *See* Ind. App. R. 39(C)(2). A true and correct copy of the City’s Revised Response to the Motion for Stay in the trial court is attached hereto as Exhibit E. A true and correct copy of the Order Denying Franciscan’s Motion for Stay is attached hereto as Exhibit F.

**IV. Circumstances Justifying Stay Before the City is Heard on the Motion for Stay.**

As set forth above, Franciscan's Hospital license expires **in two days**, on Saturday, December 31, 2022. It will be unlawful – not to mention dangerous to the public – for Franciscan to continue Hospital operations without a license, which is what the Preliminary Injunction requires. It is physically and legally impossible for Franciscan to comply with the Preliminary Injunction's mandate to keep its Hospital emergency department open for another nine months – long after its Hospital license has expired, and long after its contracts with the service providers necessary to run the Hospital safely have ended.

Given the imminent expiration of Franciscan's Hospital license and Franciscan's inability to operate an emergency department at the Hospital without violating state and federal laws, licensing requirements, and accreditation standards – all of which is set to transpire over the long holiday weekend when this Court will be closed, Franciscan respectfully requests an emergency, expedited ruling on its Motion for Stay. Immediate, irreparable injury will result to Franciscan if it has to wait for the City to file an opposition to the Motion for Stay before obtaining a stay. Under these circumstances, there is simply no time to conduct fulsome briefing on the Motion for Stay. Therefore, this Court should grant Franciscan's Motion for Stay before the City is heard on the motion. *See* Ind. App. R. 39(C)-(D).

The urgent situation in which the parties find themselves is of the City's own making, having waited until twelve days before the expiration of Franciscan's Hospital license to bring its eleventh-hour lawsuit. The urgent situation is not

because Franciscan filed its Notice of Appeal two business days after entry of the Preliminary Injunction.

## **ARGUMENT**

### **I. The Rules Allow for a Stay of the Preliminary Injunction Pending Appeal.**

To the extent the City suggests, at least in its Revised Response to Franciscan's Motion for Stay in the trial court, that a stay is improper because it was able to convince the trial court to grant it a Preliminary Injunction, that suggestion is unavailing and ignores the plain language of Trial Rule 62(C). Trial Rule 62(C) states that, "[w]hen an appeal is taken from an interlocutory or final judgment granting . . . an injunction, . . . the court to which the application is made in its sound discretion may suspend . . . the injunction . . . during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Pursuant to Appellate Rule 39, a party may seek a motion to stay in this Court if the request for a stay is denied in the trial court below or not ruled upon within a reasonable time in light of the circumstances and relief requested. A stay of the Preliminary Injunction pending appeal is expressly allowed and clearly warranted here.

### **II. Without a Stay of the Preliminary Injunction Pending Appeal, Patient Safety Is in Jeopardy.**

For starters, it will not be safe for patients in need of care to present to the Hospital after December 31, 2022. Patients presenting after December 31, 2022, will have to be transferred to other area hospitals. Those hospitals will have to be

contacted each time to ensure that they have the capacity to take the patient and ambulance transportation will have to be arranged. The delay associated with transferring a patient to a local hospital, as opposed to transporting the patient directly to such hospital in the first place, will be life-threatening with respect to patients suffering particularly serious emergency conditions such as heart attacks, strokes, respiratory distress, septic shock, sickle cell crises, traumatic injuries, and serious infections, to name a few.

**III. There is a Strong Likelihood that the Preliminary Injunction Will be Overturned on Appeal.**

There is a strong likelihood that the Preliminary Injunction will be overturned on appeal, underscoring the propriety of a stay of that erroneous order pending appeal. The City failed to meet the elements of injunctive relief. The Preliminary Injunction is a mandatory injunction that grants extraordinary relief and utterly disrupts the complicated framework of state and federal laws, licensing requirements, and accreditation standards within which all hospitals must operate. Regardless of the motivations and desires of the City, the Hospital is no exception and must likewise operate within that strict statutory and regulatory framework. The notion that a municipality can use the judicial system to compel a private corporation to operate a hospital without a license and in direct violation of state and federal laws and accreditation standards is simply unprecedented.

Indeed, the City has no standing to seek a preliminary injunction against Franciscan. Only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of

suffering a direct injury as a result of the complained-of conduct will be found to have standing. *Oman v. State*, 737 N.E.2d 1131, 1135 (Ind.2000). The City itself – as a municipal entity – can demonstrate none of those things. The City has not been legally harmed by Franciscan’s initial decision to downsize the Hospital or by its change in plans to completely close the Hospital. The City failed to point to a single contract or economic development prospect that fell through due to Franciscan’s change in plans.<sup>8</sup>

Instead, the City’s pursuit of mandatory injunctive relief in this case rests on the assertion that *its citizens* – i.e., the potential patients who would otherwise be served by the Hospital – are the ones who will be harmed by the Hospital’s closure. Putting aside the City’s attempt to manufacture standing based on someone else’s alleged injury, there is no factual basis for the City’s claim that Hammond or its citizens will be harmed by the Hospital’s closure. There are two full-service, acute-care hospitals located closer to many areas of Hammond than the Hospital (St. Catherine’s and Munster Community), and Franciscan’s Munster Hospital is located approximately six miles from downtown Hammond. Hammond residents have had and will continue to have ample access to emergency care irrespective of the Hospital’s closure.

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<sup>8</sup> Rather dramatically, Hammond claimed in its Complaint, without reference to any supporting data or evidence, that “people are going to die” if the Hospital emergency department is consolidated into other Franciscan emergency medicine assets outside of Hammond. *See* Complaint, ¶ 22. In fact, since the City waited until the last minute to file its request for injunctive relief, presumably for tactical advantage, the opposite is now true.

Jurisdictional problems aside, the City’s sole theory of liability underpinning its demand for mandatory injunctive relief – a theory of promissory estoppel – fails as a matter of Indiana law. Promissory estoppel encompasses the following elements: “(1) a promise by the promissor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise.” *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001). There is no evidence that Franciscan made any promises with the expectation that the City would rely on those promises. And even if the City had relied on any purported assurances from Franciscan, such reliance would have been patently *unreasonable*. No hospital, including Franciscan, can operate in a vacuum. Franciscan’s ability to operate the Hospital and keep its emergency department open depends and has always depended on its ability to meet state and federal laws, licensing requirements, and accreditation standards.

Moreover, while promissory estoppel is supposed to be an equitable theory utilized to prevent injustice, the Preliminary Injunction is inherently inequitable and unfair, and grants mandatory specific performance that far exceeds the City’s alleged injury in this case. *See Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 815 (Ind. Ct. App. 2000) (explaining that “the restraint imposed by the decree should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted.”). The purpose of the promissory estoppel doctrine “is to preserve rights previously acquired and *not to create new ones.*” *First National Bank*

of *Logansport v. Logan Mfg. Co., Inc.* 577 N.E.2d 949, 954 (Ind. 1991) (emphasis added). The Preliminary Injunction here creates and confers upon the City a new right to which it is not otherwise entitled.

To the extent it has been damaged at all, the City's damages should be limited to "reliance damages" – i.e., those expenses that the City supposedly incurred in relying on Franciscan's alleged promise. See Restatement (Second) of Contracts § 90, Comment d, Illustrations 8, 12 (specifically adopted by the Supreme Court in *First National Bank of Logansport*, 577 N.E.2d at 954). Specific performance is inequitable, unjust, and unfair under the circumstances.

Any one of the foregoing reasons would justify reversal of the Preliminary Injunction on appeal. Given the strong likelihood that the Preliminary Injunction will be overturned on appeal, this Court should stay the effect of that erroneous order pending appeal. Absent a stay, the benefits of such an appeal will be lost.

**IV. A Stay of the Preliminary Injunction Pending Appeal Will Not Harm the City.**

A stay of the Preliminary Injunction pending appeal will not harm the City. Again, the City had not been harmed in the first place, before the Court's entry of the Preliminary Injunction. Moreover, suspending the effect of the Preliminary Injunction will merely return the parties to the status quo that existed before the Preliminary Injunction was entered. Indeed, it is the Preliminary Injunction itself – and not Franciscan's request for a stay – that fundamentally alters the respective position of the parties as it existed before the City filed this lawsuit.

V. **Absent a Stay Pending Appeal, the Preliminary Injunction Places Franciscan in the Impossible Situation of Having to Choose Between Contempt of Court Proceedings and Violating State and Federal Laws, Licensing Requirements, and Accreditation Standards.**

The harm to Franciscan caused by the Preliminary Injunction at this late hour is enormous. Franciscan has been engaged in complex and intense planning for the last six weeks or more to concentrate its emergency medicine resources in Munster and Dyer. It's Hospital license with the ISDH is set to expire in two days.

Absent a stay pending appeal, the Preliminary Injunction places Franciscan in the impossible situation of having to choose between facing contempt of court proceedings and violating state and federal laws, licensing requirements, and accreditation standards for hospitals. Even if it could somehow operate the Hospital emergency department safely without a license, Franciscan would be prohibited from billing for its services. Forcing it to provide emergency care without compensation, when it has a fully-equipped, modern emergency department approximately six miles down the road, is inherently unjust, particularly, when the harm to the City is non-existent.

Forcing Franciscan to provide emergency care without compensation is also, more fundamentally, an unconstitutional taking. Article I, section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment to the U.S. Constitution similarly prohibits the taking of private property "for public use, without just compensation." The Fifth Amendment's Takings Clause applies to the states via the Due Process

Clause of the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Yet another reason why the Preliminary Injunction is unlikely to survive scrutiny on appeal, and why a stay of that erroneous order pending appeal is warranted.

**VI. An Appeal Bond Should Be Set For a Minimal Amount.**

Trial Rule 62(D) provides for an appeal bond or other security when the Court stays proceedings pending appeal. Trial Rule 62(D)(2) addresses criteria for the amount of any security pending appeal, none of which is applicable in this case involving a mandatory preliminary injunction forcing a private corporation to maintain a hospital emergency department for nine months. Franciscan would propose an appeal bond or letter of credit in the amount of \$100,000, which would be more than enough to cover the City's costs of the underlying litigation and this appeal.

**CONCLUSION**

For all of the foregoing reasons, Franciscan respectfully requests a stay of proceedings in the trial court below and a stay of the Preliminary Injunction pending appeal.

**VERIFICATION**

I hereby verify, under penalties of perjury, that the foregoing statements are true and correct.

  
Barbara Anderson, Interim Hospital President  
Franciscan Health Hammond

## CERTIFICATION

I hereby certify the following pursuant to Indiana Appellate Rule 39(C)-(D):

1. Service of this Motion for Stay has been made upon all counsel of record pursuant to the Certificate of Service below.
2. The urgent circumstances described in this Motion for Stay, as verified by Franciscan, support the entry of a stay before the City can be heard on the Motion for Stay.
3. The City has had notice of Franciscan's Motion for Stay filed in the trial court since December 28, 2022.
4. A proposed order is being submitted with this Motion for Stay.

/s/ Robert A. Anderson

Robert A. Anderson, Attorney No. 15359-71  
Hillary N. Buchler, Attorney No. 32526-49  
KRIEG DeVAULT LLP  
8001 Broadway, Suite 400  
Merrillville, Indiana 46410  
Telephone: (219) 227-6100  
Facsimile: (219) 227-6101  
[randerson@kdlegal.com](mailto:randerson@kdlegal.com)  
[hbuchler@kdlegal.com](mailto:hbuchler@kdlegal.com)

Libby Yin Goodknight, Attorney No. 20880-49  
KRIEG DeVAULT LLP  
One Indiana Square, Suite 2800  
Indianapolis, Indiana 46204  
Telephone: (317) 636-4341  
Facsimile: (317) 636-1507  
[lgoodknight@kdlegal.com](mailto:lgoodknight@kdlegal.com)

*Attorneys for Appellant-Defendant  
Franciscan Alliance, Inc.*

## WORD COUNT CERTIFICATE

I hereby certify that the foregoing Motion contains 3,792 words, which is no more than the 4,200 words permitted by Indiana Appellate Rule 34(G)(2).

/s/ Hillary N. Buchler

Hillary N. Buchler

## CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2022, the foregoing was filed electronically with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court using the Indiana E-Filing System (IEFS).

I also certify that on December 29, 2022, at the specific time reflected on the Notification of Service sent through Tylerhost, the foregoing was served upon the following counsel of record electronically at their respective email addresses using the Indiana E-Filing System (IEFS):

Michael E. Tolbert  
Tolbert & Tolbert LLC  
1085 Broadway, Suite B  
Gary, Indiana 46402  
[mtolbert@tolbertlegal.com](mailto:mtolbert@tolbertlegal.com)

Kevin C. Smith  
Smith Sersic, LLC  
9301 Calumet Avenue, Suite 1F  
Munster, IN 46321  
[ksmith@smithsersic.com](mailto:ksmith@smithsersic.com)

David W. Westland  
Westland & Bennett, P.C.  
2929 Carlson Drive  
Hammond, IN 46323  
[dwestland@westlandbennett.com](mailto:dwestland@westlandbennett.com)

/s/ Hillary N. Buchler

Hillary N. Buchler