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Proposed Counsel to the Debtors and Debtors in Possession

Hearing Date:
April 5, 2018 at 1:30 p.m. (EST)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
ORION HEALTHCORP, INC.	:	Case No. 18-71748 (AST)
CONSTELLATION HEALTHCARE TECHNOLOGIES, INC.	:	Case No. 18-71749 (AST)
NEMS ACQUISITION, LLC	:	Case No. 18-71750 (AST)
NORTHEAST MEDICAL SOLUTIONS, LLC	:	Case No. 18-71751 (AST)
NEMS WEST VIRGINIA, LLC	:	Case No. 18-71752 (AST)
PHYSICIANS PRACTICE PLUS, LLC	:	Case No. 18-71753 (AST)
PHYSICIANS PRACTICE PLUS HOLDINGS, LLC	:	Case No. 18-71754 (AST)
MEDICAL BILLING SERVICES, INC.	:	Case No. 18-71755 (AST)
RAND MEDICAL BILLING, INC.	:	Case No. 18-71756 (AST)
RMI PHYSICIAN SERVICES CORPORATION	:	Case No. 18-71757 (AST)
WESTERN SKIES PRACTICE MANAGEMENT, INC.	:	Case No. 18-71758 (AST)
INTEGRATED PHYSICIAN SOLUTIONS, INC.	:	Case No. 18-71759 (AST)
NYNM ACQUISITION, LLC	:	Case No. 18-71760 (AST)
NORTHSTAR FHA, LLC	:	Case No. 18-71761 (AST)
NORTHSTAR FIRST HEALTH, LLC	:	Case No. 18-71762 (AST)
VACHETTE BUSINESS SERVICES, LTD.	:	Case No. 18-71763 (AST)
MDRX MEDICAL BILLING, LLC	:	Case No. 18-71764 (AST)
VEGA MEDICAL PROFESSIONALS, LLC	:	Case No. 18-71765 (AST)
ALLEGIANCE CONSULTING ASSOCIATES, LLC	:	Case No. 18-71766 (AST)
ALLEGIANCE BILLING & CONSULTING, LLC	:	Case No. 18-71767 (AST)
PHOENIX HEALTH, LLC	:	Case No. 18-71789 (AST)
Debtors.	:	(Jointly Administered)

REPLY IN SUPPORT OF (I) THE DEBTORS' MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 542(a) AND 542(e) COMPELLING ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK PC TO TURN OVER AND ACCOUNT FOR PROPERTY OF THE ESTATES AND RECORDED INFORMATION AND (II) DEBTORS' *EX PARTE* MOTION FOR AN ORDER PURSUANT TO BANKRUPTCY RULES 2004 AND 9014 DIRECTING THE PRODUCTION OF DOCUMENTS AND THE EXAMINATION OF ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK PC, A. MITCHELL GREENE, ESQ., ADAM GREENE, ESQ., AND MATTHEW C. CAPOZZOLI

Orion HealthCorp, Inc. and its affiliated debtors and debtors in possession (collectively the "Debtors"), by and through their proposed counsel, DLA Piper LLP (US), hereby submit this Reply (the "Reply") to the objection (the "Objection') of Robinson Brog Leinwand Greene Genovese & Gluck PC ("Robinson Brog"), A. Mitchell Greene, Adam Greene, and Matthew C. Capozzoli (collectively, the "Objectors") to (I) the Debtors' Motion for an Order pursuant to sections 542(a) and 542(e) title 11 of the United States Code (the "Bankruptcy Code") Compelling Robinson Brog to Turn Over and Account for Property of the Estates and Recorded Information [Dkt. No. 18] ("Turnover Motion"); and (II) the Debtors' *Ex Parte* Motion for an Order Pursuant to Bankruptcy Rules 2004 and 9014 Directing the Production of Documents and the Examination of Robinson Brog, A. Mitchell Greene, Esq., Adam Greene, Esq., and Matthew C. Capozzoli, Esq. [Dkt. No. 21] ("2004 Motion"). In support thereof, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

Neither the Turnover Motion nor the 2004 Motion are reasonably subject to dispute or objection. Robinson Brog represented the Debtors until the Debtors were forced to fire the firm for cause in October 2017. Now in a bankruptcy proceeding, the Debtors seek access to the Debtors' client files (the Turnover Motion) and the ability to take discovery which is reasonably crafted to allow the Debtors to investigate the facts and circumstances that ultimately led to this bankruptcy case (the 2004 Motion).

As an initial matter, the Objectors erroneously contend that the Turnover Motion is procedurally improper as Debtors failed to file a complaint. Turnover pursuant to 542(e) is appropriately raised by motion. There is no need for the procedural safeguards of an adversary proceeding when the Debtors merely seek to obtain their files from their former attorney. What possible legitimate purpose is served by Robinson Brog continuing to deny the Debtors access to their own property—their client files.

The Objectors have made every effort to frustrate the Debtors' access to their client files both pre-petition and now. As discussed in the Turnover Motion, the Debtors' files have never been properly subject to a retaining lien; even if they had been, the law is clear that Robinson Brog can no longer assert a retaining lien in bankruptcy. Objectors ignore this black letter law. Ultimately, there is no basis for Robinson Brog's continued refusal to turn over the Debtors' files.

The Objectors also rely on their purported representation of Parmar, Constellation Health, LLC ("CHLLC"), and other non-debtor entities to excuse any duty to comply with further discovery under the 2004 Motion. Robinson Brog and its attorneys were paid hundreds of thousands of dollars to represent the Debtors in numerous litigation and transactional matters over more than five years. Their protests, based on unspecified and unsubstantiated inconvenience and burden, do not and cannot thwart the Debtors' entitlement to pursue discovery. There is no privilege preventing Robinson Brog from complying with the discovery demands of the Debtors. The Objectors neither requested nor received a waiver from the Debtors for their purported representation of these individuals and entities, whose interests were directly adverse to the Debtors' interests. In any event, the Debtors own whatever privilege the Objectors now purport to assert and hide behind. As such, the Debtors (and the Debtors alone)

control who may assert that privilege on their behalf. Robinson Brog has no authority to do so. Moreover, any duty of confidentiality the Objectors may have relating to their engagement with Parmar and CHLLC may, in certain circumstances, preclude their disclosure to the outside world, but it does not prevent disclosure to the Debtors upon demand.

With respect to the 2004 Motion, it is properly framed. It afforded adequate time for Objectors to prepare and comply. It is well-settled that discovery pursuant to 2004 Motions can be as broad as necessary to adequately uncover facts and information reasonably related to recovering assets into the estate. At bottom, the Objectors' attempts to block discovery are without merit.

For the reasons stated in the Turnover Motion and the 2004 Motion, and as supplemented herein, the Court should grant both Motions, order the immediate production of all requested Debtors' files, order the Objectors to submit to depositions at a time and place convenient to Debtors and their counsel, and pay the fees associated with having to defend against the Objectors' frivolous, unmeritorious and abjectly false objections. Should the Court have any concerns about the application of any privilege as alleged by the Objectors, the Debtors respectfully submit that all such documents should be submitted to the Court for an *in camera* review, but in no circumstances should such files remain in the possession of the Objectors or their counsel.

JURISDICTION & VENUE

The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The predicates for the relief set forth herein are §§ 542(a) and

(e) of the Bankruptcy Code and Rule 2004 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

BACKGROUND

On March 16, 2018 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York (the "Court"). The Debtors' chapter 11 cases are being jointly administered under Bankruptcy Rule 1015(b). The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee has been appointed in the chapter 11 cases.

The files and records sought by the Motions are necessary to properly administer these cases. To the extent not detailed in the Motions and in this Reply, additional information about the Debtors, including their business operations, the events leading up to the filing of the Chapter 11 cases, the long-standing and continuous attorney-client relationship with the Objectors, and the abrupt termination for cause after learning of Objectors' potential complicit and facilitative behavior in the underlying fraudulent conduct, can be found in the *Declaration of Timothy J. Dragelin in Support of the Debtors' Chapter 11 Petitions and First Day Motions* [Dkt. No. 2]. On March 22, 2018, the Objectors, through counsel, lodged an objection letter to the Court outlining many of the same specious arguments raised in the current objections filing. [Dk.t No. 32]. Then, on April 2, 2018, Objectors filed the subject Objection. [Dkt. No.64].

The Objectors, and their counsel, have had months in which to locate, collect, and marshal any documents that are the subject to the Turnover Motion but have refused to do so, as evidenced by the exhibits to Turnover Motion.

REPLY

I. Robinson Brog Has No Basis to Continue to Withhold the Debtors' Client Files as Requested in the Turnover Motion, and The Objectors Have No Basis to Prevent the Debtors From Seeking Further Discovery Pursuant to the 2004 Motion.

The Objectors cannot dispute that Robinson Brog and its attorneys represented the Debtors and has files relating to those matters. *See* Objection at ¶ 44. They also agree that Robinson Brog and the individually named partners herein served as the Debtors' counsel in the transactions that led to the filing of these chapter 11 cases. *See* Objection at ¶¶ 1-2. The Objectors nevertheless dispute their obligation to turn over these documents, and they also object to any further discovery unless the Objectors themselves deem it to be reasonable. *See* Objection at 1. The Debtors have no obligation to cede to the Objectors' unreasonably restrictive proposal.

As to the Turnover Motion, *In re Black Diamond Min. Co., LLC*, a case cited by both sides, illustrates that Robinson Brog's position is indefensible. 507 B.R. 209, 214–15 (E.D. Ky. 2014). In *Black Diamond*, the court held that the law firm's file relating to representation of the Debtor "*plainly* falls within [section] 542's scope." *Id.* (emphasis supplied). Simply, a law firm's files created in the course of its representation of a client is *the client's* property. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 666 N.Y.S.2d 985, 689 N.E.2d 879, 881–83 (1997). Drawing on this conclusion, the *Black Diamond* court found that section 542(a) "unquestionably" requires turnover and any privilege is irrelevant. *See* 11 U.S.C. § 542(a) ("[A]n entity. . . in possession, custody, or control. . . of property that the trustee may use. . . shall deliver [such property] to the trustee."). The files also were subject to turnover under section 542(e) merely because they related to the debtor's property or financial affairs. *Black Diamond*, 507 B.R. at 215. Similarly, the Objectors' files regarding the Debtors' matters

"relate to" the company's property within the meaning of § 542(e) because the records and intra-firm correspondence they contain are relevant to those claims." *Id.*

As for discovery sought in the 2004 Motion, the Objectors advance an equally indefensible position. A Rule 2004 inquiry is "broad and unfettered" and frequently likened to "a fishing expedition." *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 626 (Bankr. D. Del. 2016) (citations omitted). Yet the Debtors' demands are no fishing expedition: the Debtors are seeking the right to obtain further discovery that is relevant and essential to protect the Debtors' estates. The Debtors require and are entitled to obtain further information from their former counsel, in addition to the turnover of their client files, which will help the Debtors and their professionals investigate the Debtors' businesses, assets and pre-petition transactions. *In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004) ("The purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, . . . examining transactions and assessing whether wrongdoing has occurred.") (citation omitted). Indeed, Rule 2004"cut[s] a broad swath through the debtor's affairs, those associated with him, and those who might have had business dealings with him." *In re Johns-Manville*, 42 B.R. 362, 364 (S.D.N.Y. 1984) (citing *In re Mantolesky*, 14 B.R. 973, 976 (Bankr. D. Mass. 1981)).

The Debtors' files at issue in the Turnover Motion and the discovery sought in the 2004 Motion together will provide fundamental information needed to understand transactions, discover assets, and uncover other acts and circumstances which are reasonably expected to enhance the Debtors' estates.

II. The Objectors' Improper Retaining Lien Prevents the Debtors From Accessing Materials Necessary to Preserve and Maximize the Value of the Debtors' Estates.

Robinson Brog continues to improperly assert a retaining lien over the Debtors' client files due to allegedly unpaid invoices. First, nothing in the record affirmatively establishes Robinson Brog's claim to fees beyond a conclusory recitation of fees allegedly owed. In fact, it is surprising that Robinson Brog has failed to produce an engagement letter with any of the Debtors. The Objectors have not provided any invoices to prove the amount of fees allegedly owed or to indicate to which matters such fees pertain. Thus, Robinson Brog can have no valid lien under the common law. *In re Jarax Int'l, Inc*., 81 B.R. 715, 718 (Bankr. S.D. Fla. 1987).

Even if the Objectors had provided evidence of any amounts due prior to the bankruptcy filing in this case, their continued assertion of a retaining lien is improper. *See In re Lewis C. Bowers & Sons, Inc.*, No. CIV. 89-5417 (AET), 1990 WL 52415, at *5 (D. N.J. Apr. 20, 1990) (affirming bankruptcy court and stating that "there is no question" that the debtor's former law firm was obligated to turn over files requested by the Debtor). Section 542(e) "deprives accountants and attorneys of the leverage that they have today, under state law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate. *In re Beef N'Burgundy, Inc.*, 21 B.R. 69, 70 (Bankr. N.D. Ga. 1982) (citing to H.R. 95–595, 95th Cong., 1st Sess. 369–70 (1977), U.S. Code Cong. & Admin. News 1978, p. 5963; S.Rep. No. 95–989, 95th Cong., 2d Sess. 84 (1978)). It is well settled that the coercive power of a retaining lien must give way to the competing concerns and interests embodied in section 542(e), especially the interest of "prompt recovery of assets for the benefit of creditors." *In re Jarax Int'l, Inc*., 81 B.R. at 718 (holding that "federal bankruptcy policy must prevail over the state common law lien and ordering law firm to turn over files); *In re Olmsted Util., Inc.*, 127 B.R. 808, 813 (Bankr. N.D. Ohio 1991) ("Section 542(e) of the

Bankruptcy Code is simply another circumstance in which the power of coercion granted professionals through the retaining lien must give way to competing concerns and interests."). *See also In re Herrera*, 390 B.R. 746, 749 (Bankr. S.D. Fla. 2008) (holding that, notwithstanding a retaining lien, turnover of documents and files relating to a debtor's property or financial affairs is required and that the exigencies of the bankruptcy process take priority over a common law lien).

Even assuming Robinson Brog had properly asserted a retaining lien prior to the bankruptcy filing (which it did not), this Court would still have the equitable power to modify any retaining lien for the protection of the Debtors' estates and their creditors. *Id.*; *see also* 11 U.S.C. § 105; *Bank of Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966); *In re Beef N' Burgundy, Inc*., 21 B.R. at 70; *In re Lewis C. Bowers & Sons, Inc.,* No. CIV. 89-5417 (AET), 1990 WL 52415, at *3 (noting "that bankruptcy courts often approach attorney lien claims by directing the attorneys to turn over the files immediately, but scheduling a hearing on the value of the files in the future.").[1] The lien asserted by Robinson Brog is improper and frustrates the administration of the Debtors' cases.

III. The Objectors Cannot Withhold Documents Based on the Position that they Simultaneously Represented Parmar Entities to the Debtors' Detriment.

The Objectors' reliance on the attorney-client privilege to avoid any discovery obligations as enumerated in the 2004 Motion is erroneous and in bad faith. As a threshold matter, the party asserting the privilege (which in this instance would be Parmar and CHLLC, not the Objectors) has the affirmative burden of establishing its applicability. *In re Am. Metrocomm Corp.*, 274 B.R. 641, 652 (Bankr. D. Del. 2002); *In re Teleglobe Commc'ns Corp.*, No. 02-11518 MFW, 2006 WL 2568371, at *8–9 (D. Del. Feb. 22, 2006). Because the privilege

[1] In any event, the value of any lien would be based on value of the documents to the estates, not the amount of the unpaid legal fees. *In re Herrera*, 390 B.R. at 749.

interferes with the truth finding process, the privilege is narrowly construed and limited in scope only to those disclosures necessary to obtain legal advice that would not have been disclosed absent the privilege. *Id.* (citing *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 152 n. 11 (D. Del. 1977)). The Objectors' conclusory statements do not suffice.

To the extent the Objectors contend that they simultaneously represented the Debtors, on the one hand, and Parmar and CHLLC, on the other, they overlook the obvious, irreconcilable, and unwaived conflict that such representation created. Taken at face value, the Objectors ask this Court to shield documents required by the Debtors' estates based on the Objectors' breach of fiduciary duty to the Debtors (of course, Robinson Brog compounds this failure by failing to provide engagement and waiver letters). And, insofar as the Debtors contend that such representation was a "joint" representation, "the clients have no expectation that their confidences . . . will remain secret from each other, and those confidential communication [*sic*.] are not within the privilege in subsequent adverse proceedings between the co-clients." *Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del.)*, 285 B.R. 601, 612 (D.Del.2002) (quoting *Tekni–Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663, 670 (1996)); *Bass Pub. Ltd. Co. v. Promus Cos. Inc.*, 868 F.Supp. 615, 620 (S.D.N.Y.1994) ("Where there is a joint attorney-client privilege, there is no expectation that confidential information will be withheld from joint clients as there is no privilege between them."); *E.F. Hutton & Co., Inc. v. Brown*, 305 F.Supp. 371, 393 (S. D. Tex. 1969) ("[I]nformation imparted to the common attorney relating to the subject of the joint representation is imparted for the mutual benefit of all the joint clients and is therefore not privileged against any of them."); *Yorke v. Santa Fe Indus., Inc. (In re Santa Fe Trail Transp. Co.)*, 121 B.R. 794 (Bankr. N. D. Ill. 1990) (former parent corporation could not use claim of

privilege to prevent discovery by former subsidiary corporation where former parent corporation's in-house legal department represented both parties in sale of stock of former subsidiary corporation).

Numerous courts have recognized that, for purposes of the attorney-client privilege, a subsidiary and the parent are joint clients, each of whom has an interest in privileged communications. *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 473 (W. D. Mich. 1997) (collecting cases). The two factors at the core of the co-client exception – preventing unjustifiable inequality in access to information and discouraging abuses of fiduciary obligations and legal duties – apply in full force here. *See Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd*., 150 F.R.D. 648 (N. D. Cal. 1993). Additionally, *In re Mirant Corp.* is particularly instructive. 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005). In *Mirant*, the debtors were mostly subsidiary corporations of The Southern Company ("TSC"). TSC divested itself of Mirant Corporation by issuing the balance of Mirant stock to TSC shareholders as a tax free dividend. *Id.* at 648. *Mirant* eventually filed a chapter 11 petition. *Id.* Troutman Sanders LLP ("Troutman") had represented both Mirant and TSC during the divestiture, and advised both corporations on divestiture-related issues. *Id.* The debtors moved to compel production of the communications between TSC and Troutman regarding the divestiture. *Id.* at 649. The bankruptcy court held that TSC and Troutman *could not invoke* the attorney-client privilege because the law was well settled that "counsel who represents two clients in the same matter cannot keep confidences of one respecting the matter from the other." *Id.* at 651. Because Troutman represented both Mirant and TSC in the challenged transaction, privilege could not be asserted to block an inquiry into the divestiture-related legal advice.

Our case compels the same conclusion. Robinson Brog cannot invoke privilege on behalf of Parmar, CHLLC, or any other related entity to withhold documents where such documents pertain to a transaction such as the Merger. Of particular significance is that the Debtors never waived (nor were they asked by Robinson Brog to waive) the conflict arising from Robinson Brog's purported representation of Parmar, CHLLC, and other related entities, which was and remains directly adverse to the Debtors' interests. Any duty of confidentiality that the Objectors may have relating to Parmar, CHLLC, and others does not present grounds for the Objectors to eschew their obligations to provide discovery as set out in the 2004 Motion.[2] The Objectors cannot now, in hindsight, rely on a fictitious privilege, the assertion of which would be inapplicable due to the unwaived conflict discussed above.

Further, public policy weighs against sustaining the Objection. In bankruptcy, the need for investigation is "far more acute than is any concern for attorney-client communications." *In re Mirant Corp*., 326 B.R. at 654. The *Mirant* court also opined that "[i]t would be a bad precedent to carve in the case at bar a limitation on the usual rule respecting assertion of privilege in investigation of claims arising from transactions where common counsel was used." *Id.* Such is the case here, where the Debtors are acting as fiduciaries for the benefit of their creditors by pursuing an investigation. Like in *Mirant,* where the court expressed concerns over the timing between the underlying allegedly fraudulent transaction and the debtor's filing for chapter 11 protection, "it is essential to the integrity of the chapter 11 process that no stone be left unturned in ensuring satisfactory completion of Debtors' investigation." *Id.* That the

[2] The Objectors do not appear to advance a privilege or confidentiality challenge to the Debtors' Turnover Motion. To the extent their attempt to conflate discussions of both the Turnover Motion and 2004 Motion can be read as an attempt to apply the Objectors' challenges equally to both Motions, the Debtors maintain that their challenges are equally without merit for the reasons set forth in each Motion and this Reply.

Debtors filed their bankruptcy petitions not even 14 months after the close of the Merger warrants a similar conclusion based on public policy.

NOTICE

Notice of this Reply shall be provided to: (i) the Office of the United States Trustee for the Eastern District of New York; (ii) the United States Attorney for the Eastern District of New York; (iii) Alex Spiro, Esq., Quinn Emanuel Urquhart & Sullivan, LLP, co-counsel to the Objectors; (iv) Marian C. Rice, Esq., L'Abbante, Balkan, Colvita & Contini LLP, co-counsel to the objectors; (v) counsel to Bank of America, N.A.; (vi) counsel to BMO Harris Bank, N.A.; (vii) counsel to Keybank National Association; (viii) counsel to Stifel Bank & Trust; (ix) counsel to Woodforest National Bank; (x) the Internal Revenue Service; and (xi) all other parties required to receive service under Rule 2002-2 of the Local Bankruptcy Rules for the Eastern District of New York. The Debtors submit that no other or further notice need be given.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (i) overrule the Objection and (ii) enter orders granting the relief requested in the Motions; and (iii) grant such other and further relief as the Court may deem proper.

Dated: April 4, 2018
New York, New York

Respectfully submitted,

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