

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X	
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)
-----X	

OBJECTION TO MOTION OF ALLEGIANCE BILLING ASSOCIATES, INC., JOHN ESPOSITO, MARK BELLISSIMO, ROSANNA DOVGALA-WEAVERLING AND KRISTI JADCZAK FOR RECONSIDERATION OF ORDER (I) APPROVING ASSET PURCHASE AGREEMENT AND AUTHORIZING THE SALE OF CERTAIN OF THE DEBTORS' ASSETS; (II) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS; (III) AUTHORIZING THE ASSUMPTION, SALE AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (IV) GRANTING RELATED RELIEF AND RESPONSE TO STATEMENT OF MEDICAL TRANSCRIPTION BILLING, CORP
(Dkt. No. 391, 395, 396)

Medical Transcription Billing, Corp. ("MTBC") by and through the undersigned counsel, hereby submits this objection (the "Objection") to the (a) Motion for reconsideration of the

Order (i) Approving Asset Purchase Agreement and Authorizing the Sale of Certain of the Debtors' Assets; (ii) Authorizing the Sale of Assets Free and Clear of all Liens, Claims, Encumbrances and Interests; (iii) Authorizing the Assumption, Sale and Assignment of Certain Executory Contracts and Unexpired Leases; and (iv) Granting Related Relief entered on June 29, 2018 [Dkt. No. 354] (the "Sale Order") and (b) *Response to Statement in Response to Proposed Stipulation and Request for Hearing* [Dkt. No. 382] (the "MTBC Statement") [Dkt. No. 391] (the "Motion"), which was filed by Allegiance Billing Associates, Inc. ("ABA"), John Esposito ("Esposito"), Mark Bellissimo ("Bellissimo" together with Esposito and ABA, the "Consultants"), Rosanna Dovgala-Weaverling ("Dovgala") and Kristi Jadcak ("Jadcak", together with Dovgala, the "Employee Parties" together with Consultants the "Movants"). In support of its Objection, MTBC respectfully states as follows:

PRELIMINARY STATEMENT

MTBC does not object to the Debtors' rejection of the Movants' Agreements (defined below). However, the Movants seek more than mere "rejection" of the Agreements under § 365 of the Bankruptcy Code. Movants also seek entry of an order that the Agreements have been "terminated." (*See, e.g.* Motion ¶ 26.) Because "termination" is not the legal equivalent of "rejection," Movants seek relief beyond what is authorized by § 365 of the Code. MTBC objects to the Motion because Movants have shown no legal or factual basis to alter the Sale Order under Rule 60(b) to impair rights that MTBC would otherwise have under the APA (defined below), and to expand the Sale Order to provide Movants relief well beyond what is authorized under § 365 of the Code.¹

¹ Subsequently to filing the Motion, Movants presented two proposed orders to the court [Dkt. Nos. 395, 396] (the "Proposed Orders"). MTBC objects to entry of those Proposed Orders on substantially the same grounds set forth in this Objection.

BACKGROUND

1. On March 16, 2018 (the “Petition Date”), Orion HealthCorp, Inc. and its affiliated debtors and debtors in possession (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Eastern District of New York (the “Court”).

2. Prior to the Petition Date, Movants acquired certain rights and obligations pursuant to a Service Agreement dated as of September 1, 2016 (the “Service Agreement”), and two Employment Agreements, dated as of September 1, 2016 (the “Employment Agreements”, together with the Service Agreement, the “Agreements”). (*See* Motion ¶¶ 4-6.)

3. As part of the Agreements, Movants were each required to execute a Confidentiality, Non-Interference and Invention Assignment Agreement which contained a restrictive covenant which would prevent the Employee Parties from (i) engaging in medical billing and collection services in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts or Rhode Island (the “Territory”) and (ii) competing in the line of business of the Debtors anywhere in the Territory [Dkt. Nos. 304-4, 305-5] (collectively, the “Non-Compete Agreements”). (*See* Motion ¶ 7.)

4. On June 6, 2018, the Debtors indicated their intent to assume and assign the Agreements. Movants objected to the assumption of the Agreements, asserting exorbitant rights to payment, in excess of \$5.4M – Consultants claiming at least \$3M, and Employee Parties claiming at least \$2.4M. (*See* Dkt. Nos. 304, 305.) Despite receiving generous offers of employment from MTBC, Movants staunchly refused to negotiate on reasonable terms. As a result, it was decided that the Agreements would not be assumed and assigned to MTBC.

5. As of June 25, 2018, an Asset Purchase Agreement [Dkt. No. 391-3] (the “APA”) was entered into among MTBC as Purchaser and the Debtors as Sellers, whereby MTBC

purchased all of substantially all of the assets previously used by the Debtors “in providing revenue cycle management, practice management and group purchasing organization services for physicians in the United States” (the “Target Business”). (APA, Recital A.)

6. The APA provides that the assets transferred to MTBC include “all causes of action, judgments, claims and demands against third parties, whether known or unknown, except” (in relevant part) causes of action which do not “relate to the Target Assets.” (APA §§ 1.1.6, 3.1.11[v].) “Target Assets” include “all the assets, properties, business and rights, of every kind and description (whether real, personal or mixed, tangible or intangible) and wherever situated, which are owned, used or held for use by [Debtors] as of [June 25, 2018] in connection with the Target Business....” (APA § 1.1.)

7. On June 29, 2018, this Court entered an Order, *inter alia*, approving the APA [Dkt. No. 391-1.] (the “Sale Order”).

8. The Sale Order provides that the “Purchased Assets include any rights of the Debtors’ estates to enforce (a) obligations of confidentiality, covenants not to compete, covenants not to solicit, and similar obligations of employees and contractors currently or previously working in or in connection with the Debtors’ revenue cycle management, physician practice management, and group purchasing organization businesses ... provided, however, that the Court makes no determination whether or to what extent such obligations are enforceable under applicable non-bankruptcy law.” (Sale Order ¶ AA.)

9. As stated above, the Agreements were not assumed and assigned to MTBC in connection with the APA transaction. On July 9, 2018, a hearing was held concerning, *inter alia*, the Debtors’ rejection of the Agreements [Dkt. No. 391-2] (“Hearing Tr.”). Counsel for the Debtors and Movants announced a stipulation to reject the Agreements pursuant to § 365 of the

Bankruptcy Code. (Hearing Tr. 12:23-13:4.) The Court advised that it would await the submission of a written stipulation to that affect. (Hearing Tr. 19:20-23.)

10. It was not until after the APA transaction was consummated (and less than one business day prior to the July 9, 2018 hearing) that counsel for MTBC was advised that the Debtors' proposed stipulation (the "Stipulation") would provide for both "rejection" and "termination" of the Agreements. In response, the MTBC Statement was filed on July 11, 2018, to advise all interested parties that the Debtor was not authorized to enter into any agreement that would impair or otherwise affect the rights that were previously granted to MTBC pursuant to the APA and Sale Order. (*See* MTBC Statement, at 4.)

11. On July 13, 2018, Movants filed the Motion, seeking a declaration that MTBC may not enforce any restrictive covenant against them, or (in the alternative) a modification of the Sale Order to so provide.

OBJECTION

I. Debtors Do Not Have The Power To Retroactively Impair Or Otherwise Change The Rights Transferred To MTBC Pursuant To The APA And Sale Order.

12. Contrary to Movants' contentions, MTBC does not purport to have acquired the Agreements. MTBC recognizes the Debtors' right to reject the Agreements, and does not object to such rejection. Nor does MTBC seek to require Movants to provide any services pursuant to the Agreements. However, MTBC has purchased Debtors' business – including the Debtors' right, if any, to operate such business without competition from Movants. MTBC therefore objects to the Movants' attempt to unilaterally foreclose MTBC's rights pursuant to a subsequent stipulation to which MTBC is not a party. Neither Movants nor the Debtors have any such authority to bind MTBC.

13. There is little question that the Debtors' right to enforce the Movants' restrictive covenants against employees previously involved in the Debtors' business falls within the

transfer of rights under the APA. Pursuant to the APA, MTBC purchased from Debtors “all the assets, properties, business and rights, of every kind and description (whether real, personal or mixed, tangible or intangible) and wherever situated, which are owned, used or held for use by [Debtors] as of [June 25, 2018] in connection with [‘providing revenue cycle management, practice management and group purchasing organization services for physicians in the United States’].” (APA, Recital A; § 1.1.) Those assets expressly include “all causes of action, judgments, claims and demands against third parties, whether known or unknown, except” (in relevant part) causes of action which do not relate to those assets (APA §§ 1.1.6, 3.1.11[v].)

14. Further, this Court’s Sale Order expressly provides that the assets transferred to MTBC under the APA “include any rights of the Debtors’ estates to enforce (a) obligations of confidentiality, covenants not to compete, covenants not to solicit, and similar obligations of employees and contractors currently or previously working in or in connection with the Debtors’ revenue cycle management, physician practice management, and group purchasing organization businesses ... provided, however, that the Court makes no determination whether or to what extent such obligations are enforceable under applicable non-bankruptcy law.” (Sale Order ¶ AA.) The Sale Order is consistent with the APA, and makes clear that the Debtors’ right to restrict competition, if any, were included in the assets purchased by MTBC. Thus, under both the APA and the Sale Order, the Debtors’ rights, if any, to enforce the restrictive covenant against the Movants was transferred to MTBC.

15. The right to enforce a restrictive covenant is not automatically terminated upon the rejection of an agreement. *See In re Hirschhorn*, 156 B.R. 379 (E.D.N.Y. 1993) (debtor’s obligations under non-compete clause were not avoided by rejection of agreement); *Med. Malpractice Ins. Assn v. Hirsch (In re Lavigne)*, 114 F.3d 379, 386-87 (2d Cir. 1997) (“While rejection is treated as a breach, it does not completely terminate the contract”); *In re Tri-Glied*,

Ltd., 179 B.R. 1014 (Bankr. E.D.N.Y. 1995) (“rejection of a lease under 11 U.S.C. § 365(d)(4) constitutes a mere breach of the lease and not a termination”). Nor has the enforceability of any restrictive covenant been adjudicated by this Court. (Sale Order ¶ AA. [“the Court makes no determination whether or to what extent such obligations are enforceable under applicable non-bankruptcy law”].)

16. Nevertheless, Movants’ seek an order that the Agreements are not only “rejected,” but also “terminated.” Because rejection under § 365 of the Bankruptcy Code does not equate to “termination,” § 365 of the Bankruptcy Code does not authorize the Debtors to retroactively “terminate” the Agreement.

17. Not only have the Debtors already transferred their interest in enforcing the restrictive covenants to MTBC, but because the Debtors no longer own the relevant business, they have no interest in enforcing those restrictive covenants. Therefore, it is inappropriate for the Debtors to enter into an agreement with Movants that would affect those rights which were already transferred to MTBC.

18. For all of the foregoing reasons, MTBC’s rights, if any, to enforce the Debtors’ restrictive covenants against Movants cannot be impaired by an agreement between Movants and the Debtors. To the extent that Movants believe those rights cannot be enforced against them, that issue should be determined by an appropriate non-bankruptcy court if and when the issue arises.

II. MTBC Has Standing To Contest The Stipulation.

19. As stated above, MTBC acquired certain rights from the Debtors pursuant to the APA and Sale Order, including the Debtors’ rights to enforce “obligations of confidentiality, covenants not to compete, covenants not to solicit, and similar obligations of employees and contractors currently or previously working in or in connection with the Debtors’ revenue cycle

management, physician practice management, and group purchasing organization businesses....” (Sale Order ¶ AA.) Accordingly, the Debtors have been divested of any authority to impair or otherwise affect those rights.

20. To the extent that Debtors seek to modify the rights that MTBC was previously granted under the APA and Sale Order, MTBC has a clear interest in objecting to such attempt. Indeed, because the Debtors no longer own the relevant business, it is the Debtors who have no interest in protecting the right to enforce restrictive covenants against competition with their former business.

21. MTBC does not claim (as Movants suggest) that the Agreements were assumed and assigned to MTBC, or that the Debtor is not permitted to reject the Agreements. Nor, at this point, does MTBC seek any affirmative declaration that the restrictive covenants are enforceable against Movants. Instead, MTBC seeks only to protect whatever interests were granted to MTBC under the APA and Sale Order, given that the Debtor is not authorized to do anything *more* than reject the Agreements.

22. The Debtors’ authority under § 365 of the Bankruptcy Code is limited to “rejecting” the Agreements. They have no authority to “terminate” them. Because the Movants request relief beyond what is authorized by § 365, it is incumbent upon MTBC to protect those interests, if any, which were transferred to MTBC and would not otherwise be foreclosed by rejection of the Agreements.

23. For the foregoing reasons, Movants’ argument that MTBC is without standing to protect the assets it acquired from the Debtors should be rejected.

III. The Motion Is Procedurally Improper.

24. Not only is the relief sought by Movants’ substantively unjustifiable, but their Motion is also procedurally defective under Fed. R. Bankr. P. 7001(9) and Fed. R. Civ. P. 60(b).

A. Declaratory Relief Is Improper Under Fed. R. Bankr. P. 7001(9).

25. Movants seek a declaration that MTBC may not enforce any restrictive covenant against them. (*See* Motion ¶ 28.) However, such relief would require an adversary proceeding, which Movants have not commenced.

26. Under the Federal Rules of Bankruptcy Procedure, a proceeding to obtain a declaratory judgment relating to the validity of an interest in property requires an adversary proceeding. Fed. R. Bankr. P. 7001(2), (9). The Motion seeks a determination that MTBC has no valid interest in certain assets that it purchased pursuant to the APA and Sale Order – namely Debtors’ right, if any, to enforce restrictive covenants.

27. Because Movants have failed to commence an adversary proceeding, their request for declaratory relief is procedurally improper and must be denied under Fed R. Bankr. P. 7001(9). *Compare In re Eastman Kodak Co.*, No. 12-10202-ALG, 2012 WL 2255719, at *2 (Bankr. S.D.N.Y. Jun. 15, 2012) (denying *motion* which, “for all intents and purposes, [was] an action for a declaratory judgment to determine an interest in property”) *with Sampson v. Teligent, Inc. (In re Teligent, Inc.)*, No. 01-8091A, 2001 WL 1134729, at *1 (Bankr. S.D.N.Y. Sept. 6, 2001) (considering *adversary proceeding* seeking a declaration that plaintiffs were relieved of their obligations under a non-competition agreement).

B. Modification Of The Sale Order Is Improper Under Fed. R. Civ. P. 60(b).

28. In addition to declaratory relief, Movants seek relief from the Sale Order under Fed. R. Civ. P. 60(b), as made applicable by Fed. R. Bankr. P. 9024. (Motion ¶ 36.) However, the Movants have failed to establish any grounds for modification under Rule 60(b).

29. Rule 60(b) permits a court to grant relief from an order based on several enumerated grounds, including mistake, inadvertence, surprise, excusable neglect, fraud, or any other reason that justifies relief. The catch-all provision in Rule 60(b) “is reserved for only the

most limited of circumstances and is properly invoked only when there are extraordinary circumstances justifying relief....” *In re Joe’s Friendly Serv. & Son, Inc.*, 538 B.R. 618 (E.D.N.Y. 2015).

30. None of the above bases for relief apply here. Movants do not allege any facts suggesting that entry of the Sale Order was a result of fraud or mistake, and Movants made no objection to Paragraph AA of the Sale Order before it was entered. Instead of explaining under which enumerated grounds they seek modification of the Sale Order – or why they failed to object to the Sale Order before it was entered – Movants assert in conclusory fashion that they “would suffer manifest injustice if MTBC would be permitted to attempt to enforce the restrictive covenants without assuming and curing the Agreements.”

31. To the contrary, it is MTBC who would suffer injustice if the Sale Order is now modified to invalidate rights which MTBC has already paid valuable consideration for, pursuant to the APA. MTBC relied on the terms provided in the Sale Order when it consummated the APA transaction with the Debtors. It would be unjust to retroactively modify the terms of MTBC’s transaction simply because Movants desire additional protection from potential claims to which they are not entitled under § 365. To the extent that Movants’ non-compete obligations cannot be enforced against them, that issue should be determined by an appropriate non-bankruptcy court if and when the issue arises.

32. Because Movants have failed to establish any of the enumerated grounds for modification under Rule 60(b), their Motion to modify the Sale Order should be denied.

CONCLUSION

34. In light of the foregoing, MTBC respectfully submits that Movants' Motion should be denied in its entirety.

Dated: July 19, 2018
Dallas, Texas

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ Keith Aurzada
Keith Aurzada, Esq. [*Pro Hac Vice*]
Texas Bar. No. 24009880
JP Morgan Chase Tower
2200 Ross Avenue, Suite 3300
Dallas, TX 75201
Tel: (214) 721-8041
Fax: (214) 220-6741
E: keith.aurzada@bclplaw.com

*Attorneys for Medical Transcription
Billing, Corp.*

CERTIFICATE OF SERVICE

I certify that on July 19, 2018, a true and correct copy of the foregoing document was served, pursuant to the CM/ECF procedures in this District, on all parties subscribing thereto.

/s/ Keith Aurzada

Keith Aurzada