

CHAD E. MEACHAM
UNITED STATES ATTORNEY
Donna K. Webb
Assistant United States Attorney
Texas State Bar No. 21024000
1100 Commerce St., Ste. 300
Dallas, Texas 75242
donna.webb@usdoj.gov
Telephone: 214-659-8600
Facsimile: 214-659-8807
Attorneys for
United States of America
Department of Health & Human Services

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

CHRISTIAN CARE CENTERS, INC.,
Debtor.

CASE NO. 22-80000-SGJ-11
CHAPTER 11

**OBJECTION OF THE UNITED STATES TO THE SALE OF ASSETS OF DEBTORS
FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES
AND ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS**

The United States of America (the “United States”), on behalf of the Department of Health and Human Services (“HHS”), acting through its designated component, the Centers for Medicare & Medicaid Services (“CMS”), hereby objects to the sale of the assets of the debtors free and clear of all liens, claims, interests and encumbrances and the assumption and assignment of executory contracts.

FACTUAL AND PROCEDURAL BACKGROUND

1. On May 23, 2022 (the “Petition Date”), the above-captioned debtors and debtors-in-possession (the “Debtors”) filed their voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

2. Debtors operate “comprehensive living campuses and healthcare services” in Mesquite, Allen, and Fort Worth, Texas. Doc. 35, p. 2. Services provided by Debtors include independent living, assisted living, memory care, skilled nursing, outpatient therapy, respite care and hospice care. Doc 35, p. 2; Doc. 3, p. 5.

3. Debtors’ cases are being jointly administered, and pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, Debtors continue to operate their businesses and manage their affairs as debtors-in-possession.

4. On June 23, 2022, the Court entered an Order Approving Bid Procedures and Protections in Connection with the Sale of Substantially All of the Debtors’ Assets, Approving Procedures for the Assumption and Assignment of Executory Contracts, Setting Final Hearing on Sale, and Granting Other Related Relief. Debtors seek to sell substantially all their assets in an auction. The Debtors intend to sell substantially all their assets to the Stalking Horse Bidder, North Texas Benevolent Holdings, LLC (“Stalking Horse”), and all other assets to a successful bidder (the “Successful Bidder”), and to assume and assign certain executory contracts to the Stalking Horse Bidder and the Successful Bidder. The assets for sale are defined more specifically in the Asset Purchase Agreement negotiated with the Stalking Horse (the Stalking Horse APA). Doc. 31-1, pp. 14-15.

5. Debtors’ Motion for Order (A) Approving Sale of Assets of Debtors, (B) Approving Bid Procedures and Protections in Connection with the Sale of Substantially All of the Debtors’ Assets, (C) Approving Assumption and Assignment of Executory Contracts, and (D) Granting Other Related Relief (“Motion to Sell”) Exhibit A contains the Stalking Horse APA. Doc 31-1.

6. Pursuant to the Stalking Horse APA, the Debtors seek to sell their assets free and clear of all liens, claims, interests, and encumbrances, and specifically excluding as assumed

liabilities “any liabilities related to cost report settlement, fines, penalties, overpayments or recoupments, except for liabilities related to hospice cap repayments assumed in accordance with Section 2.03(e) [of the Stalking Horse APA.]” Doc 31-1, p. 17.

7. Section 2.03(e) of the Stalking Horse APA includes, as assumed liabilities “[h]ospice cap repayments to be made from and after the Closing Date pursuant to letters from Palmetto GBA dated March 31, 2021 and March 29, 2021, and anything related to such obligations for the period after September 30, 2021.” Doc. 31-1, p. 16.

8. It is anticipated that additional Medicare overpayments related to cost reports or claims filed by the debtor could be determined after the sale of the debtor’s assets.

REGULATORY BACKGROUND

9. As of the Petition Date, the Debtors are parties to Medicare provider agreements with the Secretary of HHS (the “Secretary”), acting through CMS, to receive payment for services provided to Medicare beneficiaries pursuant to the provisions of, and regulations promulgated under, Title XVIII of the Social Security Act. 42 U.S.C. §§ 1395-1395lll (the “Medicare Statute”).

10. The Debtors own entities that provide long-term care and hospice services under the Medicare program. To be eligible to do so, a provider must have a valid agreement with the Secretary, called a Health Insurance Benefit Agreement (commonly known as a “Provider Agreement” or “Medicare Provider Agreement”). 42 U.S.C. § 1395cc; 42 C.F.R. § 400.202 (defining “provider”). A Provider Agreement is defined as an agreement between CMS, acting on behalf of the Secretary, and a health facility, such as a hospice, a skilled nursing facility, or a hospital. 42 C.F.R. §§ 489.2 and 489.3.

11. The transfer of a Provider Agreement is strictly limited. Provider Agreements may be assigned only if there is a “change of ownership.” 42 C.F.R. § 489.18. When CMS determines

that a valid “change of ownership” has occurred, the existing Provider Agreement is automatically assigned to the new owner. 42 C.F.R. § 489.18(c); *United States v. Vernon Home Health, Inc.*, 21 F.3d 693, 696 (5th Cir. 1994). An assigned agreement, however, is subject to all statutory and regulatory terms under which it originally was issued, including the adjustment of payments to account for previously made overpayments. *Vernon*, 21 F.3d at 696 (citing 42 C.F.R. § 489.18(a), (d)).

12. The Secretary contracts with Medicare Administrative Contractors (“MACs”) (formerly called fiscal intermediaries or “FI”), typically private insurance companies, to administer payment to providers for Medicare covered services. MACs make interim payments to providers in accordance with the Medicare Statute and regulations and perform the day-to-day administration of Medicare, *e.g.*, audit and reimbursement activities. 42 U.S.C. § 1395kk-1; 42 C.F.R. §§ 421.400–404.

13. An overpayment may result for several reasons. *Medicare Financial Management Manual*, Ch. 3, § 10 (Rev. 11124, Nov. 18, 2021). Aggregate overpayments involve a group or all a Part A provider’s claims and may be discovered at cost-report settlement time or change of FI, result from a pattern of improper application of Medicare coverage provisions, result from a periodic interim payment adjustment, arise in situations involving provider failure to file a cost report, or occasions of fraud or program abuse. *Id.* Individual overpayments may also occur when incorrect claims payment for services is made under Medicare Part A or Part B. *Id.*

14. Medicare imposes two annual limits to payments made to hospice providers: the inpatient cap and the aggregate cap. 42 C.F.R. § 418.302(f); 42 C.F.R. § 418.309. Any amount paid to a hospice for its claims in excess of the caps is considered an overpayment and must be repaid to Medicare.

15. Once an overpayment has been determined, a debt is owed by the provider to the United States Government. *Id.*

ARGUMENT

16. The Stalking Horse APA proposed by the Debtor in the Motion to Sell impermissibly excludes the buyer's liability for "any liabilities related to cost report settlements, fines, penalties, overpayments or recoupments, except for liabilities related to hospice cap repayments to be assumed in accordance with [Section 2.03 of the Asset Purchase Agreement, titled "Assumed Liabilities"].” *Debtors Motion for Order (a) Approving Sale of Assets of Debtors, (B) Approving Bid Procedures and Protections in Connection with the Sale of Substantially All of the Debtors’ Assets, (c) Approving Assumption and Assignment of Executory Contracts, and (d) Granting Other Related Relief* (“Motion to Sell”), Exhibit A.

17. The Stalking Horse APA further references Operations Transfer Agreements (OTAs) that are not attached as part of the record. These OTAs may contain additional language that further inhibits the United States’ recoupment and setoff rights.

18. If Debtors assume and assign the Provider Agreements to a purchaser, the Debtors must cure the defaults associated with the Provider Agreements and the purchaser must assume all the burdens along with the benefits arising from assignment of the Medicare Provider Agreements, including successor liability for those agreements. 11 U.S.C. § 365(a), (b); 42 C.F.R. § 489.18(d); *Vernon*, 21 F.3d at 696 (new owner that accepted assignment of Medicare provider agreement was liable for overpayments of prior owner); *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1103 (8th Cir. 2000) (new owner of a skilled nursing facility was liable for penalties assessed on the basis of the former owner’s actions); *Eagle Healthcare, Inc. v. Sebelius*, 969 F. Supp. 2d 38, 40

(D.D.C. 2013) (“An assigned Provider Agreement is subject to all of the terms and conditions under which it was originally issued.”).¹ See also *In re Charter Behavioral Health Sys., LLC*, 45 Fed. Appx. 150, 151, 2002 WL 2004651, *1 n.1 (3d Cir. June 3, 2002) (observing that “[i]f the new owner elects to take an assignment of the existing Medicare Provider Agreement, it receives an uninterrupted stream of Medicare payments *but assumes successor liability for overpayments and civil monetary penalties asserted by the Government against the previous owner*”) (emphasis added) (citing 42 C.F.R. § 489.18(d); *Deerbrook Pavilion, LLC*, 235 F.3d at 1103-05; *Vernon*, 21 F.3d at 696).

19. The United States also objects because the Proposed Order Authorizing the Sale of Assets of Debtors, attached to Debtors’ Motion to Sell (Doc 31, Part 6) impermissibly extinguishes the United States’ recoupment and setoff rights, independent of the successor liability discussed above. Section 363(f) permits a debtor to sell property “free and clear of any interest in such property.” 11 U.S.C. § 363(f). Affirmative defenses to monies owed under a contract, including recoupment and certain setoff rights, do not qualify as interests in such property and cannot be extinguished by a Section 363(f) sale. *Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 261-64 (3d Cir. 2000).

20. The Proposed Sale Order cuts off the United States’ rights to recoupment and setoff. Paragraph GG of the Order states that,

the transfer of the Assets to the Purchaser will be, as of the Closing Date, a legal, valid, and effective transfer of the Assets, which transfer vests or will vest the Purchaser with all right, title, and interest of the Debtors to the Assets free and clear of (i) all liens (including any liens as that term is defined in Bankruptcy Code Sections 101(37)) and Encumbrances (as defined in the Agreement) relating to, accruing, or arising any time prior to the Closing Date (collectively, the “Liens”), and (ii) all debts (as that term is defined in Bankruptcy Code Section 101(12)) arising under, relating to, or in connection

¹ When a provider agreement is assigned, any underpayments that CMS may subsequently determine are also paid to the assignee.

with any act of the Debtors or claims (as that term is defined in Bankruptcy Code Section 101(5)), liabilities, obligations, demands, guaranties, options in favor of third parties, rights, contractual commitments, restrictions, interests, mortgages, hypothecations, charges, indentures, loan agreements, instruments, collective bargaining agreements, leases, licenses, deeds of trusts, security interests or similar interests, conditional sale or other title retention agreements and other similar impositions, restrictions on transfer or use, pledges, judgments, claims for reimbursement, contribution, indemnity, exoneration, infringement, products liability, alter ego liability, suits, defenses, credits, allowances, options, limitations, causes of action, choses in action, rights of first refusal or first offer, rebate, chargeback, credit, or return, proxy, voting trust or agreement or transfer restriction under any shareholder or similar agreement or encumbrance, easements, rights of way, encroachments, Liabilities (as defined in the Agreement), and matters of any kind and nature, whether arising prior to or subsequent to the Petition Date, whether known or unknown, legal or equitable, mature or unmatured, contingent or noncontingent, liquidated or unliquidated, asserted or unasserted, whether imposed by agreement, understanding, law, equity, or otherwise (including, without limitation, rights with respect to Claims (as defined below) and Liens (A) that purport to give any party a right or option to effect a setoff or recoupment against, or a right or option to effect any forfeiture, modification, profit sharing interest, right of first refusal, purchase or repurchase right or option, or termination of, any of the Debtors' or the Purchaser's interests in the Assets, or any similar rights, if any, or (B) in respect of taxes, restrictions, rights of first refusal, charges of interests of any kind or nature, if any, including without limitation, any restriction of use, voting, transfer, receipt of income, or other exercise of any attribute of ownership) collectively, as defined in this clause (ii), the "Claims" and, together with the Liens and other interests of any kind or nature whatsoever, the "Interests"), relating to, accruing, or arising any time prior to the entry of this Sale Order, with the exception of the Assumed Liabilities and the Permitted Encumbrances (each as defined in the Agreement for conveyance purposes) to the extent set forth in the Agreement, and any covenants set forth in the Agreement.

21. The proposed order expressly seeks to limit setoff and recoupment rights in

Paragraph HH:

For the avoidance of doubt, the terms "Liens" and "Claims," as used in this Sale Order, include, without limitation, rights with respect to any Liens and Claims: (1) that purport to give any party a right of setoff or recoupment against, or a right or option to affect any forfeiture, modification, profit-sharing interest, right of first refusal, purchase or repurchase writer option, or termination of, any of the Debtors' or the Purchaser's interest in the Assets, or any similar rights; or (2) in respect of taxes, restrictions, rights of first refusal, charges of interest of any kind and nature, if any, and including, without limitation, any restriction of use, voting, transfer, receipt of income, or other exercise of any of the attributes of ownership relating to, accruing, or arising at any time prior to the Closing Date, with the exception of Permitted Encumbrances and Assumed Liabilities (as those terms are defined in the Agreement) that are expressly assumed by the Purchaser pursuant to the Agreement.

CONCLUSION

For the foregoing reasons, the Proposed Order Authorizing the Sale of Assets of Debtors cannot be approved.²

This 13th day of July 2022.

Respectfully submitted,

CHAD E. MEACHAM
UNITED STATES ATTORNEY

/s/ Donna K. Webb
Donna K. Webb
Assistant United States Attorney
State Bar No. 21024000
1100 Commerce St., Ste 300
Dallas, Texas 75242
donna.webb@usdoj.gov
Telephone: 214-659-8600
Facsimile: 214-659-8807

Attorneys for Department of
Health & Human Services

Certificate of Service

On July 13, 2022, I electronically submitted the foregoing document with the clerk of court for the U.S. Bankruptcy Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Donna K. Webb
Donna K. Webb
Assistant United States Attorney

² The United States reserves its right to supplement this Objection if the Debtors file a revised proposed sale order after the deadline to object has passed.