

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	§	Chapter 11
ABC DENTISTRY, P.A., <i>et al.</i> ¹	§	Case No.16-34221
DEBTORS.	§	Joint Administration Requested

**EMERGENCY MOTION IN SUPPORT OF AN ORDER FINDING THAT PURSUANT
TO 11 U.S.C. § 333(A)(1) AND BANKRUPTCY RULE 2007.2 A PATIENT CARE
OMBUDSMAN IS NOT NECESSARY**

**NOTICE UNDER ORDER GRANTING COMPLEX CHAPTER 11 BANKRUPTCY
CASE TREATMENT**

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-ONE DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

A SEPARATE NOTICE WILL PROVIDE THE DATE AND TIME OF THE HEARING ON THIS MOTION TO OCCUR IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, 515 RUSK AVENUE, HOUSTON, TEXAS 77002.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

¹ The Debtors in these chapter 11 cases are: ABC Dentistry, P.A.; ABC Dentistry West Orem, P.L.L.C.; and ABC Dentistry Old Spanish Trail, P.L.L.C.

ABC Dentistry, P.A. and its debtor affiliates, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), file this *Motion in Support of an Order Pursuant to 11 U.S.C. § 333(a)(1) and Bankruptcy Rule 2007.2 Finding that a Patient Care Ombudsman is Not Necessary* (the “Motion”). In support of the Motion, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On August 26, 2016 (the “Petition Date”), the Debtors filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

3. The Debtors remain in possession of their property and are operating their business as debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee has been requested or appointed in these chapter 11 cases.

4. Additional detail about the Debtors’ businesses and the events leading to the chapter 11 filings can be found in the Debtors’ motions for joint administration.

RELIEF REQUESTED

5. The Debtors seek the entry of an order (the “Order”) finding that, pursuant 11 U.S.C. § 333(a)(1) and Bankruptcy Rule 2007.2 the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of the patients.

BASIS FOR RELIEF

6. A bankruptcy court is required to appoint a patient care ombudsman unless (1) a debtor does not qualify as a Health Care Business under section 101(27A) or (2) the court finds that the appointment is not necessary for the protection of patients under the specific facts of the case. 11 U.S.C. §§ 101(27A), 333(a)(1).

7. The Debtors are in the business of providing dental services and are a Health Care Business as defined under 11 U.S.C. §101(27). Pursuant to section 101(27)(A) of the Bankruptcy Code, a Health Care Business is defined as one which “... (A) ... is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of injury, deformity or disease” The Debtors provide diagnosis and treatment services for oral and/or orthodontic injury, deformity and disease. Further, Debtors provide services which may include surgical procedures, such as root canals and the removal of wisdom teeth. Therefore, the Debtors are Health Care Businesses under 11 U.S.C. §107(27).

8. Further, the Debtors decision to file for bankruptcy was not the result of patient care issues. The Debtors’ patients have not alleged injury or pursued malpractice claims.

9. Given the specific facts of the Debtors’ case, the appointment of an Ombudsman under 11 U.S.C. § 333(a)(1) and Bankruptcy Rule 2007.2 is not necessary for the protection of the Debtors’ patients.

APPLICABLE AUTHORITY

11 U.S.C. § 333(a)(1) and Bankruptcy Rule 2007.2 Recognize that a Patient Care Ombudsman is Not Necessary in Every Health Care Business Case

1. The appointment of a patient care ombudsman is not necessary for the protection of the Debtors patients under the specific facts of this case.

2. Where a debtor is a health care business under 11 U.S.C. §101(27A), a bankruptcy court is required to appoint a patient care ombudsman unless the court finds that the appointment is not necessary for the protection of patients under the specific facts of the case. 11 U.S.C. § 333(a)(1), *see also In re Smiley Dental Arlington, PLLC*, 503 B.R. 680, 688 (Bankr. N.D. Tex. 2013) (factors weigh against appointing ombudsman regardless of debtor's status as a health care business); *In re Banes*, 355 B.R. 532 (Bankr. M.D. N.C. 2006)(same); *In re Vartanian*, No. 07-10790, 2007 WL 4418163, at *2 (Bankr. D. Vt. Dec. 13, 2007)(same).

3. The plain language of section 333(a)(1) affords a court considerable discretion in determining whether an ombudsman is required. *In re Valley Health Sys.*, 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008). The party opposing the appointment of the ombudsman bears the burden of overcoming the mandatory appointment. *In re Starmark Clinics, LP*, 388 B.R. 729, 734 (Bankr. S.D. Tex. 2008). Courts consider the following nonexclusive factors in determining whether this burden has been satisfied:

(i) the cause of the bankruptcy; (ii) the presence and role of licensing or supervising entities; (iii) Debtor's past history of patient care; (iv) the ability of the patients to protect their rights; (v) the level of dependency of the patients on the facility; (vi) the likelihood of tension between the interests of the patients and the debtor; (vii) the potential injury to the patients if the debtor drastically reduced its level of patient care; (viii) the presence and sufficiency of internal safeguards to ensure appropriate level of care; [and] (ix) the impact of the cost of an ombudsman on the likelihood of a successful reorganization.

Id.; *In re Smiley Dental*, 503 B.R. at 688 (romanettes added). Additional relevant factors include:

(i) the facility's patient care is of high quality, (ii) that the debtor has adequate financial strength to maintain high-quality patient care, (iii) that the facility already has an internal ombudsman program in operation or (iv) that the situation at the facility is adequately

monitored by federal, state, local or professional association programs so that the ombudsman would be redundant.

3 COLLIER ON BANKRUPTCY ¶ 333.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012)(romanettes added).

4. In *In re Smiley Dental*, the Bankruptcy Court for the Northern District of Texas held the appointment of a healthcare ombudsman was not necessary where the debtors' dental practices (1) were not forced into bankruptcy by patient malpractice issues, (2) required licenses and insurance coverage, which were current and in accord with state requirements, (3) had not had evidence of past issues of patient care presented against the debtors, (4) serviced patients with a low level of provider dependency, (5) had little likelihood of a conflict of interests with their patients and (6) were subject to forms of internal oversight. 503 B.R. at 689.

5. In the present case, as in *In re Smiley Dental*, Debtors' bankruptcy filing did not result from patient complaints of malpractice. Rather, Debtors' filing was the result of a *qui tam* lawsuit brought by a disgruntled employee seeking civil penalties of *over \$24 million*. While the *qui tam* plaintiff alleges that the Debtors performed "harmful" and "unnecessary" procedures,² such allegations have not been corroborated by expert testimony or alleged by the Debtors' patients. The State of Texas cannot require the *qui tam* plaintiff to dismiss his lawsuit, even if it finds the suit to be meritless. Therefore, it is telling that the state has not elected to join the *qui tam* plaintiff in his suit. Since none of the Debtors' patients have alleged malpractice, no tension exists between the interest of the Debtors and their patients and no such tension is likely to arise.

6. Similar to the case in *In re Smiley*, Debtors' patients' have access to their medical records and are able to seek alternate dental or orthodontic care, should they so choose. As such,

² Notice of Removal Ex. B, at 27 (Second Amended Petition).

Debtors' patients experience little provider dependence and, thus, their dental health is not jeopardized by the Debtors' bankruptcy filing.

7. Additionally, Debtors are servicing existing debts and generating sufficient revenue to cover operational expenses and anticipate being able to do so throughout the bankruptcy proceeding. Consequently, Debtors' patients do not face a significant risk of a diminished quality of care. Furthermore, Debtor's quality of care is subject to a form of internal control. The dentists in Debtors' clinics rotate between locations, treating various patients at each locations in which they serve. Accordingly, Debtors' patients' exposure to multiple professionals provides a form of internal oversight of the care administered, which safeguards patient wellbeing. Further, like the dental practice in *In re Smiley Dental*, Debtors' businesses require licenses and insurance coverage, all of which are current and in accord with state requirements.

8. As in *In re Smiley Dental*, the Debtors have demonstrated that the totality of the circumstances weighs against the appointment of a patient care ombudsman. Because the totality of the circumstances weighs against the appointment of a patient care ombudsman, this Court should find the Debtors have carried their burden of demonstrating such an appointment is not necessary.

EMERGENCY CONSIDERATION REQUESTED

9. The Debtors respectfully request emergency consideration of this Motion. This request for relief under 11 U.S.C. 333(a)(1) is in compliance with Bankruptcy Rule 2007.2(a), requiring such a motion to be filed within 21 days of the commencement of a case. Section 333(a)(1) may require the court to appoint an ombudsman not later than 30 days after the commencement of the case. In the present case, that deadline falls on September 25, 2016, a date prior to a full 21 day notice period. It was not practical to file this motion in the first days of

the case, given the work required of the Debtors since filing for bankruptcy. The Debtors have worked diligently on obtaining approval of first day motions, setting up protocols to address US Trustee guidelines, complying with US Trustee information requests, preparing for the Initial Debtor Interview and working on Schedules and Statements of Financial Affairs for each of the Debtors. Accordingly, the Debtors respectfully request that the Court approve the relief requested in this Motion on an emergency basis.

WHEREFORE the Debtors respectfully request entry of the Order finding that no patient care ombudsman need be appointed and granting such other and further relief as is just and proper.

Date: September 9, 2016

Respectfully submitted,

BAKER BOTTS L.L.P.

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PROPOSED COUNSEL TO DEBTORS-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE ABC DENTISTRY, P.A., <i>et al.</i>¹ DEBTORS.	§ § § § § § § §	Chapter 11 Case No. 16-34221 Jointly Administered
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**ORDER FINDING THAT PURSUANT TO 11 U.S.C. § 333(A)(1) AND BANKRUPTCY
RULE 2007.2 A PATIENT CARE OMBUDSMAN IS NOT NECESSARY**

Upon the motion (the “Motion”)² of ABC Dentistry, P.A. and its debtor affiliates, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), for an order finding that a patient care ombudsman is not necessary, as more fully set forth in the Motion; the Court HEREBY FINDS AS FOLLOWS:

- (a) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334;
- (b) Venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409;
- (c) The relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and
- (d) The Debtors provided adequate and appropriate notice of the Motion under the circumstances.

¹ The Debtors in these chapter 11 cases are: ABC Dentistry, P.A.; ABC Dentistry West Orem, P.L.L.C.; and ABC Dentistry Old Spanish Trail, P.L.L.C.

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

Therefore, having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. Subject to further order of this Court, no patient care ombudsman is necessary for the protection of patients under the specific facts of this case.

2. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this order.

3. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this order.

Dated:

The Honorable Marvin Isgur
United States Bankruptcy Judge