

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

In re:

Curae Health, Inc., *et al.*¹

1721 Midpark Road, Suite B200
Knoxville, TN 37921

Debtors.

Chapter 11

Case No. 18-05665

Judge Walker

Jointly Administered

**MOTION (I) TO COMPEL BLUE CROSS BLUE SHIELD OF TENNESSEE, INC. TO
(A) TURNOVER ESTATE PROPERTY AND (B) PROVIDE AN ACCOUNTING OF
ESTATE PROPERTY IN ITS POSSESSION, AND (II) FOR RELATED RELIEF**

Comes now, Steven D Sass LLC, in its capacity as Liquidating Trustee and Debtor Representative (the “Trustee”) and respectfully submits this motion to compel Blue Cross Blue Shield of Tennessee, Inc. (“BCBST”) to (i) turnover certain funds to the Trustee, and (ii) provide an accounting of certain open claims under the health insurance plans for the employees of Curae Health, Inc., *et al.* (the “Debtors”) that were administered by BCBST (the “Motion”), pursuant to sections 542 and 105(a) of title 11 of the United States Code (the “Bankruptcy Code”). In support of this Motion, the Trustee respectfully represents as follows:

SUMMARY OF THE MOTION

1. In the ordinary course of its business, Curae Health, Inc. (“Curae”) offered the *Curae Health, Inc. Employee Benefits Plan* (the “Curae Benefit Plan”) to its employees. The Curae Benefit Plan was self-insured and administered pursuant to the *Administrative Services*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are Curae Health, Inc. (5638); Amory Regional Medical Center, Inc. (2640); Batesville Regional Medical Center, Inc. (7929); and Clarksdale Regional Medical Center, Inc. (4755); Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311).

Agreement Between BlueCross BlueShield of Tennessee, Inc. and Curae Health, Inc. (the “BCBST Agreement”). BCBST did not, directly or indirectly, provide any insured benefits under the Curae Benefit Plan. Curae was solely responsible for providing benefits to participants covered under the Curae Benefit Plan. Thus, BCBST’s sole obligation was to provide administrative services directly to Curae under the BCBST Agreement. BCBST agreed to act as administrator of the Curae Benefit Plan and Curae agreed to both advance the sums necessary for payment of any claims under the Curae Benefit Plan and pay a fee to BCBST for its services. BCBST was not liable to pay or advance any amounts payable to the Curae Benefit Plan participants. Upon information and belief, BCBST has been paid all fees due and owing under the BCBST Agreement.

2. As part of the Curae Benefit Plan, Curae entered into certain agreements with pharmaceutical companies through which Curae received rebates based on the volume of pharmaceuticals that were purchased by Curae Benefit Plan participants during the applicable plan year (the “Pharmacy Rebates”). The Pharmacy Rebates were paid initially to BCBST but were solely the property of Curae pursuant to the express terms of the BCBST Agreement.

3. The Curae Benefit Plan was terminated effective March 31, 2019, by the filing of a final Form 5500 with the Internal Revenue Service. Since the termination of the Curae Benefit Plan, BCBST has received Pharmacy Rebates of not less than \$147,000.00 that are property of liquidating trust administered by the Trustee pursuant to the *Liquidating Trust Agreement* (the “Liquidating Trust”) [Dkt No. 1014]. Despite repeated requests by the Trustee, BCBST has failed to remit the Pharmacy Rebates to the Trustee or provide any accounting of the Pharmacy Rebates or open claims under the Curae Benefit Plan. Accordingly, the Trustee seeks a bankruptcy court order requiring BCBST to (i) turnover the Pharmacy Rebates and any other

funds held with respect to the Curae Benefit Plan in compliance with the terms of the *Joint Chapter 11 Plan of Liquidation* (the “Plan”) [Dkt No. 835] and the *Findings of Fact, Conclusions of Law, and Order Confirming the Joint Chapter 11 Plan of Liquidation Of Curae Health, Inc., et al.* (the “Confirmation Order”) [Dkt No. 1074], (ii) provide the Trustee an accounting of all such funds received, and (iii) reimburse the Trustee for the costs of this Motion and related expenses incurred in seeking recovery of the Pharmacy Rebates that have been wrongfully withheld in derogation of the injunctive provisions of the Plan.

JURISDICTION AND VENUE

4. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

6. Pursuant to Article X.A.b. of the Plan, the Court retained jurisdiction to issue any order as necessary “to recover all Assets of the Debtors and property of the Debtors’ Estates, wherever located.”

7. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

8. On August 24, 2018, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Tennessee (the “Court”).

9. On September 6, 2018, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”) pursuant to 11 U.S.C. §§ 1102(a) and 1102(b)(1). [Dkt No. 112].

10. On May 4, 2019, the Debtors and the Committee filed the Plan. The Plan provided that upon the Effective Date² of the Plan, the Debtors' Assets³ would revert in the Liquidating Trust to be administered by a liquidating trustee and debtor representative. On May 13, 2019, the Court confirmed the Plan pursuant to the entry of the Confirmation Order.

11. On June 11, 2019, the Effective Date of the Plan occurred, the Liquidating Trust was established, and the Trustee was appointed. [Dkt No. 1120].

THE DEBTORS' RELATIONSHIP WITH BCBST

12. On March 17, 2015, Curae entered into the BCBST Agreement. A true and accurate copy of the BCBST Agreement is attached as **Exhibit A**. Pursuant to the BCBST Agreement, BCBST agreed to only provide ministerial administrative claims payment services for the Curae Benefit Plan. The Curae Benefit Plan covered certain of Debtors' employees and certain dependents of such employees, who are defined as "Members" in the BCBST Agreement. Curae is defined as the "Employer" in the BCBST Agreement.

13. Among the services provided by BCBST under the BCBST Agreement were "recovery services in the identified areas and, as compensation for these services, [BCBST] will retain a percentage of any recovery as identified below." *BCBST Agreement*, Ex. V. Exhibit V to the BCBST Agreement, entitled *Shared Savings*, outlines the recovery services to be provided by BCBST. Subpart 5 of Exhibit V applies to Pharmacy Rebates. It reads in full as follows:

5. Pharmacy Rebates. BlueCross may receive Pharmacy Rebates. Unless otherwise stated herein, a "Pharmacy Rebate" is any payment BlueCross receives that is attributable to a claim for a Covered Drug that is adjudicated under the Member's pharmacy benefit.

² All capitalized terms not defined in this Motion have the meanings ascribed them in the Plan.

³ Other than the D&O Claims and Tort Claims, which reverted in the applicable Debtor(s) and may be pursued by the Debtor Representative.

- 5.1 The following are specifically excluded from the definition of Pharmacy Rebate and shall be retained by BlueCross: (a) contractual obligations to BlueCross that require payment of a penalty or other amount to BlueCross if contractual obligations are not met; and (b) rebates attributable to Provider-administered Specialty Drugs.
- 5.2 For Pharmacy Rebates based on service dates occurring on or after April 1, 2017, **Employer will receive 100% of Pharmacy Rebates.**

(emphasis added).

14. Article V of the BCBST Agreement sets forth the liability and indemnification obligations of Curae and BCBST. More specifically, 5.1.1 provides that

BlueCross hereby agrees to indemnify and hold harmless the Employer, its directors, officers, employees and agents against any and all vicarious liability, actions, claims, lawsuits, settlements, judgments, costs, interest, penalties, expenses and taxes, including but not limited to, attorneys' fees and court costs, resulting from or arising directly or indirectly out of, or in connection with, actions or decisions arising directly from the gross negligence or wanton and reckless acts or failure to act by BlueCross, or its employees or agents ("the standard of care"), unless the cause of such liability was the result of the fault, criminal conduct or fraudulent acts of Employer or any of its directors, officers, employees or agents, or resulted from the direction given by Employer or its directors, officers, employees or agents in the administration of the Plan.

15. As a result, BCBST may be liable to Curae for certain acts or omissions fitting within the scope of 5.1.1. of the BCBST Agreement. This section, like the rest of the BCBST Agreement, is governed by Tennessee law. *BCBST Agreement*, 6.8.

16. Effective March 31, 2019, Curae filed the Form 5500 final return, which closed the Curae Benefit Plan.

17. Upon information and belief, BCBST is holding not less than \$147,000 in Pharmacy Rebates that were remitted to BCBST on account of the Curae Benefit Plan.

18. On October 14, 2019, the Trustee and his counsel advised counsel for BCBST, Steven Mindy, and Diana McClurg at BCBST, of the closure of the Curae Benefit Plan and the need for any funds held by BCBST to be remitted to the Trustee. Mr. Mindy indicated that he would need to evaluate the issue.

19. On October 17, 2019, Ms. McClurg emailed David Lopater, a former employee of Curae and current independent contractor of the Trust, to confirm the filing of a final Form 5500 terminating the Curae Benefit Plan. Mr. Lopater provided Ms. McClurg with a copy of the filed final Form 5500 by email on October 21, 2019.

20. On November 2, 2019, counsel for the Trustee sent an email to BCBST's counsel requesting, among other things, that all funds held by BCBST relating to the Curae Benefit Plan be remitted to the Trustee no later than November 8, 2019 (the "November 2 Email"). A true and correct copy of the November 2 Email is attached as **Exhibit B**.

21. After receiving no response to the November 2 Email, counsel for the Trustee telephoned Mr. Mindy on November 12, 2019, and left a message referencing the November 2 Email and requesting a return call or other response. No response has yet been received from Mr. Mindy.

22. On November 18, 2019, Mr. Lopater contacted Diana McClurg at BCBST to determine the status of BCBST's response to the Trustee's requests. Ms. McClurg advised that "I know our legal department is reviewing everything. I just sent a follow-up email to our internal council with your email. I will advise asap." As of January 3, 2019, the Trustee has received no further communications from BCBST or its legal counsel.

23. As a direct result of BCBST's non-responsiveness, the Trustee has been forced to expend the limited resources of the Liquidating Trust in order to craft this Motion to compel

BCBST to comply with not only the terms of the BCBST Agreement, but also the terms of the Plan and Confirmation Order.

RELIEF REQUESTED

24. Pursuant to paragraph 17 of the Confirmation Order and the Article VII.B. of the Plan, the Liquidating Trust is automatically vested with all assets of the Debtors' Estates, including the Debtors' rights in the Pharmacy Rebates, "free and clear of all Claims and equity interests in accordance with section 1141 of the Bankruptcy Code." The Trustee is further authorized pursuant to the Liquidating Trust Agreement to:

prosecute objections to Claims and prosecute Chapter 5 Actions [to include turnover actions under Section 542(a)] and relevant Causes of Action, . . . collect amounts due (including, without limitation, Debtor receivable and/or amounts owed by third parties relating to outstanding Debtor receivables, including any such amounts owed by any purchaser of Debtor assets), . . .sue and be sued, and participate in any proceeding with respect to any matter regarding or relating to this Liquidating Trust Agreement, the Confirmation Order, Claims, or the Liquidating Trust, [and] . . . take all other actions consistent with the provisions of this Agreement, the Plan, and the Confirmation Order that the Liquidating Trustee deems reasonably necessary or desirable to administer the Liquidating Trust.

Liquidating Trust Agreement, Art. 3.

25. In furtherance of the Trustee's powers, paragraph 34 of the Confirmation Order expressly enjoins any entity from "(d) asserting a setoff, right, subrogation, or recoupment of any kind against any debt, liability, or obligation due to the Debtors; and (e) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Joint Plan."

26. As noted, one of the powers of the Trustee is to prosecute Chapter 5 Actions, which are defined in the Plan to "include, but not be limited to, all causes of action under

Chapter 5 of the Bankruptcy Code” Accordingly, the Trustee is empowered to bring actions for turnover pursuant to the Section 542(a) of the Bankruptcy Code.

27. Section 542(a) of the Bankruptcy Code provides that

an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate

In other words, “any entity in possession or control of property of the estate is required to turn it over to the trustee.” *In re Tellico Lake Properties, L.P.*, 548 B.R. 800, 805 (Bankr. E.D. Tenn. 2016). In the Sixth Circuit, three requirements must be satisfied for approval of an action for turnover: “(1) that the property is or was in the possession, custody or control of an entity during the pendency of the case; (2) that the property may be used by the trustee in accordance with § 363 or exempted by the debtor under § 522; and (3) that the property has more than inconsequential value or benefit to the estate.” *Bailey v. Suhar (In re Bailey)*, 380 B.R. 486, 490 (6th Cir. BAP 2008); *In re Partin*, No. 13-35126, 2014 WL 2566073, at *1 (Bankr. N.D. Ohio June 6, 2014); *In re Tellico Lake Properties, L.P.*, 548 B.R. 800, 805 (Bankr. E.D. Tenn. 2016). In this matter, each of these questions is answered with an emphatic “Yes.”

28. Considering the first requirement, any possession during the bankruptcy case, even if the property is subsequently transferred, is sufficient. *Bailey*, 380 B.R. at 490. BCBST clearly and admittedly has possession of the Pharmacy Rebates and has had possession of the same during the pendency of the Debtors’ bankruptcy cases.

29. As to the second requirement, the Pharmacy Rebates are, without question, property of the Liquidating Trust that the Trustee is authorized to use pursuant to the Plan, Confirmation Order, and Liquidating Trust Agreement. Curae clearly has an interest in the

Pharmacy Rebates that is superior to any interest that could be claimed by BCBST. Pursuant to Subpart 5 of Exhibit V of the BCBST Agreement, Curae is expressly entitled to 100% of the Pharmacy Rebates. BCBST is not owed any amounts under the BCBST Agreement and, thus, has no basis to set off against the Pharmacy Rebates. However, in any event, the Confirmation Order expressly enjoins all entities from exercising any right of set off with respect to property of the Liquidating Trust. Consequently, there is simply no basis to deny the Trustee's right to turnover of the Pharmacy Rebates and any other funds held by BCBST relating to the Curae Benefit Plan.

30. As for the requirement that the property at issue be more than of inconsequential value, the Pharmacy Rebates and other funds in question total not less than \$147,000, which is more than inconsequential value by any reasonable standard. Accordingly, the Court should order BCBST to immediately turnover to the Trustee all funds held relating to the Curae Benefit Plan.

31. Section 542(a) expressly provides an accounting remedy. *Braunstein v. McCabe*, 571 F.3d 108, 122 (1st Cir. 2009) (citing 11 U.S.C. § 542(a) (stating that an entity holding property of the estate "shall ... account for such property or the value of such property")). Because the Pharmacy Rebates are subject to turnover, the Trustee is entitled to an accounting of all receipts and disbursements by BCBST relating to the Curae Benefit Plan, including the Pharmacy Rebate receipts.

32. The Trustee asserts that the actions of BCBST are in contempt of the Confirmation Order and that sanctions against BCBST are appropriate. Accordingly, the Trustee requests that BCBST be required to reimburse the Liquidating Trust for the legal fees incurred in compelling BCBST to comply with the terms of the Confirmation Order and Plan. As noted,

BCBST has no basis for withholding the Pharmacy Rebates under the terms of the BCBST Agreement – it clearly provides that Curae is entitled to 100% of such rebates. Nevertheless, BCBST has refused to respond to repeated requests from the Trustee and his representatives regarding the status and turnover of the Pharmacy Rebates. The Confirmation Order expressly prohibits “(d) asserting a setoff, right, subrogation, or recoupment of any kind against any debt, liability, or obligation due to the Debtors; and (e) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Joint Plan.” The actions of BCBST in failing to turn over the Pharmacy Rebates upon request of the Trustee clearly fall within the behavior enjoined by the Confirmation Order.

WHEREFORE, the Trustee respectfully requests that the Court (i) enter the proposed order: (a) granting the Motion, (b) requiring BCBST to turn over the Pharmacy to the Trustee, and (c) setting a hearing to establish the amount of attorneys’ fees and expenses owed by BCBST to the Liquidating Trust, and (ii) grant such other relief as the Court deems just.

Dated: January 10, 2020
Nashville, Tennessee

Respectfully submitted,

MANIER & HEROD, P.C.

/s/ Michael E. Collins

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*Co-Counsel to Steven D Sass LLC, in its
capacity as Liquidating Trustee and
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, a copy of the foregoing was sent via ECF to all parties registered to receive electronic notice in the case and via U.S. mail, postage prepaid to the following:

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/s/ Michael E. Collins
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