

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

In re:)
) Chapter 11
CURAE HEALTH, INC., et al.¹) Case No. 18-05665
) Judge Walker
Debtors.) Jointly Administered
)
May 9, 2019 9:00 am)
Courtroom 2)
2nd Floor Customs House)
701 Broadway, Nashville, TN 3720)

THE STATE OF MISSISSIPPI DIVISION OF MEDICAID'S
REQUEST FOR ADEQUATE ASSURANCE AND LIMITED OBJECTION
TO (I) AUTHORIZING THE PROPOSED SALE OF NORTHWEST
MISSISSIPPI REGIONAL MEDICAL CENTER
FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES
AND OTHER INTERESTS, (II) APPROVING THE CLARKSDALE APA;
AND (III)-(IV) SEEKING OTHER AND RELATED RELIEF

The State of Mississippi, Mississippi Division of Medicaid
("MDOM"), reserving all of its claims and defenses, including any objections
to jurisdiction, to the extent necessary, if necessary, requests adequate assur-

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); 2019-04-26 limited Objection To Sale 2019-04-26 limited Objection To Sale (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).

ance under 11 U.S.C. §363(e) and objects to the authorization of the proposed sale of Northwest Mississippi Regional Medical Center, approval of the Clarksdale APA or any other relief which in any manner impairs or diminishes the rights and claims of MDOM against Northwest Mississippi Regional Medical Center, Clarksdale Regional Medical Center, Inc., the Estate of Clarksdale Regional Medical Center, Inc., CHS/Community Health Systems, Inc., or any other person or entity which owes taxes, now or in the future, under Mississippi law to MDOM. In support of this objection, MDOM shows the following:

1. CHS/Community Health Systems, Inc., finds itself justifiable trapped by its own machinations and being “free and clear” of MDOM’s taxes and rights of recoupment are not valid, or even, necessary components of any sale.

2. CHS/Community Health Systems, Inc., “sold” the Clarksdale Hospital to the Debtor Clarksdale Regional Medical Center, Inc., some 18 Months ago but remained contractually obligated to Coahoma County, Mississippi to operate the hospital.

3. In December, 2018, CHS/Community Health Systems, Inc., took on the role of indemnifying the failure of Clarksdale HMA, LLC to pay

MDOM's taxes. [Docket No. 558 - ¶1.4(h)].²

4. In effect and practice the attempt to extinguish its obligation to pay taxes to MDOM is gratuitous, without any legitimate sound business reason and smacks of a lack of good faith by CHS.

5. As can be seen, the purchasers of the other hospitals Monroe Health Services, Inc., and Progressive Medical Management of Batesville, LLC, in cooperation with the Debtors Amory Regional Medical Center, Inc., and Batesville Regional Medical Center, Inc., their Estates, and the Committee, are attempting to make sure, that MDOM's taxes are paid in full both by funds generated at closing and recoupment by MDOM.

6. There is no equitable or legal reason that CHS/Community Health Systems, Inc., should not be required to do the same.

7. MDOM is party and holds an administrative claim for unpaid taxes, penalties and interest incurred by the Estate of Debtor Clarksdale Regional Medical Center, Inc.

8. On February 13, 2019, the Mississippi Division of Medicaid ("MDOM") filed the State of Mississippi Division of Medicaid's Motion to (I) Approve its Administrative Expense, and Compel Payment Thereof, and

² "Manager shall undertake, manage, assume, administer, and pay from its own funds: (i) all Hospital operating expenses, including without limitation, ... taxes, ... incurred and arising on or after the Effective Date.... Manager shall take such actions on behalf of Owner and under Owner's provider numbers, including, without limitation, Owner's provider numbers issued by Medicare, Medicaid or their fiscal intermediaries or paying agents (the 'Programs')."

(II) Upon Any Failure to Pay that the Debtor(s) Be Required to Appear at a Hearing to Show Cause and for the Court to Hear and Consider Whether to Dismiss or Convert the Proceedings [Docket No. 758] (the “MDOM Motion”). The MDOM Motion is fully incorporated herein by reference and the matters asserted therein are reasserted here in objection to the proposed sale. In the MDOM Motion, MDOM asserts certain claims, including administrative expense claims, against the Debtors for failure to pay certain taxes, penalties and interest to MDOM (“MDOM Taxes”).

9. On April 2, 2019, MDOM filed the Reply of the State of Mississippi Division of Medicaid to Joint Objection of the Debtors and Official Committee of Unsecured Creditors and Objection to Cross-Claim [Docket No. 919] (the “MDOM Reply And Objection”). The MDOM Reply and Objection is fully incorporated herein by reference and the objections asserted therein are reasserted here to the proposed sale. MDOM’s Reply and Objection establishes that the taxes, penalties and interest were incurred by the Clarksdale Estate after the petition in bankruptcy was filed.

10. On April 15, 2019, and again on April 16, 2019, MDOM filed its Objection To Proposed Plan. [Docket No. 948]. The Objection to Plan is incorporated by reference and the objections asserted therein are reasserted here to the proposed sale.

11. As of April 26, 2019, MDOM is owed at least \$1,584,005.15, in unpaid post-petition taxes, interest and penalties by Northwest Mississippi Regional Medical Center, Clarksdale Regional Medical Center, Inc., and the Estate of Clarksdale Regional Medical Center, Inc. The amount due continues to grow. The nature of the taxes is set forth in Miss. Code §43-13-145.

12. The above referenced taxes are taxes incurred by the Estate of Debtor Clarksdale Regional Medical Center, Inc.

13. The taxes, interest and penalties are entitled to allowance and payment under 11 U.S.C. §503(b)(1)(B).

14. This entire amount, and any taxes, interest and penalties which come due after April, 2019, should be paid to MDOM as and when such payments are due and payable to MDOM under Mississippi law. 28 U.S.C. §960.

15. Under Mississippi law, a lessee or purchaser of a hospital is subject to taxation which includes unpaid Miss. Code §43-13-145 taxes. See Rule 4.3: Change of Ownership of State of Mississippi Administrative Code Title 23: Medicaid Part 200. Rule 4.3 provides:

A. A change of ownership of a provider/facility as defined by the Division of Medicaid includes, but is not limited to: inter vivos gifts, purchases, transfers, lease arrangements, cash and/or stock transactions or other comparable arrangements whenever the person or entity acquires or controls a majority interest of the facility or service. The new owner, upon consummation of the transaction effecting the change of ownership, shall, as a condi-

tion of participation, assume liability, jointly and severally, with the prior owner for any and all amounts that may be due to the Medicaid program.

B. The new ownership agreement shall be subject to any restrictions, conditions, penalties, sanctions or other remedial actions taken by the Division of Medicaid, the state agency or the federal agency against the prior owner of the facility.

16. Under Miss. Code §43-13-145 and Administrative Rule 4.3, the Debtor, Clarksdale HMMA, LLC and its Indemintor CHS/Community Health Systems, Inc., are currently liable for the full amount of the unpaid Miss. Code §43-13-145 taxes, interest and penalties. There is no legal authority or jurisdiction vested in the Court to enjoin the collection of Miss. Code §43-13-145 taxes from either the Debtor, Clarksdale HMMA, LLC and its Indemintor CHS/Community Health Systems, Inc. 28 U.S.C. §1341 (“Tax Injunction Act”). 12. See also §524(e) of the Bankruptcy Code. (“discharge of a debt of the debtor does not affect the liability of any other entity on... such debt.”). As proposed, the sale seeks to achieve that which cannot be achieved without conflicting with §524(e) and 28 U.S.C. §1341.

17. The Court lacks jurisdiction to approve a sale which “enjoin[s], suspend[s] or restrain[s] the ... collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” **California v. Grace Brethren Church**, 457 U.S. 393, 407–08 (1982)(citations

omitted).

18. Mississippi law provides plain, speed and efficient procedures for conducting provider administrative hearings on tax issues. 23 Miss. Admin. Code Miss. R. Pt. 300, R. 1.1. See also Rule 5.03 of Mississippi's Uniform Rules of Circuit and County Courts (Scope of Appeals from Administrative Agencies).

19. To the extent that the Motion seeks approval of a sale which enjoins, suspends or restrains the collection of Miss. Code §43-13-145 taxes from CHS/Community Health Systems, Inc., or any purchaser, MDOM objects and asserts the Court's lack of jurisdiction to approve such a sale.

20. Miss. Code §43-13-145 is not pre-empted by 11 U.S.C. §363(f) and Miss. Code §43-13-145 taxes, interest, and penalties are not pre-petition debts and are not an "interest in such property" for purposes of 11 U.S.C. §363(f). See **In re Wolverine Radio Co.**, 930 F.2d 1132, 1147 (6th Cir. 1991) (11 U.S.C. §363(f) does not pre-empt state tax law on successor liability; cal-

culuation of successor's tax liability was not an interest under §363(f)).³

21. Moreover, MDOM's right of recoupment is a defense to any affirmative non-bankruptcy law claims by the Debtor, its estate, any party in interest and specifically to any future claim asserted by a purchaser of the subject hospital. This Court does not have jurisdiction over such affirmative claims seeking money damages. **Waldman v. Stone**, 698 F.3d 910, 921 (6th Cir. 2012). See also **Stern v. Marshall**, 564 U.S. 462, 503 (2011).

22. MDOM's right to recoupment cannot be discharged in bankruptcy. See e.g., **In re Slayton**, 509 B.R. 90, 94 (Bankr. E.D. Mich. 2014) ("right of recoupment was not discharged by the Debtor's bankruptcy discharge") See also **In re Ketelsen**, 282 B.R. 208, 214 (Bankr. E.D. Tenn. 2001) ("a creditor with a right of offset may exercise this right post-discharge.") and 5 COLLIER ON BANKRUPTCY 553.08 [1] (15th ed. rev. 2000) (text, n.5 and n.6). Compare **Waldschmidt v. CBS, Inc.**, 14 B.R. 309, 314 (M.D. Tenn. 1981) (music company allowed to recoup advances from post-petition royalties).

³ See also **Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV**, 209 F.3d 252 (3d Cir.2000) (excluding defenses or recoupment rights from the § 363(f) term "interests"); **Hispanic Indep. Television Sales, LLC v. Kaza Azteca Am. Inc.**, No. 10 CIV. 932 SHS, 2012 WL 1079959, at *5 (S.D.N.Y. Mar. 30, 2012); **In re American Home Mortg. Holdings, Inc.**, 402 B.R. 87, 94 (Bankr. D. Del. 2009)(holding that recoupment is a "defense" and not a "claim," such that a sale free and clear under § 363 does not extinguish a right of recoupment); and **In re Lawrence United Corp.**, 221 B.R. 661, 669 (Bankr.N.D.N.Y.1998); Compare **In re Vitalsigns Homecare, Inc.**, 396 B.R. 232, 240 (Bankr. D. Mass. 2008) (recoupment from purchaser by federal government under Medicare)("It appears that the provider agreement, the statute, and the regulations form an arrangement that imposes both benefits and burdens on the provider. It cannot accept the benefits without the attendant burdens.").

Logically Section 363 should not be applied to discharge that which is not dischargeable.

23. If the Court determines that the unpaid taxes, interest and penalties or right to recoupment are an “interest” or “interest” under 11 U.S.C. §363(f) then the sale should not be approved because MDOM demands adequate protection and is not provided with adequate protection of such interest pursuant to 11 U.S.C. §363(e). See generally **Illinois Dep't of Revenue v. Hanmi Bank**, 895 F.3d 465, 473 (7th Cir. 2018), reh'g denied (Aug. 24, 2018)(generally adequate protection requires a party to be paid in full at closing).

24. As to MDOM the proposed sale does not satisfy 11 U.S.C. §363(f)(1). Miss. Code §43-13-145 and Administrative Rule 4.3 are “applicable non-bankruptcy law[s]” which do not permit sale of such property free and clear of” Miss. Code §43-13-145 taxes, interest and penalties or MDOM’s right to recoupment. 11 U.S.C. §363(f)(1). Compare **Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.**, 554 U.S. 33, 53 (2008)(pre-confirmation transfers are subject to state taxes).

25. MDOM does not consent under 11 U.S.C. §363(f)(2).

26. The transaction does not meet the requirements of 11 U.S.C. §363(f)(3). If the Court determines that the unpaid taxes, interest and penalties or the defense of recoupment are an “interest” under 11 U.S.C. §363(f)

then that interest meets the definition of “lien” in 11 U.S.C. §101(37)(“interest in property”).

27. The transaction does not meet the requirements of 11 U.S.C. §363(f)(4). There is no dispute that the Miss. Code §43-13-145 taxes, interest and penalties are owed.

28. The transaction does not meet the requirements of 11 U.S.C. §363(f)(5). MDOM cannot be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. The Movants have not identified any proceeding in which MDOM could be compelled to accept less than full payment by the Debtor, its Estate or a purchaser.

29. No showing has been made that the proposed sale meets the requirements of 11 U.S.C. §363(d).

CONCLUSIONS AND RESERVATIONS OF RIGHTS

30. For the reasons stated herein, MDOM respectfully requests that this Court (i) sustain the Objection of MDOM to the proposed sale and deny approval; and (ii) grant such other and further relief as the Court deems just and proper under the circumstances.

31. MDOM hereby expressly reserves all of its rights under this Objection and expressly reserves all of its rights under the Plan (as such may be amended, modified or supplemented), and any other or new plan which

debtors may file, including, but not limited to, the right to assert any and all objections it may have to confirmation of the Plan.

Dated: April 30, 2019.

Respectfully submitted,

STATE OF MISSISSIPPI
DIVISION OF MEDICAID

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. Specifically including:

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