

**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

Lead Case No. 18-05665

Judge Walker

Jointly Administered

**EXPEDITED MOTION FOR ENTRY OF ORDER GRANTING
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
STANDING TO PURSUE CERTAIN ESTATE-BASED CLAIMS**

The Official Committee of Unsecured Creditors (the “**Committee**”) appointed in the above-captioned proceedings (the “**Chapter 11 Cases**”) of Curae Health, Inc., *et al.* (the “**Debtors**”) hereby moves, on an expedited basis, for entry of the order attached hereto as Exhibit A (the “**Standing Order**”) granting the Committee standing to pursue certain estate-based claims pursuant to sections 105, 1103, and 1109 of title 11 of the United States Code (the “**Bankruptcy Code**”). In support of its motion, the Committee respectfully states as follows:

Preliminary Statement

1. As a result of the Committee’s preliminary investigation into the Debtors’ history and affairs, the Committee believes that the Debtors and their estates have claims and causes of action against the Debtors’ current and/or former officers, directors, and managers, including, but not limited to current board members Joe Dawson, Jim Decker, Anne Swartz, and Chris Sawyer; current officers Steve Clapp, Tim Brown, and Sarah Moore; former board members Warren

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).

Payne and Greg Harb; and current manager Strategic Healthcare Resources, LLC (collectively, the “**Estate Claims**”). Some or all of the Estate Claims are covered by that certain insurance policy numbered 8242-0764 (as extended by any applicable tails, endorsements, or riders, the “**Policy**”) issued by Chubb Group of Insurance Companies (“**Chubb**”).

2. The Policy is a “claims made” policy, and the insureds may lose coverage for the Estate Claims if a lawsuit to pursue covered claims is not commenced before May 15, 2019 at 12:01 a.m. (the “**Policy Deadline**”). In light of the foregoing, the Debtors have sought to purchase a “tail” to extend the Policy Deadline by one (1) year for approximately \$140,000, but ServisFirst Bank has refused to consent to the use of cash collateral necessary to purchase the tail.

3. The Committee has accordingly demanded that the Debtors bring the claims before the Policy Deadline. However, the Debtors are inherently conflicted with respect to the Estate Claims because certain of their current officers, directors, and/or managers may be targets of those claims, and have advised the Committee that they will not prosecute them.

4. Because the Debtors do not intend to pursue the Estate Claims, the Committee seeks standing to assert, prosecute, and/or settle any and all claims, causes of action, objections, and other rights on behalf of the Debtors’ estates with respect to the Estate Claims on an expedited basis such that the Committee may initiate any necessary lawsuits before the Policy Deadline.

5. As set forth more fully below, the Committee asserts that the Estate Claims are “colorable” and otherwise satisfy the standard for granting derivative standing to the Committee under sections 1103 and 1109 of the Bankruptcy Code. Therefore, the Standing Order should be entered granting the Committee such standing consistent with section 105 of the Bankruptcy

Code.

Jurisdiction, Venue, and Statutory Predicates

6. The United States Bankruptcy Court for the Middle District of Tennessee (the “**Bankruptcy Court**”) has jurisdiction over this motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for relief requested herein are sections 105, 1103, and 1109 of the Bankruptcy Code.

Background

7. On August 24, 2018 (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Bankruptcy Court, commencing these Chapter 11 Cases.

8. On September 6, 2018, the Office of the United States Trustee appointed the Committee.

9. The Policy provides coverage for, among other things, claims against “Insured Persons” for “D&O Wrongful Acts” (each as defined in the Policy) such as breach of duty (“**D&O Coverage**”).

10. Under the Policy, the Debtor’s current and former directors, officers, and managers are “Insured Persons,” and therefore entitled to D&O Coverage.

11. With respect to D&O Coverage, the Policy provides “claims made” coverage, which according to the Policy “applies only to ‘Claims’ first made during the ‘Policy Period’, or any extended reporting period.”

12. The Policy Period, as extended by an endorsement/rider with an effective date of March 1, 2019, is from 12:01 a.m. on January 1, 2018 through 12:01 a.m. on May 15, 2019.

The Debtors have sought to purchase a tail to further extend the Policy Period by one (1) year for

approximately \$140,000, but ServisFirst Bank has refused to consent to the use of cash collateral necessary to purchase the tail.

13. Based on the Committee's preliminary investigation into the Debtors and their affairs, the Committee believes that the Debtors' estates have claims and causes of action (defined above as Estate Claims) against the Debtors' current and/or former officers, directors, and managers, including, but not limited to current board members Joe Dawson, Jim Decker, Anne Swartz, and Chris Sawyer; current officers Steve Clapp, Tim Brown, and Sarah Moore; former board members Warren Payne and Greg Harb; and current manager Strategic Healthcare Resources, LLC.

14. The Estate Claims include, but are not limited to, claims arising from alleged breaches of fiduciary duties as set forth in more detail in the Committee's *Motion for (I) Termination of Debtors' Exclusivity Periods to Permit the Committee to File a Plan of Liquidation, and (II) For Leave, Standing and Authority to Commence, Prosecute and, If Appropriate, Settle Causes of Action on Behalf of the Debtors' Estates* (the "**Exclusivity Motion**") [Docket No. 722], which was resolved in connection with the *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan*. [Docket No. 841]. Some or all of the Estate Claims are covered by the Policy, which is set to expire at 12:01 a.m. on May 15, 2019.

15. Because certain of the Debtors' current officers, directors, and/or managers may be targets of the aforementioned claims, the Debtors are inherently conflicted with respect to the Estate Claims, and have accordingly advised the Committee that the Debtors will not pursue them.

Relief Requested

16. The Committee respectfully requests entry of the Standing Order granting the Committee standing to assert, prosecute, and/or settle any and all claims, causes of action, objections, and other rights on behalf of the Debtors' estates with respect to the Estate Claims.

Basis for Relief

17. Section 105(a) of the Bankruptcy Code provides in relevant part that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

18. Sections 1103(c)(5) and 1109(b) of the Bankruptcy Code provide in relevant part as follows:

A committee appointed under section 1102 of this title may—

. . . (5) perform such [unenumerated] services as are in the interest of those represented.

11 U.S.C. § 1103(c)(5).

A party in interest, including . . . a creditors' committee . . . may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).

19. “The majority of courts agree that creditors’ committees are impliedly granted standing to initiate adversary proceedings through Bankruptcy Code § 1103(c)(5), § 1109(b), or both.” *Tennessee Valley Steel Corp. v. B.T. Commercial Corp.* (*In re Tennessee Valley Steel Corp.*), 183 B.R. 795, 799 (Bankr. E.D. Tenn. 1995); *see also, e.g., Unsecured Creditors Comm. v. Noyes* (*In re STN Enters.*), 779 F.2d 901, 904 (2d Cir. 1985) (recognizing sections 1103(c)(5) and 1109(b) as creating an “implied, but qualified, right . . . to initiate adversary proceedings in the name of the debtor in possession”); *In re Adelpia Communications Corp.*, 330 B.R. 364,

373 (Bankr. S.D.N.Y. 2005) (observing that “[t]he practice of authorizing the prosecution of actions on behalf of an estate by committees . . . upon a showing that such is in the interests of the estate, is one of long standing, and nearly universally recognized”) (internal citations omitted).

20. Typically, standing for a creditors’ committee to prosecute estate causes of action is subject to a three-part test: “(1) the creditors’ committee must assert a colorable claim; (2) the debtor must have unjustifiably refused to pursue the claim; and (3) the creditors’ committee must have obtained the permission of the bankruptcy court to initiate the action on behalf of the debtor.” *Tennessee Valley Steel*, 183 B.R. 795 at 799-800; *see also, e.g., Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988) (identifying same three factors).² For the reasons set forth below, this standard has been met with respect to the Estate Claims, and the Standing Order granting that standing should be entered consistent with the Court’s authority under section 105 of the Bankruptcy Code.

21. The first element – whether the Estate Claims are “colorable” – is a relatively low threshold. Courts are not required to conduct mini-trials on the merits of the claims. Instead, they need only determine that the claims “will likely benefit the estate based on a cost-benefit

² In 1995, the same year the *Tennessee Valley Steel* decision was issued, the 6th Circuit articulated a substantially similar standard in the context of granting a creditors’ committee standing to bring avoidance actions under sections 547 and 548 of the Bankruptcy Code:

. . . 1) a demand has been made upon the statutorily authorized party to take action; 2) the demand is declined; 3) a colorable claim that would benefit the estate if successful exists, based on a cost-benefit analysis performed by the court, and 4) the inaction is an abuse of discretion (“unjustified”) in light of the debtor-in-possession’s duties in a Chapter 11 case. A creditor has met its burden to show standing to file an avoidance action if it has fulfilled the first three requirements and the trustee or debtor-in-possession declined to take action without stating a reason. The burden then shifts to the debtor-in-possession to establish, by a preponderance of the evidence, that its reason for not acting is justified.

Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re Gibson Group), 66 F.3d 1436, 1446 (6th Cir. 1995).

analysis[.]” *Gibson Group*, 66 F.3d at 1442; *see also, e.g., Adelpia*, 330 B.R. at 369 (noting that the court need only be satisfied that there is “some factual support” for the claims); *Official Comm. Of Unsecured Creditors v. Fishbein & Co., P.C. (In re Corell Steel)*, No. 91-4919, 1992 WL 196768, at *2 n.3 (E.D. Pa. Aug. 10, 1992) (creditors’ committee seeking to prosecute estate causes of action need only demonstrate that its proposed claims are “potentially meritorious”); *Official Comm. Of Unsecured Creditors v. Hudson United Bank (In re Am.’s Hobby Ctr., Inc.)*, 223 B.R. 275,288 (Bankr. S.D.N.Y. 1998) (noting that standing to sue should be denied where claims are “facially defective”).

22. Here, the Committee’s preliminary investigation has revealed, among other things, that in the Committee’s view, the Debtors’ directors, officers and managers failed to exercise the applicable standard of care, including, without limitation, in connection with transactions relating to (i) the acquisitions of the three (3) Debtor hospitals; (ii) post-acquisition operations of the Debtors, including revenue cycle issues; (iii) pre-petition dispositions of certain assets; (iv) transition services agreements with CHS; and (iv) incurring of obligations and pledges of collateral to ServisFirst. The Committee asserts that such conduct (some examples of which were described in more detail in the Exclusivity Motion) gives rise to claims for breaches of fiduciary duties and other claims on behalf of the Debtors’ Estates. The Committee submits that these causes of action and others, which will be set forth in detail in a complaint to be filed in advance of the Policy’s May 15, 12:01 a.m. deadline, will benefit the estates if successful, are not facially deficient, and therefore constitute “colorable” claims.

23. With respect to the second element – unjustifiable refusal to pursue claims – courts consider “whether conflicts of interest exist between the debtor and the parties against whom the creditors’ committee’s derivative action was or will be brought; whether the creditors’

interests are protected despite the debtor's refusal; whether allowing the creditors' committee to pursue the action on the debtor's behalf will benefit the estate; and whether appointing a trustee and allowing the trustee, as opposed to the creditors' committee, to pursue the action or converting the Chapter 11 case to a Chapter 7 would be more beneficial to the estate.”

Tennessee Valley Steel, 183 B.R. at 806.

24. Here, the Committee made a demand upon the Debtors to initiate an action bringing the Estate Claims against the appropriate parties, and the Debtors have informed the Committee that they will not pursue the Estate Claims without justification. As set forth above, the Debtors are subject to inherent conflicts of interest because current officers and directors may be targets of Estate Claims. Further, (i) the creditors’ interests are not protected absent a grant of standing to the Committee because coverage for the Estate Claims under the Policy may be lost if the Estate Claims are not brought before the impending Policy Deadline, and no other party is prepared to do so; (ii) the Committee is well-positioned to bring the Estate Claims due to its familiarity with the Debtors, and doing so before the Policy Deadline will benefit the estates by preserving applicable coverage; and (iii) appointing a trustee to prosecute the Estate Claims is not in the best interests of creditors herein given the work that has been already done by the Committee and, in any event, no trustee could be prepared to do so before the Policy Deadline. Accordingly, the Committee submits that the second element of the test for standing has been satisfied.

25. Finally, the third element – that a creditors’ committee obtain permission of the bankruptcy court to initiate the action on behalf of the debtor – will be satisfied in this case upon the entry of the Standing Order.

26. In light of the foregoing, the grant of standing to the Committee to pursue the

Estate Claims is appropriate under sections 1103(c)(5) and 1109(b) of the Bankruptcy Code. The Committee therefore requests that the Bankruptcy Court exercise its authority to enter the Standing Order under section 105(a) of the Bankruptcy Code in order to permit the Committee to bring the Estate Claims before the Policy Deadline and avoid the potential loss of a valuable source of recovery to the extent the Estate Claims are successful.

Reservation of Rights

The Committee expressly reserves its right to seek further standing and authority to assert, prosecute, and/or settle claims, causes of action, objections, and other rights of the Debtors' estates against any persons or entities.

Conclusion

WHEREFORE, the Committee respectfully requests that the Bankruptcy Court (i) enter the Standing Order and (ii) grant such other and further relief that the Bankruptcy Court deems just and proper.

[Signature page follows.]

Dated: May 2, 2019

/s/ Michael E. Collins

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2019, 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 parties listed on the mailing matrix attached as Exhibit B.

/s/ Robert W. Miller _____
Robert W. Miller