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Denise H. Curtis, Clerk
U.S. Bankruptcy Court for D.C.

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Deryck A. Palmer, Esq.
Andrew M. Troop, Esq.

FARRELL FRITZ. P.C.
EAB Plaza
Uniondale, New York 11556
(516) 227-0700
Ted A. Berkowitz, Esq.
Patrick Collins, Esq.

Attorneys for the Reorganized Debtors

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLUMBIA

In re	
GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION I, et al.,	**Chapter 11** 02-2250
	Case No. 02-2550 (SMT)
Debtors.	**(Jointly Administered)**

OBJECTION OF THE REORGANIZED DEBTORS TO CLAIM FOR CURE AMOUNT FILED BY METROPOLITAN WASHINGTON ORTHOPAEDIC ASSOCIATION

TO THE HONORABLE S. MARTIN TEEL, JR.,
UNITED STATES BANKRUPTCY JUDGE:

Doctors Community Healthcare Corporation ("DCHC"), Greater Southeast Community Hospital Corporation I ("Greater Southeast"), Michael Reese Medical Center Corporation ("Michael Reese"), Pacifica of the Valley Corporation ("Pacifica") and Pacin Healthcare-Hadley Memorial Hospital Corporation ("Hadley"), the Reorganized Debtors under the Second Amended Joint Chapter 11 Plan of Reorganization (the "Plan") confirmed in the above-captioned cases, hereby object to the Claim for Cure Amount of Not Specifically Identified Assumed Executory Contract (the "Claim"), dated August 10, 2004, filed by The Metropolitan Washington Orthpaedic Association, Chatered 1975

("MWOA") and Rida Azer, M.D. ("Azer" and together with MWOA, the "Claimants"). The Reorganized Debtors respectfully represent as follows:

Preliminary Statement

1. The Claim should be denied because Greater Southeast never entered into an agreement with Claimants on the terms asserted in the Claim. As the parties bearing the burden of proving the existence of a binding contract and its terms, Claimants have submitted no writing nor any other evidence demonstrating that Greater Southeast ever agreed to be bound by the terms of the alleged "modified" contract with the Claimants. No cure amounts are owed to Claimants under the agreements between Greater Southeast and Claimants assumed (only to the extent such agreements were in effect and were executory) by Greater Southeast pursuant to the plan of reorganization.

Background

2. On November 20, 2002 (the "Petition Date"), each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to an order of this Court, the Debtors' cases are being jointly administered for procedural purposes only.

3. On February 25, 2004, this Court approved the Debtors' Second Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for Debtors' Second Amended Joint Chapter 11 Plan of Reorganization (the "Disclosure Statement") and authorized the Debtors to solicit votes on the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization (as approved and modified by the Confirmation Order, the "Plan").

4. On April 2, 2004, following a hearing (the "Confirmation Hearing") that lasted more than two days, this Court entered, *inter alia*, the Confirmation

Order, confirming the Debtors' Plan. The Plan became effective according to its terms on April 5, 2004 (the "Effective Date"). The transactions contemplated by the Plan have been carried out, and the Plan has been substantially consummated.

Factual Background

5. Greater Southeast and MWOA entered into an On Call Services Agreement, dated January 1, 2001, pursuant to which MWOA provided on-call orthopaedic medical and surgical coverage for Greater Southeast's Emergency Department for a monthly fee of $10,000. A copy of the On Call Services Agreement is annexed hereto as Exhibit "A". The initial term of the On Call Services Agreement expired as of January 1, 2002 (see On Call Services Agreement, Section 5) and Greater Southeast has no record of a written renewal agreement being in effect for the term (January 1, 2004 through May 31, 2004, the "Disputed Period") of the alleged agreement asserted by Claimants as the basis for their Claim Nevertheless, MWOA continued to provide on-call coverage for Greater Southeast's Emergency Department after January 1, 2002 continuing through the end of the Disputed Period and Greater Southeast continued to pay MWOA a monthly fee of $10,000 for such services.

6. Greater Southeast and MWOA also entered into an Professional Servives Agreement, dated June 21, 2002, pursuant to which MWOA provided care for D.C. Alliance patients at D.C. General Hospital and Greater Southeast for a flat per session fee. A copy of the Professional Services Agreement is annexed hereto as Exhibit "B". The initial term of the Professional Services Agreement expired as of June 21, 2003 (see Professional Services Agreement, Section 8) and Greater Southeast has no record of a written renewal agreement being in effect for the Disputed Period.

Nevertheless, MWOA continued to provide provided care for D.C. Alliance patients after June 21, 2003 continuing through the end of the Disputed Period and Greater Southeast continued to pay MWOA the previously agreed upon fee for such services.

7. Beginning in Summer 2003 and continuing into 2004, Paul Tuft of DCHC and Joan Phillips and others of Greater Southeast engaged in discussions and correspondence with MWOA and Dr. Azer, one of its principals, regarding possible restructuring of the terms pursuant to which MWOA would provide services to Greater Southeast. Under one scenario proposed by MWOA, Greater Southeast would pay $140,000 per month to MWOA to provide orthopaedic services at Greater Southeast and to patients served by the D.C. Alliance at D.C. General Hospital and Greater Southeast. Greater Southeast never indicated an intention to be bound by such terms nor any other proposed modifications. No agreement to restructure the relationship was ever reached. No written "modification" agreement was ever executed nor were drafts ever prepared by Greater Southeast or exchanged between the parties.

8. During the Disputed Period, i.e., the term of the alleged "modified" agreement, MWOA continued to provide the same services to Greater Southeast that it had provided prior to the Disputed Period and Greater Southeast continued to pay MWOA at the same rates in effect prior to the Disputed Period. The parties continued discussions during the Disputed Period regarding possible restructuring of the relationship pursuant to which MWOA provided services to Greater Southeast. Indeed, as late as April 19, 2004, MWOA was proposing to provide orthopaedic services to Greater Southeast, including the D.C. Alliance, for a fee of $80,000 per month (a copy of an April 19, 2004 letter from Dr. Azer to Joan Phillips is annexed hereto as Exhibit "C")--

as opposed to the $140,000 per month asserted by Claimants as a term of the "modified" agreement. No agreement was ever reached and Claimants terminated their relationship with Greater Southeast, effective June 19, 2004.

9. In the Debtors' Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases, dated May 11, 2004, Greater Southeast indicated its intention to assume the On Call Services Agreement and the Professional Services Agreement,[1] to the extent that such agreements were still in effect and still executory.[2] In the Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases the Reorganized Debtors indicated a cure amount of $0 for each contract.

The Claim

10. Claimants filed a letter, dated May 28, 2004, and Restated Notice of Objection, dated June 28, 2004, objecting to the stated cure amount and asserting that the terms of the assumed agreements obligate Greater Southeast to pay MWOA (i) $140,000 per month payment during the Disputed Period and (ii) an additional $200,000

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[1] The applicable entries on the Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases read as follows:

Contract Party	Subject Matter	Cure Amount
Azer MD, Rida (Metro. Wash. Ortho.)	Orthopedic Surgery	$0.00
Azer, Rida	DC General MD Contractor	$0.00

[2] *See* Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases, second paragraph ("Nothing contained in the Notice or its schedules constitutes an admission . . . that any given entry in the attached schedule identifies: (i) an enforceable contract or lease, (ii) a contract which is still executory or a lease that is unexpired, or (iii) an arrangement styled as a 'lease' that is in fact properly characterized as a sale.").

for MWOA receivables it asserts were assigned to Greater Southeast.[3] Claimants then filed the Claim, asserting in the alternative that the foregoing terms constituted a separate contract from those listed in the Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases that was assumed pursuant to the provision of the Plan providing for assumption of all executory contracts not specifically designated for rejection.

11. Conspicuously absent from Claimants' filings are any (i) documentary evidence of the alleged "modified" agreement or (ii) affidavit testimony regarding any alleged oral "modified" agreement between the parties.

Objection to Claim

12. The Claim should be denied because the entire amount claimed is predicated on a contract, or alternatively a contract modification, that does not exist. A party asserting the existence of a contract bears the burden of proving "both (1) an agreement as to all material terms; and (2) intention of the parties to be bound." Jack Baker, Inc. v. Office Space Development Corporation, 664 A.2d 1236, 1238 (D.C. 1995). Claimants cannot satisfy either of these elements with respect to the alleged contract.

13. As to the first element, absence of an agreement on the material terms is evident from the parties' continued discussions regarding price, which discussions occurred *after* the supposed commencement of the term of the alleged modified contract. Claimants assertion that the parties had agreed on a fee of $140,000 per month for MWOA's services is belied by Dr. Azer's April 19, 2004 letter proposing a

[3] To the extent that MWOA's previously filed Restated Notice of Objection is not superceded by the Claim, the Reorganized Debtors also oppose the Restated Notice of Objection for the reasons stated herein.

fee of $80,000 per month. See In re U.S. Office Products Co. Securities Litigation, 251 F. Supp.2d 58, 71-72 (D.D.C. 2003) (finding no enforceable agreement in light of contradictory evidence on material terms of alleged agreement).

14. The subsequent negotiations over payment terms also indicate that the parties had not previously intended to enter into a binding contract. See Jack Baker, 664 A.2d at 1239 (stating that subsequent negotiations over drafts of a written agreement reflect parties intent not to be bound in absence of an executed agreement). Here, the discussions never even progressed to the stage where a written draft agreement or written amendments to the existing agreements were prepared.

15. Neither can any of Greater Southeast's actions be reasonably construed as acceptance "by deed" of the alleged modified contract. Greater Southeast's acceptance of services from MWOA during the term of the alleged modified contract is not evidence of Greater Southeast's assent to the modified contract because the services provided by MWOA during the Disputed Period were the same as those provided by MWOA to Greater Southeast prior to the Disputed Period. Greater Southeast accepted those services but paid MWOA at the rates in effect prior to the Disputed Period. Greater Southeast never accepted the receivables purportedly assigned to it by MWOA, took no steps to collect such receivables and returned to MWOA the invoices and other documentation purportedly representing such receivables.

16. Finally and most importantly, Claimants have not submitted any writing indicating Greater Southeast's intent to be bound by the terms of the alleged modified contract. Given that the parties previously entered into written contracts providing for payments of lesser amounts to MWOA than under the alleged modified

agreement, it is reasonable to conclude that a postpetition agreement on the modified terms asserted by MWOA would have been committed to writing and perhaps even submitted to this Court for approval pursuant to 11 U.S.C. § 363(b)(1). See Jack Baker, 664 A.2d at 1240 (whether the contract is of a type normally committed to writing and whether the amount of money involved is large or small are factors to be considered in determining whether an alleged oral contract is enforceable). Under the circumstances, the absence of any writing indicating Greater Southeast's assent to terms providing for increased payments to MWOA is conclusive evidence that no agreement was ever reached on such terms.

[CONTINUED ON NEXT PAGE]

WHEREFORE, the Reorganized Debtors request that this Court enter an Order denying the Claim and granting such other or further relief as is appropriate under the circumstances.

Dated: Washington, D.C.
~~August~~ September 2, 2004

Deryck A. Palmer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Andrew M. Troop
WEIL, GOTSHAL & MANGES LLP
100 Federal Street
Boston, MA 02110
(617) 772-8300

Peter D. Isakoff (D.C. Bar No. 358419)
Holly E. Loiseau (D.C. Bar No. 452442)
Cleveland Lawrence III (D.C. Bar No. 480462)
WEIL, GOTSHAL & MANGES LLP
1501 K Street, N.W., Suite 100
Washington, D.C. 20005
(202) 682-7000

and

Ted A. Berkowitz
Patrick Collins
FARRELL FRITZ, P.C.
EAB Plaza
Uniondale, New York 11556
(516) 227-0700

ATTORNEYS FOR THE
REORGANIZED DEBTORS

CERTIFICATE OF SERVICE

I, Holly Loiseau, certify that I caused to be served a true and correct copy of the foregoing Objection of the Reorganized Debtors to Claim for Cure Amount Filed by Metropolitan Washington Orthopaedic Association via first class mail, and/or electronic mail or facsimile on the parties/counsel listed on the attached service list on September 2, 2004.

Holly Loiseau

COMBINED MASTER SERVICE LIST
PAPER SERVICE LIST
(by first class mail and email)

Name and Street Address	Email Address, if any
Any and all of the Debtors c/o Doctors Community Healthcare Corporation 6730 North Scottsdale Road Suite 290 Scottsdale, Arizona 85253	pleadings@doctorscommunity.com
Deryck A. Palmer, Esq. Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, New York 10153 (Counsel for the Debtors)	deryck.palmer@weil.com
Andrew M. Troop, Esq. Weil, Gotshal & Manges LLP 100 Federal Street, 34th Floor Boston, MA 021 10 (Counsel for Debtors)	andrew.troop@weil.com
Peter D. Isakoff, Esq. Holly E. Loiseau, Esq. Weil, Gotshal & Manges LLP 1501 K Street N.W. Suite 100 Washington, D.C. 20005 (Counsel for the Debtors)	peter.isakoff@weil.com holly.loiseau@weil.com
Dennis J. Early, Esq. Office of the United States Trustee 115 South Union St., Plaza Level Suite 210 Alexandria, Virginia 22314	dennis.j.early@usdoj.gov
Kevyn D. Orr, Esq. Jones Day 51 Louisiana Avenue, N.W. Washington, D.C. 20001 (Counsel for National Century Financial Enterprises, Inc)	korr@jonesday.com

Michael L. Bernstein, Esq.
Charles A. Malloy, Esq.
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(Counsel for Health Care Reit, Inc.)

michael_bernstein@aporter.com

charles_malloy@aporter.com

Sam J. Alberts, Esq.
White & Case
601 13th Street, N.W.
Suite 600 South
Washington, DC 20005
(Counsel for the Joint Committee of Unsecured Creditors)

salberts@whitecase.com

Bruce J. Lipstein
Noble and Lipstein
Suite 404
7801 Old Branch Avenue
Clinton, MD 20735
(Counsel for the Movant)

ELECTRONIC SERVICE LIST
(by email only)

Neil Demchick
Navigant Consulting
2 North Charles Street,
Baltimore, Maryland 21201

ndemchick@navigantconsulting.com