IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLUMBIA

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

REPLY OF UNIVERSAL CARE INC. TO THE SUPPLEMENTAL OPPOSITION TO PROPOSED STIPULATION AND ORDER RESOLVING ALLEGED "CURE CLAIM" OF UNIVERSAL CARE, INC. AND REQUEST FOR RELATED RELIEF

Universal Care Inc. ("Universal Care"), by and through its counsel, responds to the additional objections asserted by the Liquidating Trustee in his Supplemental Opposition to Proposed Stipulation and Order Resolving Alleged "Cure Claim" of Universal Care, Inc. and Request for Related Relief (the "Supplemental Objection") and in furtherance thereof, states as follows:

Throughout the Supplemental Objection, the Trustee[1] attempts to contort what are otherwise clear facts and evidence into ambiguities. The foundations of three of the four arguments raised in the Supplemental Objection are weak, at best. In the first point the Trustee raises, he ignores the clear and unambiguous language in the GSA. In his second argument, he disregards testimonial and written evidence that the Debtors did not reject the contracts referred to in the Stipulation. In his final and last attempt to prevent the Debtors from assuming two contracts with Universal Care, the Trustee misinterprets the Confirmation Order in an attempt to

[1] All capitalized terms, unless otherwise defined herein, shall have the same meaning as defined in the Reply of Universal Care, Inc. to the Limited Objection of the DCHC Liquidating Trust to Motion for Court Approval of Stipulation and Order Resolving Cure Claim of Universal Care, Inc.

confer on himself veto authority over the Debtors' decision not to reject the GSA. This Court should overrule all of the myriad objections advanced by the Trustee and approve the Stipulation.

PRELIMINARY OBJECTION

In his untimely Supplemental Objection, the Trustee now attempts to raise four "supplemental" objections to the Motion. In the Limited Objection of DCHC Liquidating Trust to Motion for Court Approval of Stipulation and Order Resolving Cure Claim of Universal Care, Inc. (the "Limited Objection"), the Trustee was required to set forth his "*complete specification* of the *factual and legal grounds* upon which the motion is opposed. . . ." Local Rule 9013-1(4). The Trustee failed to raise the "supplemental" objections in the Limited Objection, even though the Trustee was then aware of the grounds for these objections, and failed to preserve his right to make additional objections later. For example, the Trustee could have objected (or reserved his right to object) to whether the contracts at issue were executory. At the time the Trustee filed the Limited Objection, he also could have objected on the basis that the Reorganized Debtors were required to seek his approval prior to entering into the Stipulation or moving this Court for the relief requested in the Motion. After all, the Confirmation Order the Trustee relies upon as the basis for this particular supplemental objection was entered by this Court *a year* prior to the date the Motion was even filed. These objections were foreseeable at the time of the Limited Objection but the Trustee failed to assert them at that time and as required by this Court's rules. The Trustee should not be permitted to advance these arguments now, and Universal Care should not be called to task for the lack of foresight on the part of the Trustee.[2]

[2] Even if the Trustee argues that he should be permitted to assert the objections included in the Supplemental Objection now because he had not yet completed his factual investigation,
(continued…)

ARGUMENT

A. The GSA Was Renewed Each Year As A Continuous Contract

In construing a contract, this Court should examine the words contained in that contract and agreed to by the parties to it. CAL. CIVIL CODE § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). The intent of the parties should be deduced from the words used in the contract. CAL. CIVIL CODE § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title."). Only when those terms are ambiguous should this Court look to extrinsic evidence to discern the intent of the parties. *See, e.g., Bert G. Gianelli Distrib. Co. v. Beck & Co.*, 219 Cal. Rptr. 203, 172 Cal. App. 3d 1020 (1985).

In this case, the GSA is clear — it renews automatically on an annual basis unless terminated by one of the parties as provided in the various termination provisions of the GSA. *See* Supplemental Objection (hereinafter "Trust") Ex. 1, GSA at p. 12; Trust Ex. 2, GSA at p. 2; Trust Ex. 3, GSA at p. 2; Trust Ex. 4, GSA at p. 2; Trust Ex. 5, GSA at p. 2. Throughout the at least eight year relationship between Pacifica and Universal Care, the GSA automatically renewed each year, and neither party terminated it. *See* Deposition of Erich Mounce at pp. 134-36 (June 1, 2005) attached as Exhibit A; Deposition of Jeffrey V. Davis at pp. 35-39 (June 6, 2005) attached as Exhibit B . Indeed, Universal Care would have been prohibited by the automatic stay of Section 362 of the Bankruptcy Code from terminating the GSA after the

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this alleged lack of factual information does not account for the fact that the Trustee failed even to reserve his right to assert that the contracts at issue were not executory. The Limited Objection contained one basic objection and no more. The Trustee should not now be heard on objections he simply failed to consider at the time he was required to make all of his objections.

Debtors filed their bankruptcy petitions. Universal Care did amend the GSA during some years, as expressly authorized by the GSA, by changing the premium rates charged for the health care plan due to the ever-increasing costs of health care. Universal Care had the unilateral right to make changes to the rates under the GSA after providing notice to Pacifica. *See* Trust Ex. 1, GSA at p. 12; Trust Ex. 2, GSA at p. 3; Trust Ex. 3, GSA at p. 3; Trust Ex. 4, GSA at p. 3; Trust Ex. 5, GSA at p. 3. The benefits remained largely the same,[3] with the exception of a few additions resulting, primarily, from legislative requirements imposed by the State of California. Amendments to rates and other provisions by legislative mandate are both permissible and contemplated under the GSA and did not have the effect of creating a new agreement between the parties.[4] *See, e.g., In re Country Club Estates at Aventura Maint. Assoc., Inc.*, 227 B.R. 565, 568 (Bankr. S.D. Fla. 1998) (Rate changes that occurred at the renewal of the contract did not create a new agreement, rather, the original contract continued in force.).

The Trustee attempts to elevate form over substance in this case and ignores key provisions of the GSA. The automatic renewal provision in the GSA, often referred to as an "evergreen" clause, reflects the parties' intent that their contract was continuous. By operation of the renewal provision of the GSA, Pacifica's employees would have health insurance each year, even if it was ever more costly each year. If the parties intended to enter into a contract for a defined term, they would not have included a provision that would allow that contract to

[3] The benefits provided to Pacifica's employees under the GSA remained the same because Pacifica was obligated to maintain a certain level of health care benefits under union contracts with its employees.

[4] Taken to its logical extreme, the Trustee would probably also argue that a new agreement was created each month by the fact that the number of subscribers under the GSA constantly changed due to new hires and terminations of Pacifica's employees which ultimately changes the monthly premium total. The absurdity of such a position is clear and was not what either party to the GSA intended.

continue in perpetuity. Furthermore, had the parties intended for rate renewals to create new agreements, rather than amendments, they would not have included the numerous provisions allowing Universal Care to modify those rates simply by issuing a notice.

B. Neither the Debtors Nor the Reorganized Debtors Rejected the GSA

Under the Plan and the Confirmation Order, the Debtors could only reject their executory contracts[5] through one of the following methods: 1) an order issued by this Court as a result of a motion to reject a particular agreement or group of agreements; 2) placing the contract on the rejected contracts list attached to the Plan Supplement; 3) listing the contract on the Contract Supplement as rejected; or 4) filing a notice of rejection as a result of the inability of the Debtors and the contract party to reach an agreement on a cure amount for the contract. *See generally,* Confirmation Order at ¶¶ 2.i, 5, 6; Plan at § 8. The Debtors did not take any of the above actions with respect to the GSA.

The Debtors cannot reject any of their executory contracts without this Court's approval. Section 365 of the Bankruptcy Code states: [e]xcept as provided in section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, *subject to the court's approval*, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (emphasis added). This Court never entered an order rejecting any of the contracts between Universal Care and Pacifica, and the Debtors never issued a rejection notice under the procedures approved by this Court in the Confirmation Order. To the contrary, the contracts between Universal Care and Pacifica were assumed under the express terms of the Confirmation Order and the Plan.

[5] This description excludes executory contracts with the Debtor, Pine Grove Hospital Corporation, all of which were deemed rejected ninety days after the Effective Date unless assumed by the Trustee prior to that date. Plan at § 8.1(c).

The Trustee relies upon a few communications between the parties to support his argument that the Debtors rejected the GSA. The Trustee cannot point to any language in the Bankruptcy Code, the Plan or the Confirmation Order, however, which grants the Debtors the ability to reject an executory contract by e-mail or any other type of communication other than a court-filed document. No such document was filed for the GSA in this case. In fact, the Debtors' own counsel indicated that the GSA was not on a list of rejected contracts and that "contracts that are not listed at all are deemed assumed." *See* Trust Ex. 20.

Neither the GSA nor the Capitation Agreement was rejected by the Debtors. The Trustee's arguments to the contrary ignore the explicit language of the Bankruptcy Code, the Plan and the Confirmation Order. Furthermore, the Trustee tells only half of the story in asserting this objection because the documents Universal Care produced to the Trustee indicate that the parties never issued a termination notice as threatened in prior correspondence. *See* Communications attached as Exhibit C. Most importantly, the corporate designees for both the Debtors and Universal Care testified that the GSA was not rejected when questioned about the very communications the Trustee cites as evidence of rejection. *See* Deposition of Erich Mounce at pp. 64-68, 104-12 (June 1, 2005) attached as Exhibit A; Deposition of Jeffrey V. Davis at pp. 118-21 (June 6, 2005) attached as Exhibit B.

C. The Trustee Misinterprets the Clear Language of the Confirmation Order

Neither the Debtors nor Universal Care were required to consult with, let alone seek the approval of, the Trustee prior to executing the Stipulation. Paragraph 24 of the Confirmation Order states in relevant part:

> Pursuant to Section 7.1(b) of the Plan other than with respect to the Retained Liabilities and Retained Prepetition Claims, the Liquidating Trustee shall have the right to the exclusion of all others (except as to applications for allowances of compensation and reimbursement of expenses under sections 330

> and 503 of the Bankruptcy Code) to make, file and prosecute objections to Claims. With respect to Retained Liabilities and Retained Prepetition Claims, the applicable Reorganized Debtor(s) or other entit(ies) responsible for Retained Liabilities and/or Retained Prepetition Claims shall have the right to the exclusion of all others (except as to applications for allowances of compensation and reimbursement of expenses under sections 330 and 503 of the Bankruptcy Code) to make, file and prosecute objections to Claims; provided, however, that the Reorganized Debtors or other entit(ies) **shall not settle or withdraw any *filed objection* against a Claim held by a preference claim transferee** with respect to a preference claim assigned to the Liquidating Trust without the consent of the Liquidating Trustee, which consent shall not be unreasonably withheld.

(emphasis added). The Stipulation did not require the Trustee's consent because the Debtors did not file any objections to Universal Care's claim. In addition, the Trustee did not have the authority to file an objection to Universal Care's claim (even had it done so, which he did not) because Universal Care's pre-petition claim was a Retained Prepetition Claim to which only the Debtors could object.[6]

The Trustee would have this Court rewrite the Confirmation Order as follows: "the Reorganized Debtors or other entit(ies) **shall not settle or withdraw any** ~~filed objection against a~~ **Claim** held by a preference claim transferee with respect to a preference claim assigned to the Liquidating Trust without the consent of the Liquidating Trustee, which consent shall not be unreasonably withheld." This Court should not undertake such a task and grant the Trustee the veto power he now seeks, but did not bargain for.

[6] Section 1.93 of the Plan defines Retained Prepetition Claims as follows: "the following **prepetition unsecured claims against the Debtors**, which, pursuant to the Recapitalization Proposal, are to be retained and paid by the Reorganized Debtors in accordance with their terms or on such other terms as may be agreed to by the Reorganized Debtors and the holder of the Claim: . . . (v) **all accrued and unpaid prepetition employee benefit obligations** with respect to both union and non-union employees." (emphasis added). The obligations arising under the GSA are employee benefit obligations of the Debtors.

WHEREFORE, Universal Care requests that this Court: 1) overrule the Trustee's Objection and Supplemental Objection to the Motion; 2) enter an order approving the Stipulation and Order Resolving Cure Claim of Universal Care Inc.; and 3) grant such other and further relief as is just.

Dated: July 22, 2005

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2005, I served the attached Reply of Universal Care, Inc. to the Supplemental Opposition to Proposed Stipulation and Order Resolving Alleged "Cure Claim" of Universal Care Inc. and Request for Related Relief electronically and via first-class mail, upon the recipients listed below:

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