

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RECEIVED

JUL 20 2020

BMC GROUP

In Re:)	
)	Chapter 11
FAYETTE MEMORIAL HOSPITAL)	
ASSOCIATION, INC. d/b/a FAYETTE)	Case No. 18-07762-JJG-11
REGIONAL HEALTH SYSTEMS,)	
)	
Debtor,)	

APPLICATION FOR PAYMENT OF ADMINISTRATIVE CLAIM

McKesson Corporation and certain affiliated companies (collectively, “McKesson”), including Macro Helix LLC (“Macro Helix”), file this *Application for Payment of Administrative Claim* (the “Amended Application”) in the above-captioned bankruptcy case of *In re Fayette Memorial Hospital Association, Inc. d/b/a Fayette Regional Health Systems* (the “Debtor”).¹ In support of this Amended Application, McKesson respectfully states as follows:

Jurisdiction

1. The United States Bankruptcy Court for the Southern District of Indiana (this “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (G).

¹ On June 2, 2020, McKesson filed its Application for Payment of Administrative Expense [the “Original Application”; Docket No. 844] and the supporting declaration of Nicholas Bruni. [Docket No. 845]. On June 23, 2020, the Debtor filed its Objection to the Original Application. [Docket No. 860]. In that Objection, the Debtor pointed out several deficiencies, including the inclusion of certain pre-petition amounts, McKesson’s erroneous understanding about the hospital sale closing date, and McKesson’s failure to itemize and attach certain post-petition invoices. This Amended Application addresses all of these items. The Amended Application now includes the exact amounts owed from March 1, 2019 through January 2020 and provides evidence of the Debtor’s usage of the Macro Helix services and software system after July 16, 2019. Out of fairness to the Debtor and to allow it sufficient time to respond to this new information, rather than include these supplemental items in a reply brief, McKesson has withdrawn its Original Application and files this Amended Application.

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

3. The bases for relief requested herein are §§ 105, 362, and 365 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background of McKesson and Debtor’s Business Relationship

4. Debtor operated a 112-bed acute care hospital and provided both inpatient and outpatient services, including specialized medical services. [Docket No. 302.]

5. McKesson is one of the largest healthcare companies in the United States and the world. (Declaration of Nicholas Bruni (“Bruni Decl.”) at ¶ 6.). McKesson and Debtor had a series of overlapping agreements to provide Debtor with pharmaceuticals, including specialty pharmaceuticals such as oncology medication, for use in Debtor’s treatment of patients, and to provide certain technology and logistical support for health care institutions such as Debtor. (Bruni Decl. at ¶ 6.).

6. McKesson, through McKesson Health Solutions, LLC, and Debtor executed a License Agreement (“Health Solutions Agreement”) for certain healthcare-related software utilized by Debtor. In addition to the Health Solutions Agreement, Debtor and McKesson (through Macro Helix) are parties to an agreement (the “Macro Helix Agreement”) whereby Macro Helix helped Debtor manage 340B drug program participation through pioneering software and services that target the operational, financial and regulatory complexities associated with the program. (Bruni Decl. at ¶ 7). A copy of the Macro Helix Agreement is attached to the Bruni Declaration as **Exhibit A**.

7. On October 10, 2018 (the “Petition Date”), the Debtor filed a voluntary petition in this Court for reorganization relief under Chapter 11 of Title 11 of the Bankruptcy Code. [Docket

No. 1.]. The Debtor filed schedules on or about November 1, 2018 [Docket No. 67] and on Schedule G Debtor at Contract No. 2.25 included the Health Solutions Agreement as an executory contract.

8. On or about March 1, 2019, Debtor filed the Sale Motion. [Docket No. 268]. Pursuant to the Sale Motion, Debtor filed the (1) *Omnibus Motion for Order Authorizing Assumption and Assignment of Executory Contracts and Leases* [Docket No. 302] and (2) *Second Omnibus Motion for Order Authorizing Assumption and Assignment of Executory Contracts and Leases* [“Contract Assumption Motion;” Docket No. 340]. In the first omnibus motion, Debtor proposed assuming the Health Solutions Agreement and indicated a cure obligation of \$5,372.59. The Macro Helix Agreement was not listed in the Contract Assumption Motion or in Debtor’s Bankruptcy Schedule G (List of Executory Contracts and Unexpired Leases).

9. On April 26, 2019, McKesson filed a motion to compel assumption or rejection of the Macro Helix Agreement and related relief, including payment of the then-outstanding post-petition amounts due under that agreement. [“Contract Assumption/Rejection Motion;” Docket No. 350]. On May 10, 2019, the Debtor filed a Limited Objection to the Contract Assumption/Rejection Motion. [Docket 371]. In that Limited Objection, the Debtor indicated that it was in the process of reviewing the underlying invoices and “how the amounts due and owing can be satisfied within Debtor’s cash collateral and DIP financing budgets.” Limited Objection, ¶ 8. Debtor then stated:

“While the Debtor does not object to an order allowing an administrative expense claim for the post-petition amounts due under the Macro Helix Agreement, the Debtor requests additional time to review and evaluate the invoices first received on May 7, 2019, and Debtor objects to the Motion to the extent it seeks to compel immediate payment of all post-petition amounts determined to be due and owing, as such an immediate payment of a accrued

amount will likely cause a default under the debtor in possession financing terms.”

Limited Objection, ¶ 11. On May 29, 2019, based on Debtor’s Limited Objection, the Court denied the Contract Assumption/Rejection Motion without prejudice. [Docket No. 406].

10. On July 3, 2019, this Court entered an order granting the Sale Motion. [Docket No. 468]. The order granting the Sale Motion and the related documents filed prior to July 3, 2019 do not include or mention the Macro Helix Agreement.

11. On July 12, 2019, Debtor filed its First Omnibus Motion for Order Authorizing Rejection of Executory Contracts and Leases. [Docket No. 471]. While the Health Services Agreement was listed as being rejected, the Macro Helix Agreement was not included as a to-be rejected contract. To date, Debtor has not rejected the Macro Helix Agreement.

12. Based on Debtor’s representations in its Objection to the Original Application, McKesson understands that the sale of Debtor’s hospital closed on or about July 15, 2019 (at 11:59 p.m.). According to Debtor’s representations in that Objection, “All remaining employees were terminated at that time, and the Debtor provided no patient care from that date/time forward. Beginning at 12:00AM on July 16, 2019, Reid began providing health care services to the community from the Debtor’s main facilities and employed a substantial number of Debtor’s former employees.” Objection to Original Application, ¶ 11.

13. On June 10, 2019, McKesson filed its Proof of Claim. In that Proof of Claim, McKesson asserted an administrative claim of \$88,619.95 for the period from the Petition Date through February 2019, plus additional amounts owed through rejection of the underlying contracts. Proof of Claim, ¶ 6, a copy of which is attached to the Bruni Declaration as **Exhibit B** and incorporated herein. McKesson asserted a continuing administrative claim for the services provided under the Macro Helix Agreement. As set forth in paragraph 7 of the Proof of Claim,

“As post-petition services continue without payment both the McKesson Claim and the Administrative Claim will continue to accrue.” As of the date of this Amended Application, Debtor has not objected to McKesson’s Administrative Claim or the Proof of Claim. (Bruni Decl. at ¶ 13.).

14. From the Petition Date through January 2020, Debtor continually used the software and services of Macro Helix. By way of example, from the Petition Date through January 2020, seven employees of Debtor designated and authorized users (Daniel Casey, William Combes, Lisa Huntington, Tim Lakes, Duy Vu Le, Beth Snyder, and Jacob Vogel) accessed Macro Helix’s software on nearly 2,500 occasions. During this time period, Debtor processed thousands of prescriptions through the Macro Helix system. (Bruni Decl. at ¶ 14; **Exhibit C**, listing the aggregate number of prescriptions processed on a monthly basis).

15. From the Petition Date through January 2020, Debtor owes McKesson owes McKesson \$188,826.38 under the Macro Helix Agreement (the “Administrative Claim”) for the services provided by Macro Helix. (Bruni Decl. at ¶ 15.). Copies of the invoices evidencing the \$188,826.38 owed to McKesson are attached to the Bruni Declaration as composite **Exhibit D**.

16. In its Objection to the Original Application, the Debtor argues that any administrative claim for services provided after July 16, 2019 must be denied “because the services were not provided to the Debtor,” Objection, ¶ 30, and the “Debtor terminated all remaining employees and no longer provided any patient care effective as of 11:59PM on July 15, 2019.” Objection, ¶ 31. While Macro Helix does not dispute that the Debtor was no longer providing patient care on and after July 16, 2019, on and after that date, the Debtor permitted numerous individuals to use the services and software provided by Macro Helix under its still-in-effect agreement with the Debtor.

17. Under the Order Authorizing Sale of Certain of Debtor's Assets Free and Clear of Claims, Liens, Rights, Interests and Encumbrances to Reid Hospital & Health Care Services, Inc. ("Reid"), the Debtor retained its "Accounts Receivables." *See* Dkt. No. 468, ¶ G ("The Reid Bid does not contemplate the purchase of the Debtor's Accounts Receivable"); Dkt. No. 468, Exh. A, Asset Purchase Agreement between the Debtor and Reid (the "APA"). In fact, under the APA, the Purchaser agreed to provide the Debtor with "reasonable access to computers, software, licenses, medical records (if any), patient payor source information, [and] claims submissions/rejections/status information and remittance advices" and the Debtor agreed to "pay [non-minimal] expenses" to the Purchaser. APA, § 6.15.

18. In light of this deal structure and to help maximize the recovery on its Accounts Receivable, the Debtor's approach becomes obvious. In order to collect its pharmaceutical-related Accounts Receivable following the sale to Purchaser, the Debtor still needed Macro Helix's software and services. As a result, Debtor opted to not include the Macro Helix agreement in its First Omnibus Executory Contract Rejection Motion. Rather, the Macro Helix system would remain open and available for as-needed use. That way former Debtor employees (Lisa Huntington, Colin O'Brien, and Daniel Casey) could use the Macro Helix system to assist in collecting pharmaceutical-related Accounts Receivable. And, Debtor still has not rejected the Macro Helix contract.

19. Macro Helix's system records show that Lisa Huntington accessed the Macro Helix system (under the Debtor's license) on the following dates: August 9, 2019; August 21, 2019; October 21, 2019, October 22, 2019, November 24, 2019, January 5, 2020 (three separate logins); and January 19, 2020. Macro Helix's records show that Colin O'Brien accessed the Macro Helix system (under the Debtor's license) on August 7, 2019 (two separate logins). And, Macro Helix's

records show that Daniel Casey accessed the Macro Helix system (under the Debtor's license) on September 9, 2019 and September 10, 2019. As individuals with approved access rights to the Macro Helix, all three of these individuals were Debtor employees who, McKesson believes, still work or worked for the hospital system but now as employees of Reid.²

20. The following chart shows the usage of the Macro Helix services and system (under the still operative agreement with Macro Helix) on and after July 16, 2019:

PID	Pharm Name	User Name	DateAdded	Action	Notes
9316	CVS PHARMACY #06652	O'Brien, Colin	8/7/2019 11:12 AM	User Login	Successful Login
9316	CVS PHARMACY #06652	O'Brien, Colin	8/7/2019 2:25 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	8/9/2019 9:21 AM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	8/21/2019 8:39 AM	User Login	Successful Login
9000	KROGER #014-827	Casey, Daniel	9/9/2019 9:12 AM	User Login	Successful Login
9000	KROGER #014-827	Casey, Daniel	9/10/2019 8:45 AM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	10/21/2019 10:45 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	10/22/2019 7:03 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	11/24/2019 4:39 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	1/5/2020 5:32 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	1/5/2020 6:23 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	1/5/2020 6:23 PM	User Login	Successful Login
9000	KROGER #014-827	Huntington, Lisa	1/19/2020 8:20 PM	User Login	Successful Login

(Bruni Decl., ¶ 16).

21. Having used and benefitted from the Macro Helix services and system from July 16, 2019 through January 2020, the Debtor must pay the reasonable value of these services during these months, which is charged at a baseline monthly cost of \$1,707.50. (See Bruni Decl., ¶ 17). To be clear, even though the Macro Helix Agreement is still in force and has not been rejected, McKesson is limiting its administrative claim just for the post-petition months of active use, which ended in January 2020.³

22. For all of these reasons, Macro Helix is entitled to hold an allowed administrative claim in the amount of \$188,619.38.

² Lisa Huntington's LinkedIn page indicates that she remains an employee of Fayette Regional Health System. <https://www.linkedin.com/in/lisa-huntington-67211916a/>.

³ Should Debtor restart its usage of the Macro Helix system and the Macro Helix Agreement, McKesson reserves its right to seek additional amounts for such usage.

McKesson is Entitled to Payment of its Administrative Claim

23. Pursuant to 11 U.S.C. § 503(b)(1), McKesson still holds an administrative claim in the amount of \$188,826.38 for the post-petition services provided under the Macro Helix Agreement. (Administrative expenses include “the actual, necessary costs and expenses of preserving the estate . . .”). Where the debtor and its estate actual uses or receives the benefit of third parties’ goods and services, that third party is entitled to both hold an allowed administrative expense for the value of the goods and services and to be paid in accordance with the terms of the underlying contract. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) (citing *Philadelphia Co. v. Dipple*, 312 U.S. 168, 174 (1941)) (A debtor’s receipt of benefits pursuant to a contract pending rejection or assumption, obligates the debtor to pay a reasonable value of the services. The value of those services may be what is specified in the contract); *In re Smurfit-Stone Container Corp.*, 425 B.R. 735, 741 (Bankr. D. Del. 2010). When a contract exists, as here, the contract rate is the reasonable value of the services provided to the estate. *Id.* (citing *In re Bethlehem Steel Corp.*, 291 B.R. 260, 264 (Bankr. S.D.N.Y. 2003)).

24. Under the Bankruptcy Code and relevant and controlling case law, McKesson is entitled to immediate payment of all post-petition amounts due under the Agreements, at the contractual amounts. That amount totals \$188,826.38. (Bruni Decl. at ¶ 18.) McKesson is entitled to, and requests, immediate payment of \$188,826.38, the amount of its Administrative Claim.

Conclusion

WHEREFORE, McKesson requests entry of an order compelling Debtor to immediately pay McKesson the Administrative Claim; and such other and further relief as the Court deems just and proper.

July 15, 2020

Respectfully Submitted,
RUBIN & LEVIN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, a copy of the foregoing *Application for Payment of Administrative Claim* was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on July 15, 2020, a copy of the foregoing *Application for Payment of Administrative Claim* was mailed by first-class U.S. Mail, postage prepaid, or electronic mail as indicated, and properly addressed to the following:

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