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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, *et al.*,[1] Debtors and Debtors in Possession.	Chapter 11 Lead Case No. 19-01189-11 Jointly Administered **OBJECTION TO CONFIRMATION OF SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF ASTRIA HEALTH AND ITS DEBTOR AFFILIATES**

[1] The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

The United States of America (the "United States"), on behalf of the United States Small Business Administration ("SBA") and the Department of Health and Human Services ("HHS"), acting through its designated component, the Centers for Medicare & Medicaid Services ("CMS"), objects to confirmation of the chapter 11 plan of reorganization, as described in the *Second Amended Joint Chapter 11 Plan of Reorganization of Astria Health and Its Debtor Affiliates* (the "Plan") filed by the Debtors. [Dkt. No. 1986]. The Court should not confirm the Plan in its current form because it does not comply with the applicable portions of Title 11 of the United States Code (the "Bankruptcy Code"), as required by 11 U.S.C. § 1129. The United States has provided the Debtors with specific carve out language regarding the objections set forth below and requested that the Debtors include such language in any order confirming the Plan. The United States has not yet received a response, but expects to continue negotiating with the Debtors to resolve its objections.

BACKGROUND

The Debtors filed their chapter 11 bankruptcy cases on May 6, 2019. The Debtors are a large non-profit healthcare system comprising several entities, including five that entered into provider agreements with the Secretary of HHS, under which they would provide health care services to Medicare beneficiaries ("Provider Agreements"). On October 30, 2019, HHS timely filed proofs of claim in the Debtors' cases for Medicare overpayment claims and asserting CMS' rights of recoupment and setoff under 42 C.F.R. § 405.371. *See* POC 67, Case No. 19-01190; POC 83, Case No. 19-01191, POC 91, Case No. 19-01192; POC 7, Case No. 19-01198; POC 18, Case No. 19-01200.

On May 15, 2020, the Debtors commenced an adversary proceeding against the SBA and filed a Motion for Temporary Restraining Order, seeking a court order requiring the SBA to

consider their loan applications pursuant to the Paycheck Protection Program ("PPP") despite their status as debtors in bankruptcy.[2] The United States opposed the Motion and this court heard oral argument. Ultimately, this court issued an oral decision granting the Debtors' Motion and a preliminary injunction order on June 10, 2020. As a result, in June 2020, the Debtors obtained from Banner Bank (the "Lender") two PPP loans totaling approximately $2,743,300 (together, the "PPP Loans").[3] The United States filed a timely notice of appeal to the District Court for the Eastern District of Washington, the Debtors cross-appealed, and the district court consolidated the two appeals by order dated July 27, 2020.

On June 26, 2020, this court entered a stipulated order staying proceedings in the adversary proceeding pending the outcome of the United States' appeal of the preliminary injunction in district court. In the meantime, the United States filed a motion to withdraw the reference, which remains pending in the district court.

On November 11, 2020, the Court entered an order approving the disclosure statement. [Dkt. No. 1991].

The Debtors filed their *Notice of Filing Certain Plan Supplements to the Second Amended Joint Chapter 11 Plan of Reorganization of Astria Health and Its Debtor Affiliates* (the "Plan Supplement") on November 25, 2020 [Dkt. No. 2043]. The Plan Supplement includes the Debtors' Schedule of Assumed Agreements as Exhibit "A." The Provider Agreements are not included in the Schedule of Assumed Agreements.

Attached as Exhibit "I" to the Plan Supplement are the Debtors' revised financial

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[2] In response to "the incredible economic devastation wrought by the COVID-19 pandemic," Congress passed the Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act, signed into law on March 27, 2020. *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, Civ. No. 20-01324, 2020 WL 3447767, at *3 (D. Md. June 24, 2020). The CARES Act created the Paycheck Protection Program (PPP).

[3] Specifically, debtors Yakima HMA Home Health LLC (19-01200) and SHC Medical Center Toppenish (19-01190) obtained loans in the amounts of $384,400.00 and $2,358,900.00, respectively.

projections, which include a balance sheet reflecting an entry for "PPP Loans Balance" of approximately $2,743,000.00 only through December 2020. The PPP Loans Balance is not included in the Debtors' subsequent quarterly forecasts [Dkt. No. 2043, at p.179].

ARGUMENT

I. The Plan Violates the Bankruptcy Code and Cannot Be Confirmed Because It Does Not Provide the Required Treatment for the Lender's Administrative Expense Claim.

The Plan violates the Bankruptcy Code and cannot be confirmed. As set forth above, the Debtors obtained the PPP Loans postpetition. Having disbursed the loan funds, the Lender holds an administrative claim under section 364 that must be paid in cash in full as of the Effective Date of the Plan. 11 U.S.C. § 1129(a)(9)(A). While the Lender is currently the creditor that should have its administrative expense claims on account of the PPP Loans paid in full, the SBA has a contingent claim on account of its guarantee. Because the Plan provides for no such payments to the Lender, it violates the Bankruptcy Code in a manner that could affect SBA's rights and claims and cannot be confirmed.

A plan must provide that the holders of administrative claims under section 507(a)(2) or 507(a)(3) will receive cash equal to the allowed amounts of those claims on the effective date in order to be confirmed. 11 U.S.C. §1129(a)(9)(A). The only exception to this requirement is if the "holder of a particular claim has agreed to a different treatment of such claim." *Id.*

The Plan provides for the creation of an Administrative and Priority Claims Reserve. *See* Plan, §VI.F.10. However, the Debtors through their counsel represented to the United States that they do not intend to reserve or pay any amounts for the PPP Loans because they believe they will not have to repay them. This assumption is reflected in the Debtors' financial projections, which initially include the "PPP Loans Balance" as "Other Liabilities" through December 2020, but not thereafter. In doing so, the Debtors mistakenly assume that the PPP Loans will

automatically be forgiven or that the Debtors will prevail in their litigation position that the PPP Loans are grants that need not be repaid rather than loans.

In addition, because SBA's bankruptcy exclusion would have precluded the Debtors from obtaining the PPP Loans absent a preliminary injunction order that is subject to appeal, it is premature to assume forgiveness while the consolidated appeals remain pending. At any rate, the facts are that the PPP Loans have been issued and the Debtors have neither applied for nor received forgiveness of the loans.

While a PPP loan may be forgivable under certain circumstances, it is nevertheless a loan and not a "grant." *See Tradeways, Ltd. v. U.S. Dep't of the Treasury*, No. CV ELH-20-1324, 2020 WL 3447767 at *17 (D. Md. June 24, 2020) (concluding that "the fact that PPP proceeds are forgivable does not make the money an outright gift" and "the mere existence of favorable forgiveness terms in the CARES Act does not transform the PPP loan into a grant.").

Although the Lender has a right to payment of the PPP Loans admin expense claims, in cash, in full on the effective date of the plan, the United States' objection could be resolved if the Debtors and Lender are willing to agree to consensual treatment of the PPP Loans administrative claims in a manner that preserves the parties' rights on appeal as set forth below.

Accordingly, the United States reiterates its requests that the Lender be granted a priority administrative expensive claim and that the court refrain from entering a confirmation order that would affect the SBA's rights with respect to the PPP Loans and its rights on appeal of the preliminary injunction. The United States requests that if the Court proceeds with entering an order confirming the Plan, such order should include the following provisions:

a. Banner Bank (the "Lender"), and its assigns, subrogees and guarantors, is entitled to administrative priority status pursuant to sections 364(b) and 503(b)(1) of the

Bankruptcy Code to the full amount of Debtors' obligation on the PPP Loans, as defined by the loan documents and law applicable to the PPP Loans; and

b. Nothing in the order shall be construed as (i) determining, construing, or limiting any right, obligation, or term of the PPP Loans, loan documents, or law governing the PPP loans, including whether all or any part of the PPP Loans are subject to forgiveness; (ii) vesting in this Court any authority to make a determination about whether all or any part of the PPP Loans is subject to forgiveness under the loan documents and law governing the PPP Loans.

c. Notwithstanding any provisions to the contrary in the Plan, the Order confirming the Plan, and any implementing Plan documents, nothing shall affect the United States' appeal of the Order Granting Preliminary Injunction in the SBA Adversary Proceeding, and the District Court proceedings related thereto.

In addition, the Debtors should also increase the Administrative and Priority Claims Reserve to include the full amount of the PPP Loans. *See* Plan, §VI.F.10. The Debtors' financial projections do not indicate that setting aside additional reserves would render the Plan infeasible. Moreover, the Debtors provide no information that the Lender has agreed to a different treatment other than what the Bankruptcy Code requires under section 1129(a)(9)(A), namely, full payment of the PPP Loans in cash as of the Effective Date. Thus, the Plan does not explain how the administrative claims of the Lender will be satisfied. By assuming that PPP Loan forgiveness is a foregone conclusion, the Plan fails to satisfy section 1129(a)(9)(A) of the Bankruptcy Code and should not be confirmed.

The United States merely seeks to preserve the status quo and its rights on appeal, and therefore its objection could be resolved if the Debtors and Lender are willing to agree to

consensual treatment of the PPP Loans administrative expense claims in a manner that preserves such rights.

II. The Plan Fails to State Whether Debtors Will Assume or Reject its Provider Agreements and Violates Section 365 of the Bankruptcy Code because it Fails to Cure Defaults and Provide Adequate Assurance of Future Performance under the Provider Agreements.

The Plan fails to comply with the requirements for assumption of the Provider Agreements in section 365 of the Bankruptcy Code to cure existing defaults and to provide adequate assurance of future performance under the Provider Agreements. Despite Medicare's importance as a revenue source to the Debtors, and the Debtors' representation to the United States that they wish to continue their participation as a Medicare provider and will assume the Provider Agreements, the Plan Supplement does not include the Provider Agreements as part of the Schedule of Assumed Agreements. If the Debtors reject the Provider Agreements, the Provider Agreements will terminate in accordance with the governing Medicare statute at 42 U.S.C. §§ 1395-1395lll and regulations at 42 C.F.R., Chapter IV, Part 489 [489.18] as well as the examples offered by the related policies and procedures (the "Medicare Law").[4] Without Medicare reimbursement, the Debtors' operations may be negatively impacted.

It is well-established that the Medicare Provider Agreements are treated as executory contracts in bankruptcy. *See, e.g., Univ. Med. Ctr. v. Sullivan* (*In re Univ. Med. Ctr.*), 973 F.2d 1065, 1075 n.13 (3d Cir. 1992); *In re Heffernan Mem'l Hosp. Dist.*, 192 B.R. 228, 231 (Bankr. S.D. Cal. 1996); *In re Consumer Health Servs. of Am.*, 171 B.R. 917, 920 (Bankr. D.D.C. 1994), *rev'd on other grounds*, 108 F.3d 390 (D.C. Cir. 1997); *In re Tidewater Memorial Hosp., Inc.*, 106 B.R. 876, 880 (Bankr. E.D. Va. 1989). If the Debtors wish to continue to participate in

[4] Debtors have no right to continued participation as Medicare providers without compliance with the Medicare statute and regulations. *See Erickson v. U.S. ex rel. Dep't of Health & Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995).

Medicare, they must assume their Provider Agreements prior to confirmation of the Plan and, as discussed below, cure outstanding defaults and provide adequate assurance of future performance under the contract—particularly, recoupment of Medicare overpayments from future payments. 11 U.S.C. § 365.

In addition to not meeting requirements under 11 U.S.C. § 365, the Plan requests that the Court grant a blanket discharge of debt without any provision for Medicare's overpayments to the Debtors. *See* Plan, §VII.A. Moreover, contrary to applicable bankruptcy and Medicare law, the Plan fails to contain any explicit preservation of the United States' setoff and recoupment rights, such as those HHS preserved in its proof of claim.

If the Debtors wish to have the benefits of any executory contract assumed, then they must also accept the burdens. *Univ. Med. Ctr.*, 973 F.2d at 1075. The Third Circuit in *Univ. Med. Ctr.* explicitly stated that, once a Medicare provider in bankruptcy assumes its Medicare Provider Agreement "[t]here is no question that HHS could withhold . . . post-petition reimbursement in order to recover prepetition overpayments." *Id.* at 3. Indeed, by assuming Medicare Provider Agreements, the Debtors would opt into a system under which Medicare Law directs the Secretary to make payments based on minimal information, and then adjust future payments to account for previous overpayments. *See* 42 U.S.C. §§ 1395u(b)(3)(B)(ii), 1395gg(b)(1), 1395ddd(f)(2), 42 C.F.R. § 405.370.

Moreover, neither the Debtors nor the Court can set a sum certain cure amount owed to Medicare, though the Plan purports to generally reserve jurisdiction over this matter to this Court. *See* Plan, § VI. "Retention of Jurisdiction." Exclusive jurisdiction over reimbursement determinations lies with the federal district court only after exhaustion of all applicable

administrative remedies.[5] *See* 42 U.S.C. §§ 405(g) and (h). Sections 405(g) and 405(h) of the Social Security Act, 42 U.S.C. §§ 405(g) and (h), govern court review of a provider's request for reimbursement. Section 405(g) provides for federal district court judicial review of a final decision of the Secretary made after an administrative hearing. Section 405(h) of the Social Security Act, incorporated into the Medicare Statute by 42 U.S.C. § 1395ii, states:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1356 of title 28, United States Code, to recover on any claim arising under this title.

42 U.S.C. § 405(h).

Section 405(h) is not merely a codification of the doctrine of administrative exhaustion. Rather, it is a "statutorily specified jurisdictional prerequisite" which cannot be dispensed with by a "judicial conclusion of futility." *Weinberger v. Salfi*, 422 U.S. 749, 758 (1975).

Claims falling within section 405(h)'s purview are broad. In *Shalala v. Illinois Council on Long Term Care, Inc.*, the U.S. Supreme Court described the wide scope of section 405(h), stating that section 405(h) claims encompass a wide variety of claims, including, but not limited to, "[c]laims for money, claims for other benefits, claims of program eligibility, and claims that contest a sanction or remedy." 529 U.S. 1, 14 (2000). Further, it held that a court lacks jurisdiction over a section 405(h) claim unless and until a plaintiff has exhausted its administrative remedies pursuant to section 405(g). *Id.* at 15; *see Heckler v. Ringer*, 466 U.S. 602, 605 (1984) (holding that section 405(h) required a plaintiff to obtain a final administrative decision on their claims, even if cast as "procedural," prior to seeking judicial review).

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[5] The bankruptcy court's jurisdiction is limited by 28 U.S.C. § 1334, and its authority is limited to the extent a district court can refer claims under 28 U.S.C. § 157. *See e.g.* *In re Ray*, 624 F.3d 1124, 1130 (9th Cir. 2010) (the "jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute.").

If the Plan is amended to address this issue, the Debtors are not authorized, and the Court has no jurisdiction, to determine a monetary cure for the Provider Agreements before the Debtor providers have presented their claims and exhausted their administrative remedies. For the Debtors' Provider Agreements, the only permissible cure and the only adequate assurance of performance is for the Debtors to perform under the Provider Agreements in the ordinary course of business, including accepting responsibility for current Medicare overpayments and any Medicare overpayments subsequently determined by CMS under the Medicare Law.

Accordingly, the United States proposes that the Plan be modified to address the foregoing. The United States requests that if the Court proceeds with entering an order confirming the Plan, such order should include the following provisions:

a. Notwithstanding anything to the contrary in the Debtors' Plan, any of its exhibits, the Plan Supplement, or this Confirmation Order, CMS' right of recoupment and CMS' administration of the Debtors' Medicare Provider Agreements and federal Medicare laws and regulations, are unaffected by the confirmation of the Plan.

b. This Confirmation Order shall be an order authorizing the Debtors to assume their Medicare Provider Agreements on the Effective Date, including all benefits and burdens identified therein.

c. Upon assumption, the Medicare Provider Agreements will be governed by the appropriate federal Medicare laws, statutes, regulations, policies and procedures (including 42 U.S. §1395g(a), which section provides that all payments to the Debtors will be adjusted for prior overpayments (if any)). These include, but are not limited to, adjustment of all payments to account

for all prior overpayments and underpayments, including those relating to the pre-petition periods. Such adjustments, if any, will be deemed to occur in the ordinary course of business without any modifications or limitations arising from the Bankruptcy Code.

d. For avoidance of doubt, nothing in this Confirmation Order shall be construed to affect the rights of the United States to assert setoff and recoupment and such rights are expressly preserved.

Based on the foregoing, confirmation of the Plan should be denied unless and until the Debtors assume the Provider Agreements in accordance with the requirements of the Bankruptcy Code and Medicare Law.

III. The Plan Should Not Be Confirmed Because of the Overbroad Provisions in Section VII of the Plan.

The Plan should not be confirmed for the following additional reasons. Section VII of the Plan includes overbroad language in its provisions for Discharge (§ VII.A.), Compromise and Settlement of Claims, Interest, and Controversies (§VII.B.), Exculpation (§ VII.E.), Releases (§ VII.F.), Injunction (§ VII.G.), and Setoffs (§ VII.J.).

Section VII.A includes a "Permanent Injunction" as part of a discharge, and Section VII.G permanently enjoins after the effective date, commencing or continuing any action or proceeding of any kind, including on account of any claims, interests, causes of actions or liabilities that have been compromised or settled against the Debtors and the Reorganized Debtors, among others. To the extent such language is intended to interfere with United States' rights, including in the ongoing litigation of pending appeals and the assumption of the Provider Agreements as set forth above, the Plan contravenes the Bankruptcy Code and applicable law. Similarly, Section VII.B is likewise overbroad and might be construed as settling any claims and

interests of the United States. The United States objects to the Plan because although Section 1123(b)(3) permits the Debtors to settle claims they hold, it does not allow the Debtors to unilaterally "settle" any and all claims held by creditors against the Debtors. 11 U.S.C. § 1123(b)(3)(A). Because the United States has not agreed to any such "settlement" under Fed. R. Bankr. P. 9019, the Plan violates section 1129(a)(1) and may not be confirmed to the extent it does not clarify that the United States is not agreeing to any "settlement" approved under the Plan or order confirming the Plan. Therefore, any order confirming the Plan should include a carve out because the United States has not agreed to any specific treatment other than what it is entitled to under the Bankruptcy Code.

With regard to Sections VII.E and VII.F, the United States Trustee's objection to the Plan addresses the United States' shared concern regarding the scope of the exculpation and release clauses in the Plan. To reiterate, the existing Ninth Circuit authority maintains that under 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts, but the discharge does not provide for the release of *third parties* from liability; "to the contrary, § 524(e) specifically states that 'discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).'" *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995). While it is true that recently, in *Blixeth v. Credit Suisse* 961 F.3d 1074 (9th Cir. 2020), the Ninth Circuit provided for a very narrow release, the United States concurs with the United States' Trustee's assertion that the release and exculpation clauses in the Plan are more akin to the global release in *Lowenschuss* and among other findings, the court should hold that no release extends to third parties not closely involved and acting as fiduciaries of the estate in the Plan process.

Finally, in regards to Sections VII.G and VII. J, to the extent the injunction and setoff provisions therein are intended to strip the United States' setoff and recoupment rights, including those specifically related to payment adjustments under the Provider Agreements, and to the extent these provisions prematurely disallow or waive any of the United States' claims, they are impermissible. Therefore, the United States requests that any order confirming the Plan also include carve out language stating that "Nothing in this Confirmation Order shall constitute a waiver by the United States of its the rights to assert setoff and recoupment, and such rights are expressly preserved."

CONCLUSION

WHEREFORE, for the foregoing reasons, the United States respectfully requests that this Court deny confirmation of the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization dated November 11, 2020 [Dkt. No. 1986].

Respectfully submitted,

December 4, 2020

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