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8 **U.S. BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 In Re: BORREGO COMMUNITY
HEALTH FOUNDATION,
11
12 Debtor and Debtor-in-Possession.

Case No. 3:22-bk-02384-LT11
Chapter 11

DEPARTMENT OF HEALTH AND HUMAN SERVICES OPPOSITION TO DEBTOR'S NOTICE OF MOTION AND MOTION FOR ENTRY OF (I) AN ORDER (1) APPROVING FORM OF ASSET PURCHASE AGREEMENT; (2) APPROVING AUCTION SALE FORMAT AND BIDDING PROCEDURES; (3) APPROVING PROCESS FOR DISCRETIONARY SELECTION OF STALKING HORSE BIDDER AND BID PROTECTIONS; (4) APPROVING FORM OF NOTICE TO BE PROVIDED TO INTERESTED PARTIES; (5) SCHEDULING A COURT HEARING TO CONSIDER APPROVAL OF THE SALE TO THE HIGHEST AND BEST BIDDER; AND (6) APPROVING PROCEDURES RELATED TO THE ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (II) AN ORDER AUTHORIZING THE SALE OF PROPERTY FREE AND CLEAR OF ALL CLAIMS, LIENS AND ENCUMBRANCES

Date: November 28, 2022
Time: 2:00 p.m.
Place: Dept 3. Room 129



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1 The U.S. Department of Health and Human Services (“HSS”) hereby submits its
2 Opposition to Debtor’s Notice Of Motion And Motion For Entry Of (I) An Order (1)
3 Approving Form Of Asset Purchase Agreement; (2) Approving Auction Sale Format
4 And Bidding Procedures; (3) Approving Process For Discretionary Selection Of
5 Stalking Horse Bidder And Bid Protections; (4) Approving Form Of Notice To Be
6 Provided To Interested Parties; (5) Scheduling A Court Hearing To Consider Approval
7 Of The Sale To The Highest And Best Bidder; And (6) Approving Procedures Related
8 To The Assumption Of Certain Executory Contracts And Unexpired Leases; And (II)
9 An Order Authorizing The Sale Of Property Free And Clear Of All Claims, Liens And
10 Encumbrances, Dk. 161, (“Motion”) filed by Borrego Community Health Foundation,
11 Chapter 11 Debtor and Debtor-in-Possession (“Debtor”).

12 **I. INTRODUCTION**

13 HHS does not object to the Debtor selling its assets. However, it is unclear
14 whether Debtor’s Motion is improperly attempting to sell assets that actually belong to
15 the federal government, not the bankruptcy estate. To the extent Debtor is requesting
16 authority to sell property that belongs to the federal government, HSS objects and
17 requests that the Court set a briefing schedule and evidentiary hearing to determine
18 whether such assets are property of the Debtor’s bankruptcy estate.

19 For reasons set forth below, HHS opposes Debtor’s Motion and requests that the
20 Court deny Debtor’s Motion or, alternatively, continue the hearing on the Motion and
21 set a briefing schedule and evidentiary hearing on whether the assets the Debtor is
22 attempting to sell are property of the bankruptcy estate.

23 **II. PROCEDURAL BACKGROUND**

24 On September 12, 2022, Debtor filed a petition for relief under Title 11 of the
25 United States Code (“Bankruptcy Code”). Dk. 1. Debtor filed its Schedules and
26 Statement of Financial Affairs on October 17, 2022. Dk. 97. Debtor’s initial 341(a)
27 meeting of creditors took place on October 18, 2022 and was continued to November
28

8, 2022¹. Debtor filed the instant Motion on November 10, 2022. Dk. 161.

III. FEDERAL FUNDS PROVIDED TO DEBTOR

As reflected in Debtor’s schedules, statement of financial affairs, and below, a portion of its income is from federal funding. Specifically, Debtor’s Statement of Financial Affairs² reflects the following:

<u>Time</u>	<u>Business Income</u>	<u>Non-Business Revenue³</u>
7/1/2022 to 9/12/2022	\$21,672,458.17	\$4,308,799.97
7/1/2021 to 6/30/2022	\$129,498,962.36	\$29,418,936.41
7/1/2020 to 6/30/2021	\$214,619,548.00	\$21,204,028.00

A. Medicare Provider Agreements

In 1965, Congress enacted The Health Insurance Program for the Aged and Disabled through Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 et seq., (“Medicare”). Medicare is a federal health care program providing benefits to persons who are over the age of 65 and some under that age who are blind or disabled. Medicare is administered by the Centers for Medicare and Medicaid Services (“CMS”), a federal agency under HHS. Individuals who receive benefits under Medicare are referred to as Medicare “beneficiaries.” Medicare enters into agreements with providers and suppliers to establish their eligibility to participate in the Medicare Program. Providers and suppliers complete a Medicare Enrollment Application (often called a Form CMS-855) whereby the providers and suppliers must certify compliance with certain federal

¹ At the continued 341(a) Meeting of Creditors on November 8, 2022, HHS also asked Debtor about a potential sale. Debtor responded that it was “considering all options” and that it was unable to provide any additional information, despite having created its “data room” for potential purchasers 11 days earlier, and then filing the instant motion only 2 days later.

² Dk. 98, Statement of Financial Affairs, ¶ 2, page 15 of 97.

³ Grant and Misc. Revenue.

1 requirements.

2 Debtor holds 41 medicare provider numbers, 24 active and 17 deactivated. CMS
3 administers the funds Debtor receives under its Medicare Provider Agreements. CMS
4 utilizes National Governmental Services (“NGS”) and Nordian Healthcare Solutions
5 (“Nordian”) to assist it in administering Debtor’s Medicare Provider Agreements.

6 Under the Medicare Provider Agreements, Debtor must submit cost reports on an
7 annual basis for each cost report year. Cost reports are due by the last day of the fifth
8 month following the close of Debtor’s cost report year. 42 C.F.R. § 413.24. CMS
9 reviews Debtor’s cost report submission in order to make any necessary adjustments as
10 required by section 1395g(a) of the Medicare statute. However Debtor has failed to
11 submit long overdue cost reports that HHS estimates collectively reflect upwards of
12 \$1,500,000.

13 **B. Federal Grants**

14 HHS’s Health Resources & Services Administration (“HRSA”) programs
15 provide equitable health care to people who are geographically isolated and
16 economically or medically vulnerable. Section 330 of the Public Health Service
17 (“PHS”) Act authorizes the Health Center Program. 42 U.S.C. § 254b. To be eligible as
18 a grantee under section 330 of the PHS Act, an organization, among other requirements,
19 must be a non-profit organization, must have a patient-majority governing board, and
20 must institute a sliding fee scale. Other grant funding requirements applicable to Health
21 Center Program grantees are found at Health Center Program Statute: Section 330 of
22 the Public Health Service Act (42 U.S.C. §254b); Health Center Program
23 Regulations: 42 CFR 51c and 42 CFR 56.201 – 56.604; and Grant Regulations: Uniform
24 Administrative Requirements for HHS Awards: 45 CFR 75.

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1 HRSA records⁴ reflect that Debtor has been awarded the following Health Center
 2 Program⁵ grants:

<u>Grant Name</u>	<u>Grant Period</u>		<u>Project Period</u>		<u>Cummulative Award Amount</u>
	<u>Start</u>	<u>End</u>	<u>Start</u>	<u>End</u>	
Base Health Center	9/1/02	2/28/23	3/1/19	2/28/23	\$4,973,751
Expanding Capacity for Coronavirus Testing	5/1/20	4/30/23	5/1/20	4/30/23	\$4,106,464
American Rescue Plan Funding for Health Centers	4/1/21	3/31/23	4/1/21	3/31/23	\$36,903,375
American Rescue Plan Health Center Construction and Capital Improvements	9/15/21	9/14/24	9/15/21	9/14/24	\$3,439,299
Local Community-Based Workforce to Increase COVID-19 Vaccine Access	7/31/21	7/31/23	7/31/21	7/31/23	\$1,000,000

16 These grants are on “advance drawdown restriction,” which means that before any
 17 available funds are transferred to the Debtor’s account, the Debtor must submit a request
 18 to HRSA detailing the amount needed and how the funds will be used. Only if HRSA
 19 approves the request are the funds released to Borrego. Debtor must also provide an
 20 annual Federal Financial Report regarding use of HRSA funds.

21 The federal government retains its interest in any property, equipment or supplies
 22 purchased with HRSA funds. 45 C.F.R. §§ 75.318; 75.320.

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 25 ⁴ See Recipient Information, HHS’ Tracking Accountability in Government Grants
 26 System (TAGGS), available at
 27 [https://taggs.hhs.gov/Detail/RecipDetail?arg_EntityId=vF5oaoaCcFwi06R%2b7L0iF
 A%3d%3d](https://taggs.hhs.gov/Detail/RecipDetail?arg_EntityId=vF5oaoaCcFwi06R%2b7L0iFA%3d%3d).

28 ⁵ Requirements applicable to Health Center Program grantees are found at 42 U.S.C.
 §254b; 42 C.F.R. 51c and 42 C.F.R. 56.201 – 56.604; and 45 C.F.R. 75.

1 **C. Provider Relief Bureau Funds**

2 Since the Provider Relief Fund (“PRF”) was created in April 2020, Debtor
3 received a total of \$17,608,363.54 in PRF distributions and has yet to report on its use
4 of \$6,011,481.10 of these funds. Congress established the PRF in the Coronavirus Aid,
5 Relief, and Economic Security Act (“CARES Act”), Pub. L. 116-136, Title VIII, 134
6 Stat. 281, 563 (Mar. 27, 2020), to “reimburse . . . eligible health care providers for health
7 care related expenses or lost revenues . . . attributable to coronavirus.” *Id.* Eligible health
8 care providers include “public entities, Medicare or Medicaid enrolled suppliers and
9 providers, and such for-profit entities and not-for-profit entities . . . as the Secretary may
10 specify . . . that provide diagnoses, testing, or care for individuals with possible or actual
11 cases of COVID 19.” *Id.*

12 PRF recipients must repay PRF distributions if they fail to agree to, or comply
13 with, certain “terms and conditions” (“PRF Terms and Conditions”). PRF recipients
14 agree to the PRF Terms and Conditions by electronically attesting to acceptance thereof.
15 They must do so within 90 days of receiving a distribution.⁶ Providers also must report
16 their use of such funds during the applicable “Reporting Time Period,” approximately
17 twelve to eighteen months after disbursement.⁷ If a PRF recipient does not comply with
18 the PRF Terms and Conditions, the recipient must repay the PRF distributions to
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22 ⁶ HRSA, Current and Future Payments, [https://www.hrsa.gov/provider-relief/future-](https://www.hrsa.gov/provider-relief/future-payments)
23 [payments](https://www.hrsa.gov/provider-relief/future-payments); HRSA, Provider Relief Programs: Provider Relief Fund and ARP Rural
24 [Payments Frequently Asked Questions](https://www.hrsa.gov/sites/default/files/hrsa/providerrelief/provider-relief-fund-faq-complete.pdf), 3 (Jan. 27, 2022),
25 [https://www.hrsa.gov/sites/default/files/hrsa/providerrelief/ provider-relief-fund-faq-](https://www.hrsa.gov/sites/default/files/hrsa/providerrelief/provider-relief-fund-faq-complete.pdf)
26 [complete.pdf](https://www.hrsa.gov/sites/default/files/hrsa/providerrelief/provider-relief-fund-faq-complete.pdf) (“HRSA Guidance”). Guidance documents such as this one do not have
27 the force and effect of law, *Perez v. Mortgage Bankers Ass 'n*, 575 U.S. 92, 97 (2015),
28 but can “‘advise the public’ of how the agency understands, and is likely to apply, its
binding statute. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion)
(quoting *Perez*, 575 U.S. at 97).

⁷ HRSA Guidance, 39.

1 HRSA.⁸

2 PRF distributions are nontransferable. Only the PRF distribution recipient (who
3 properly accepts the PRF Terms and Conditions) is entitled to use the funds.⁹ HRSA
4 Guidance expressly prohibits any assignment or transfer of PRF distributions through
5 the sale of a facility, instead mandating that, where a PRF recipient transfers a facility
6 to a new operator, “the original recipient must use the funds for its eligible expenses
7 and lost revenues and return any unused funds to HRSA.”¹⁰ Furthermore, if “a bankrupt
8 recipient is liquidated, it must similarly use the funds for its eligible expenses and lost
9 revenues and return any unused funds to [HRSA].¹¹ In short, only the PRF recipient
10 may use PRF distributions, and only if it accepts, or is deemed to accept, the PRF Terms
11 & Conditions. Otherwise, it must return them to HRSA.

12 **D. Debtor’s Schedules**

13 In the “Global Notes” filed with its Schedules, Debtor acknowledges that it may
14 have improperly characterized certain items, for which it received restricted funds,
15 which may not be property of the Debtor’s estate. Dk. 97, ¶¶ 8 and 12, pages 9 and 10
16 of 97.

17 Notwithstanding the foregoing, Debtor’s Schedules appear to list government
18 interests as follows:

- 19 • Schedule B: Accounts Receivable ARPA Grant \$23,191,631 (page 18 of 97);
20 • Schedule B: Medical & Dental Equipment \$1,196,895.10 (page 22 of 97);
21 • Schedule E/F: “USAO Southern District” Undetermined amount due to
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24 ⁸ HRSA, Provider Relief Fund General Information,
25 <https://www.hrsa.gov/providerrelief/faq/general>; HRSA, Terms and Conditions,
<https://www.hrsa.gov/provider-relief/pastpayments/terms-conditions>.

26 ⁹ HRSA, Terms and Conditions, <https://www.hrsa.gov/provider-relief/past-payments/termsconditions>.

27 ¹⁰ HRSA Guidance, 19.

28 ¹¹ HRSA Guidance, 19.

1 government (page 59 of 97); and

- 2 • Schedule G: Department of Health and Human Services Health Resources and
3 Services Administration “Notice of Grant Award Authorization” (page 70 of
4 97).

5 **IV. LEGAL ARGUMENT**

6 **A. Debtor May Only Sell Property of the Estate**

7 HHS opposes the Motion, on the grounds that Debtor is seeking to sell assets,
8 before the Court has determined whether these assets are property of the estate. The
9 Ninth Circuit Bankruptcy Appellate Panel noted that “a bankruptcy court may not allow
10 the sale of property as property of the estate without first determining whether the debtor
11 in fact owned the property.” *Warnick v. Yassian (In re Rodeo Canon Dev. Corp.)*, 362
12 F.3d 603 (9th Cir. 2004), *opinion withdrawn and superseded*, 126 F. App’x 353 (9th
13 Cir. 2005) (internal quotations omitted). HHS contends that the government, not the
14 bankruptcy estate, owns the HRSA funds, personal property purchased with HRSA
15 funds, and PRF funds. To the extent Debtor is requesting authority to sell these assets,
16 the Court must first determine whether such assets are property of the estate. Thus, HHS
17 requests that the Court set an evidentiary hearing and briefing schedule to determine
18 what interest, if any, Debtor’s estate has in the HRSA funds, personal property
19 purchased with HRSA funds, and PRF funds before ruling on the instant Motion.

20 **B. Medicare Provider Agreements**

- 21 1. “Free and Clear” Sale Contravenes the Medicare statute at 42 U.S.C. §
22 1395g(a)

23 To the extent Debtor seeks to sell its Medicare Provider Care Agreements “free
24 and clear” of any liability, doing so would preclude HHS from effectuating Congress’
25 requirement that “necessary adjustments” shall be made to the amount of Medicare
26 payments made to a provider. In essence, Debtor would be asking the Court to ignore a
27 critical element of the payment provision of the Medicare statute. However, there is no
28 “authority for the proposition that the Bankruptcy Code can act to override an explicit

1 statutory limitation on what the government owes for a particular service.” *United*
2 *States v. Consumer Health Services of America, Inc.*, 108 F.3d 390 at 393 (D.C. Cir.
3 1997). To the contrary, bankruptcy courts have recognized that section 1395g(a) is
4 fundamental to the Medicare program:

5 The statute, at 42 U.S.C. § 1395g(a), contemplates and directs
6 that adjustments will be made whenever it is determined that the
7 interim payments previously disbursed were excessive. This is
8 the fundamental payment provision which underlies Medicare
reimbursement. There is no evading it or circumventing it, under
any authority or at any time.

9 *In re Tri County Home Health Services, Inc.*, 230 B.R. 106, 112 (Bankr. W.D. Tenn.
10 1999). A bankruptcy court “may not interfere with . . . the statutory prescription that
11 HHS make ‘necessary adjustments’ to current payment to account for previously
12 rendered overpayments.” *In re S. Inst. for Treatment and Evaluation*, 217 B.R. 962, 966
13 (Bankr. S.D. Fla.). HHS’s recoupment right is a “statutory entitlement [that] forecloses
14 any equitable attempt, whether by injunction or otherwise” to bar the recovery of
15 overpayments. *Md. Dept. of Human Res. v. U.S. Dept. of Agriculture*, 976 F.2d 1462,
16 1480-81 (4th Cir. 1992).

17 2. Debtor Cannot Satisfy Any of the Criteria of 11 U.S.C. § 363(f) with
18 Respect to its Medicare Provider Agreements

19 Section 363(f) of 11 U.S.C. § 363 authorizes certain sales of property “free and
20 clear of any interest in such property” only if:

- 21 (1) applicable non-bankruptcy law permits sale of such property
free and clear of such interest;
- 22 (2) such entity consents;
- 23 (3) such interest is a lien and the price at which property is to be
sold is greater than the aggregate value of all liens on such
property;
- 24 (4) such interest is in bona fide dispute; or
- 25 (5) such entity can be compelled, in a legal or equitable
proceeding, to accept a money satisfaction of such interest.

26 11 U.S.C. § 363(f).

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1 i. *Debtor does not have a property interest in Medicare Provider*
2 *Agreements*

3 As a threshold matter, Debtor does not have a property interest in Medicare
4 Provider Agreements, either as a right to participate in Medicare as a provider or in the
5 “necessary adjustments” required by 42 U.S.C. § 1395g (a).

6 With respect to any potential property interest in reimbursement as a provider,
7 the Ninth Circuit joined the First and Tenth Circuit Courts of Appeals in holding that a
8 medical provider does not possess a property interest in continued participation in
9 Medicare. *See Erickson v. U.S. ex rel. Dept. of Health and Human Services*, 67 F.3d
10 858 (9th Cir. 1995).

11 Likewise, the “necessary adjustment,” or recoupment, provided for in section
12 1395g(a), is not a property interest. Because recoupment must arise from the same
13 transaction, it functions as a defense to payment rather than a mutual obligation or claim
14 under the Bankruptcy Code. *See Brown v. General Motors Corp.*, 152 B.R. 935, 938
15 (W.D. Wis. 1993). *See also Chicago Title Ins. Co. v. Seko Inv. (In re Seko Inv., Inc.)*
16 156 F.3d 1005, 1008-9 (9th Cir. 1997). “The right of recoupment is not itself a claim
17 ... and therefore does not even fall under the broadest interpretation of an ‘interest’ in
18 property.” *In re Lawrence United Corp.*, 221 B.R. 661 (N.D.N.Y. 1998).

19 ii. *Debtor cannot satisfy any of the five criteria in section 363(f)*

20 Section 363(f)(1) authorizes the sale of a Debtor’s property free and clear of any
21 interest in the property if applicable non-bankruptcy law permits the sale of such
22 property free and clear of such interest. Medicare Provider Agreements may only be
23 transferred pursuant to specific terms set forth at 42 C.F.R. § 489.18(d), which states
24 that “[a]n assigned agreement is subject to all applicable statutes and regulations and to
25 the terms and conditions under which it was originally issued.” This includes the
26 statutory requirement in 42 U.S.C. § 1395g(a) that adjustments are made for
27 overpayments. *See U.S. v. Vernon Home Health, Inc.* 21 F3d 693, 696 (5th Cir. 1994),
28 *cert. denied* 513 U.S. 1015 (1994). Thus, to the extent Debtor seeks to sell or transfer

1 any Medicare Provider Agreements “free and clear,” it cannot satisfy 11 U.S.C. §
2 363(f)(1).

3 11 U.S.C. § 363(f)(2) provides that sale of a Debtor’s property may be authorized
4 free and clear of any interest in such property if the party holding such interest consents.
5 HHS objects to the extent Debtor seeks to sell or transfer any Medicare Provider
6 Agreements “free and clear,” so Debtor cannot satisfy 11 U.S.C. § 363(f)(2).

7 Section 363f(3) authorizes the sale of a Debtor’s property free and clear of any
8 interest in the property if such interest is a lien and the price at which property is to be
9 sold is greater than the aggregate value of all liens on such property. There are no lien
10 interests applicable here so Debtor cannot satisfy 11 U.S.C. § 363(f)(3).

11 Under 11 U.S.C. § 363(f)(4), the sale of a Debtor’s property may be authorized
12 free and clear of any interest in such property if such interest is in bona fide dispute.
13 This requires the Debtor to show that “there is an objective basis for either a factual or
14 legal dispute as to the validity of the debt.” *See* Lawrence P. King, *Collier on*
15 *Bankruptcy* ¶ 363.06[5] (15th ed. 1998). Thus, whether a dispute is bona fide does not
16 turn on the amount of the debt, but on the validity of the underlying liability. As
17 described above, there is no dispute that Debtor lacks a protectable property interest in
18 Medicare Provider Agreements, nor is there such a dispute about the “necessary
19 adjustments” directive as a component of the Medicare statute. Debtor cannot satisfy
20 the fourth criteria.

21 Finally, section 363(f)(5) authorizes the sale of a Debtor’s property free and clear
22 of any interest in the property if such entity can be compelled, in a legal or equitable
23 proceeding, to accept a money satisfaction of such interest. No legal or equitable
24 proceeding can compel HHS to accept money to disregard or abrogate the statute
25 directing its provision of Medicare. *See e.g., Md. Dept. of Human Res.*, 976 F.2d at 1480
26 (“An injunction may not strip a federal agency of its power to exercise lawful authority
27 conferred by Congress through statute.”).

28 Therefore, to the extent Debtor seeks to sell its Medicare Provider Agreements

1 free and clear of any liability under 11 U.S.C. 363(f), it cannot do so.

2 3. Medicare Provider Agreements are Executory Contracts that Must Be
3 Assumed and Assigned Pursuant to 11 U.S.C. § 365

4 To the extent Debtor seeks to sell its Medicare Provider Agreements as executory
5 contracts, it must comply with the terms of 11 U.S.C. § 365. Under a Medicare Provider
6 Agreement, the expected ongoing delivery of healthcare services is due to Medicare
7 beneficiaries. The continued reimbursement of the cost to provide those services,
8 subject to any necessary adjustments required by 42 U.S.C. § 1395g(a), is due from
9 HHS.

10 “A Medicare provider agreement is an executory contract. The Bankruptcy Code
11 does not define “executory contract,” but courts have generally defined such a contract
12 as one under which performance is due to some extent on both sides.” *In re Heffernan*
13 *Mem’l Hosp. Dist.*, 192 B.R. 228, 231 n.4 (S.D. Cal. 1996) (citing *NLRB v. Bildisco &*
14 *Bildisco*, 465 U.S. 513, 522 n. 6 (1984). *See also, In re Univ. Med. Ctr.*, 973 F.2d 1065,
15 1075 (3d Cir.1992) (“A Medicare provider agreement easily fits within th[e] definition
16 [of executory contract]”); *In re Berks Behavioral Health, LLC*, 2010 WL 4922173, 7
17 (Bankr. E.D. Pa. 2010) (“[A] Medicare Provider Agreement shall not be considered an
18 ‘asset’ that may be sold pursuant to section 363 of the Bankruptcy Code and shall be
19 treated as an executory contract subject to the Assumption and Assignment
20 Procedures”).

21 The Bankruptcy Code permits the assignment of an executory contract only if the
22 Debtor-in-possession assumes the contract and provides adequate assurance of future
23 performance by the assignee of the contract. *See* 11 U.S.C. § 365(f)(2).

24 The proper assumption of an executory contract requires the Debtor to “cure[],
25 or provide[] adequate assurance that [it] will promptly cure” its liabilities. 11 U.S.C. §
26 365(b)(1)(A). Otherwise stated, assumption of an executory contract entails “liab[ility]
27 for the performance of the entire contract.” *In re Airlift Int’l, Inc.*, 761 F.2d 1503, 1508
28 (11th Cir. 1985). Debtor has failed to submit overdue cost reports that HHS estimates

1 collectively reflect upwards of \$1,500,000. Prior to any assumption, much less
2 assignment, Debtor must submit its cost reports so that CMS can determine any
3 necessary adjustments.

4 The language of § 365(b)(1) is unequivocal. A party to an
5 executor contract must be paid all amounts due him under the
contract before the contract may be assumed.

6 *Matter of Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169, 1174 (7th Cir. 1996).

7 To the extent Debtor is trying to sell the Medicare Provider Agreements as an
8 executory contract, the Motion provides that a counter party to an Assumed Executory
9 Contract must serve an objection to the assumption and assignment of such contract
10 within 20 days after service of Debtor’s Cure Notice. *See* Motion p. 14, line 22 to p. 15,
11 line 13, ¶ 38. However, as Debtor has not filed its cost reports following the close of
12 Debtor’s last cost-report year, HHS is unable to determine with any degree of certainty
13 what outstanding amounts, if any, are owed under the Medicare Provider Agreements.¹²

14 **C. HRSA Grant Funds**

15 As set forth above, it is unclear whether the Debtor is attempting to “sell” either
16 the outstanding amounts remaining on the federal grants or the tangible property
17 purchased with federal grant money, neither of which are property of the estate.
18 Debtor’s Schedules list U.S. Department of Health and Human Services Health
19 Resources and Services Administration “Notice of Grant Award Authorization” on
20 Schedule G as an executory contract. *See* Dk. 97, Schedule G, page 70 of 97. Debtor’s
21 Schedules also list “Accounts Receivable ARPA Grant \$23,191,631” and “Medical &
22 Dental Equipment \$1,196,895.10” on Schedule B as assets. *See* Dk. 97, Schedule B,
23 page 18 and 22 of 97. However, it is unclear whether Debtor has improperly listed the
24 HRSA funds as executory contracts on Schedule G, and HRSA funds and tangible
25 property purchased with HRSA funds as assets on Schedule B.

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27
28 ¹² Even if Debtor were to submit the missing reports now, the CMS review process
takes approximately 2-3 months.

1 1. HRSA Undisbursed Funds Are Not Property of the Estate

2 HHS opposes the Motion to the extent Debtor is attempting to sell the HRSA
3 funds that have not yet been disbursed on the federal grants. The Motion appears to
4 request authority to sell “any or all tangible and intangible real and personal property
5 assets of the Debtor as defined and set forth in the Draft APA.” Dk. 161, Motion, Exhibit
6 1, ¶ 2, page 40 of 49. HHS has not seen a copy of the Draft APA but is concerned as
7 Debtor’s schedules appear to list the undisbursed HRSA funds as both accounts
8 receivable on Schedule B and executory contracts on Schedule G.

9 The federal government owns the HRSA funds that have not yet been distributed.
10 “[F]unds of the government are specifically appropriated to certain national objects, and
11 if such appropriations may be diverted and defeated by state process or otherwise, the
12 functions of the government may be suspended. So long as money remains in the hands
13 of a disbursing officer, it is as much the money of the United States, as if it had not been
14 drawn from the treasury. Until paid over by the agent of the government to the person
15 entitled to it, the fund cannot, in any legal sense, be considered a part of his effects.”
16 *Buchanan v. Alexander*, 45 U.S. 20, 20–21, 11 L. Ed. 857 (1846).

17 Here, the undisbursed HRSA funds are not property of the estate and may not be
18 sold as either accounts receivable or executory contracts.

19 2. Property Purchased with HRSA Funds Is Not Property of the Estate

20 HHS opposes the Motion to the extent Debtor is attempting to sell the personal
21 property purchased with HRSA funds. Debtor lists Medical & Dental Equipment with
22 a value of \$1,196,895.10 as an asset on Schedule B. Dk. 97, Schedule B, page 22 of 97.
23 However, Debtor submitted a draw down request for February 2022 which included
24 \$503,381 for dental equipment. It is unclear whether the medical and dental equipment
25 listed on Schedule B includes the dental equipment purchased with HRSA funds.¹³

26
27
28 ¹³ The dental equipment alone does not constitute the extent of property purchased using grant funds. Rather, it is a salient example from the Debtor’s schedule.

1 The federal government has an interest in the personal property purchased with
2 HRSA funds. *See In re Joliet-Will Cnty. Cmty. Action Agency*, 847 F.2d 430, 433 (7th
3 Cir. 1988). In *Joliet*, the debtor, who was exclusively financed through federal and state
4 grants, filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code¹⁴. *Id.* at
5 431. The Chapter 7 trustee attempted to distribute the assets of the debtor to creditors
6 pro rata. *Id.* The Seventh Circuit held that the debtor’s assets did not belong to the
7 debtor’s bankruptcy estate and ordered the trustee to abandon the debtor’s assets. *Id.* at
8 435. The court reasoned that there was “no evidence that the authors of the Bankruptcy
9 Code intended to deprive the federal government of property rights that it would enjoy
10 against an unsecured creditor, merely because the creditor is represented by a trustee in
11 bankruptcy.” *Id.* at 433.

12 Like the undisbursed HRSA funds, personal property purchased with HRSA
13 funds is not property of the estate and may not be sold.

14 3. Any Successor in Interest of the Debtor Must Be Approved by HRSA

15 The Motion incorrectly states that HRSA approves or determines whether an
16 entity is a Federally Qualified Health Center¹⁵. Dk. 161, Motion p. 2, lines 10-16.
17 Instead, HRSA conducts a “Successor-in-Interest” or “SII” evaluation to determine
18 whether a successor entity is eligible to receive the Health Center Program grant funding
19 that was awarded to the original health center and be recognized as a new Health Center
20 Program recipient¹⁶. If HRSA approves the SII, the rights to and obligations under a
21 Health Center Program award will be acquired by the new entity¹⁷. Thus, the HRSA
22

23 ¹⁴ Title 11 of the United States Code.

24 ¹⁵ HRSA does not determine whether an entity is a Federally Qualified Health Center.

25 ¹⁶ Please see <https://bphc.hrsa.gov/sites/default/files/bphc/compliance/hc-rg-changes-sii-requests.pdf> for additional information regarding the procedures for a health center
26 to request HRSA approval of a successor-in-interest arrangement.

27 ¹⁷ To the extent Debtor is contemplating sale of its business and assets to more than
28 one bidder, HHS objects as it would be impermissible to divide the grants piecemeal.
The debtors Health Center Program grant funds were allotted based on the service

1 grant funds may not be “sold” or transferred free and clear of any liens and other
2 interests as the Motion suggests.

3 Importantly, the Motion does not present a contingency for the winning bidder
4 should HRSA not approve the SII request.

5 **D. Provider Relief Funds**

6 It is also unclear whether Debtor is attempting to sell any PRF funds. HHS
7 opposes the Motion to the extent Debtor seeks authority to sell the PRF funds. Debtor
8 received \$17,068,363.54 in PRF funds, but has not yet reported on \$6,011,481.10 of
9 those funds. Further, Debtor may still be audited for all PRF funds received. Under PRF
10 Terms and Conditions, PRF payments that were made incorrectly, or exceed either lost
11 revenues or expenses incurred due to the coronavirus, or do not otherwise meet
12 applicable legal and program requirements, must be returned to HHS. Moreover, non-
13 compliance with the PRF Terms or Conditions is grounds for the Secretary to recoup
14 some or all of the payments or take other actions pursuant to 45 C.F.R. § 371.¹⁸

15 Additionally, to the extent there are any unused PRF funds, these monies must
16 be returned to HHS and may not be transferred to a prospective buyer. PRF money does
17 not transfer to a buyer, however, a buyer of the Debtor’s assets may be eligible to apply
18 for future PRF payments, which would also be subject to HRSA approval.

19 Thus, HHS opposes the Motion to the extent it is attempting to sell or transfer
20 any PRF funds received by the Debtor.

21 **E. No waiver under FRBP 6004**

22 Debtor’s Motion seeks to waive the 14-day stay of the order on its Motion that is
23 provided for in Bankruptcy Rule 6004(h). HHS opposes Debtor’s request to waive the
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25 _____
26 sites proposed at the time of the Service Area Competition and would only be
27 transferred through the SII process intact to a sole approved successor entity.

28 ¹⁸ See, e.g., Phase 4 General Distribution Relief Fund Terms and Conditions, available
at <https://www.hrsa.gov/sites/default/files/hrsa/provider-relief/terms-conditions-phase-4-general-distribution-relief-fund.pdf>.

1 14-day stay. As demonstrated above, Debtor’s Motion leaves many questions
2 unanswered, and an adverse order would require significant time to review and consider
3 whether appeal is appropriate.

4 **V. CONCLUSION**

5 Based on the foregoing, HHS requests that the Court deny Debtor’s Motion or,
6 in the alternative, continue the hearing on Debtor’s Motion and set an evidentiary
7 hearing and briefing schedule to determine what assets belong to Debtor’s estate.

8
9 Dated: November 18, 2022

Respectfully Submitted,

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