



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 29, 2016**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

MEDICOMP, INC.,

CASE NO. 16-01126-NPO

DEBTOR.

CHAPTER 11

**ORDER GRANTING MOTION TO WAIVE AND DISPENSE
WITH THE APPOINTMENT OF A PATIENT CARE OMBUDSMAN**

This matter came before the Court for hearing on April 27, 2016 (the "Hearing"), on the Motion to Waive and Dispense with the Appointment of a Patient Care Ombudsman (the "Motion") (Dkt. 89) filed by the debtor, Medicomp, Inc. ("Medicomp"), and the United States Trustee's Response to Debtor's Motion to Dispense of Appointment of Patient Care Ombudsman Under Section 333 (the "Response") (Dkt. 92) filed by Henry G. Hobbs, Jr., the Acting United States Trustee for Region 5 (the "UST") in the above-styled chapter 11 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Craig M. Geno ("Geno") appeared on behalf of Medicomp and Margaret O. Middleton ("Middleton") appeared on behalf of the UST. Having considered the matter and being fully advised in the premises, the Court granted the Motion from the bench. This Order memorializes and supplements the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(a)(2)(A). Notice of the Motion was proper under the circumstances.

Facts

Medicomp initiated the Bankruptcy Case by filing a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code on March 30, 2016 (Dkt. 1). The Court entered the Order Directing Appointment of Patient Care Ombudsman and Setting Hearing (the “Order”) (Dkt. 20) on April 4, 2016, directing the UST to appoint a patient care ombudsman (“PCO”) pursuant to § 333¹ unless the UST or a party in interest files a motion to dispense with the appointment of a PCO. Pursuant to the Order, Medicomp filed the Motion on April 25, 2016.

In the Motion, Medicomp argued that a PCO is “not necessary for the protection of patients under the specific facts in this case.” (Mot. at 1). Medicomp further provided that “patient care is being adequately provided for at all of the Debtor’s facilities that require patient care in this bankruptcy case.” (*Id.*). According to Medicomp, the following evidence indicates that patients are being adequately cared for: (a) Medicomp has “provided for the receipt, handling and disposition of patient complaints and has adopted an appropriate procedure for dealing with them”; (b) “facility methodology is adequately provided for in training and in employee materials”; (c) the State Board surveys reflect few, if any, patient care problems or issues”; (d) “the on-going development, maintenance and enforcement of care plans as well as the hiring and sufficiency of the number of staff members for each facility who are knowledgeable about compliance” with

¹ All code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless otherwise indicated.

Medicaid/Medicare reimbursement are “adequate and appropriate”; and (e) “lawsuits and/or malpractice claims are being handled and addressed in appropriate manners.” (*Id.* at 2). Based on the aforementioned evidence, Medicomp argued that “patient care is being more than adequately addressed, handled and provided for at each facility.” (*Id.*). Accordingly, Medicomp “respectfully urges the Court to dispense with the appointment of an Ombudsman for the benefit of the Debtor, its estate and all creditors.” (*Id.*). The Motion further provided that Medicomp representatives responsible for patient care “shall submit, every sixty (60) days, a written report to the Court with respect to patient care and highlight any negative facts or issues regarding patient care.” (*Id.*).

In response to the Motion, the UST filed the Response on April 26, 2016. In the Response, the UST argued that “the Debtor’s contentions, on their own, are insufficient evidence to prove that a patient care ombudsman is not necessary.” (Resp. at 1). According to the UST, Medicomp “has the burden to provide testamentary and documentary evidence to the [C]ourt regarding all factors that may impact the patient care quality throughout the pendency of this case.” (*Id.*). If the Court determines that a PCO is not necessary at this time, the UST requested that “should the Debtor experience any negative trend that precipitates the appointment of a patient care ombudsman at a later time, the Court, upon a motion from the UST or a party in interest, shall reconsider the appointment.” (*Id.* at 2).

Huffman Testimony

At the Hearing, Scott Huffman (“Huffman”), one (1) of two (2) regional directors for Medicomp, testified on behalf of Medicomp. Huffman testified that Medicomp provides physical, speech, and occupational therapy only to patients who receive a prescription for therapy

services from a medical doctor. The majority of Medicomp's facilities are private, outpatient Medicomp clinics, but Medicomp operates several facilities that are unaffiliated, meaning they provide staffing to other therapy facilities, and several clinics that operate at affiliated hospitals and nursing homes. In preparation for the Hearing, Huffman worked with other Medicomp administrators to complete charts, which were prepared by Middleton, with information regarding each Medicomp facility in that system (the "Chart") (Debtor Exhibit 17).²

Medicomp has implemented a policy that provides for the investigation and resolution of patient complaints and grievances (the "Grievance Policy"). Medicomp posts notices informing patients of the Grievance Policy and whom they may contact with a complaint in the waiting room of each facility. (Debtor Exhibit 14). In addition to the Grievance Policy, Huffman testified that Medicomp is in compliance with the Mississippi State Board of Physical Therapy (the "State Board")³ requirement that certain notices be posted throughout the facility notifying patients to call the State Board with complaints and grievances. Medicomp also distributes questionnaires to randomly selected patients twice a year seeking feedback regarding Medicomp's services. (Debtor Exhibit 15). In addition to implementing a procedure to obtain patient complaints and feedback, Medicomp uses a third-party service known as "Silent Whistle" to provide employees with an opportunity to lodge anonymous complaints against Medicomp. (Debtor Exhibit 16). Huffman

² The Chart was introduced into evidence at the Hearing as "Debtor Exhibit 17." All citations to this document will be in reference to this exhibit. All future citations to exhibits will be in reference to documents introduced as evidence at the Hearing. They will be cited as "Debtor Exhibit ____."

³ According to Huffman, each state in which Medicomp operates has a state physical therapy board that oversees physical therapists and physical therapy facilities within that state. The term "State Board" will be used throughout this Order to refer collectively to the physical therapy boards in each state in which Medicomp operates.

stated that he is the person who would investigate and resolve any such complaints but that he has never received a complaint pursuant to the Grievance Policy or “Silent Whistle.” Huffman testified that the lack of complaints indicates that patient care is satisfactory.

Pursuant to state regulations, each Medicomp facility is required to have a business license to operate, and Huffman stated that each facility has an up-to-date and valid business license. Additionally, each therapist employed by Medicomp is required to be individually credentialed and licensed to practice as a therapist, and Medicomp’s Human Resources Director verifies each therapist’s credentials. The State Board visits Medicomp’s facilities periodically to ensure that they are in compliance with that state’s regulations. Huffman stated that several of Medicomp’s facilities were not in compliance with certain state regulations⁴ when a recent survey was conducted by the State Board, but the violations were remedied and those facilities are now in compliance with state regulations.

Huffman testified that patient records are maintained by an independent third-party electronic records maintenance company located in California. Medicomp does not keep hard copies of patient records and Medicomp’s corporate headquarters does not maintain the electronic copies of the records.

Attorney Arguments

At the close of testimony, Middleton expressed concern about the necessity of a PCO, arguing that although Medicomp presented some evidence regarding the satisfaction of the factors for waiver of a PCO, the UST needs more time to obtain information regarding patient care in order to fully appreciate whether a PCO is necessary in the Bankruptcy Case. Middleton stated

⁴ Huffman stated that the violations were minor and included not posting business licenses or individual physical therapist certifications.

that the Bankruptcy Case and the related administratively consolidated bankruptcy case of Pioneer Health Services, Inc., Case No. 16-01119-NPO, are so complex that she needs more time to consider whether a PCO would be appropriate. Middleton stated that the UST is not especially concerned about patient care at Medicomp because patients are required to obtain a prescription from a doctor who monitors their condition. According to Middleton, the prescription requirement means patients also are under a doctor's care, which indicates that their interests are protected. Thus, although a PCO may not be warranted at this time, Middleton stated that she desires leave of the Court to request a PCO if she later learns that patients' interests are not being adequately protected.

Geno argued that Medicomp is adequately protecting patients' interests without the assistance of a PCO, and there is no proof of concerns about patient care from any state, federal, or local regulatory agency. Geno noted that there have been zero complaints against Medicomp, which indicates that Medicomp is adequately caring for its patients and protecting their interests. Geno stated that Medicomp would be willing to provide the UST with periodic reports prepared by its financial advisor regarding patient care, survey results, complaints, and any other information the UST desires. According to Geno, Medicomp will keep the UST advised and informed regarding patient care at Medicomp, and that it will do anything else the UST finds necessary to protect its patients' interests.

Discussion

Pursuant to § 333, if a debtor is a health care business, the appointment of an ombudsman is mandatory unless the Court finds that one is not necessary for the protection of patients under the specific facts of the case. 11 U.S.C. § 333(a)(1); 3 COLLIER ON BANKRUPTCY ¶ 333.02[2] (16th

ed. 2015). A PCO must be appointed within thirty (30) days after the Bankruptcy Case was filed unless the Court, “on motion of the United States trustee or a party in interest filed no later than 21 days after commencement of the case . . . finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients.” FED. R. BANKR. P. 2007.2(a). The party opposing the appointment of a PCO bears the burden of overcoming the mandatory appointment. *In re Smiley Dental Arlington, PLLC*, 503 B.R. 680, 688 (Bankr. N.D. Tex. 2013).

The Court must consider the evidence presented at the Hearing in determining whether the facts of the Bankruptcy Case warrant the appointment of a PCO. 3 COLLIER ON BANKRUPTCY ¶ 333.02[2]. Because § 333(a)(1) uses the term “for the protection of patients,” the Court’s determination that a PCO is not necessary “must be tied to a decision that the patients are otherwise adequately protected.” *Id.* The most widely adopted test for whether a PCO should be appointed was first adopted by a Florida bankruptcy court in *In re Alternate Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007).⁵ This test considers the following non-exclusive list of nine (9) factors in determining whether a PCO is necessary to protect patients’ interests: (a) the cause of the bankruptcy; (b) the presence and role of licensing or supervising entities; (c) debtor’s past history of patient care; (d) patients’ ability to protect their rights; (e) patients’ level of dependency on the facility; (f) likelihood of tensions between patients’ and debtor’s interests; (g) potential injury to patients if debtor drastically reduced its level of patient care; (h) the presence and sufficiency of internal safeguards to ensure an appropriate level of care; and (i) the impact of the cost of a PCO on the likelihood of a successful reorganization. *Id.* at 758.; *In re Sewell*, No. 15-13703-NPO (Dkt.

⁵ The test from *In re Alternate Family Care* has been adopted by this Court and other courts within the Fifth Circuit Court of Appeals.

19), slip op. at 4 (Bankr. N.D. Miss. Nov. 10, 2015).

This Court has considered the *In re Alternate Family Care* factors in several previous cases. *See id.*; *In re Delta Radiology, PLLC*, No. 15-13487 (Dkt. 16), slip op. at 4 (Bankr. N.D. Miss. Oct. 27, 2015); *In re Gulfport Obstetrical & Gynecological Clinic, P.A.*, No. 15-51557-NPO (Dkt. 81), slip op. at 4-5 (Bankr. S.D. Miss. Oct. 29, 2015); *In re Genesis Hospice Care, LLC*, No. 08-15576-NPO, 2009 WL 467265 (Bankr. N.D. Miss. Feb. 24, 2009). In addition to the factors articulated in *In re Alternate Family Care*, this Court also considered three (3) additional factors that it found particularly important in deciding whether patients' interests are adequately protected without a PCO: (a) the debtor's financial ability to maintain high-quality patient care; (b) the existence of an internal ombudsman program to protect the rights of the patients; and (c) the oversight by federal, state, or professional association programs. *In re Hyperion Foundation, Inc.*, No. 08-51288-NPO (Dkt. 260), slip op. at 3 (Bankr. S.D. Miss. June 18, 2009). Additionally, this Court has considered the availability of a qualified professional to accept the appointment, the projected costs of such appointment, and the type of medical care provided by the debtor. *In re Greater Meridian Health Clinic, Inc.*, No. 06-51313-NPO (Dkt. 88), slip op. at 3 (Bankr. S.D. Miss. Feb. 16, 2007).

In *In re RAD/ONE, P.A.*, this Court determined that a PCO was not necessary to protect patients' interests. In that case, the debtor provided only outpatient care, which lessened "the need for the appointment of a PCO to insure a continuity of day-to-day care for patients." *In re RAD/ONE, P.A.*, No. 08-15517-NPO, 2009 WL 467286, at *2 (Bankr. N.D. Miss. Feb. 24, 2009). Additionally, the debtor had implemented a basic internal ombudsman program to handle patient complaints, and was "in compliance with regulatory agency requirements." *Id.* Similarly, in *In*

re Genesis Hospice Care, LLC, this Court found that a PCO was not necessary based primarily on the fact that the debtor provided outpatient medical care to patients in their homes, distributed medicines, supplies, and equipment to patients in their homes, and provided referrals. *In re Genesis Hospice Care, LLC*, 2009 WL 467265, at *2. Additionally, patient care was overseen by an interdisciplinary team that met every other week, was in compliance with all state and federal requirements, and had an internal complaint process. *Id.* Although this Court determined that, based on the facts in those two cases, a PCO was not necessary, it also held that “should the Debtor experience any negative trend which indicates the need for the appointment of a PCO in the future, the Court anticipates the filing of an appropriate motion so that the Court might reconsider such an appointment” pursuant to Federal Rule of Bankruptcy Procedure 2007.2(b) (“Rule 2007.2(b)”). *Id.*; *In re RAD/ONE, P.A.*, 2009 WL 467286, at *2.

More recently, in *Gulfport Obstetrical and Gynecological Clinic, P.A.*, the Court considered the previously discussed factors in determining that a PCO was not necessary to protect patients’ interests. *In re Gulfport Obstetrical & Gynecological Clinic, P.A.*, No. 15-51557-NPO (Dkt. 81), slip op. at 5. This Court found it particularly important that the debtor demonstrated that it was an outpatient facility and patients are treated at a hospital if in-patient treatment is required. *Id.* Further, patients visited the debtor for “advice, consultation, and minor procedures” and the debtor maintained sufficient working capital to maintain “high-quality outpatient care.” *Id.*

After careful application of the above-referenced factors to the Bankruptcy Case, the Court finds that the appointment of a PCO is not necessary *at this time* to protect patients, to monitor the quality of patient care, or to represent the interests of patients. At the Hearing, Medicomp

presented testamentary and documentary evidence to demonstrate that patients are adequately protected without the appointment of a PCO. First, patients are required to obtain a prescription from a doctor in order to receive treatment at Medicomp. This indicates that the patients' care is being monitored by a doctor in addition to Medicomp. Second, Medicomp has an internal Grievance Policy in place that informs patients on how to lodge a complaint, and it also utilizes the "Silent Whistle" program to allow employees to file a complaint anonymously if they believe patients' interests are being compromised. According to Huffman, Medicomp has never received a complaint from either of these avenues, indicating that Medicomp is providing satisfactory patient care without a PCO. Finally, the State Board provides oversight to ensure that Medicomp is adhering to regulations, which provides an additional layer of protection for patients.

Conclusion

For the foregoing reasons, the Court finds that a PCO is not necessary to protect patients at this time. If the financial advisor employed by Medicomp in the Bankruptcy Case discovers a problem or issue that may negatively impact patient care, in addition to notify Pioneer and Geno, that person is required to contact Middleton directly to inform her of the issue. If the facts change or if the UST uncovers additional information through further investigation that indicates the necessity of a PCO in the future, the Court will reconsider the appointment of a PCO upon the filing of an appropriate motion. *See* FED. R. BANKR. P. 2007.2(b).⁶

IT IS, THEREFORE, ORDERED that the Motion is hereby granted.

IT IS FURTHER ORDERED that Medicomp's financial advisors and all other

⁶ "[T]he court, on motion of the United States trustee, or a party in interest, may order the appointment at a later time during the case if it finds that the appointment has become necessary to protect patients." FED. R. BANKR. P. 2007.2(b).

professionals employed by Medicomp are hereby instructed to report any information that may affect the quality of patient care directly to the UST.

IT IS FURTHER ORDERED that the Court will reconsider the future appointment of a PCO upon an appropriate motion pursuant to Rule 2007.2(b).

END OF ORDER##