SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 19, 2018

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:

PIONEER HEALTH SERVICES OF PATRICK COUNTY, INC.,	**CASE NO. 16-01120-NPO**
DEBTOR.	**CHAPTER 11**

IN RE:

PIONEER HEALTH SERVICES OF ONEIDA, LLC,	**CASE NO. 16-01124-NPO**
DEBTOR.	**CHAPTER 11**

IN RE:

PIONEER HEALTH SERVICES OF MONROE COUNTY, INC.,	**CASE NO. 16-01125-NPO**
DEBTOR.	**CHAPTER 11**

ORDER DENYING MOTION FOR RECONSIDERATION UNDER FEDERAL RULES OF BANKRUPTCY PROCEDURE 7052, 9023, AND 9024 OF THE COURT'S ORDER SUSTAINING OBJECTIONS TO PROOFS OF CLAIM FILED BY SIEMENS HEALTHCARE DIAGNOSTICS INC. SEEKING ALLOWANCE OF ADMINISTRATIVE EXPENSES PURSUANT TO 11 U.S.C. § 503(b)(9)

There came on for hearing on October 12, 2018 (the "Reconsideration Hearing"), the Motion for Reconsideration under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 of the Court's Order Sustaining Objections to Proofs of Claim Filed by Siemens Healthcare Diagnostics Inc. Seeking Allowance of Administrative Expenses Pursuant to 11 U.S.C. § 503(b)(9) (the "Motion to Reconsider" or "Motions to Reconsider") filed by Siemens Healthcare Diagnostics Inc., a wholly owned subsidiary of Siemens Medical Solutions USA, Inc., ("Siemens Healthcare"), and the Debtors' Answer and Response to Motion for Reconsideration under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 of the Court's Order Sustaining Objections to Proofs of Claim Filed by Siemens Healthcare Diagnostics Inc. Seeking Allowance of Administrative Expenses Pursuant to 11 U.S.C. § 503(b)(9) (the "Response" or "Responses") filed by Patrick Health Services of Patrick County, Inc. ("PHS of Patrick"), Pioneer Health Services of Oneida, LLC ("PHS of Oneida"), and Pioneer Health Services of Monroe County, Inc. ("PHS of Monroe" or collectively, the "Affiliated Debtors"), in each of the above-referenced bankruptcy cases (the "Bankruptcy Cases") as follows: in the bankruptcy case of Pioneer Health Services of Patrick County, Inc. (the "Patrick Case") (Case No. 16-01120-NPO), the Motion to Reconsider (Patrick Case, Dkt. 183) filed by Siemens Healthcare and the Response (Patrick Case, Dkt. 190) filed by the Affiliated Debtors; in the bankruptcy case of Pioneer Health Services of Oneida, LLC (the "Oneida Case") (Case No. 16-01124-NPO), the Motion to Reconsider (Oneida Case, Dkt. 177) filed by Siemens Healthcare and the Response (Oneida Case, Dkt. 183) filed by the Affiliated Debtors; and in the bankruptcy case of Pioneer Health Services of Monroe County, Inc. (the "Monroe Case") (Case No. 16-01125-NPO), the Motion to Reconsider (Monroe Case, Dkt. 200) and the Response (Monroe Case, Dkt. 206) filed by the Affiliated Debtors.

At the Reconsideration Hearing, Craig M. Geno represented the Debtors, Stephen T. Masley represented Siemens Healthcare, Darryl S. Laddin represented the Official Committee of the Unsecured Creditors, Brian I. Swett represented Capital One National Association, and Robert E. Dozier represented the Internal Revenue Service. At the end of the Reconsideration Hearing, the Court denied the Motions to Reconsider from the bench. This Order memorializes and supplements that bench ruling.[1]

Jurisdiction

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

Facts

The facts are stated fully in the Order Sustaining Objections to Proofs of Claim Filed by Siemens Healthcare Diagnostics, Inc. Seeking Allowance of Administrative Expenses Pursuant to 11 U.S.C. § 503(b)(9) (the "Siemens Order") issued by the Court on September 4, 2018, in each of the Bankruptcy Cases. (Patrick Case, Dkt. 169; Oneida Case, Dkt. 158; Monroe Case, Dkt. 181). Only a summary of the facts necessary for an understanding of the issues raised in the Motions to Reconsider are set forth below.

The Affiliated Debtors operated community hospitals in Aberdeen, Mississippi; Oneida, Tennessee; and Stuart, Virginia. Siemens Healthcare is a medical technology company that began selling medical equipment and laboratory supplies to the Affiliated Debtors in 2012.

[1] The Court makes the following findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7052.

Bankruptcy Cases

The parent company of the Affiliated Debtors, Pioneer Health Services, Inc. ("PHS"), filed a voluntary chapter 11 petition for relief in Case No. 16-01119-NPO (the "PHS Case") (PHS Case, Dkt. 1) on March 30, 2016. On that same date, the Affiliated Debtors likewise filed voluntary chapter 11 petitions for relief. (Patrick Case, Dkt. 1; Oneida Case, Dkt. 1; Monroe Case, Dkt. 1). The Bankruptcy Cases of the Affiliated Debtors were administratively consolidated into the PHS Case. (PHS Case, Dkt. 44; Patrick Case, Dkt. 45; Oneida Case, Dkt. 39; Monroe Case, Dkt. 41).

Proofs of Claim

On July 27, 2016, Siemens Healthcare filed proofs of claim in the Bankruptcy Cases for "Products," "Service performed, Products and Equipment Lease," and "Product and Equipment Lease" (the "Supplies") sold and/or provided to the Affiliated Debtors before their bankruptcy filings for which they allegedly owed Siemens Healthcare $60,878.74 of which Siemens Healthcare designated $29,394.81 as administrative expenses (the "Proofs of Claim") (Patrick Case, POC 42; Oneida Case, POC 53; Monroe Case, POC 56). Siemens Healthcare did not file separate motions or applications seeking payment of its administrative expenses under § 503(b)(9).[2] Its requests for payment appear only in the designations in the Proofs of Claim.[3]

Section 503(b)(9) provides for the allowance of administrative expenses for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under

[2] All statutory citations are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

[3] The proof-of-claim form (Official Form 10) used by Siemens Healthcare allows a claimant to designate the portion of its claim entitled to priority but instructs the claimant to "*not use this form to make a claim for an administrative expense*" and to file "*a request for payment of an administrative expense according to 11 U.S.C. § 503*." (Patrick Case, POC 42; Oneida Case, POC 53; Monroe Case, POC 56).

this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9). Section 507(a) sets forth ten categories of expense claims in descending order that are entitled to priority payment in a bankruptcy case. Among those ten categories, § 507(a)(2) grants second priority to administrative expenses allowed under § 503(b). In a chapter 11 bankruptcy case, § 1129(a)(9)(A) requires full cash payment of any "claim of a kind specified in section 507(a)(2)" on the effective date of a plan.

Scheduling Order

On June 19, 2018, the Court entered the Scheduling Order (the "Scheduling Order") (PHS Case, Dkt. 3309): (1) requiring the Affiliated Debtors to file objections to proofs of claim by June 25, 2018, and (2) setting August 9 and 10, 2018, as alternative dates for hearings, if necessary, on any objections to proofs of claim filed by the Affiliated Debtors. In addition, the Scheduling Order required counsel for the Affiliated Debtors to serve notice of any objection, along with a copy of the Scheduling Order, to the affected creditor.

Siemens Claims Objections

On June 24, 2018, the Affiliated Debtors filed the Objection to Claim Number 42 (Patrick Case, Dkt. 128), the Objection to POC 53 (Oneida Case, Dkt. 110), and the Objection to Claim Number 56 (Monroe Case, Dkt. 145) (together, the "Siemens Claims Objections"), which are substantively identical. The Affiliated Debtors challenged only the portion designated by Siemens Healthcare in the Proofs of Claim as administrative expenses, alleging that Siemens Healthcare "cannot meet the statutory requirements of § 503(b)(9)." (Obj. to POC 42 at 1; Obj. to POC 53 at 2; Obj. to POC 56 at 2).

Notices of Siemens Claims Objections & Siemens Hearing

Counsel for the Affiliated Debtors prepared and sent the Notice of Objection to Claim, Response Deadline & Hearing Date (the "Notice" or "Notices") to Siemens Healthcare in each of the Bankruptcy Cases. (Patrick Case, Dkt. 129; Oneida Case, Dkt. 111; Monroe Case, Dkt. 146). The Notices informed Siemens Healthcare that "consistent with the attached [Scheduling] [O]rder, you have thirty (30) days from the date of this Notice in which to object or to respond to the [Siemens Claims] Objection" and "in the event a written response is filed, it will be heard on August 10, 2018, commencing at 9:00 a.m."

Consolidated Response

In each of the Bankruptcy Cases, Siemens Healthcare filed the identical Response to the Debtors' Objection to Claim Nos. 42, 53, and 56 of Siemens Healthcare Diagnostics Inc. (the "Consolidated Response") (Patrick Case, Dkt. 143; Oneida Case, Dkt. 127; Monroe Case, Dkt. 154). After purportedly reducing the amounts designated as administrative expenses in the Proofs of Claim to exclude amounts unrelated to the value of the Supplies, Siemens Healthcare asked the Court to overrule the Siemens Claims Objections and to allow the revised amounts as administrative expenses. As revised, the total amount of Siemens Healthcare's administrative expense claim is $20,024.73, with the amount of the administrative expense purportedly incurred by each Affiliated Debtor shown below:

PHS of Patrick	$2,559.89
PHS of Oneida	$11,523.41
PHS of Monroe	$5,941.43

(Consol. Resp. at 5-6).

To the Consolidated Response, Siemens Healthcare attached the Declaration in Opposition to the Debtors' Objection to Claim Nos. 42, 53, and 56 of Siemens Healthcare Diagnostics Inc.

(the "Declaration") (Consol. Resp. at 9-15). In the Declaration, Yesim Brisbane ("Brisbane") stated that he is the director of accounting for Siemens Medical Solutions USA, Inc., the parent company of Siemens Healthcare, and that his review of its records and files revealed that Siemens Healthcare had shipped the Supplies to the Affiliated Debtors, which they "received . . . within 20 days before the Petition Date." (*Id.* at 3).

Siemens Hearing

Pursuant to the Notices, a hearing was held on the Siemens Claims Objections at 9:00 a.m. on August 10, 2018 (the "Siemens Hearing") (Patrick Case, Dkt. 182).[4] The Siemens Claims Objections were not the only contested matters set for hearing on August 10, 2018. Also set for hearing at 9:00 a.m. that day were two pleadings filed by First Guaranty Bank (PHS Case, Dkt. 3486 & 3447) in the PHS Case and objections filed by the Affiliated Debtors to proofs of claim filed by McKesson Medical-Surgical, Inc. ("McKesson") in the Bankruptcy Cases (Patrick Case, Dkt. 119; Oneida Case, Dkt. 107; Monroe Case, Dkt. 139) (the "McKesson Claims Objections"). The Affiliated Debtors raised two issues for the Court's determination relevant to both the Siemens Claims Objections and the McKesson Claims Objections: (1) Did the Affiliated Debtors receive goods within 20 days before the date of the commencement of the Bankruptcy Cases? and (2) Were the goods sold to the Affiliated Debtors in the ordinary course of their business? The notices sent to McKesson were substantively the same as the Notices sent to Siemens Healthcare (*Compare* Patrick Case, Dkt. 129; Oneida Case, Dkt. 111; Monroe Case, Dkt. 146, *with* Case No. 16-01123-NPO, Dkt. 102; Oneida Case, Dkt. 108; Monroe Case, Dkt. 140). The Siemens Claims Objections were the last contested matters heard that day.

[4] The transcript of the Siemens Hearing was filed only in the Patrick Case.

The Court called first the motions filed by First Guaranty Bank, at which time counsel for the parties announced a settlement. (Patrick Case, Dkt. 182 at 5-8). The Court next held an evidentiary hearing on the McKesson Claims Objections (the "McKesson Hearing"). (*Id.* at 8-18). The Affiliated Debtors called one witness, Julie Gieger ("Gieger"), PHS's vice-president of finance, who testified regarding McKesson's collection efforts in the weeks preceding the bankruptcy filings. (*Id.* at 18-44). The purpose of Gieger's testimony was to show that the Supplies had not been sold to the Affiliated Debtors in the ordinary course of business, a required element of § 503(b)(9). After the Affiliated Debtors rested, counsel for McKesson announced he had no witnesses to present and no exhibits to introduce, and the Court heard closing arguments. (Patrick Case, Dkt. 182 at 44-62). Because the Affiliated Debtors raised the same issues with respect to both the McKesson Claims Objections and the Siemens Claims Objections, the Court reserved ruling on the McKesson Claims Objections until after the Siemens Hearing. (*Id.* at 62).

The Court then heard opening statements on the Siemens Claims Objections. (*Id.* at 62-69). After counsel for Siemens Healthcare delivered his opening statement, counsel for the Affiliated Debtors again called Gieger to the witness stand. (*Id.* at 69-88). Like her testimony in the McKesson Hearing, Gieger's testimony in the Siemens Hearing focused on the collection activities of Siemens Healthcare in the weeks preceding the bankruptcy filings. Again, the purpose of her testimony was to show that the Supplies had not been sold to the Affiliated Debtors in the ordinary course of business. Through Gieger's testimony, the Affiliated Debtors introduced 14 exhibits into evidence. (*Id.*). These exhibits consisted of emails dated April 20, 2015, through February 1, 2016, related to the "credit hold" status that Siemens Healthcare placed on its accounts with the Affiliated Debtors. Counsel for Siemens Healthcare used these exhibits to cross-examine Geiger. (*Id.* at 88-96). After counsel for the Affiliated Debtors conducted a brief redirect

examination, he announced that the Affiliated Debtors had concluded their presentation. (Patrick Case, Dkt. 182 at 96). The Court then addressed counsel for Siemens Healthcare:

THE COURT: All right. Mr. Masley?

MR. MASLEY: We don't have any evidence, Your Honor.

(*Id.* at 97).

In his closing arguments, counsel for the Affiliated Debtors maintained that Gieger's testimony shifted the burden of proof onto Siemens Healthcare to establish all elements of its administrative expense claim. (*Id.* at 97-98). In his closing arguments, counsel for Siemens Healthcare complained that the Affiliated Debtors raised the issue as to whether the Supplies were delivered in the ordinary course of business for the first time at the Siemens Hearing and, therefore, the issue was not properly before the Court. (*Id.* at 100). He also maintained that the Proofs of Claim created a presumption of validity as to the existence and amount of Siemens Healthcare's administrative expenses. (*Id.* at 99).

Order

In the Order, the Court ruled that administrative expense determinations are governed by § 503(b), and the party seeking payment of an administrative expense claim bears the burden of proving all elements of the statute by a preponderance of the evidence. (Siemens Order at 11 (citing *Toma Steel Supply, Inc. v. TransAmerican Nat. Gas Corp. (In re TransAmerican Nat. Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992)). The Court then concluded that Siemens Healthcare had not shown by a preponderance of the evidence that the Affiliated Debtors received the Supplies within 20 days of the commencement of the Bankruptcy Cases. (Siemens Order at 13-14). Accordingly, the Court sustained the Siemens Claims Objections. Because it sustained the Siemens Claims Objections on these grounds, the Court found it unnecessary to address whether

the Supplies were sold in the ordinary course of business. (*Id.*). That issue was not mentioned in either the Siemens Claims Objections or the Consolidated Response but was raised for the first time by counsel for the Affiliated Debtors at the Siemens Hearing. For that additional reason, the Court declined to rule on the issue. Aggrieved by the Order, Siemens Healthcare filed the Motions to Reconsider on September 18, 2018. The Affiliated Debtors filed the Responses on October 10, 2018.

Discussion

In the Motions to Reconsider, Siemens Healthcare cites Rules 7052, 9023, and 9024 of the Federal Rules of Bankruptcy Procedure as authority for the relief it seeks. Siemens Healthcare argues that the Court erred: (1) by failing to consider the Declaration when counsel for Siemens Healthcare was unable to ascertain from the Notices whether the Siemens Hearing would be an evidentiary hearing; and (2) in applying a burden of proof, though correct, inconsistent with the Notices upon which the Siemens Hearing was based. Siemens Healthcare argues that the Court should reconsider the Siemens Order "since it is premised on mistakes and errors of law and fact and has resulted in significant prejudice and manifest injustice to Siemens Healthcare." (Mot. To Recon. 183 at 7). Siemens Healthcare asks the Court to continue and reset the Siemens Hearing to allow Siemens Healthcare an opportunity to present admissible evidence that the Affiliated Debtors received the Supplies within 20 days of the bankruptcy filings. (*Id.* at 10).

A. Reconsideration

1. Rules 52(b) and 59(e)

Rule 7052 of the Federal Rules of Bankruptcy Procedure ("Rule 7052") provides that a motion to amend the findings of a judgment "shall be filed no later than 14 days after entry of judgment." FED. R. BANKR. P. 7052. Similarly, Rule 9023 of the Federal Rules of Bankruptcy

Procedure ("Rule 9023") provides that a motion "to alter or amend a judgment shall be filed . . . no later than 14 days after entry of judgment." FED. R. BANK. P. 9023. Rule 7052 generally adopts the provisions of Rule 52 of the Federal Rules of Civil Procedure ("Rule 52"), which authorizes the Court in a non-jury trial to "amend its findings—or make additional findings—and . . . amend the judgment accordingly." FED. R. CIV. P. 52(b). Rule 9023, in turn, generally adopts the provisions of Rule 59 of the Federal Rules of Civil Procedures ("Rule 59"), which authorizes the Court to "alter or amend a judgment." FED. R. CIV. P. 59(e).

Motions filed under Rule 52(b) and Rule 59(e) are governed by a similar standard. *Interstate Fire & Cas. Co. v. Catholic Diocese of El Paso*, 622 F. App'x 418, 429 (5th Cir. 2015). Rule 59 "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (quotation omitted). Under Rule 59(e), a final judgment may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003)).

2. Rule 60

Rule 9024 of the Federal Rules of Bankruptcy Procedure generally adopts the provisions of Rule 60 of the Federal Rules of Civil Procedure ("Rule 60"). FED. R. BANKR. P. 9024. Rule 60(b) provides grounds upon which relief from a judgment, order or proceeding of a bankruptcy court may be sought, including "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged . . . ; or (6) any other reason that justifies relief." FED. R. CIV. P. 60(b)(1)-(6).

3. Legal Standard

"[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration." *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). A motion to reconsider is classified as either a Rule 59(e) or Rule 60 motion depending on the time of filing. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994). A motion filed within 14 days is viewed as a motion to alter or amend the judgment under Rule 59(e). Here, Siemens Healthcare filed the Motions to Reconsider within the 14-day period and so it falls under Rule 59(e), not Rule 60(b). Under Rule 59, the Court has considerable discretion. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). A Rule 60(b) motion is governed by more exacting substantive requirements. *Lavespere*, 910 F.2d at 173.

Siemens Healthcare argues that the Court should grant the Motion to Reconsider to correct "a manifest error of law or fact." "'Manifest error' is one that 'is plain and indisputable, and that amounts to a complete disregard of the controlling law or an obvious mistake or departure from the truth.'" *Berezowsky v. Ojeda*, 652 F. App'x 249, 251 (5th Cir. 2016) (citation omitted). The moving party must show more than mere disagreement with the outcome of a hearing; it must show that the Court committed a "direct, obvious, [or] observable error," and "one that is of at least some importance to the larger proceedings." *In re Energy Future Holdings Corp.*, 904 F.3d 298, 312 (3d Cir. 2018) (quoting *Manifest Injustice*, BLACK'S LAW DICTIONARY (10th ed. 2014)). A Rule 59(e) motion, however, cannot be used to raise arguments or claims "that could, and should, have been made before the judgment issued." *Marseilles Homeowners Condo Ass'n v. Fidelity Nat'l Ins. Co.*, 542 F.3d 1053, 1058 (5th Cir. 2008) (quotation & citation omitted). Rule 59(e) does not exist to give a disappointed party a "second bite at the apple." *Sequa Corp. v. GBJ Corp.*,

156 F.3d 136, 144 (2d Cir. 1998). Similarly, Rule 52(b) should not be used to relitigate old issues, advance new theories, or secure a rehearing on the merits. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986).

B. The Court did not commit a manifest error of law or fact when it refused to consider the Declaration.

In the Order, the Court determined that Siemens Healthcare failed to offer any admissible evidence at the Siemens Hearing that the Affiliated Debtors received the Supplies within 20 days before the date of the commencement of the Bankruptcy Cases, and, therefore, the Court sustained the Siemens Claims Objections and disallowed Siemens Healthcare's administrative expense claims. The Affiliated Debtors stipulated at the beginning of the Siemens Hearing as to the accuracy of the amounts shown on the invoices billed to the Affiliated Debtors but specifically refused to stipulate as to the date of receipt of the Supplies. (Patrick Case, Dkt. 182 at 63). Gieger, the only witness at the Siemens Hearing, was not asked whether the Affiliated Debtors received the Supplies within 20 days of the bankruptcy filings and did not volunteer that information. Neither Brisbane nor any other representative of Siemens Healthcare was present at the Siemens Hearing to testify about the date of receipt of the Supplies. Although Brisbane's Declaration, which purportedly established this element of Siemens Healthcare's claims, was attached as an exhibit to the Consolidated Response, it was never made part of the evidentiary record at the Siemens Hearing. *See Ashley Elizabeth Scianna Arora Invs. Tr. v. Amegy Bank Nat'l Ass'n (In re Bigler LP),* Adv. No. 10-03029, 2011 WL 2420319, at *9 (Bankr. S.D. Tex. June 9, 2011) ("In a contested hearing, each party has a duty to offer into evidence any exhibits it seeks to include as part of the evidentiary record."); *In re DePugh*, 409 B.R. 84, 109-10 (Bankr. S.D. Tex. 2009) ("[D]ocuments which are merely filed on the court's docket record . . . do not constitute evidence

concerning a matter before the court unless those documents are specifically made a part of an evidentiary record applicable to a particular proceeding.") (citation & quotation omitted).

Counsel for Siemens Healthcare contends that the Court disregarded the Declaration based on an erroneous assumption that the Siemens Claims Objections had been set for an evidentiary hearing when it had not. He challenges the sufficiency of the Notices prepared and sent by counsel for the Affiliated Debtors. He insists that the Notices did not contain language notifying Siemens Healthcare that the Siemens Hearing "would be an evidentiary hearing at which witnesses may testify." (Mot. to Recon. at 3). Although counsel for the Affiliated Debtors prepared and sent the Notices, he alleges that the Court failed to comply with Rule 9014(e) of the Federal Rules of Bankruptcy Procedure ("Rule 9014(e)"), which states, in pertinent part, "[t]he court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify." FED. R. BANKR. P. 9014(e). Counsel for Siemens Healthcare used the analogy of a basketball game to demonstrate the unfairness to Siemens Healthcare. According to him, Siemens Healthcare suffered the same prejudice as would befall a basketball team if it had been allowed to play a game on what its coach thought was a *college* basketball court, only to be told later by the referee that the game was played on a *professional* basketball court, thereby changing the position of the 3-point line (or arc).

As set forth in the Order, the dispute between the parties regarding the payment of administrative expenses is a contested matter governed by Rule 9014. Under Rule 9014(d), the testimony of witnesses in a contested matter must be given in the same manner as in an adversary proceeding. The advisory committee added Rule 9014(d) "to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held."

FED. R. BANKR. P. 9014, advisory committee's note to 2002 amendment. Rule 43 of the Federal Rules of Civil Procedure ("Rule 43"), made applicable to bankruptcy cases by Rule 9017 of the Federal Rules of Bankruptcy Procedure ("Rule 9017"), requires that the testimony of witnesses with respect to disputed material factual issues in contested matters must be taken in open court "unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise." FED. R. CIV. P. 43(a). Rule 43(c), however, grants courts the discretion to "hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." FED. R. CIV. P. 43(c). Thus, under Rule 9017 and Rule 43, a bankruptcy court may conduct an evidentiary hearing with live witnesses or consider a motion on affidavits. *Cochener v. Sommers (In re Cochener)*, No. 01-34884-HR-7, 2005 WL 1571211, at *8 (S.D. Tex. June 30, 2005). "The Advisory Committee Note expresses a preference for resolving disputed *material* factual issues with live testimony." 10 COLLIER ON BANKRUPTCY ¶ 9014.07 (16th ed. 2018). According to the Advisory Committee, a court should resolve disputed factual matters on affidavits only "by agreement of the parties." FED. R. BANKR. P. 9014, advisory committee's note to 2002 amendment.

Counsel for Siemens Healthcare contends that the Court conducted the Siemens Hearing based on the Notices prepared by counsel for the Affiliated Debtors as if the Siemens Hearing was both: (1) an evidentiary hearing where a live witness testified and was cross-examined and exhibits were introduced into evidence and (2) a "paper hearing" where Siemens Healthcare was allowed to present its evidence through a Declaration attached to the Consolidated Response. The Court finds no language in the Notices that supports this contention. The Notices informed Siemens Healthcare that the Siemens Claims Objections would be "heard" on August 10, 2018, but did not specifically identify the Siemens Hearing as evidentiary or non-evidentiary in nature. Even so,

Siemens Healthcare may well be the only party in the Bankruptcy Cases that has brought before the Court the issue of whether the word "heard" meant something other than an evidentiary hearing. For example, after receiving notices nearly identical to the Notices in question, McKesson litigated the same issues on the same day as Siemens Healthcare but never argued that it had been misled into believing the McKesson Hearing was something other than an evidentiary hearing. After service of the Notices, counsel for Siemens Healthcare had more than a month to clarify the scope of the Siemens Hearing but made no effort to do so, as demonstrated by the following inquiry conducted by the Court at the Reconsideration Hearing:

> THE COURT: You never contacted [counsel for the Affiliated Debtors] if you had any questions about whether it was evidentiary or not. Correct?
>
> MR. MASLEY: Correct.
>
> THE COURT: Did you contact the Clerk's office?
>
> MR. MASLEY: I did not, Your Honor.
>
> THE COURT: Did you contact chambers?
>
> MR. MASLEY: I did not.

(Recon. Hr'g at 9:38:00-9:38:45 (Oct. 12, 2018)).[5]

Even if the Notices prepared by counsel for the Affiliated Debtors were deficient, counsel for Siemens Healthcare should have known before the Siemens Hearing that it would be conducted as an evidentiary hearing. Counsel for Siemens Healthcare is no stranger to proceedings before

[5] The Reconsideration Hearing was not transcribed. The citation is to the time stamp of the audio recording.

this Court.[6] All contested matters before this Court are set for an evidentiary hearing at the first setting on the calendar with witnesses expected to be available for direct and cross-examination on any disputed material factual issue. Any contested matter that appears on the Court's calendar that is not set for an evidentiary hearing is designated specifically as a status conference. Moreover, counsel for Siemens Healthcare was present in the courtroom during the McKesson Hearing and, thus, had an analogous preview of the Affiliated Debtors' case against his client. Yet at no time before the Siemens Hearing did counsel for Siemens Healthcare express surprise as to the nature of the proceedings or request a continuance. Just before the Siemens Hearing, the Court engaged in the following discussion with counsel for Siemens Healthcare:

THE COURT: Mr. Masley, you're up.

MR. MASLEY: I think it's Mr. Geno's objection but I'm happy to go first.

THE COURT: Well.

MR. MASLEY: Can we go first, Your Honor?

THE COURT: No, that's all right. Mr. Geno?

(Patrick Case, Dkt. 182 at 62). At this preliminary stage of the proceedings, counsel for Siemens Healthcare could have asked the Court to clarify whether the contested matters had been set for an evidentiary hearing or a status conference, but he remained silent.

Then, just before counsel for Siemens Healthcare began his opening statement, he asked whether the Affiliated Debtors would agree to stipulate to the value of the Supplies, the delivery of the goods, and the receipt of the Supplies within the 20-day period. Counsel for the Affiliated

[6] For example, counsel for Siemens Healthcare has filed more than 20 motions, objections, applications, and responses on behalf of Siemens Healthcare and other creditors in the PHS Case alone. (PHS Case, Dkt. 1045, 1048, 1056, 1310, 1419, 2037, 2062, 2335, 2356, 2531, 2682, 2879, 2894, 2961, 3011, 3203, 3204, 3234, 3249, 3279, 3281, 3447, 3486).

Debtors responded that the Affiliated Debtors agreed only that "the amounts of the invoices were the amounts of the invoices," but "[e]verything else I think is an issue." (Patrick Case, Dkt. 182 at 63-64). The Court next engaged in the following discussion with counsel for Siemens Healthcare:

THE COURT:	Let's just make sure we got it down. Okay. The entity we're dealing with here is Siemens Healthcare Diagnostics, Inc., correct?
MR. MASLEY:	Yes, Your Honor.
THE COURT:	And we're dealing with three proofs of claim, 42, 53, and 56, correct?
MR. MASLEY:	Correct.
THE COURT:	And we're going forward on all three proofs of claim today?
MR. MASLEY:	Correct, Your Honor.

(*Id.* at 64). This discussion provided counsel for Siemens Healthcare with another opportunity to inform the Court that he was confused about the nature of the proceedings, but again he remained silent. Indeed, at no point during the Siemens Hearing did counsel for Siemens Healthcare argue that the Notices were deficient, object to Gieger's live testimony or to the introduction of exhibits into evidence, or inform the Court that he was unaware that evidence in the form of live testimony would be allowed or expected. By failing to object, Siemens Healthcare waived any procedural due process argument arising out of the sufficiency of the Notices. *Kontrick v. Ryan*, 540 U.S. 443, 460 n.13 (2004).

Returning to Siemens Healthcare's basketball analogy, there are regulations governing the dimensions and markings of different basketball courts, just as there are bankruptcy statutes and rules governing determinations of administrative expenses. The 3-point line (or arc) on the professional basketball court was visible to the coach, just as the evidentiary nature of the Siemens Hearing was apparent to everyone present in the courtroom. The coach should have asked the

referee about the position of the 3-point line (or arc), just as counsel for Siemens Healthcare should have asked the Court about the nature of the proceedings after service of the Notices or at least during the Siemens Hearing. Only after entry of the Order, however, did Siemens Healthcare complain about the sufficiency of the Notices.

The Court cannot grant Siemens Healthcare a replay after the strategic decision of its counsel not to bring Brisbane or any other witness to the Siemens Hearing fell short. In sum, "[the Court] do[es] not countenance [Siemens Healthcare's] request for a do-over." *Interstate Fire & Cas. Co.*, 622 F. App'x at 422.

C. The Court did not commit a manifest error of law or fact when it applied the burden of proof applicable to a request for payment of an administrative expense claim.

In the Order, the Court found that Siemens Healthcare had the burden of proving all statutory elements of its administrative expense claims. The Court acknowledged that the Proofs of Claim filed by Siemens Healthcare created an evidentiary presumption as to the validity and amount of its unsecured claims under Rule 3001(f) of the Federal Rules of Bankruptcy Procedure ("Rule 3001(f)").[7] No such evidentiary presumption, however, attached to its administrative expense claims. *See In re Cardinal Indus., Inc*, 151 B.R. 833, 836 (Bankr. S.D. Ohio 1992) (declining to extend the presumption under Rule 3001(f) to the priority status of administrative expense claims); *In re Visi-Trak, Inc.*, 266 B.R. 372, 374 (Bankr. N.D. Ohio 2001). Unlike proofs of claim, administrative expense claims are allowed under § 503(b) only after notice and a

[7] Specifically, Rule 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f).

hearing.[8] Payment of Siemens Healthcare's administrative expenses generally required that it do more than file the Proofs of Claim. Indeed, the first paragraph of Official Form 410, the official proof-of-claim form, instructs claimants: "Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503."[9] (Siemens Order at 12). Thus, the proper procedure for Siemens Healthcare to request payment of its administrative expenses was to file a separate motion or application under § 503(b)(9), not to file the Proofs of Claim.[10] The Court could have sustained the Siemens Claims Objections on the ground Siemens Healthcare failed to follow the proper statutory procedure and did not file a proper request for payment of an administrative expense claim before the deadline for filing such a request expired by order of the Court on May 1, 2018. (PHS Case, Dkt. 2912). Instead, the Court chose to avoid any additional costs to the parties by treating the Proofs of Claim as informal requests for payment of administrative expenses, a decision that largely benefitted Siemens Healthcare.

[8] Under the Bankruptcy Code, the phrase "after notice and a hearing" means "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A).

[9] At the Reconsideration Hearing, counsel for Siemens Healthcare stated that the Proofs of Claim filed by Siemens Healthcare on July 27, 2016, appear on Official Form 10, not Official Form 410 (though Official Form 10 was replaced by Official Form 410 on December 1, 2015). Official Form 410 provides: "Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503." Official Form 10 contains nearly identical language: "*Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.SC. § 503*." (Patrick Case, POC 42; Oneida Case, POC 53; Monroe Case, POC 56). Thus, the distinction drawn by counsel for Siemens Healthcare between the two forms is without meaning.

[10] Counsel for Siemens Healthcare also represents First Guaranty Bank in the PHS Case, and on May 1, 2018, he filed the Motion of First Guaranty Bank for Allowance of Administrative Claim and for Adequate Protection (PHS Case, Dkt. 3011). First Guaranty Bank's request was later withdrawn with prejudice. (PHS Case, Dkt. 3429).

Siemens Healthcare alleges that the Court conducted the Siemens Hearing under the burden of proof applicable to an objection to a properly-filed proof of claim but after the Siemens Hearing, imposed the burden of proof applicable to a request for payment of an administrative expense claim. Siemens Healthcare complains that the Court changed the nature of the proceedings *sua sponte* and that it "was not on notice prior to, or even during, the hearing" of the Court's "newly imposed standard." (Mot. To Recon. at 10).

At the Reconsideration Hearing, counsel for Siemens Healthcare stated that he agreed with the Court's decision to consider the Proofs of Claim as informal requests for payment of administrative expenses and agreed with the Court's discussion of the burden of proof applicable to administrative expense claims. He disagreed, however, with the Court's decision to impose that burden of proof on Siemens Healthcare. Counsel for Siemens Healthcare argued at the Reconsideration Hearing that the Court had three options after the Siemens Hearing: (1) sustain the Siemens Claims Objections on statutory procedural grounds;[11] (2) inform counsel of its intent to apply the burden of proof generally applicable to administrative expense claims and reset the Siemens Hearing to allow Siemens Healthcare to present live testimony and other admissible evidence; or (3) rule as it did. Counsel for Siemens Healthcare described the second option as the only fair one since it prejudiced both parties equally.

As a preliminary matter, the Court rejects counsel's contention that it conducted the Siemens Hearing as if the shifting burdens of proof applicable to properly-filed proofs of claim applied to Siemen Healthcare's § 503(b)(9) claims. Although counsel for Siemens Healthcare

[11] Even if the Court granted the Motion to Reconsider, the Court could sustain the Siemens Claims Objections on alternative grounds based on the statutory procedural defect, a fact that Siemen Healthcare's counsel downplayed at the Reconsideration Hearing. Given that there is an undisputed separate basis for the Court to reach the same outcome that it did in the Siemens Order, the Motion to Reconsider must be viewed as wholly without merit.

maintained in his closing arguments that evidence that the Affiliated Debtors received the Supplies within the 20-day period either was unnecessary because of the presumption of validity under Rule 3001(f) or was established by Brisbane's statements in the Declaration, the Court gave no indication at the Siemens Hearing that it agreed with his analysis. To the contrary, the burden of proof was the subject of vigorous debate between the parties. For example, counsel for the Affiliated Debtors stated in his closing arguments:

> I don't believe we have any evidence or proof of receipt of the goods. There are no documents in evidence submitted by Siemens [Healthcare], no documents were admitted into evidence, and Ms. Geiger certainly didn't testify that the debtor received—the debtors received the goods.

(Patrick Case, Dkt. 182 at 98). After closing arguments by both parties, the Court took the matters under advisement without adopting any position as to the proper burden of proof or as to any other issue.

It appears that Siemens Healthcare expected the Court to rule on each issue as it was raised during the Siemens Hearing so that its counsel could adjust his legal tactics and arguments accordingly. Siemens Healthcare has cited no case law—and the Court has found none—that supports the position that it is the duty of the Court to guide counsel's legal arguments during a hearing. *See Head Start Family Educ. Program, Inc. v. Cooperative Edu. Serv. Agency 11,* 46 F.3d 629, 635 (7th Cir. 1995) ("This court has no duty to research and construct legal arguments available to a party.").

The Court finds that the lone case cited by Siemens Healthcare in the Motions to Reconsider in support of its argument is distinguishable. (Mot. to Recon. at 10). In *Underwood v. Hunter,* 604 F.2d 367 (5th Cir. 1979), the Fifth Circuit Court of Appeals held that the district court erred in entering final a judgment in favor of the defendants after first converting a hearing on a motion for a preliminary injunction to a hearing on a motion to dismiss and, second, because

the district court allowed the parties to present evidence outside the pleadings, converting the preliminary injunction hearing to a hearing on a motion for summary judgment. The Fifth Circuit found that the district court abused its discretion by ignoring the notice requirements embodied in Rule 56 and Rule 12(d) of the Federal Rules of Civil Procedure. If the court considers matters outside the pleadings in deciding a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, the motion must be treated as one for summary judgment and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." FED. R. CIV. P. 12(d). Because the district court did not follow these notice requirements, the plaintiffs had no indication that a summary judgment—a final judgment—might result from the preliminary injunction hearing. Unlike in *Hunter*, the Notices here clearly and adequately informed Siemens Healthcare that the outcome of the Siemens Hearing would result in the final resolution of its administrative expense claims.

Conclusion

For the above reasons, the Court finds that the Motions to Reconsider should be denied.

IT IS, THEREFORE, ORDERED that the Motions to Reconsider are denied.

##END OF ORDER##