UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

HYPERION FOUNDATION, INC.,
D/B/A OXFORD HEALTH &
REHABILITATION CENTER, **CASE NO. 08-51288-NPO**

DEBTOR. **CHAPTER 11**

MEMORANDUM OPINION AND ORDER GRANTING
MOTION TO ELIMINATE APPOINTMENT OF OMBUDSMAN

On June 5, 2009, there came on for hearing (the "Hearing") the Motion to Eliminate Appointment of Ombudsman (Dkt. #27) (the "Motion") filed by Hyperion Foundation, Inc., d/b/a Oxford Health & Rehabilitation Center (the "Debtor"), the Response to Motion to Eliminate Appointment of Ombudsman (the "AHC's Response") (Dkt. #54) filed by Academy Healthcare Center, Inc., f/k/a Adventist Health Center, Inc. ("AHC"), and the United States Trustee's Response to Debtor's Motion to Eliminate Appointment of Ombudsman (Dkt. #61) (the "UST's Response") filed by the United States Trustee for Region 5 (the "UST") in the above-styled chapter 11 proceeding. At the Hearing, Craig M. Geno appeared on behalf of the Debtor, Derek A. Henderson appeared on behalf of AHC, and Robert C. Gravolet appeared on behalf of the UST. The Court, having considered the Debtor's Motion and the responses of AHC and UST, the evidentiary record and arguments of counsel, makes the following findings of fact and conclusions of law.[1]

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

Facts

1. On August 5, 2008, the Debtor filed a voluntary petition for relief (the "Petition") pursuant to chapter 11 of the Bankruptcy Code. (Dkt. #1).

2. The Debtor is a nonprofit corporation operating as a 120-bed nursing home in Lumberton, Mississippi, but currently housing approximately 85 residents.

3. If the debtor under chapter 11 is a health care business, the appointment of a patient care ombudsman ("PCO") is mandated by 11 U.S.C. § 333(a)(1) to monitor the quality of patient care and to represent the interests of the debtor's patients "unless the court finds that appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case."

4. The term "health care business" is defined under 11 U.S.C. § 101(27)(B)(ii)(I) to include any skilled nursing facility. The parties do not dispute that the Debtor meets the definition of a "health care business."

5. In its Motion and at the Hearing, the Debtor took the position that the appointment of a PCO is not necessary under the specific facts in this case because "patient care is adequately provided by current and existing policies, procedures and practices within the Debtor organization and by various governmental and private agencies and accrediting entities." (Dkt. #27).

6. At the Hearing and in its Response, AHC[2] asserted that this Court should appoint a PCO because the Debtor is unable to maintain and operate the nursing home in a manner that adequately insures the safety and welfare of its residents. In support of its contention, AHC insists that the Debtor has a depleted patient census, has had numerous deficiency citations from the

[2] AHC owns the real property on which the Debtor operates its nursing home.

Mississippi State Department of Health, including an "Immediate Jeopardy" health citation, and also has been cited for violations of the "Life Safety Code."

7. In its Response to the Debtor's Motion, the UST averred that the Debtor's contentions, on their own, were insufficient evidence to prove that a PCO is not necessary and that the Debtor has the burden to provide testamentary and documentary evidence to the Court regarding the current level of patient care and the Debtor's compliance with all state and federal regulations related to patient care.

Discussion

The question before the Court is whether the appointment of a PCO is necessary for protection of the Debtor's nursing home residents under the specific facts and circumstances of this case. 11 U.S.C. § 333(a)(1). Previously, this Court has considered the following factors in determining whether a PCO is necessary: (1) the quality of the debtor's existing patient care; (2) the debtor's financial ability to maintain high-quality patient care; and (3) the existence of an internal ombudsman program to protect the rights of patients or of oversight by federal, state, local or professional association programs. See In re Rad/One, Bankr. L. Rep. (CCH) ¶ 81,431 (Bankr. N.D. Miss. Feb. 24, 2009); In re Genesis Hospice Care, Bankr. L. Rep. (CCH) ¶ 81,442 (Bankr. N.D. Miss. Feb. 24, 2009); see also 3 Collier on Bankruptcy ¶ 333.02 (15th ed. 2009).

A. Quality of the Debtor's Patient Care

Debbie Danforth ("Danforth") testified at the Hearing that she is an independent nurse consultant and that since 2003 she has been under contract with AltaCare Corporation ("AltaCare") as its Director of Critical Services. AltaCare is a for-profit corporation with its principal place of business in Georgia and provides a variety of management and consulting services to approximately

30 nursing homes, including the Debtor. Danforth's contractual duties with AltaCare require her to assist the Debtor in maintaining compliance with certain state and federal standards. Danforth is a registered nurse and has a master's degree in business administration. Prior to 2003, she worked as a full-time employee of AltaCare for approximately six years, during which time she performed essentially the same type of work.

Danforth explained that in order to qualify to receive payments under Medicare[3] and/or Medicaid,[4] the Debtor periodically must be certified as meeting certain minimum health and safety requirements. In Mississippi, the governmental entity responsible for making this determination through on-site inspections of nursing facilities is the Division of Health Facilities Licensure and Certification of the Mississippi State Department of Health (the "Department"). Most of the 85 residents of the Debtor are Medicaid patients, although the eligibility requirements for both programs are uniform. See infra note 5.

Danforth testified that on February 27, 2009, the Department conducted its annual survey of the Debtor in connection with its state licensing duties and also as part of its obligation to certify health care facilities for participation in the Medicare and/or Medicaid programs. As a result of the survey, the Department cited the Debtor with eight deficiencies, resulting in violations of the

[3] Medicare is a federal program that provides nursing home health services to aged or disabled individuals who are eligible for social security benefits. 42 U.S.C. § 1395 *et seq*.

[4] Medicaid is a state-administered program that provides medical care services to individuals whose income and resources are below certain limits. 42 U.S.C. § 1396 *et seq*. The federal government reimburses the State for a portion of its Medicaid expenditures. 42 U.S.C. § 1396b.

following federal regulations:[5] Notice of rights and services, 42 C.F.R. § 483.10(b)(1), (b)(5)-(10); Privacy and confidentiality, 42 C.F.R. §§ 483.10(e), 483.75(l)(4); Dignity, 42 C.F.R. § 483.15(a); Social services, 42 C.F.R. § 483.15(g)(1); Environment, 42 C.F.R. § 483.15(h)(1); Comprehensive care plans, 42 C.F.R. § 483.20(k)(3)(i); Naso-gastric tubes, 42 C.F.R. § 483.25(g)(2); and Laboratory services, 42 C.F.R. § 483.75(j)(1). (UST Ex. 1). Danforth testified that the deficiencies are assessed on four severity levels, as defined by the Department in its Scope and Severity Matrix (the "Matrix") (UST Ex. 2), with Level 1 being described as a deficiency that has the potential for causing no more than a negative impact and Level 4 being described as an "immediate jeopardy" deficiency that without immediate correction has caused, or is likely to cause, serious injury. The highest severity level found by the Department during its survey of the Debtor was Level 2, described in the Matrix as a violation resulting in "no actual harm with potential for more than minimal harm that is not immediate jeopardy." (UST Ex. 2).

Also, Danforth testified that according to the Centers for Medicare and Medicaid Services ("CMS"), the average number of deficiencies found by the Department during its annual inspections is six, and the average number found by other state agencies nationally is eight. The Department found an above-average number of deficiencies of the Debtor when compared to other nursing homes in Mississippi but the same number, nationally. Danforth further testified that in accordance with state and federal regulations, AltaCare submitted a "plan of corrections" in which it corrected or eliminated each of the alleged deficiencies, and, more importantly, that the survey team later determined on April 27, 2009, that the Debtor was in substantial compliance.

[5] Skilled nursing facilities participating in Medicare and nursing facilities participating in Medicaid must meet the requirements set forth in 42 C.F.R. §§ 483.1-483.75.

Because AHC's allegations raise issues concerning the safety and welfare of the nursing home residents of the Debtor, the Court will briefly discuss each of the alleged deficiencies and the corrective action taken by the Debtor:

Notice of rights and services, 42 C.F.R. § 483.10(b)(1), (b)(5)-(10); Social services, 42 C.F.R. § 483.15(g)(1). The first deficiency found by the Department concerned the Debtor's failure to document the advance health-care directives[6] of four of its residents.[7] The Debtor corrected the violation by obtaining the written directives, by implementing procedures to ensure that new residents properly executed advance directives upon admission and that current residents annually reviewed their directive choices, and by training the staff on the facility's policy regarding advance directives.

Privacy and confidentiality, 42 C.F.R. §§ 483.10(e), 483.75(l)(4); Dignity, 42 C.F.R. § 483.15(a). The second deficiency found by the Department arose out of the Debtor's failure to afford its female residents full privacy when receiving showers in the shower area. Twenty female residents complained to the survey team about the absence of shower curtains. Although there were rolling screens, there were not enough of them to provide full privacy at all angles. Danforth testified that to correct the problem, AltaCare installed shower curtains to provide maximum

[6] An "advance health-care directive" is a written instruction, such as a living will, recognized under State law and related to the provision of medical care when an individual is incapacitated. The instructions would include, for example, any orders not to resuscitate. 42 U.S.C. § 1395cc(f)(3).

[7] The Federal Patient Self-Determination Act, 42 U.S.C. § 1395cc(f), requires nursing homes receiving Medicaid or Medicare to inform all competent adult patients about state laws on advance directives and to record any advance directives the patient may have. See Uniform Health-Care Decisions Act, Miss. Code Ann. §§ 41-41-201 to 41-41-229.

privacy.

Physical environment, 42 C.F.R. § 483.15(h)(1). The third deficiency also concerned the showers. The residents complained that one of the two shower stations had been closed for repairs for several weeks. Danforth testified that near the end of January, 2009, AltaCare shut down one of the shower stations because of plumbing problems and that the repairs took several weeks because AltaCare had to order a replacement valve on two separate occasions. Danforth testified, however, that the residents' shower schedule remained the same while the shower was inoperable. Also, she testified that the plumbing was repaired by April 15, 2009, and all showers are now fully operational. The Department found other violations concerning minor repairs to a bedside table, the arms of wheelchairs and shower tiles, all of which AltaCare fixed.

The survey team also concluded that the Debtor had violated two provision of the Life Safety Code of the National Fire Protection Association ("LSC"). See 42 C.F.R. § 483.70(a). Specifically, two doors at the facility did not comply with the LSC, and the Debtor had failed to test the facility's fire alarm for sensitivity in a timely manner. The Debtor has replaced the doors and has conducted the required sensitivity testing.

Comprehensive care plans, 42 C.F.R. § 483.20(k)(3)(I); Laboratory services, 42 C.F.R. § 483.75(j)(1). The fourth violation arose out of the Debtor's failure to obtain laboratory results as ordered by a physician and the Debtor's failure to administer medication in a timely manner. Danforth explained that the resident in question had refused to allow his blood to be drawn and that the Debtor corrected the problem by notifying the physician of the resident's refusal and by documenting the physician's withdrawal of the order in the resident's medical chart. The other resident received antibiotics for treatment of an abscess three days late because the medication was

unavailable at the pharmacy. The Debtor notified the patient's physician of the delay in starting his treatment and implemented procedures to make sure all ordered medications are available for administration.

Naso-gastric tubes, 42 C.F.R. § 483.25(g)(2). The fifth deficiency concerned the Debtor's failure to label a container connected to a patient's gastrostomy, or feeding, tube. There was no documentation indicating its contents, rate of flow or the date and time it was started. The Debtor determined that the adhesive on the back of the label had become loose and corrected the problem by securing all such labels with extra tape.

In this instance, the Court will not substitute its judgment for that of the State of Mississippi as to whether the Debtor is providing adequate patient care. Given the results of the Department's re-survey on April 27, 2009 – that the Debtor is in compliance with all state and federal health and safety requirements – the Court finds that the current quality of patient care weighs against the appointment of a PCO. AHC failed to present any testimony or documentary evidence showing that the Debtor received an "Immediate Jeopardy" health citation, as it had alleged in its pleadings. As noted previously, the most serious level of citation issued against the Debtor was at "Level 2–No Actual Harm," and it is undisputed that the standard of patient care currently being provided by the Debtor is satisfactory to the governing authorities. Moreover, Danforth testified that the Debtor has no pending lawsuits, medical malpractice or otherwise.

Notably, if the Debtor had not achieved compliance, the Department could have taken measures to terminate the facility's participation in the Medicare/Medicaid programs or could have taken less drastic measures, such as the appointment of a temporary manager or the imposition of a monetary penalty. See 42 U.S.C. § 1395i-3. However, the Department took no remedial action

whatsoever after the Debtor submitted its plan of corrections.

B. Financial Strength of Debtor

At the Hearing, Troy Peoples ("Peoples"), the Treasurer of Gulf States Conference of Seventh-day Adventist, testified that on May 29, 2009, twenty-seven employment checks written by the Debtor on April 24, 2009, and on May 8, 2009, in the combined amount of $1,988.20 were returned unpaid for insufficient funds. (AHC Ex. 15). Peoples explained that some of the high school students of Bass Memorial Academy ("BMA"), an Adventist boarding school within the Gulf States Conference, work for the Debtor in order to defray part of their school expenses and endorse their employment checks to BMA. Peoples further testified that on June 3, 2009, he contacted the Debtor's bank to determine if the Debtor's account had sufficient funds on deposit to cover additional employment checks issued on May 22, 2009, in the total amount of $818.71, and had not yet presented the checks for payment. (AHC Ex. 16).

At the Hearing, AHC painstakingly read from the Debtor's monthly operating reports ("MORs") for February, March and April, 2009 (AHC Exs. 7-9) to show that the Debtor is currently operating with a negative cash balance. For example, the April, 2009 MOR (AHC Ex. 9), filed by the Debtor on May 22, 2009, shows that the Debtor ended the month with a negative cash balance of $98,167.18 (AHC Ex. 9 at 2), an accounts payable of $487,754.28 – an increase from the previous month of $65,266.41 (AHC Ex. 9 at 3), a positive income (before depreciation or taxes) of $46,574.01 (AHC Ex. 9 at 4), and a negative cash flow of $98,167.18 (AHC Ex. 9 at 5). In addition, the Debtor's bank statement includes charges for overdrafts and insufficient funds in the total amount of $1,421.00. (AHC Ex. 9 at 30).

Douglas Mittleider ("Mittleider"), the President of AltaCare, testified at the Hearing that the

Debtor had insufficient funds in its account in April, 2009, only because Northern Healthcare Capital, LLC ("NHC") had failed to deposit funds into its account in a timely manner. He explained that the Debtor and NHC had entered into a Credit and Security Agreement, which NHC was slow to implement. He described the years after Hurricane Katrina struck the Mississippi Gulf Coast in 2005, as financially challenging not only because of the expense of repairs to its facilities but also because of the reduction in its patient census.

Mittleider further testified that he prepared the Debtor's annual budget for 2009 (Debtor's Ex. 1), and that in accordance with the budget, he anticipates that the Debtor will increase its patient census and will have a net cash income of $63,814.00 at the end of this year. Notably, the budget does not include estimated expenses for employment of a PCO. He also testified that except for the employment checks mentioned by Peoples during his earlier testimony (when Mittleider first became aware that the checks had been dishonored by the bank), the Debtor was current in paying all of its post-petition debts. He does not believe that the Debtor's financial situation has in any way adversely impacted the quality of patient care provided by the Debtor.

The Debtor's Administrator, L.J. Daniels ("Daniels"), likewise testified that the Debtor's financial distress has not in any way negatively affected patient care. Daniels has a bachelor's degree in health care management and a master's degree in public health and has been the Debtor's Administrator since March, 2005. He was employed at the facility when Hurricane Katrina made landfall and testified that the Debtor's patient census declined as a result of evacuees failing to return to the community, a circumstance shared by other nursing homes in the storm area. However, he testified that he expected the patient census to increase, an opinion echoed by Danforth in her testimony.

Although it is clear that the Debtor's handling of its financial affairs is far from perfect, there was no testimony or documentary evidence that its shortcomings in this regard impacted the quality of health care it provides its residents. Notably, the Department did not find fault with the Debtor in this respect in its recent inspection. Moreover, the Court has recently imposed numerous conditions on the Debtor in its oral ruling from the bench on June 5, 2009, denying the Motion to Convert to Chapter 7 (Dkt. #220) filed by AHC and the Motion To Convert or, Alternatively, To Dismiss (Dkt. #222) filed by the UST. The Court's order, which will be set out in a separate memorandum opinion, required the Debtor, for example, to pay the employment checks identified by Peoples within two business days and to implement procedures so that the Debtor will not incur any additional bank fees for overdraft charges and insufficient funds. The Court is satisfied that these conditions will protect the financial strength of the Debtor and that the appointment of a PCO would constitute an unnecessary drain on the resources of the Debtor.

C. Existence of Redundant Ombudsman Programs

Danforth testified that the Debtor has an internal ombudsman program for receiving and resolving resident complaints about patient care. Each month, all residents are invited to attend a meeting where they are encouraged to voice any concerns. Their concerns, if any, are brought to the attention of the Director of Nursing or other department head based upon the nature of the problem. AltaCare then implements any necessary corrective action. These same concerns are raised again with the Debtor's Quality Improvement Committee for the purpose of making sure the problem has been addressed to the satisfaction of the resident who made the original complaint.

Danforth also testified that a toll-free telephone number is posted in the facility for use by all residents and their family members. Because the number rings directly in AltaCare's corporate

office in Georgia, it provides the complainant with anonymity. If deemed necessary, Danforth assigns a regional survey team to investigate the complaint, which is then reviewed by AltaCare's Corporate Compliance Committee.

Finally, she testified that AltaCare publishes information at the facility notifying residents that they may report incidents of physical abuse or neglect directly to the Mississippi State Department of Health by calling a toll-free telephone number. In the event the State substantiates the complaint, the Department will issue a deficiency notice, thus requiring the Debtor to submit a plan of correction just as if the deficiency was issued by the Department as part of its annual survey of the facility. Notably, the State has the authority to suspend or revoke the license of any nursing home that it determines has substantially failed to comply with health and safety standards. Miss. Code Ann. § 43-11-17.

The statutory role of a PCO is to "monitor the quality of patient care," "report to the court . . . regarding the quality of patient care" every two months and "file . . . a motion or a written report" if the PCO "determines that the quality of patient care . . . is declining significantly." 11 U.S.C. § 333(b)(1)-(3). The existing internal complaint procedures and quality control systems, together with the regular annual inspections by the Department, are sufficiently redundant to the role of a PCO so that they weigh against the appointment of yet another inspector to review the level of patient care provided by the Debtor.

Conclusion

In light of the foregoing, the Court concludes that the appointment of a PCO is not "necessary for the protection of patients under the specific facts of this case." 11 U.S.C. § 333(a)(1). Nevertheless, if the Debtor should experience any negative trend which indicates the need for the appointment of a PCO in the future, the Court expects the filing of an appropriate motion by the Debtor, AHC, the UST or other party in interest so that the Court might reconsider such an appointment. See Fed. R. Bankr. P. 2007.2(b). ("[T]he court, on motion of the United States trustee or a party in interest, may order the appointment at a later time if it finds that the appointment has become necessary to protect patients.").

IT IS, THEREFORE, ORDERED that the Debtor's Motion is well taken and that the appointment of a PCO is not necessary at this time for the protection of patients in the above-styled chapter 11 proceeding.

A separate final judgment consistent with this Memorandum Opinion will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED, this the 18th day of June, 2009.

/ s / Neil P. Olack
NEIL P. OLACK
U. S. BANKRUPTCY JUDGE