UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

HEARTSOUTH, PLLC,	**CASE NO. 10-50787-NPO**
DEBTOR.	**CHAPTER 11**
HEARTSOUTH, PLLC	**PLAINTIFF**
VS.	**ADV. PROC. NO. 12-05017-NPO**
MCKESSON INFORMATION SOLUTIONS, LLC	**DEFENDANT**

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) REGARDING COUNTS ONE THROUGH THREE OF THE ADVERSARY COMPLAINT

There came on for hearing on August 16, 2012 (the "Hearing"), the Motion to Dismiss Pursuant to Rule 12(b)(1) Regarding Counts One Through Three of the Adversary Complaint and for a More Definite Statement Regarding Count Four (the "Motion to Dismiss") (Adv. Dkt. 7),[1] and Memorandum in Support of its Motion to Dismiss Pursuant to Rule 12(b)(1) Regarding Counts One Through Three of the Adversary Complaint and for a More Definite Statement Regarding Count Four (Adv. Dkt. 8) filed by McKesson Information Solutions, LLC ("McKesson"); Plaintiff's Response to Defendant's Motion to Dismiss Pursuant to Rule 12(b)(1) Regarding Counts One Through Three of the Adversary Complaint and for a More Definite Statement Regarding Count Four (the "Response") (Adv. Dkt. 11) filed by HeartSouth, PLLC (the "Debtor"); and McKesson's Combined Rebuttal and Rebuttal Memorandum in Support of its Motion to Dismiss (Adv. Dkt. 12)

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 12-05017-NPO, are cited as "(Adv. Dkt. ___)"; and (2) citations to docket entries in the main bankruptcy case, Case No. 10-50787-NPO, are cited as "(Dkt. ___)".

filed by McKesson, in the above-styled adversary proceeding (the "Adversary").

On May 17, 2012, the Debtor initiated the Adversary by filing an Adversary Complaint (the "Complaint") (Adv. Dkt. 1) against McKesson. In the Complaint, the Debtor asserted claims against McKesson for: (1) breach of contract ("Count One"), (2) breach of warranty ("Count Two"), (3) wilful and intentional misrepresentation of fact ("Count Three"), and (4) injunctive relief and contempt ("Count Four"). In response to the Complaint, McKesson filed the Motion to Dismiss. In the Motion to Dismiss, McKesson seeks to have Count One, Count Two, and Count Three of the Complaint dismissed under Federal Rule of Civil Procedure 12(b)(1)[2] ("Rule 12(b)(1)") on the ground that the Debtor lacks standing and, therefore, the Court does not have subject matter jurisdiction. Additionally, the Motion to Dismiss requests that this Court require the Debtor to provide a more definite statement as to Count Four of the Complaint pursuant to Federal Rule of Civil Procedure 12(e), or in the alternative, "enter an order that McKesson is not required to answer or otherwise respond to Count Four until a final, non-appealable order has been entered regarding its Motion to Dismiss." (Adv. Dkt. 7 at ¶ 17).

At the Hearing, Nicholas Van Wiser represented the Debtor, and John A. Crawford, Jr. represented McKesson. Following the Hearing, on August 17, 2012, this Court entered an Order Denying McKesson Information Solutions, LLC's Motion for a More Definite Statement Regarding Count Four and Granting McKesson Information Solutions, LLC's Request for Additional Time to File an Answer or Other Responsive Pleading to the Adversary Complaint (the "Order Extending Deadline")(Adv. Dkt. 13). As this Court already has denied McKesson's request for a more definite

[2] Rule 12(b)(1) of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

statement as to Count Four of the Complaint and has granted its request for additional time to file an answer or other responsive pleading, this Memorandum Opinion solely addresses whether Count One, Count Two, and Count Three of the Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. The Court, being fully advised in the premises, and having heard and considered the arguments of counsel at the Hearing, and the pleadings which have been filed in the Adversary, finds that the Motion to Dismiss should be granted for the reasons set forth below. Specifically, the Court finds as follows.[3]

Facts

1. The Debtor is a Mississippi, limited liability company owned and operated by F. Alan Covin, M.D. (Dkt. 222 at 4).

2. The Debtor operates medical clinics across the State of Mississippi. (Dkt. 222 at 5).

3. In 1998, when the Debtor first opened its doors, its focus was primarily cardiology. (Dkt. 222 at 5). Since that time, the Debtor has opened clinics across the state specializing in areas of practice from opthamology to family medicine. (Id.).

Debtor's Relationship with McKesson

4. In May, 2009, the Debtor was solicited by McKesson, through its sales territory vice president, Angela Hos, to implement McKesson's Practice Partner software at the Debtor's medical clinics. (Adv. Dkt. 1 at ¶ 4).

5. The Practice Partner software was to be used for "electronic billings, electronic

---

[3] Pursuant to Federal Rule of Civil Procedure 52, as made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7052, the following constitutes the findings of fact and conclusions of law of the Court.

medical records and electronic claims submission to carriers such as Blue Cross/Blue Shield, Medicaid, Medicare and Tri-Care." (Adv. Dkt. 1 at ¶ 4).

6. According to the Debtor, "based upon the representation[s] as to the functionality and capabilities of [the] Practice Partner software made by McKesson," the Debtor decided to implement the software at its medical clinics. (Adv. Dkt. 1 at ¶ 5).

7. On August 19, 2009, the Debtor entered into a Physician Practice Solutions Master Agreement (the "Agreement"), Contract Number PSMA66029PMSI, with McKesson whereby McKesson granted to the Debtor "a limited, nonexclusive, nontransferable, non-sublicensable, perpetual license to use" the Practice Partner software. (Debtor Ex. 1 at 1-3).[4]

8. The Agreement warranted "that . . . [the Practice Partner] Software [would] perform in all material respects in accordance with the functional specifications set forth in the Documentation provided to [the Debtor]." (Debtor Ex. 1 at ¶ 3.1.3(a)).

9. The Agreement further "warrant[ed] that the [Practice Partner] Equipment, when installed, [would] conform in all material respects to its published functional specifications and [would] be in good working order." (Debtor Ex. 1 at ¶ 3.3.3).

10. As a disclaimer, the Agreement stated that, "THE WARRANTIES IN THIS [Agreement] ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS AND IMPLIED." (Debtor Ex. 1 at ¶ 3.6).

11. Another provision of the Agreement provided that, "IN NO EVENT WILL MCKESSON BE LIABLE TO [the Debtor] . . . FOR ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO LOST PROFITS

---

[4] Hereinafter, exhibits attached to the Complaint are cited as "(Debtor Ex. ___)".

. . . WHETHER BASED ON BREACH OF CONTRACT, WARRANTY, TORT, PRODUCT LIABILITY, OR OTHERWISE." (Debtor Ex. 1 at ¶ 5.2.2).

12. Finally, the Agreement stated that, if McKesson is liable "UNDER, IN CONNECTION WITH, OR RELATED TO THIS [Agreement, liability] WILL BE LIMITED TO" the fees paid to McKesson by the Debtor "DURING THE 12-MONTH PERIOD PRECEDING THE DATE OF THE CLAIM." (Debtor Ex. 1 at ¶ 5.2.1).

13. The Debtor recalled that shortly after entering into the Agreement, two representatives from McKesson, Michelle Butler ("Butler") and Lisa Arnold ("Arnold"), were sent to the Debtor's medical clinics to serve as project managers for the implementation of the Practice Partner software. (Adv. Dkt. 1 at ¶¶ 7-8).

14. During implementation of the Practice Partner software, in October, 2009, Devonne Bradshaw replaced Butler and Arnold as project manager. (Adv. Dkt. 1 at ¶ 9).

15. According to the Debtor, McKesson initially promised that the Practice Partner software would be fully implemented by December, 2009. (Adv. Dkt. 1 at ¶ 9). In November, 2009, as a result of what the Debtor believed to be McKesson's failure "to provide adequate training, an incomplete setup and a total lack of any meaningful testing of the" software, the "go 'live'" date was pushed back to February, 2010. (Id. at ¶ 11).

16. When the Practice Partner software did "go live" in February, 2010, the Debtor insisted that "fatal functionality flaws" with the software became evident almost immediately. (Adv. Dkt. 1 at ¶ 11-12).

17. The Debtor alleged that the flaws in the Practice Partner software resulted in Medicare and Blue Cross/Blue Shield, "either . . . not receiving claims or . . . returning claims"

because they did not meet their "claims submission standards and protocols." (Adv. Dkt. 1 at ¶ 12).

18. The issues with the Practice Partner software, according to the Debtor, caused serious cash flow problems. (Adv. Dkt. 1 at ¶ 13).

Bankruptcy Case

19. The Debtor maintained that it was the cash flow problems created by the flaws in the Practice Partner software that forced the Debtor, on April 1, 2010, to file a voluntary petition (the "Petition") for relief under chapter 11 of the Bankruptcy Code[5] (the "Bankruptcy Case"). (Dkt. 1; Adv. Dkt. 1 at ¶ 17).

20. Along with the Petition, on April 1, 2010, the Debtor filed its List of Creditors Holding 20 Largest Unsecured Claims. (Dkt. 3). The Debtor listed McKesson as one of its twenty largest unsecured creditors, though McKesson's claim was listed as "Disputed Subject to Setoff." (Id. at 1).

21. On April 1, 2010, the Debtor also filed its bankruptcy schedules. (Dkt. 4). In Schedule F - Creditors Holding Unsecured Nonpriority Claims, the Debtor listed McKesson as holding a $27,533.43 claim for "Computer software." (Id. at 44). The Debtor checked a box on Schedule - F indicating that McKesson's claim was "Disputed" and further explained that the claim was "Subject to Setoff." (Id.).

22. On April 5, 2010, an Order Establishing Bar Dates and Requiring Filing of Proofs of Claim was entered whereby this Court ordered that the last day for filing a proof of claim in the Bankruptcy Case was July 1, 2010. (Dkt. 29). McKesson did not file a proof of claim in the

[5] Hereinafter, all Code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

Bankruptcy Case.

23. On November 29, 2010, the Debtor filed its Disclosure Statement for Plan of Reorganization of the Debtor (Dkt. 215) and Debtor's Plan of Reorganization (Dkt. 216).

24. Thereafter, on December 3, 2010, the Debtor filed its First Amended Disclosure Statement for Amended Plan of Reorganization of the Debtor (the "Disclosure Statement") (Dkt. 222) and Debtor's First Amended Plan of Reorganization (the "Plan") (Dkt. 223).

Disclosure Statement

25. Notice of the filing of the Disclosure Statement was sent to McKesson. (Dkt. 227).

26. The Disclosure Statement states that it is simply intended "to provide the holders of claims against the Debtor with adequate information to make an informed decision in exercising their rights to vote to accept or reject the Plan." (Dkt. 222 at 1).

27. The Disclosure Statement further advises that it "summarizes certain terms of the Plan, but the Plan itself will be the governing document. If any inconsistency exists between the Plan and the Disclosure Statement, the terms of the Plan approved by the Court shall prevail." (Dkt. 222 at 1). Before giving a brief overview of the terms of the Plan, the Disclosure Statement reiterates that "[a]ny conflict between [the Disclosure Statement] and the Plan will be resolved by the terms and provisions contained in the Plan." (Id. at 6-7).

28. In a section entitled "Pre-Petition History," the Disclosure Statement provides a brief account of the relationship between the Debtor and McKesson prior to its decision to file for relief under the Code. (Dkt. 222 at 4-5).

29. According to the Disclosure Statement, the Debtor's financial "difficulties began in the summer of 2009, when it decided to employ the services of McKesson . . . to implement a unified

billing and electronic medical records computer system across the [Debtor's] clinic system." (Dkt. 222 at 5).

30. The Disclosure Statement recalls that McKesson assured the Debtor that the Practice Partner software would be fully implemented and ready to "go 'live'" by December, 2009. (Dkt. 222 at 5). When the software eventually went "'live,'" the Disclosure Statement claims, it "failed miserably in terms of being able to accurately code and transmit charges to Medicare and Blue Cross Blue Shield, two of the primary sources for patient payments." (Id.).

31. The Disclosure Statement explains that the Debtor experienced serious cash flow issues as a result of the coding and transmitting errors caused by the Practice Partner software. (Dkt. 222 at 5).

32. Because of the serious cash flow issues faced by the Debtor, it was forced to file for relief under the Code, according to the Disclosure Statement. (Dkt. 222 at 5).

33. The Disclosure Statement notes that since filing the Petition, the Debtor has ceased using McKesson's Practice Partner software and now uses "Athena" software for electronic billing and medical records. (Dkt. 222 at 5).

34. In another section of the Disclosure Statement entitled "Potential and Pending Litigation," the Debtor lists "[p]otential litigation against McKesson Information Services for damages resulting from the failure of the implementation of the McKesson Information Systems by Heartsouth," as a possible claim of the Debtor. (Dkt. 222 at 6).

35. However, in the "Means for Executing the Plan," the Disclosure Statement states that the Plan will be funded exclusively through the Debtor's continued operation of its medical clinics. (Dkt. 222 at 14-15).

36. After Plan confirmation, the Disclosure Statement provides that this Court shall retain jurisdiction over "any and all motions, adversary proceedings, or contested matters brought before the Bankruptcy Court." (Dkt. 222 at 18).

37. On February 1, 2011, the Order Approving First Amended Disclosure Statement and Fixing Time for Filing Acceptances or Rejections to the First Amended Plan of Reorganization Combined with a Hearing Notice Thereof (Dkt. 253) was entered.

Plan

38. In the Plan, the Debtor again states that it intends to fund the Plan exclusively through continued operation of its medical clinics. (Dkt. 223 at 9).

39. In fact, the Plan makes no mention of any potential litigation by the Debtor against McKesson.

40. Of the greatest significance, however, is the Debtor's choice of its "Retention of Jurisdiction" language in the Plan, which is vastly different from the language it used when summarizing the terms of the Plan in the Disclosure Statement. (Dkt. 223 at 14). According to the Plan, this Court shall retain jurisdiction, in relevant part, only "[t]o determine any and all applications, adversary proceedings, and contested or litigated matters that may be pending on the Effective Date." (Id.).

41. The Plan defines the "Effective Date" as "the first business day following the fourteenth day after the Confirmation Date in which the Confirmation order becomes final and non-appealable." (Dkt. 223 at 2).

42. Thereafter, on April 28, 2011, an Order Confirming Plan (the "Confirmation Order") (Dkt. 311) was entered.

Adversary

43. Over a year after confirmation of the Plan and the Effective Date, on May 17, 2012, the Debtor filed the Complaint against McKesson.

44. As previously mentioned, the Complaint asserts various causes of action against McKesson stemming from the implementation of the Practice Partner software at the Debtor's medical clinics. (Adv. Dkt. 1).

45. According to the Debtor, the Agreement obligated "McKesson to provide software and training sufficient to implement an electronic medical records and electronic billing submission software that was compatible with the clinic[s'] organizational structure." (Adv. Dkt. 1 at ¶ 22). In the Debtor's view, McKesson breached this term of the Agreement, and as a result, the Debtor was "damaged in an amount not less than $1,000,000.00." (Id. at ¶¶ 22-26).[6]

46. The Debtor alleges that McKesson breached its warranty as to the amount of time it would take to implement the Practice Partner software, and, as a result, the Debtor was damaged in "the amount of $1,000,000.00." (Adv. Dkt. 1 at ¶¶ 27-33).[7]

47. The Debtor also alleges that "McKesson represented that it had a software package that was able to perform electronic statement submission and electronic medical records in a functional, first-class fashion." (Adv. Dkt. 1 at ¶ 35). According to the Debtor, such representations were false, McKesson knew they were false, the Debtor reasonably relied on such representations, and the Debtor was injured in an amount not less than $1,000,000.00. (Id.).[8]

48. Finally, the Debtor insists that after the Confirmation Order was entered, McKesson

---

[6] Hereinafter, Debtor's claim for breach of contract shall be referred to as "Count One."

[7] Hereinafter, Debtor's claim for breach of warranty shall be referred to as "Count Two."

[8] Hereinafter, Debtor's wilful and intentional misrepresentation claim shall be referred to as "Count Three."

continued to attempt to collect payment from the Debtor in violation of the discharge injunction provided for in § 524 and the Confirmation Order. (Adv. Dkt. 1 at ¶¶ 37-40).[9]

49. In response to the Complaint, on July 11, 2012, McKesson filed its Motion to Dismiss (Adv. Dkt. 7).

Discussion

A. Rule 12(b)(1) Jurisdictional Standard

Rule 12(b)(1) provides that a claim should be dismissed if the court lacks subject matter jurisdiction to hear the dispute. The standard for dismissal of a claim under Rule 12(b)(1) is similar to the standard employed when considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Kelley v. Papanos, No. H-11-0626, 2012 WL 208446, *1 (S.D. Tex. Jan. 24, 2012) (citation omitted). However, when deciding a motion to dismiss pursuant to Rule 12(b)(1), a court may "'consider a broader range of materials,'" than it could if the motion to dismiss was brought under Federal Rule of Civil Procedure 12(b)(6). Id., *quoting* Williams v. Wynne, 533 F.3d 360, 365 n.2 (5th Cir. 2008). "A court may consider '(1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts'" when deciding a Rule 12(b)(1) motion to dismiss. Id., *quoting* Clark v. Tarrant Cnty., 798 F.2d 736, 741 (5th Cir. 1986). Generally speaking, the burden of proving the court has jurisdiction to hear the claim rests with the plaintiff. Id. (citation omitted).

B. Postconfirmation Jurisdiction and § 1123(b)(3)(B)

After a petition for relief is filed pursuant to chapter 11 of the Code, the Debtor acts as a

---

[9] Hereinafter, Debtor's injunctive relief and contempt claim shall be referred to as "Count Four."

debtor-in-possession. Dynasty Oil and Gas, LLC v. Citizens Bank (In re United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008) (citation omitted). As the debtor-in-possession, the debtor has many of the rights of a bankruptcy trustee. Id. (citation omitted). One of these rights is the ability to pursue claims for the benefit of the bankruptcy estate. Id., *citing* 11 U.S.C. § 1107(a). After confirmation of the debtor's plan of reorganization, however, the debtor is no longer the debtor-in-possession, and, as a result, the debtor's role in the bankruptcy case changes significantly. Id. (citation omitted).

Before confirmation, a chapter 11 debtor must file a disclosure statement and plan of reorganization with the bankruptcy court. *See* In re Gulf Coast Oil Corp., 404 B.R. 407, 424 (Bankr. S.D. Tex. 2009). The purpose of filing a disclosure statement is to provide creditors with sufficient information so that they may make an informed decision on whether to vote to accept or reject the debtor's plan. In re U.S. Brass Corp., 194 B.R. 420, 423 (Bankr. E.D. Tex. 1996), *see* 11 U.S.C. § 1125. The plan is the contract between the debtor and his allowed creditors. In re Pete Gallegos Paving, Inc., No. 03-50139, 2008 WL 1751971, *2 (Bankr. S.D. Tex. Apr. 14, 2008) (quotation omitted). As a result, courts apply general rules of contract interpretation when interpreting a plan of reorganization. McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1335 (5th Cir. 1995) (citation omitted).

"'Confirmation of the plan marks the beginning of the reorganized debtor's new financial life. New legal relationships are established and old ones are modified or terminated.'" In re Good, 428 B.R. 235, 243 (Bankr. E.D. Tex. 2010), *quoting* In re Valley Park Group, Inc., 96 B.R. 16, 24 (Bankr. N.D.N.Y. 1989). For instance, plan confirmation vests all of the property previously held by the bankruptcy estate in the debtor. *See* 11 U.S.C. § 1141(b). As the bankruptcy estate ceases to exist after confirmation of the debtor's plan, the debtor, no longer the debtor-in-possession, lacks standing

to assert claims for the benefit of the estate. United Operating, 540 F.3d at 355 (citation omitted).

A debtor may preserve his ability to bring a claim of the bankruptcy estate after confirmation if it "expressly provides for the claim's 'retention and enforcement'" in its plan of reorganization. Id. ("[A] plan may . . . provide for . . . the retention and enforcement [of any claim] by the debtor.") In the Fifth Circuit Court of Appeals, Dynasty Oil and Gas, LLC v. Citizens Bank (In re United Operating), 540 F.3d 351 (5th Cir. 2008) is the leading case which addresses the retention of estate claims by a post-confirmation debtor under § 1123(b)(3)(B). In United Operating, after the debtor's plan of reorganization was confirmed, the Official Unsecured Creditor's Committee (the "Committee") filed a complaint against two of the debtor's creditors, Citizens Bank ("Citizens") and Wildcat Energy, LLC ("Wildcat"). Id. at 354. The complaint alleged causes of action against Citizens and Wildcat under both state law and the Code. Id. The bankruptcy court subsequently dismissed the state law claims under Federal Rule of Civil Procedure 12(b)(6). Id. A little over a year later, the debtor filed a state court complaint against Citizens and Wildcat, as well as others (the "State Court Complaint"). Id. Many of the state law claims asserted in the State Court Complaint were nearly identical to the state law claims brought by the Committee and subsequently dismissed by the bankruptcy court. Id. Wildcat and Citizens removed the State Court Complaint to district court, and thereafter, the case was referred to the bankruptcy court. United Operating, 540 F.3d at 354. On summary judgment, the bankruptcy court held that the debtor was barred from bringing the state law claims under the doctrines of *res judicata* and collateral estoppel. Id.

On appeal, the Fifth Circuit did not address whether the common law claims were barred by *res judicata* or collateral estoppel. Id. Instead, as a preliminary matter, the Fifth Circuit concluded that the debtor lacked standing to bring the State Court Complaint. Id. at 354-55. The Fifth Circuit held that a post-confirmation debtor may preserve its ability to bring a claim of the estate, "but only

if the plan of reorganization expressly provides for the claim's 'retention and enforcement by the debtor.'" Id. at 355 (citation omitted). "If a debtor has not made an effective reservation, the debtor has no standing to pursue a claim [of the estate] . . . [t]his is a logical consequence of the nature of a bankruptcy, which is designed primarily to 'secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time.'" Id. (quotation omitted). For a debtor to expressly retain his right to bring an estate claim after confirmation, the debtor's plan of reorganization must include "specific and unequivocal" language retaining the claim. United Operating, 540 F.3d at 355 (quotation omitted). The Fifth Circuit held that a debtor must include "specific and unequivocal" language of its intent to retain an estate claim after confirmation so that its creditors will be on notice of any future litigation the debtor may wish to pursue against them. Id. "[A]bsent specific and unequivocal retention language in the plan, creditors lack sufficient information regarding their benefits and potential liabilities to cast an intelligent vote." Id. (internal quotations omitted). In United Operating, the Fifth Circuit concluded that the debtor's "blanket reservation of 'any and all claims'" in its plan of reorganization was not "specific and unequivocal" and, thus, the debtor did not retain the state law claims asserted in the State Court Complaint under § 1123(b)(3)(B) after plan confirmation. Id. As the debtor's plan did not retain the state law claims, the Fifth Circuit held that the State Court Complaint should be dismissed under Rule 12(b)(1). Id.

A year later, the Fifth Circuit reiterated its position that a debtor who wishes to bring a claim of the bankruptcy estate after confirmation must specifically and unequivocally retain the claim in its plan of reorganization. Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ) v. Weil, Gotshal & Manges, LLP (In re Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ)), 333 Fed. Appx. 822, 826 (5th Cir. 2009) (unpublished). In National Benevolent Association, the debtor, after confirmation of its chapter 11 plan, filed a malpractice claim against

Weil, Gotshal & Manges, LLP, who represented the debtor prior to its chapter 11 case, as well as in bankruptcy, based upon pre-petition conduct. Id. at 825. The debtor's plan of reorganization defined "Professional" as "a professional employed in the Bankruptcy Cases under 11 U.S.C. §§ 327 and 1103." Id. at 827. As a result, the Fifth Circuit read the debtor's plan only to retain claims against professionals "employed in the Bankruptcy Cases," and not for professional malpractice which may have occurred prior to the filing of the bankruptcy petition. Id. at 828. Because the debtor's plan did not retain the right to bring pre-petition malpractice claims after confirmation, the Fifth Circuit concluded that the claim must be dismissed under Rule 12(b)(1). Id. The Fifth Circuit reached its conclusion based on the plain language of the plan, and as a result, the "case did little to refine what the court meant by "'specific and unequivocal'" in United Operating. *See* In re Crescent Res., LLC, 455 B.R. 115, 124 (Bankr. S. D. Tex. 2011) (quotation omitted).

Last year, the Fifth Circuit again addressed what is necessary for a debtor to include in his plan of reorganization to successfully retain an estate action under § 1123(b)(3)(B). Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Tex. Wyo. Drilling, Inc.), 647 F.3d 547 (5th Cir. 2011). In Spicer, the debtor's plan of reorganization provided that the debtor "shall retain all rights, claims, defenses and causes of action, including, but not limited to, the Estate Actions" after confirmation. Id. at 549. The plan defined the "Estate Actions" as claims under chapter 5 of the Code. Id. The debtor's disclosure statement provided additional detail as to the "Estate Actions." Id. In its disclosure statement, the debtor stated that it "reserve[d] all rights to pursue . . . any Estate Actions not limited to but including any preference [action]." Id. (citation omitted). The disclosure statement defined "'Estate Actions' to include 'various potential avoidable transfers that can be recovered under Chapter 5.'" Id. (quotation omitted). As an attachment to its disclosure statement, the debtor included a chart of claims and causes of action it wished to pursue after confirmation which included,

"'[v]arious pre-petition shareholders of the Debtor' who might be sued for 'fraudulent transfer and recovery of dividends paid to shareholders,' valuing the claims at approximately $4 million." Spicer, 647 F.3d at 549 (quotation omitted).

After confirmation, the debtor brought claims against former shareholders of the debtor alleging that certain pre-petition dividend payments were fraudulent transfers under the Code (the "Avoidance Action"). Id. Thereafter, the former shareholders filed a motion for summary judgment, alleging that the debtor lacked standing to bring the Avoidance Action. Id. Prior to the hearing on the motion for summary judgment, the bankruptcy court, *sua sponte*, converted the case from a chapter 11 case to a chapter 7 case. Id. As a result, the chapter 7 trustee succeeded the debtor as the plaintiff in the Avoidance Action.[10] Id. The bankruptcy court denied the motion for summary judgment, finding that the former shareholders' assertion that the debtor lacked standing was without merit, and the court concluded that the chapter 7 trustee could pursue the claims, even if the postconfirmation chapter 11 debtor could not. Id. The former shareholders requested that the matter be directly appealed to the Fifth Circuit. Spicer, 647 F.3d at 549.

On direct appeal, the Fifth Circuit found that the debtor had standing to pursue the Avoidance

[10] Because the case was converted from a chapter 11 case to a chapter 7 case, the bankruptcy court rescheduled the hearing on the motion for summary judgment and requested that the parties provide the court with additional briefing as to the effect of conversion on the arguments presented in the motion. Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Tex. Wyo. Drilling, Inc.), 422 B.R. 612, 620 (Bankr. N.D. Tex. 2010). In response to the bankruptcy court's request, "[t]he [former shareholders] argue[d] that the conversion to chapter 7 had no effect on the proper application of any of the theories raised" in the motion for summary judgment. Id. at 622 "The [former shareholders] insist[ed] that the [chapter 7] Trustee stands solely in the shoes of [the Debtor] as they existed at the time of conversion and that the Trustee is bound by all actions (or omissions) of the debtor." Id. The bankruptcy court concluded that "the Trustee may enforce the . . . claims against the [former shareholders] and that none of the defenses asserted by the [former shareholders] prevents the Trustee from doing so." Id. at 637.

Action.[11] Id. at 552. In reaching its conclusion, the Fifth Circuit held that a court may look to the plan, as well as the disclosure statement, to decide whether a debtor has retained an estate action after confirmation. Id. at 550-51. In reaching its conclusion, the Fifth Circuit noted "that the disclosure statement is the primary notice mechanism informing a creditor's vote for or against a plan." Id. at 551. Considering the language contained in the debtor's plan, as well as the disclosure statement, the Fifth Circuit held that the debtor successfully retained the Avoidance Action. Id. at 552.

1. McKesson

In its Motion to Dismiss, McKesson insists that the Debtor did not "specifically and unequivocally" retain Count One, Count Two, and Count Three of the Complaint in the Plan. (Mot. at ¶ 1). McKesson cites United Operating for the proposition that, "[t]o preserve a claim, 'the plan must expressly retain the right to pursue such actions and the reservation must be 'specific and unequivocal.''" Id. at ¶ 5 (citation omitted). In McKesson's view, the Plan did not retain the Debtor's right to pursue the state law claims asserted by the Debtor against McKesson in Count One, Count Two and Count Three of the Complaint after confirmation, because the Plan failed to mention the claims entirely. Id. at ¶ 6. Further, McKesson argues that although the Disclosure Statement does mention the Debtor's intent to "[p]otentially [pursue] litigation" against McKesson, the retention language in the Disclosure Statement "is neither specific, nor unequivocal." Id. at ¶¶ 8-11. First, McKesson insists that "'potential' litigation is equivocal." Id. at ¶¶ 8-9. Second, McKesson believes that the retention language in the Disclosure Statement is not specific because the Disclosure Statement only, "vaguely mentions, '[d]amages resulting from the failure of the implementation of

[11] The Fifth Circuit did not address the effect of conversion of the bankruptcy case from a chapter 11 case to a chapter 7 case on the arguments presented in the motion for summary judgment. Spicer, 647 F.3d at 549.

the McKesson Information Systems by [the Debtor].'" Id. at ¶ 10. Because the Plan and the Disclosure Statement, in McKesson's view, do not "specifical[ly] and unequivocal[ly]" retain the Debtor's ability to bring Count One, Count Two, and Count Three of the Complaint after confirmation, McKesson believes that this Court should dismiss Count One, Count Two, and Count Three of the Complaint under Rule 12(b)(1). Id. at ¶ 11.

2. Debtor

In the Response, the Debtor insists that the Disclosure Statement does include "specific and unequivocal language" of its intent to pursue an action against McKesson after confirmation. (Resp. at ¶ 4.). The Debtor believes that McKesson "places too much emphasis" on United Operating in light of the Fifth Circuit's more recent decision in Spicer, which held that bankruptcy courts may look to the plan, as well as the disclosure statement, when determining whether a debtor has retained an estate cause of action in its plan of reorganization. Id. at ¶ 3. The Debtor argues that the "Pre-Petition History," included in the Disclosure Statement, plus its disclosure of a desire to "potential[ly] [pursue] litigation against McKesson . . . for damages resulting from the failure of the implementation of the McKesson Information Systems" is sufficient to satisfy the Fifth Circuit standard announced in United Operating, and refined in Spicer, to retain an estate claim after confirmation. Id. at ¶¶ 3-4. Because the Debtor believes the Plan, and the Disclosure Statement, include "specific and unequivocal" language of its desire to bring claims such as those brought in Count One, Count Two, and Count Three of the Complaint after confirmation, it insists that the Motion to Dismiss should be denied. Id. at ¶ 4.

3. Court's Analysis

Typically, in order to determine whether a debtor may bring a claim against a creditor after

confirmation of its plan of reorganization, this Court must decide, in light of the Fifth Circuit's holding in United Operating and its progeny, whether the debtor has included "specific and unequivocal" language reserving the claim in its plan of reorganization. For this reason, both the Debtor and McKesson focus their arguments almost entirely on whether the language in the Disclosure Statement regarding "potential" litigation was sufficiently specific and unequivocal to reserve the Debtor's claims against McKesson. The Fifth Circuit, however, has previously looked no further than the plan language of a debtor's plan to conclude that a debtor did not successfully retain a postconfirmation cause of action simply by looking to the plain language of the debtor's plan. Nat'l Benevolent Ass'n, 333 Fed. Appx. at 822. Similarly, in the instant case, this Court need look no further than the plain language of the Plan and the Disclosure Statement to hold that it does not have jurisdiction to hear Count One, Count Two, or Count Three of the Complaint.

In the Motion to Dismiss and the Response, the parties overlook the section in the Plan entitled "Retention of Jurisdiction," which is dispositive of the standing issue. That section states that this Court shall retain jurisdiction after confirmation only to, "determine any and all applications, adversary proceedings, and contested or litigated matters that may be pending on the Effective Date." (Dkt. 223 at 14). The Plan defines the "Effective Date" as the "first business day following the fourteenth day after the Confirmation Date in which the Confirmation Order becomes final and non-appealable." (Dkt. 223 at 2). The Confirmation Order was entered on April 28, 2011. (Dkt. 311). Thus, the "Effective Date" of the Plan was May 13, 2011, "the first business day following the fourteenth day after the Confirmation Date." (Id.). The Debtor, however, did not file the Adversary until May 17, 2012, over a year after the "Effective Date." Simply stated, there was no adversary proceeding pending on the "Effective Date." Thus, this Court, applying a plain language reading of

the Plan, finds that it lacks jurisdiction over Count One, Count Two, and Count Three of the Complaint, and as a result, these claims should be dismissed under Rule 12(b)(1).

It is critical to note that the "Retention of Jurisdiction" language contained in the Plan, is inconsistent with the "Retention of Jurisdiction" language used in the Disclosure Statement. In the Disclosure Statement, the Debtor states that this Court shall have jurisdiction *after* confirmation over, "any and all motions, adversary proceedings, or contested matters brought before the Bankruptcy Court." (Dkt. 222 at 19). If this Court were to apply the "Retention of Jurisdiction" language in the Disclosure Statement, it would arguably have jurisdiction over Count One, Count Two, and Count Three of the Complaint, although it would then have to consider whether the reference to "potential" litigation in the Plan was "specific and unequivocal" enough to reserve the Debtor's claims. The Disclosure Statement makes clear, however, that its purpose is simply intended "to provide holders of claims with adequate information to make an informed decision in exercising their rights to vote to accept or reject the Plan." (Dkt. 222 at 1). The Plan, as the contract, is to "be the governing document." (Id.). As a result, the Disclosure Statement states *twice* that "[i]f any inconsistency exists between the Plan and the Disclosure Statement, the terms of the Plan approved by the Court shall prevail." (Id.).

In summary, bankruptcy courts are to apply the general rules of contract interpretation to a debtor's plan of reorganization. The plain language of the Plan, which the Disclosure Statement provides is the "governing document," states that this Court shall retain jurisdiction after confirmation only to, "determine any and all applications, adversary proceedings, and contested or litigated matters that may be pending on the Effective Date." (Dkt. 223 at 14). The Adversary was filed on May 17, 2012, long after the Effective Date had passed. Thus, this Court does not have

jurisdiction over Count One, Count Two, and Count Three of the Complaint. As this Court finds it does not have jurisdiction to hear Count One, Count Two, and Count Three of the Complaint, these claims should be dismissed under Rule 12(b)(1).

C. 28 U.S.C. § 1334(b)

In the alternative, McKesson, in the Motion to Dismiss, argues that even if the Debtor had standing, this Court does not have jurisdiction to hear Count One, Count Two, and Count Three of the Complaint pursuant to 28 U.S.C. § 1334(b). (Mot. at ¶ 16.) This Court, however, need not decide whether it has jurisdiction over Count One, Count Two, and Count Three of the Complaint under 28 U.S.C. § 1334(b), as it has already found that the plain language of the Plan states that this Court does not retain jurisdiction over adversary proceedings filed after the "Effective Date."

Conclusion

Accordingly, for the reasons set forth herein, the Court finds that the Motion to Dismiss is well taken and should be granted. Specifically, the Court finds that the Debtor's Plan does not retain jurisdiction for this Court to hear Count One, Count Two, and Count Three of the Complaint for the reasons set forth above, and as a result, Count One, Count Two, and Count Three of the Complaint should be dismissed under Rule 12(b)(1).

In accordance with the Order Extending Deadline, an answer or other responsive pleading to Coun Four, the only remaining claim in the Complaint, is due within 14 days after entry of this Memorandum Opinion. The Court will set a status conference in order to implement a scheduling

order on Count Four of the Complaint. A final judgment will not be entered until final disposition of all matters in the Adversary.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: October 2, 2012