



SO ORDERED,

Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: September 4, 2018

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

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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

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IN RE:

PIONEER HEALTH SERVICES  
OF ONEIDA, LLC,

CASE NO. 16-01124-NPO

DEBTOR.

CHAPTER 11

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IN RE:

PIONEER HEALTH SERVICES  
OF MONROE COUNTY, INC.,

CASE NO. 16-01125-NPO

DEBTOR.

CHAPTER 11

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**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)**

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There came on for an evidentiary hearing on August 10, 2018 (the “Hearing”): (1) the objection to the administrative expense claim of Siemens Healthcare Diagnostics, Inc. a wholly owned subsidiary of Siemens Medical Solutions USA, Inc. (“Siemens Healthcare”) filed by each

of the above-referenced, related debtors and (2) the response filed by Siemens Healthcare, as follows: in the bankruptcy case of Pioneer Health Services of Patrick County, Inc. (the “Patrick Case”) (Case No. 16-01120-NPO), the Objection to Claim Number 42 (the “Objection to POC 42”) (Patrick Case, Dkt. 128) filed by Pioneer Health Services of Patrick County, Inc. (“PHS of Patrick”) and the Response to the Debtors’ Objection to Claim Nos. 42, 53, and 56 of Siemens Healthcare Diagnostics Inc. (the “Consolidated Response”) (Patrick Case, Dkt. 143) filed by Siemens Healthcare; in the bankruptcy case of Pioneer Health Services of Oneida, LLC (the “Oneida Case”) (Case No. 16-01124-NPO), the Objection to Claim Number 53 (the “Objection to POC 53”) (Oneida Case, Dkt. 110) filed by Pioneer Health Services of Oneida, LLC (“PHS of Oneida”) and the Response to the Debtors’ Objection to Claim Nos. 42, 53, and 56 of Siemens Healthcare Diagnostics Inc. (the “Consolidated Response”) (Oneida Case, Dkt. 127) filed by Siemens Healthcare; and in the bankruptcy case of Pioneer Health Services of Monroe County, Inc. (the “Monroe Case”) (Case No. 16-01125-NPO), the Objection to Claim Number 56 (the “Objection to POC 56”) (Monroe Case, Dkt. 145) filed by Pioneer Health Services of Monroe County, Inc. (“PHS of Monroe”) and the Response to the Debtors’ Objection to Claim Nos. 42, 53, and 56 of Siemens Healthcare Diagnostics Inc. (the “Consolidated Response”) (Monroe Case, Dkt. 154) filed by Siemens Healthcare.

At the Hearing, Craig M. Geno represented PHS of Patrick, PHS of Oneida, and PHS of Monroe (together, the “Affiliated 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. The Affiliated Debtors presented the testimony of one witness and introduced fourteen exhibits into evidence at the Hearing. Siemens Healthcare did not call any witnesses or

introduce any exhibits into evidence. Having considered the pleadings as well as the testimony, exhibits, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052:<sup>1</sup>

### **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 Affiliated Debtors operated community hospitals located in Aberdeen, Mississippi; Oneida, Tennessee; and Stuart, Virginia. Pioneer Health Services, Inc. (“PHS”), located in Magee, Mississippi, is the parent company of the Affiliated Debtors. Siemens Healthcare is a medical technology company and sells laboratory supplies. Beginning in 2012, the Affiliated Debtors entered into a series of contracts with Siemens Healthcare for the purchase of medical equipment and laboratory supplies. Julie Gieger (“Gieger”), currently PHS’s vice-president of finance and its sole remaining employee, testified at the Hearing regarding the course of dealings between the parties. The Affiliated Debtors presented her testimony in an attempt to show that Siemens Healthcare did not satisfy the “ordinary course of business” requirement for an administrative claim under 11 U.S.C. § 503(b)(9).<sup>2</sup>

Gieger testified that before the bankruptcy filings, she was the comptroller of PHS and was familiar with the payment history of the Affiliated Debtors. With respect to Siemens Healthcare,

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<sup>1</sup> Specifically, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7052.

<sup>2</sup> From this point forward, all statutory citations are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

the Affiliated Debtors placed orders for certain medical supplies with Siemens Healthcare pursuant to various agreements on an open account basis. Once Siemens Healthcare accepted the order, it shipped the item to the applicable hospital, and invoiced that hospital. The payment terms on the invoice was “net 30 days,” meaning full payment was due within thirty (30) days.

According to Gieger, the Affiliated Debtors paid Siemens Healthcare pursuant to the invoice terms until 2015, when the Affiliated Debtors began experiencing cash-flow problems and started making late payments. As a result, Siemens Healthcare declined to accept any new orders from the Affiliated Debtors until payments were made on overdue invoices. As evidence of this change in payment, Gieger testified at the Hearing about emails dated April 20, 2015, through February 1, 2016, to and from Siemens Healthcare discussing the “credit hold” status of the accounts of PHS of Monroe and PHS of Oneida. For example, in an email dated June 2, 2015, a Siemens Healthcare representative wrote the accounts payable clerk at PHS of Monroe, “Please be advised that the attached past due invoices are creating a credit hold on the account. Please review these invoices and advise me on their payment status so I can have this order expedited for shipment.” (Aff. Debtors Ex. 5). Next, in an email dated July 27, 2015, a Siemens Healthcare representative informed the accounts payable clerk at PHS of Oneida, “Please be advised that the attached past due invoices are causing your orders to come up on credit hold. Please review these invoices and advise me on their payment status so I can have your order expedited for shipment.” (Aff. Debtors. Ex. 7). Later, the Siemens Healthcare representative asked the same accounts payable clerk, “Can you advise me on the payment status of the other invoices? Because your payment is not enough to release the order.” (*Id.*). Geiger testified that all of the Affiliated Debtors were treated by Siemens Healthcare in the same way; Siemens Healthcare refused to process new orders for medical and laboratory supplies until payments were made on overdue invoices.

On March 30, 2016, PHS filed a voluntary chapter 11 petition for relief in Case No. 16-01119-NPO (the “PHS Case”) (PHS Case, Dkt. 1). On that same date, the Affiliated Debtors also filed voluntary chapter 11 petitions for relief, including PHS of Patrick (Patrick Case, Dkt. 1), PHS of Oneida (Oneida Case, Dkt. 1), and PHS of Monroe (Monroe Case, Dkt. 1). The bankruptcy cases of these Affiliated Debtors have been administratively consolidated into the PHS Case. (PHS Case, Dkt. 44; Patrick Case, Dkt. 45; Oneida Case, Dkt. 39; Monroe Case, Dkt. 41). These are all liquidating chapter 11 bankruptcy cases. Although the hospitals operated by the Affiliated Debtors remained in operation at the time of the bankruptcy filings, they either have been sold or closed since then.

On July 27, 2016, Siemens Healthcare filed a proof of claim in the bankruptcy cases of each of the Affiliated Debtors for “Products,” “Service performed, Products and Equipment Lease,” and “Product and Equipment Lease” sold and/or provided pre-petition (the “Laboratory Supplies”) of which Siemens Healthcare designated a separate amount as an administrative expense under § 503(b)(9) accorded priority under § 507(a)(2) (the “Proofs of Claim”) (Patrick Case, POC 42; Oneida Case, POC 53; Monroe Case, POC 56). Each of the Proofs of Claim includes the Addendum to Siemens Healthcare Diagnostics, Inc.’s Proof of Claim (the “Addendum”) (*id.* at 3-5), which describes various agreements under which the Affiliated Debtors “agreed to purchase a minimum of certain reagents, consumables, supplies and other products at discounted prices” (*id.* at 3). Copies of these agreements, as well as the unpaid invoices, are attached to the Proofs of Claim. The invoices appear to identify the goods shipped, the dates of the shipments, and the delivery number for each shipment. According to the Proofs of Claim,

Siemens Healthcare sold goods to the Affiliated Debtors in the twenty days before the commencement of the bankruptcy cases for which it is owed the following amounts:<sup>3</sup>

PHS of Patrick	POC 42	\$ 2,639.89
PHS of Oneida	POC 53	\$20,354.80
PHS of Monroe	POC 56	\$ 6,400.12

On June 24, 2018, the Affiliated Debtors filed the Objection to POC 42, Objection to POC 53, and Objection to POC 56 (together, the “Objections”), which are substantively identical. In the Objections, the Affiliated Debtors contend 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). They do not contest the validity or amount of the unsecured claim asserted in the Proofs of Claim. They challenge only the portion designated as a priority claim. In the Consolidated Response, Siemens Healthcare reduces the amount of its claim for administrative expenses to the value of the goods only. Apparently, the amount in the Proofs of Claim included taxes, shipping and handling, and service fees. The revised amount of its administrative expense claim is 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). Siemens asks the Court to adjust the amount in the Proofs of Claim designated as administrative expenses under § 503(b)(9) to this revised amount and to overrule the Objections.

Siemens Healthcare attached as an exhibit to the Consolidated Response 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

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<sup>3</sup> According to Siemens Healthcare, these amounts do not include amounts due for maintenance or other services provided by Siemens Healthcare or amounts due under an equipment lease agreement. (Consol. Resp. at 3-4 nn. 2-3).

(“Brisbane”) stated that he is the director of accounting for Siemens Medical Solutions USA, Inc., the parent company of Siemens Healthcare. Brisbane further stated that his review of the records and files of Siemens Healthcare showed that Siemens Healthcare shipped goods to the Affiliated Debtors, which they received within twenty days before their bankruptcy filings, and that the value of those goods are the amounts as set forth in the Consolidated Response. Finally, he stated that he had reviewed the records and files maintained in Siemens Healthcare’s computer systems and confirmed the delivery dates of the goods identified in the invoices that relate to its administrative expense claim.

### **Discussion**

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 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). An additional requirement not expressly set forth in the statute, but imposed by courts, is that the creditor has not been paid for the goods. *See Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 878 (Bankr. M.D. Tenn. 2010). The importance to Siemens Healthcare of holding an administrative expense claim is made clear by § 507(a)(2), which grants expense claims priority status in the distribution of the estate’s assets and by § 1129(a)(9)(A), which requires full payment of such claims on the effective date of the plan. The Affiliated Debtors raise two issues for the Court’s determination relevant to all Proofs of Claim, namely, whether the Affiliated Debtors received the Laboratory Supplies and whether Siemens Healthcare sold the Laboratory Supplies in the ordinary course of business. They do not dispute that Siemens Healthcare sold “goods” to them within the meaning of § 503(b)(9) or that Siemens Healthcare was not paid for the goods.

## A. Burden of Proof

As noted previously, Siemens Healthcare asserts its priority status in the Proofs of Claim. A proof of claim filed in accordance with § 502(a) that meets the requirements of Rule 3001 of the Federal Rules of Bankruptcy Procedure (“Rule 3001”) and Official Form 410 (“Official Form 410”), the official proof of claim form, constitutes *prima facie* evidence of the validity and amount of that claim pursuant to Rule 3001(f). 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). Under the procedural framework provided by Rule 3001, a timely-filed proof of claim that meets the *prima facie* standard is allowed automatically under § 502(a) absent an objection, and assets of the estate may be distributed based on that claim. *In re Duggins*, 263 B.R. 233, 239 (Bankr. C.D. Ill. 2001). To rebut the presumption, a party in interest who objects must produce evidence that is at least equal in probative force to that offered in the proof of claim. *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947); *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 552 (5th Cir. 1985); *see also In re Cluff*, 313 B.R. 323, 339 (Bankr. D. Utah 2004) (noting that the objecting party must produce counter-evidence and not merely state that the claim should not be allowed). If the party who objects to the proof of claim produces sufficient evidence rebutting the presumption, then the burden of going forward with the evidence shifts back to the claimant who bears the ultimate burden of persuasion to establish the validity and amount of its claim by a preponderance of the evidence. *See In re Pursue Energy Corp.*, 379 B.R. 100, 105 (Bankr. S.D. Miss. 2006); *see also Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 21 (2000) (“[O]ne who asserts a claim is entitled to the burden of proof that normally comes with it.”).



The fundamental purpose of the claims allowance process under Rule 3001(f) is to facilitate the efficient, economical resolution of claims allowance disputes without the formalities of an adversary proceeding. *In re Shank*, 315 B.R. 799 (Bankr. N.D. Ga. 2004); *see Section 1120(a)(1) Comm. of Unsecured Creditors v. Interfirst Bank Dallas, N.A., (In re Wood & Locker, Inc.)*, 868 F.2d 139, 142 (5th Cir. 1989) (describing adversary proceedings as “full blown federal lawsuits”). Rule 3001(f) accomplishes that goal by allocating the burden of proof at different stages.

At the Hearing, the parties assumed, without any debate, that the evidentiary presumption afforded by Rule 3001(f) extends not only to the validity and amount of Siemen Healthcare’s unsecured claim (which the Affiliated Debtors do not dispute in the Objections) but also to the priority status asserted by Siemens Healthcare in the Proofs of Claim. Section 507(a) sets forth, in descending order, ten categories of expense claims 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).

Most of the legal arguments by counsel at the Hearing focused on the extent to which the evidence presented by the Affiliated Debtors at the Hearing rebutted the *prima facie* validity of Siemen Healthcare’s § 503(b)(9) claim. *Pursue Energy Corp.*, 379 B.R. at 105. The Affiliated Debtors argued that their evidence shifted the burden of proof onto Siemens Healthcare to prove all elements of its administrative expense claim, whereas Siemens Healthcare argued that the Affiliated Debtors’ evidence rebutted only the “ordinary course of business” element of its claim. The Affiliated Debtors treated this issue as dispositive because Siemens Healthcare chose not to offer any evidence of its own at the Hearing but relied solely on the Proofs of Claim and the Declaration to establish its administrative expense claim.

In that regard, the Court notes that Siemens Healthcare never sought to make the Declaration a part of the evidentiary record at the Hearing. Although Siemens Healthcare attached the Declaration to the Consolidated Response, it did not formally offer it into evidence. *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.”). Even assuming Siemens Healthcare had attempted to introduce the Declaration into evidence at the Hearing, it is questionable whether Siemens Healthcare could have overcome evidentiary objections to its introduction. An example of one such objection lies in the nature of this proceeding.

This dispute between the parties is a contested matter governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure (“Rule 9014”). Under Rule 9014(d), the testimony of witnesses in contested matters must be given in the same manner as in an adversary proceeding. 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 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). Here, the Court set the Objections for an evidentiary hearing, and there was no agreement between the parties allowing the submission of Brisbane's testimony by declaration or affidavit. Thus, Rule 9014 and Rule 43 would have prohibited Siemens Healthcare's use of the Declaration at the Hearing absent the consent of the Affiliated Debtors. For all of these reasons, the Court will not consider the Declaration.

Without the Declaration, Siemens Healthcare's priority status hinges solely on the Proofs of Claim. In the Consolidated Response and at the Hearing, Siemens Healthcare maintained that the Proofs of Claim created a presumption of validity as to the existence and amount of its administrative expense claim and that the Affiliated Debtors failed to sufficiently rebut that presumption.

Notwithstanding the parties' assumption to the contrary, most courts have held that the evidentiary presumption under Rule 3001(f) does not extend to the priority status asserted in proofs of claim. *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). Section 503(a) provides that "[a]n entity may timely file a request for payment of an administrative expense." 11 U.S.C. § 503(a); *see In re Mansfield & Tire Rubber Co.*, 73 B.R. 735, 739 (Bankr. N.D. Ohio 1987) ("[A] written document, filed with the court, stating the nature and the amount of the claim, and evidencing an intent to hold the estate liable is sufficient to constitute a request for payment under Section 503 of the Bankruptcy Code."). Administrative expense determinations then are governed by § 503(b), where the party seeking such treatment bears the burden of proof by a preponderance of the evidence. *See Toma Steel Supply, Inc. v. TransAmerican Nat. Gas Corp. (In re*

*TransAmerican Nat. Gas Corp.*), 978 F.2d 1409, 1416 (5th Cir. 1992). Unlike proofs of claim filed under § 501(a), which are deemed allowed under § 502(a) absent objection, administrative expense claims are allowed under § 503(b), as determined by the court, only after notice and a hearing.<sup>4</sup> In other words, the determination of an administrative claim requires that the claimant do more than file a proof of claim. The first paragraph of Official Form 410 expressly embraces this view: “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.”

The Court agrees with those courts that have recognized the distinction between the presumed validity of a properly filed claim through § 502 and Rule 3001(f), and the establishment of an administrative expense claim under § 503(b). *See In re Taranovich*, No. 93-42152, 1994 WL 329429, at \*2 (Bankr. S.D. Ga. June 30, 1994). The claims allowance process establishes the existence of debts and the creditor’s entitlement to payment but does not determine the order in which those claims are paid from assets of the bankruptcy estate. Instead, the determination of administrative expense is governed by provisions of the Bankruptcy Code independent of § 501, § 502, and Rule 3001(f). “The Rules do not create an evidentiary presumption that properly filed claims are entitled to priority or secured status simply because such status is asserted.” *In re Hack*, No. 08-72553, 2009 WL 1392068, at \*6 (Bankr. C.D. Ill. May 14, 2009).

Accordingly, the Court finds that although the Proofs of Claim filed by Siemens Healthcare created an evidentiary presumption as to the validity and amount of Siemens Healthcare’s unsecured claim under Rule 3001(f), they did not create an evidentiary presumption of priority. The proper procedure for presentation of this issue was a request for payment of an administrative

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<sup>4</sup> 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).

expense filed by Siemens Healthcare pursuant to § 503(b)(9), not a claim objection filed by the Affiliated Debtors. To avoid any additional costs to the parties and given the unusual procedural posture of these matters, the Court will treat the Proofs of Claim as requests for administrative expenses but will impose the same burden of proof that would have been imposed on Siemens Healthcare if the correct procedure had been followed. The Court, therefore, finds that Siemens Healthcare had the burden of proving its entitlement to the administrative expenses under § 503(b)(9), as designated in the Proofs of Claim, without any presumptive validity. The Court next considers whether Siemens Healthcare has met its burden of proving by a preponderance of the evidence that the Affiliated Debtors received the Laboratory Supplies and that it sold the Laboratory Supplies in the ordinary course of the Affiliated Debtors' business.

**B. Did Siemens Healthcare prove by a preponderance of the evidence that the Affiliated Debtors received the Laboratory Supplies?**

The Affiliated Debtors stipulated at the beginning of the Hearing as to the accuracy of the amounts shown on invoices billed to the Affiliated Debtors by Siemens Healthcare within twenty days of the bankruptcy filings. Gieger did not testify, however, as to whether the Affiliated Debtors took physical possession of the Laboratory Supplies. *See* BLACK'S LAW DICTIONARY 1460 (10th ed. 2009) (defining "receive" as "[t]o take . . . ; to come into possession of"); MISS. CODE ANN. § 75-2-103-(1)(c) (defining "receipt" of goods as taking physical possession of them). During the relevant period, Gieger worked as the comptroller of PHS at its headquarters in Magee, Mississippi. It is unlikely she would have personal knowledge of the delivery of any goods to the hospitals operated by the Affiliated Debtors in other cities and/or states. As the custodian of the records of PHS and the Affiliated Debtors, she possibly could have testified about information gleaned from various files regarding the shipment and receipt of the Laboratory Supplies from Siemens Healthcare, but she was never asked any such questions at the Hearing. Accordingly, the

Court finds that Siemens Healthcare's priority claim fails because Siemens Healthcare did not offer any admissible evidence at the Hearing that the Affiliated Debtors took physical possession of the Laboratory Supplies and proof by a preponderance of the evidence is an essential element of Siemens Healthcare's administrative expense claim under § 503(b)(9).

**C. Did Siemens Healthcare prove by a preponderance of the evidence that the Laboratory Supplies were sold in the ordinary course of the Affiliated Debtors' business?**

As an additional reason for sustaining the Objections, the Affiliated Debtors argued for the first time at the Hearing that the Laboratory Supplies were not sold in the ordinary course of their business because of Siemens Healthcare's unusual collection activities. As authority for their contention, the Affiliated Debtors relied by analogy on the "ordinary course of business" defense to preferential transfers set forth in § 547(c)(2). As discerned by the Court, the precise legal issue raised by the Affiliated Debtors at the Hearing is whether the second prong of the ordinary business exception in § 547(c)(2) is also an element of "ordinary course of business" for purposes of § 503(b)(9). In other words, does the "ordinary course of business" element of § 503(b)(9) require Siemens Healthcare to show consistency in the payments made by the Affiliated Debtors within the twenty-day period? The parties agree that this issue is one of first impression in all courts.

The Court finds it unnecessary to address this novel issue since it has sustained the Objections on other grounds. Moreover, the issue was not mentioned in either the Objections or the Consolidated Response but was raised for the first time by counsel for the Affiliated Debtors at the Hearing. The Court declines to rule on an issue of first impression when both sides have not had sufficient opportunity to formulate clear and concise legal arguments.

### **Conclusion**

Siemens Healthcare had the ultimate burden of proving all of the elements of its § 503(b)(9) claim. Because Siemens Healthcare failed to present any evidence at the Hearing proving that the Affiliated Debtors received the Laboratory Supplies, the Objections should be sustained.

IT IS, THEREFORE, ORDERED that the Objections are hereby sustained.

##END OF ORDER##